Award No. 2784
Docket No. CL-2755

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks that:

(a) The carrier violated the Clerks' Agreement when it compensated employe P. E. Swartz, Stenographer, General Yardmasters Office, Marion, Ohio, at pro rata rate for service performed on his assigned rest day, and

(b) That carrier shall now compensate employe Swartz at time and one-half rate for all service performed on his rest days January 4, 1942, to and including December 27, 1942.

EMPLOYES' STATEMENT OF FACTS: P. E. Swartz is employed as Stenographer in the office of the General Yardmaster at Marion, Ohio. His position is assigned to work six days each week, Monday to Saturday, inclusive. Effective January 4, 1942 his services were utilized on his rest day on either his own or the Hold Clerk or Correspondence Clerk's position. This practice was discontinued on December 27, 1942. For service on his assigned rest day, P. E. Swartz was paid at pro rata rate of position worked.

POSITION OF EMPLOYES: There is in effect between the parties an agreement bearing effective date of September 1, 1936 containing the following rule:

Rule 32 (Sunday and Holiday Work) reads as follows:

"(a) Except as provided in Rules 23 and 25, work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid at the rate of time and one-half, except that employes necessary to the continuous operation of the carrier, and who are regularly assigned to such service, will be assigned one regular day off duty in seven (7), Sunday if possible, and if required to work on such regularly assigned seventh (7th) day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.

"(b) Where a monthly rated employe's assigned rest day is other than Sunday and falls on one of the specified holidays, with the result that the employe is required to work more days during the year for his annual salary than he would be required to work had his rest day been Sunday, his annual vacation will be increased accordingly.

In this claim filed in behalf of P. E. Swartz there was no protest or claim filed until January 4, 1943. Swartz and the other employes in the General Yardmaster's office, Marion, fully understood the arrangement Swartz had made to work extra at pro rata rate and Swartz was paid on that basis during each payroll period of the year 1942 without protest. When claim was filed January 4, 1943 and the matter first called to the attention of the Superintendent, the arrangement which Swartz made was immediately cancelled. Swartz in his statement September 5, 1943 said that he did not know of any time claim entered in his behalf until "several months" prior to September 5, 1943, practice having been discontinued in December, 1942.

This claim should be denied by the Third Division for the following reasons:

1. Swartz voluntarily worked extra under an arrangement he personally made with the Chief Clerk to General Yardmaster, and time slips were prepared and sent to the Accounting Department at Hornell, N. Y. for payment at pro rata rate on the basis of an extra clerk and the Superintendent was not consulted nor aware of the arrangement Swartz had made. Monthly payments were made all in regular manner without protest.
2. Swartz was not ordered, notified or called to work as contemplated by Rule 27 of Rules and Regulations September 1, 1936. It was purely a voluntary arrangement.
3. When Local Chairman for Brotherhood first protested and made retroactive claim on January 4, 1943, Superintendent first knew of the arrangement and ordered it cancelled.
4. This is purely a retroactive claim first filed with the Railroad by the Local Chairman January 4, 1943 for work which was performed and paid for without protest in all pay periods between January 4, 1942 and December 27, 1942, both inclusive.
5. In settlement of other claims, Brotherhood has accepted principle of adjustment from date protest or claim first filed by claimant or Brotherhood.
6. National Railroad Adjustment Board in many awards which cover retroactive claims has followed principle of sustaining claims only from first date claim was filed. (See Award 2088 by Third Division and Awards 3523 and 4936 by First Division.)

OPINION OF BOARD: P. E. Swartz was employed on a position as Stenographer in the office of the General Yardmaster at Marion, Ohio. This position is assigned to work six days per week, Monday to Saturday, inclusive.

On January 4, 1942, the Chief Clerk to the General Yardmaster suggested to Swartz that he make himself available as an extra clerk in order to increase his earnings. Swartz, it appears, agreed that he would like to work extra and arranged with the Chief Clerk to render service on Sundays and holidays which were his rest days and that he was to be paid at pro rata rate of the position worked.

Swartz worked on forty Sundays during the year 1942, either working on his own position or on similar work.

There is in effect between the parties a current agreement which contains Rule 32 (Sunday and Holiday Work) reading as follows:

> "(a) Except as provided in Rules 23 and 25, work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday) shall be paid at the rate of time and one-half, except that employes necessary to the continu-

ous operation of the carrier, and who are regularly assigned to such service, will be assigned one regular day off duty in seven (7), Sunday if possible, and if required to work on such regularly assigned seventh (7th) day of duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate."

It is one of the contentions of the Carrier that Swartz voluntarily accepted Sunday work as extra work and that he agreed to work at pro rata rate on the basis of an extra clerk.

The agreement involved in this case clearly provides for pay at the rate of time and one-half for work performed on Sundays and holidays. The agreement is not between Swartz and the Carrier, it is between the Brotherhood and the Carrier and the essence of the claim here is for the enforcement of the agreement. Regardless of what Swartz agreed to work for, the Carrier was bound to pay him the amount the agreement called for.

We quote from Award No. 2217 of this Division:

"The Carrier states the crucial question in its own submission of this case. It says:

'The question to be decided in this case concerns the right to make an individual employment contract with an employe.'

"Due recognition of the principles of collective bargaining requires a negative answer to that question, as to all cases where the individual employment contract serves to deprive the employe of some right or benefit accruing to him under the collective agreement. This Board has followed this principle in many cases—Awards Nos. 522, 524, 732, 946 and 1214. The contention of the Carrier in this case is that it has the right to enforce an individual contract with an employe, which deprives that employe of rights which she could have asserted under the collective agreement, had the individual contract not been entered into. If this can be done in cases involving the marriage of a female employe, what prevents it from being done in other cases, and what becomes of the collective agreement?"

In Award No. 2602 this Division cites the recent case of the Supreme Court of the United States entitled The Order of Railroad Telegraphers v. Railway Express Company. We quote from the award:

"The Carrier's argument is highly persuasive and would appeal to the conscience of the referee, if he had any discretion in the matter. It appears, however, that no less an authority than the Supreme Court of the United States, has declared in the case of The Order of Railroad Telegraphers v. Railway Express Co. (No. 343, decided February 28, 1944) that where collective bargaining agreements exist their terms cannot be superseded or varied by special voluntary individual contracts, even though a relatively few employes are affected and these are specially and uniquely situated. The Court based its decision upon the fundamental proposition that if it were otherwise 'statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually.' The decision is precisely in point, clear, positive and unequivocal, and we have no other choice than to apply the law of the land, as declared by the nation's highest tribunal. The Carrier will have to find whatever solace it can in the thought that it was motivated by a generous humane impulse, for the benefit of an unfortunate employe."

This Referee has read the opinion of Justice Jackson which fairly and squarely meets the question here involved. If the Carrier could enter into agreements, be they voluntary or not, with its individual employes to vary the terms of the current agreement, it would certainly mean an end of collective bargaining, for what was made collectively could be promptly unmade individually.

Clearly there was a violation of the rule and Swartz had no right to make an agreement with the Carrier to work for less than the amount specified in the agreement.

It is next contended by the Carrier that no protest or claim was made prior to the time that the violation complained of had been terminated. The record shows that, although this violation continued through a twelve-month period, January 4, 1942, to December 27, 1942, at no time did the Brotherhood complain and that the first protest or claim was made on January 4, 1943, the record showing that when the Superintendent found out about the manner in which Swartz was working, he immediately terminated the arrangement which was on December 27, 1942.

There is a long line of awards by the First Division of this Board which hold that protests must be made prior to the time the violation is terminated and that the claim will only be allowed from the date that the protest or claim is filed.

In Award No. 2088, this Division, speaking through Judge Tipton, said:

> "* * * but since the record shows this claim was not prosecuted with proper dispatch, the claim for compensation should date from February 25, 1938, from which date it was advanced to the submission now considered."

In Docket No. CL-2756 which was submitted to this Referee, the Employes in that case recognize this rule and only ask for the allowance of claim from the date it was filed. The reason for the rule is sound. There is no reason why there should be delays in filing claims. In addition to that, the Carrier is entitled to know that the Brotherhood is contending the arrangement made is a violation of the current agreement.

There is some question as to whether the claim submitted here is one of a continuing violation or whether each violation was a separate violation. The claim was filed on January 4, 1943, which was only about a week after the correction of the violation. This Referee believes that, as it was filed within such a short time after the violation which certainly would be considered a reasonable time, the claim should be allowed for the period of December 1st to December 27th, 1942. This is on the theory that there were separate violations and that the claim for this period was made within a reasonable time after the violation took place.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the current agreement as contended by the Petitioner.

AWARD

Claim sustained from December 1st to December 27th, 1942.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of January, 1945.