Award Number 3105

Docket Number MW-3057

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL SYSTEM

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the provisions of Rule 36 of the Agreement in effect by assigning S. G. Littleton, Pumper, to three hours per day service;

(2) That in conformance with Schedule Rule 36, Pumper S. G. Littleton shall be paid at agreement rate for not less than eight hours per day six days per week;

(3) That Pumper S. G. Littleton shall be paid the difference between what he has received and that which he should have received on the basis of eight hours per day assignment at the prevailing minimum rate applicable to pumpers, retroactive to November 30, 1942.

EMPLOYES' STATEMENT OF FACTS: S. G. Littleton has been employed as pumper at Tremont, Louisiana since November 30, 1942. Since his employment as pumper, Littleton has been assigned and paid for three hours per day, seven days per week.

Since employed as pumper on November 30, 1942 and until February 1, 1943, Littleton was paid on the basis of the minimum rate applicable to pumpers calculated on an hourly basis. The Carrier, however, failed to apply the increases in rates of pay applicable under the provisions of wage settlement consummated at Washington, January 17, 1944.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rules 31(b) and 36 of Agreement in effect between the Carrier and the Brotherhood of Maintenance of Way Employes read:

> "Rule 31(b). Eight consecutive hours, exclusive of the meal period, shall constitute a day; except as otherwise provided in Rule 32. Regular assigned daily working hours shall not be reduced below eight to avoid making force reduction, except by mutual agreement between employes and supervising officer."

> "Rule 36. Positions not requiring continuous manual labor such as track, tunnel, bridge and highway crossing watchmen, flagmen at

may hereafter be made in the interpretation and application of this rule is a matter for negotiation between the parties.

Third Division Award No. 1397 is evidentiary of the attitude of the Board in matters involving the long continued acquiescence of the parties in a practice of mutuality of interpretation. Here it was said:

> "The practice complained of is one of long standing. During its continuance there have been revisions of the contract, without correction, if correction be needed, of this practice. That is persuasive that, for eleven years or more, the employes themselves have not regarded it as a violation of their contract."

Further bearing out this principle is the following from Third Division Award No. 2436, involving this carrier:

> "Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself.
>
> "We conclude therefore that the specified practices are not superseded by subsequent agreements and that they remain in force until such time as they may be eliminated by negotiation, a field entirely foreign to the powers of this Board."

Also, see First Division Awards Nos. 4234, 7615; Second Division Awards Nos. 974, 1011; Third Division Awards Nos. 389, 974, 982, 1109, 1178 and 2137. That the parties should resort to negotiation to change the accepted practice is further evidenced by Third Division Awards Nos. 116, 1289, 1435, 1606, 1640, 1645, 1806 and 2146.

The employes, after sleeping on their rights to protest for thirty-seven (37) years, are here seeking to establish a claim based on a method of operation which was practiced for twenty-seven (27) years prior to the date of the amended Railway Labor Act and for ten (10) years subsequent thereto.

Carrier submits the employes' claim is inconsistent and should be denied on the basis that it has been established that:

1. The claimant is not amendable to the agreement with the Brotherhood of Maintenance of Way Employes, and, if the Board holds to the contrary,
2. The claim is now barred under the provisions of Section 3, First, Paragraph (i) of the Railway Labor Act; however, if the Board considers it has jurisdiction,
3. There has been no violation of any rule of the current Rules Agreement and the mutually acquiesced in practice should prevail, and
4. The doctrine of laches must now operate and apply. See Third Division Award No. 2811 involving the same parties.
5. If, notwithstanding the Carrier's position, the Board holds the work in dispute is amenable to the existing rules agreement, the Carrier maintains the claim is not valid since the claimant is not covered thereby. See Third Division Award No. 2386 which denies a similar claim on the basis that one who contracts with a Carrier to perform work reserved to employes is bound by such contract and has no right to recover more than is stipulated by the terms of his independent agreement.

OPINION OF BOARD: A manually operated pumping station was established at Tremont, Louisiana, by the Vicksburg, Shreveport and Pacific Railroad Company in 1907. The Respondent Carrier took over the railroad on June 2, 1926. The pump continued to be operated by a car inspector, who was not a member of the maintenance of way craft, as a part of his regular duties and at no extra compensation, until August 4, 1938. J. P. Littleton then assumed the operation at the monthly figure of $25.00, which was increased to $27.50 on May 1, 1940, and to $29.50 on December 1, 1941.

Meanwhile, on June 25, 1938, the Fair Labor Standards Law was enacted, providing for minimum wages of 25 cents per hour from October 24, 1938, 30 cents from October 24, 1939, 36 cents from March 1, 1940, and 40 cents from August 31, 1942; and the Carrier, in conjunction with other railroads, also entered into an agreement with representatives of its employes to pay a minimum wage of 46 cents per hour, effective December 1, 1941. Between March and November, 1941, the Carrier paid said J. P. Littleton varying amounts, ranging from $32.40 to $47.18 per month for operating the Tremont pump.

On November 30, 1942, the Claimant, S. G. Littleton, addressed a communication to the Carrier which read:

> "I will accept the water pumping job at Tremont for twenty nine dollars and fifty cents (29.50)."

While there is no evidence of a formal acceptance of Claimant's offer, he did immediately begin work and continued to operate said pump until January 6, 1945, when automatic equipment was installed. A check of the Carrier's records reveals that Claimant was never paid the $29.50 rate, but that his compensation ranged from $41.40 to $48.73 per month. Claimant lived and worked on a 30 acre farm, located some half mile from the station and ordinarily devoted three hours, or less, to the pump, usually in the late afternoon. His name did not appear on the seniority lists compiled by the Carrier, nor was its absence therefrom protested by the Organization. The stubs of the checks by means of which the Claimant was paid indicate that he was listed on the Company's books as an employe.

The claim was first presented to the Carrier on February 21, 1944. It is calculated to have the Claimant compensated for eight hours per day, six days per week, from November 30, 1942 to January 6, 1945. The Petitioner relies upon Rules 31 (b) and 36 of the Agreement, effective September 1, 1934. Carrier says that the position was specifically excepted from the Agreement by Section (k) of the Scope Rule; that the Claimant was an independent contractor; and that the claim is barred because of long delay in its presentation and prosecution.

If the Claimant was an independent contractor that, of itself, would constitute a sufficient reason for denying relief. We shall, therefore, give first consideration to that question. With respect to that issue the position of the Carrier appears to be that the relationship of the parties was established by its unqualified acceptance of the offer contained in the Claimant's letter of November 20, 1942, and that the subsequent increases in the amounts paid to the Claimant are attributable to a precaution on its part not to violate the penal provisions of the Fair Labor Standards Act, rather than as a recognition that Claimant was an employe receiving more than $30.00 per month.

Whether one performing work for another is an employe or an independent contractor depends upon the power of control which the employer is entitled to exercise over the person in question. "The relation is that of independent contractor where it appears that a person employed to do work is not, in the execution and performance of such work, subject to the control of the employer, but is free to execute the work without being subject to the orders of the employer with respect to the details thereof. If, however, one engages another to perform certain work, retaining control of the conduct of the person thus engaged with respect to the work to be done or the order, method and plan of the work, the relation is that of master and servant, and not of employer and independent contractor." (35 American Jurisprudence, Master and Servant, sec. 5).

The record discloses that during the Claimant's service regular deductions were made from the compensation due him by the Carrier under the provisions of the Railroad Retirement Act. Said Act provides in Title 45, Section 228-a(c) that,

"An individual is in the service of an employer . . . **if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service,** which service he renders for compensation." (Emphasis supplied).

This legislative definition of an employe, as distinguished from an independent contractor, is in substantial accord with the cmomon law rule quoted above. While the Carrier might well have increased the Claimant's compensation to meet the requirements of the Fair Labor Standards Act, without recognizing that he was an employe, its conduct in respect to the Railroad Retirement Act is quite a different matter. Deductions from pay pursuant to the last mentioned Act could only be justified if the Claimant was an employe, and the Carrier's conduct in making such deductions amounts to a recognition or admission on its part that the Claimant was an employe, in fact. We must conclude, therefore, that the Claimant was not an independent contractor.

Inasmuch as Claimant was an employe pumper, and Rule 36 of the Agreement specifically recognizes "pumpers" as within its purview, it must also be concluded that he was covered by said Agreement; and, since it cannot be disputed that Claimant was paid more than $30.00 per month, it necessarily follows that he was entitled to the benefit of that part of said Rule 36 which directs that the hours of employes subject thereto "shall not be reduced below eight per day for six days per week." This leaves for consideration only the question as to the extent of the relief, if any, to which the Claimant is entitled.

The Claimant asks for an adjustment in his compensation for the full period of his employment, to-wit: from November 30, 1942 to January 6, 1945; the Carrier contends that the claim should be denied in its entirety because of laches. We think the correct answer to this problem is to be found between these extremes. The Petitioner's complaint was first called to the Carrier's attention on February 21, 1944. At that time the position was still in existence and being filled by the Claimant. The demand made on behalf of the Claimant was notice to the Carrier of the nature of the Petitioner's complaint, yet it did nothing to correct the irregularity before the position was abolished on January 6, following. Laches cannot be invoked to bar relief for a continuing violation of the express terms of an effective Agreement, of which alleged violation and demand for correction the Carrier has due and proper notice. We hold, therefore, that the Claimant is entitled to an adjustment of his wages for the period above indicated. To grant relief retroactively prior to that time would do violence to equitable principles frequently invoked by this Board. Until the violation was called to the Carrier's attention the Claimant and the Petitioner had, over a considerable period, led the Carrier to believe that no ground for complaint existed. The Petitioner might have protested the failure of the Carrier to bulletin the position and to add the Claimant's name to the seniority lists. The Claimant also had full opportunity to question the correctness of his compensation rate at semi-monthly intervals from November 30, 1942 to February 21, 1944, and his failure so to do may well be considered as an acquiescence on his part with respect to the prevailing practices. We cannot say that this inaction did not prejudice the Carrier. Redress will therefore be limited to the period subsequent to the time the claim was first presented to the Carrier.

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 Agreement.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 31st day of January, 1946.