Award No. 3763
Docket No. CL-3620

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, 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 that the Carrier violated the Clerks' Agreement when it permitted students and others available for work only between certain hours to perform work at 14th Street Freight Station, Chicago, in violation of the seniority rights of the employes at that location, and

That freight house employes available to perform the work shall be paid four (4) hours at rate of time and one-half at Delivery Clerk's rate of pay for each day that they have been denied the right and opportunity to perform this work on an overtime basis in accordance with their seniority rights from September 23, 1944 until November 14, 1945 when the practice was discontinued.

EMPLOYES' STATEMENT OF FACTS: In the spring of 1944, the Erie Railroad instituted the practice of working students and individuals gainfully employed elsewhere on a four (4) hour basis at its 14th Street Freight House, Chicago, Illinois. These students and other individuals were permitted to report for work at 6:00 P. M. and there were others who were permitted to report and put to work at 3:00 P. M.

Under date of April 20th the Local Chairman of the Clerks' Committee at Chicago directed the attention of the local officer to this violation of the Clerks' Agreement and copy of Local Chairman's letter of April 20th is attached hereto as employes Exhibit "A". The Local Committee waited patiently for the Carrier to correct the violation of the Clerks' Agreement, and the letter of protest from the Committee being ignored entirely, on September 18th, the Local Committee again, after some discussions with the Agent notified the Agent that on and after September 23, 1944, if the practice was not discontinued claims would be instituted for employes who were available to perform this work on an overtime basis; copy of Local Chairman's letter of September 18th is attached hereto as employes Exhibit "B".

Under date of October 2, 1944, proper claim was filed with the Agent. On October 14th, the Agent denied employes claim referring to letters of September 18th and October 2nd. Claim has been handled through the usual line of succession up to and including the highest officer designated for handling grievances on the Erie Railroad, and the Carrier's position throughout has been as indicated in Vice President Mr. P. W. Johnston's letter of June 27, 1946, copy of which is attached as employes Exhibit "C".

Carrier notes that in the Statement of Claim as shown by Mr. Harrison in his letter to Mr. Johnson December 10th, shows that the claim is filed on behalf of:

> "Freight Office Employes available to perform the work shall be paid four (4) hours at rate of time and one-half at delivery clerks rate of pay for each day that they have been denied the right and opportunity to perform this work on an overtime basis in accordance with their seniority rights from September 23, 1944 until November 14, 1945 when the practice was discontinued."

In the handling of this claim on the property the employes have not shown that any individual employe at 14th Street Freight Platform, Chicago, was ever denied any overtime work nor has it been shown that any such employe ever made a request for this overtime work. To the contrary many of the said employes refused to work overtime when requested to do so.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee claims that the Carrier violated their Agreement as to the seniority rights of its employes at the 14th Street Freight Station in Chicago when it permitted students and others to work there. It asks that during the period from September 23, 1944 to November 14, 1945, the freight house employes available to perform this work be compensated for four hours at time and one-half Delivery Clerks' rate for each day that they have been denied the right and opportunity to perform this work on an overtime basis.

This claim is on behalf of all employes who were available for the work on an overtime basis.

It is undoubtedly true that during the war, and immediately following, the work at the Freight Station greatly increased and that the Carrier was hard put to find sufficient help to get it done. But that fact did not justify the Carrier in violating its Agreement with these employes. Nor does the fact that the practice of which the Committee here complains, which began on August 31, 1943, started long before the date for which this claim is made in any way limit these employes' rights because the record establishes that in April of 1944 the employes complained thereof and, before September 23, 1944, they demanded of the Carrier that the practice be stopped.

It is apparent that the work available at the Carrier's 14th Street Freight Station in Chicago was of such a fluctuating nature that the regular rules of the parties' Agreement were not fully adaptable thereto. This is evidenced by the fact that out of a roster of about 250 men approximately only 105 are regularly assigned. The balance become additional forces to be daily assigned according to the work that is available. About an average of 110 of this balance work daily, the rest being absent because of voluntary leave, sickness, etc. To cover this situation the parties placed in their Agreement Rule 23 relating to "Platform Roster 'B' Employes". This rule, insofar as necessary for this Opinion, provides as follows:

> "(a) Regularly assigned Roster 'B' platform positions will be established quarterly as follows:
>
> 1. 1st quarter—January, February and March
> 2nd quarter—April, May and June
> 3rd quarter—July, August and September
> 4th quarter—October, November and December
>
> 2. At Piers 20 and 21 (nights) on Sundays to Thursdays, inclusive, (except nights before holidays) and at Weehawken Docks (nights) on Mondays to Fridays, inclusive (except nights before holidays), divide the number of manhours paid for during the same quarter of the preceding year by 1100 to arrive at the number of regularly established eight (8) hour positions to be worked on such

nights during the current quarter. No additional operations of this character will be established, except through negotiations between Management and the General Chairman or their representatives.

On nights other than as above specified only such forces will be used as are needed.

3. Divide the total manhours paid for at each operating unit during the same quarter of the preceding year by 1224, to arrive at the number of regularly established eight (8) hour positions to be worked during the current quarter for the number of days per week as provided in Rule 28, except, however, that this number may be reduced, if necessity should arise, by mutual agreement between the Management and Division Chairman by posting notice of the positions not required, the remaining number of positions to be known as the regularly established Roster 'B' platform positions.
4. Additional forces may be worked to take care of fluctuating work over and above forces provided in Paragraph (3) above on either an eight (8) or four (4) hour basis but the positions worked on the four (4) hour basis will not exceed fifty (50) per cent of the additional forces worked on any day. Employes worked on a four (4) hour basis will be paid a minimum of four (4) hours at pro rata rate for each tour of duty of four (4) hours or less. If held on duty in excess of four (4) hours they shall be paid a minimum eight (8) hours for each tour of duty. Time worked in excess of eight (8) hours will be paid for at regular overtime rate.

(b) The regularly assigned Roster 'B' platform positions as determined in paragraph (a) of this rule will be filled in the regular manner as provided in this agreement.

(c) The additional forces will report regularly at a specified time at their place of employment for any available work and senior qualified employes so reporting will be used. If assigned to duty, provisions of paragraph (a)-4 of this rule and/or Rule 25 will apply."

Other rules of the Agreement provide as follows:

"Rule 20 (e)—Regularly assigned employes will be given preference when overtime is necessary on their positions. Other qualified employes may be used to assist in such overtime, provided they are not worked in lieu of the regular employes."

"Rule 22—No overtime will be worked unless by direction of proper authority."

"Rule 25—Notified or Called

(a) Employes notified or called to perform work, either before or after, but not continuous with, their regular work period shall be allowed a minimum of three (3) hours for two (2) hours' work or less and if held on duty in excess of two (2) hours, time and one-half shall be allowed on the minute basis.

(b) Employes notified or called to perform work either before or after, but continuous with their regular work period, shall be allowed time and one-half on the minute basis for such time worked.

(c) Employes notified or called to perform work on Sundays and/or specified holidays shall be allowed a minimum of four (4) hours for two (2) hours and forty (40) minutes work or less, and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half shall be allowed on the minute basis."

Carrier admits it did not provide a specified reporting time when additional forces could report in order to be assigned to available work.

The question then arises, is the Carrier obligated, under Rule 23 (c), to fix a specified reporting time when all employes classified as additional forces may report to be assigned to available work? We think it does.

It will be observed that Rule 23 provides a complete working arrangement to take care of the work at the freight station no matter how much it may fluctuate. It gives the Carrier a roster of employes to take care of this variance and secures for those additional forces the right to this work, provided they make themselves available for it. By the provisions of 23 (a)-1 the number of regularly assigned Roster "B" platform positions is determined every quarter. This is done by using the provisions of Rule 23 (a)-3. When so determined they are, by Rule 23 (b), filled as provided by the rules of the Agreement. However, as to the additional forces, that is, the employes of "Roster B" who have not been so assigned to regularly established Roster "B" platform positions, Rule 23 (a)-4 makes them available to the Carrier to perform any work over and above what can be done by the forces provided under Rule 23 (a)-3. It also provides that these forces may be used on either an eight or a four hour basis. This gives the Carrier a group of employes available for service in accordance with its needs regulated only by the amount of work available. In order to determine who of this group is available and entitled to this work, Rule 23 (c) provides that the Carrier shall provide a specified time when they can regularly report for any available work and be assigned thereto according to their seniority and, if need be, at an overtime basis as indicated by the reference therein to Rule 25.

The record establishes that under Rule 25 of the parties' Agreement effective September 1, 1936, which has provisions comparable to Rule 23 of the present Agreement, the Carrier provided such a specified reporting time. In conjunction therewith the Carrier also posted a bulletin as to the employes of the additional forces then working, showing their next assignment. This avoided the necessity of their leaving work and reporting. Just when this practice ceased and when the employes of the additional forces started to report at the several starting times, without having previously reported or having been assigned, is not clear but that such happened is apparent from the record.

Commencing on August 31, 1943, and continuing until November 14, 1945, the Carrier, without having provided either a specified reporting time as provided by Rule 23 (c), or requiring such outside forces to report, began the practice of employing outside forces, consisting of students and others, to work from 6:00 to 10:00 P. M. The claim is based on this practice.

About December 1, 1945, the Carrier again began the practice of posting a bulletin advising the additional forces then working of their next assignments so they could inform themselves thereof as they left work. It should be said that there is nothing in the Rules that requires a posting of such bulletins. It is undoubtedly a convenience to the men and a practical means for Carrier to avoid such men leaving their jobs to report at the specified time, when fixed by Carrier, to secure the next assignment on available work.

We think Rule 23 (c) requires the Carrier to fix a specified time each day when the additional forces may report to find out what work is available and when the men reporting as available may be assigned thereto according to their seniority. The Carrier violated its Agreement when it failed to do so and when it used outside forces without first making this work available to the employes of the additional forces and offering it to them. This it should have done even though it would have required it to use these additional forces on an overtime basis.

To permit the Carrier to do what it has here done would defeat the additional forces employes out of their contractual rights, which it was the Carrier's duty to protect.

It will thus be seen that the Carrier should have made available and offered this work to the additional forces of the freight house employes who were available to perform it. Because of Carrier's failure to do so,

and because it gave this work to outside forces, in violation of their Agreement, these employes are entitled to recover insofar as they have been adversely affected.

It should here be said that the claim is in proper form although it does not mention the individuals for whom it is seeking to recover. See Award 3687.

However, because of the following reasons the record is insufficient to here award any monetary recovery:

First, it appears that during the period of December, 1944 and January of 1945, the Carrier used a large number of soldiers. No complaint is made as to their use. The record does not show whether students or others were used during this period. If not used then no recovery can be had for that period. If some were used then recovery can be had up to the extent thereof, if the facts so justify.

Second, there is evidence in the record that these men, or at least some thereof, were offered this work. This the employes deny. The record is not sufficient to determine that question. If the work was offered to them on the proper basis, that is overtime, and they refused it then they cannot now complain and are thereby prevented from recovering. However, if they were available on an overtime basis and it was offered to them on a pro rata basis then they would not be prevented from having their claim sustained.

Third, there is evidence that some of these men received overtime, but to just what extent cannot be determined. The right of these claimants is limited to four hours per day when available and, if they have already received a part thereof, they can be allowed only such additional as will bring it to four hours per day.

In view of the above the claim is returned to the property with a determination that the Carrier has violated its Agreement and that the employes who can establish that they were available on an overtime basis shall have their claim to compensation allowed subject, however, to the limitations as herein set forth.

When such claims are established they shall be allowed on an overtime basis based on the highest rate paid to such outside employes on each day or days for which allowed.

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 its Agreement.

AWARD

Claim as to violation of the Agreement sustained. Returned to the property for further consideration as to monetary allowances which are to be determined on the basis as in the Opinion set forth.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of January, 1948.