Award No. 4087
Docket No. CL-3954

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Pennsylvania Railroad Company failed to properly apply the provisions of the National Wage Agreements of January 17, 1944, April 4, 1946 and May 25, 1946, to certain employes and positions generally termed as "excepted positions."

(b) The Pennsylvania Railroad Company be required to compensate each employe who filled one of these positions covered by Paragraph I-C, III-1-A, III-1-D, and III-2-A of Supplemental Agreement "A" of the Rules Agreement, effective May 1, 1942, for the period December 1, 1943 up to and including the last day of the pay period on which the adjustment is made for the difference between 204 and 243 1/3 hours a month as follows:

December 1, 1943 to December 26, 1943	—39-1/3 hrs. a mo. at 9¢
December 27, 1943 to December 31, 1945	—39-1/3 hrs. a mo. at 10¢
January 1, 1946 to May 21, 1946	—39-1/3 hrs. a mo. at 10¢
May 22, 1946 to (date of settlement)	—39-1/3 hrs. a mo. at 28½¢

EMPLOYES STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Pennsylvania Railroad Company (hereinafter referred to as the Brotherhood and the Carrier respectively).

As a result of handling by the National Mediation Board, its Case No. R-268, the Carrier recognized the Brotherhood as the representative of Clerical, Other Office, Station and Storehouse Employes of the Pennsylvania Railroad Company as of October 15, 1936. This Brotherhood has represented this class of employes continuously since that date.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and the Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act. This Rules Agreement will be considered as a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

Under date of January 17, 1944, an agreement was made at Washington, D. C. by and between certain participating carriers, including the Carrier and

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement or interpretations thereof. Similarly there has been no violation of the National Wage Agreements.

Therefore, the Carrier respectfully submits that your Honorable Board should dismiss the claim of the Employes in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: There is in effect between the parties an Agreement, effective May 1, 1942, covering rules, rates of pay, and working conditions of the Carrier's clerical, station, storehouse and other office employes, known as the "Master Agreement," also a Supplemental Agreement "A" executed in connection therewith and effective on the same date. The primary purpose of the latter Agreement, covering so-called appointive positions paid on a monthly rate and commonly referred to as excepted positions, was to designate offices, departments, positions, work and employes not subject to some or all of the provisions of the Master Agreement.

Neither time nor space will permit the detailing of the terms and provisions of either Agreement. It will suffice to say that the positions and employes involved in the instant dispute are those covered in paragraphs I-C, III-1-A, III-1-D, and III-2-A of Supplemental Agreement "A", and that it is conceded the Master Agreement is applicable to such positions and employes, in the present case as a class, limited only by the qualifying terms of the paragraphs heretofore mentioned.

Under date of January 17, 1944, the Carrier and the Organization executed an Agreement increasing rates of pay of employes represented by the latter from 4 to 10 cents per hour but actually resulting for practical purposes of this proceeding in a total increase, of 9 cents per hour from December 1, 1943 to December 31, 1945. On April 4, 1946, the same parties entered into another Agreement, effective January 1, 1946, increasing wages of the same class of employes 16 cents per hour. This Agreement remained in force until May 21, of that same year. May 25, 1946, a similar Agreement, effective May 22 preceding, was executed which affected a further wage increase of 2½ cents per hour. These wage increases were made applicable to all employes of the Carrier represented by the Brotherhood.

In passing we pause to note that all three of the Agreements to which reference has just been made were executed in conjunction with fourteen other Railway Labor Organizations and a number of participating Carriers and were a part and parcel of what is commonly known and referred to as the National Wage Agreements.

We also pause to point out the claim as set forth in the respective submissions has, by joint consent of the parties, been corrected to conform with the rate of the Agreements mentioned and now reads 9¢ instead of 10¢, 25¢ instead of 26¢, and 27½¢ instead of 28½¢. Differently stated, such claim has been reduced 1¢ an hour for all dates subsequent to and inclusive of December 27, 1943.

From what has been heretofore stated, it becomes apparent this case involves application of the three Wage Increase Agreements to the employes occupying the appointive and/or excepted positions specifically listed in the four paragraphs of Supplemental Agreement "A" and hinges upon the construction to be given provisions of such Agreements prescribing the manner and method of determining the hourly increases payable to employes occupying positions compensated on a monthly basis. These provisions are two in number and with slight variations in language, of no consequence here, are to be found in similar form in each instrument. No useful purpose would be served in quoting all such provisions. We therefore quote them as they appear in the Agreement dated January 17, 1944.

Section 2 (d) of such Agreement provides:

"Determine the equivalent hourly rate by dividing the existing monthly rate by the number of hours comprehended by the monthly rate. The amount of increase applicable to the hourly rate thus obtained—multiplied by the number of hours comprehended by the monthly rate—shall be added to the existing monthly rate."

Section 2 (i) thereof reads:

"The increase in wages provided for in this Section shall be computed in accordance with the wage or working conditions agreement in effect between each Carrier and each labor organization of employes, and in instances where fixed daily, weekly or monthly rates are paid for all services rendered, the increase in wages shall be applied in such manner as will give effect to the number of hours used in fixing said rates and to the equivalent hours for special allowances included in said rates. Special allowances not included in said rates will not be increased."

At the outset the issues can be clarified and this Opinion shortened by pointing out matters not in dispute in this case. The parties concede (1) all employes involved are covered by the three National Wage Increase Agreements, (2) the only serious controversy between them is concerning the application of the basic formula set up by Section 2 (d), supra, and depends upon the construction to be placed upon the phrase "the number of hours comprehended by the monthly rate" as used therein, (3) there is nothing in the Master Agreement which defines, sets forth, or fixes the number of hours contemplated by the monthly rate of the involved positions, and, (4) Rule 4-A-1 (c) of the Master Agreement, providing the straight time hourly rate for monthly rated employes will be determined by dividing the monthly rate by 204, by virtue of the exception provisions of sections of Supplemental Agreement "A", has no application in determining how the hourly rate for the monthly rated employes here involved shall be computed.

It will also expedite the progress of the Opinion to summarize as briefly as possible the positions of the respective parties. The Brotherhood takes the position the employes filling these monthly rated positions are subject to call every day in the year and are excepted from payment of overtime and that by reason thereof, and the Carrier's own interpretation of the Agreement with respect thereto, the days contemplated by such position include all the days of the year and therefore "the number of hours comprehended by the monthly rate," as the term is used in the Wage Increase Agreements, must be 243-1/3. The Carrier's position is that there is no applicable provision in the working Agreement specifying the number of hours comprehended within the monthly rates of such employes and that, therefore, there is no basis in such Agreement for a claim the number of hours comprehended by the monthly rate of their positions is that claimed by the Brotherhood or in fact any number of hours whatsoever.

We think the initial premise on which the Carrier bases its position is clearly erroneous. When the Labor Organizations and the Carriers, including the two herein involved, promulgated and eventually consummated the National Wage Agreements they not only contemplated, as is here conceded and as we have held (See Awards 3916 and 4060), that pay increases were applicable to all employes within the scope of an agreement and that the Organization of which they are a part could represent them in procuring such increases but they also apprehended, and we think agreed, if in fact it is not expressly so provided by the language to be found in the Agreements themselves, that there was comprehended within the monthly rate of each employe so rated a fixed and determinable number of hours. Otherwise how could the Agreements, applicable to all employes, be applied to positions of monthly rated employes covered by working Agreements which, as here, failed to state or indicate the number of hours comprehended by their monthly rate? True enough, as Carrier points out, Section 2 (i) of the Wage Increase Agreements, heretofore quoted, contains the phrase, "The increase in wages provided for in this Section shall be computed in accordance with the wage or working conditions agreement in effect between each carrier and each labor organization of employes." Such phrase is to be interpreted as requiring the

working Agreements to be used as a yardstick whenever available but is not to be construed as barring an employe covered by an Agreement which is lacking in the particulars mentioned from participating in the benefits of the negotiated wage increases. We believe and hold that under the language of the Wage Increase Agreements where the working Agreement does not specify them the hours contemplated by the monthly rate are those contemplated by the parties in fixing the pay assigned to the involved position or positions and may and are to be determined from all the available evidence pertaining to them.

Just what evidence is to be considered in determining the hours comprehended by the monthly rate where there is no applicable provision in the working Agreement is not a new question. In Award 4060, the rule, to which we adhere, is stated thus:

> "If reports to outside agencies indicate the number of hours used in calculating a monthly salary, it is evidence to be considered. If the Carrier indicates the hours comprehended in paying for a partial month's employment, it is competent evidence of the fact. The number of hours actually worked, in the absence of any other yardstick, may be the controlling factor."

Having determined how the hours comprehended by the monthly rate are to be determined, since they cannot here be determined from the working Agreement, we turn to the record.

With respect to sub-section "a" of the claim we have little difficulty in concluding the Carrier failed to properly apply the provisions of the National Wage Agreements. The record contains several exhibits showing wage increases granted employes herein involved. Some were given increases on the basis of 240 comprehended hours, others on a basis of 204 hours, and still others on an entirely different basis. Summarized, the Carrier's explanation of how it arrived at result evidenced by such exhibits and other facts to be found in the record is that some men were given what other men not excepted from the Agreement were allowed under Rule 4-A-1-(c), supra, and others were given more because in the Carrier's own opinion they were entitled to more. The general tenor of the explanation was to the effect that since the Agreement did not specify the hours comprehended by such positions the Carrier could use whatever figure it saw fit in computing wage increases for the occupants thereof under Section 2 (d) of the Wage Agreements. The Carrier's action, as we have seen, was not in compliance with the requirements of such section. Therefore, the Brotherhood's position with respect to subdivision "a" of its claim must be upheld.

Sub-section "b" of the claim is not so easily decided. The record, although replete with extraneous and immaterial matter, is sadly lacking in evidence to sustain contentions advanced by either party with respect thereto. The Carrier relies upon its position as heretofore stated and makes no attempt by concrete evidence to establish what hours were actually comprehended by the monthly rate or refute the Brotherhood's contentions as to what they actually must be deemed to be. Of course, in response to the latter's statement to the effect 243-1/3 hours is regarded as the number of hours so comprehended Carrier states the number of hours comprehended has long been recognized as 204. But that is not evidence. On the other hand, the Brotherhood, which has the burden of maintaining the claim, essays to sustain it on theories and general statements unsupported by evidence. On the face of the written record it fails to produce probative evidence respecting any of the things held in Award 4060 to be essential to the establishment of the comprehended hours contempated by the parties in establishing monthly rated positions. The best evidence adduced, and that most heavily relied on, is to be found in the exhibits showing there was no uniformity in hours comprehended in the monthly rate in the Carrier's action in computing wage increases under the Wage Agreements. Apparently the Brotherhood relies on this evidence as sustaining its position by reason of what was said and held in Award 3916. The facts of the instant case, particularly in view of the

Carrier's explanation of its action and the further fact that at no time did it ever recognize 243-1/3 hours as the comprehended hours of the month, are not analogous to those in that case and we do not believe its Award supports a conclusion that the exhibits in question are of sufficient probative value to sustain Petitioner's claim. Moreover, it will be noted the all decisive factor in that case was the reporting of monthly rated positions to the Interstate Commerce Commission as being paid on a 365 day yearly basis which is the equivalent of a 243-1/3 hour a month basis. There is no evidence of that character here.

We frankly concede that on the written record we could be compelled to hold the Brotherhood failed to establish this phase of the claim by sufficient proof. But that is not all we have before us. On the recent hearing of this case before this Division, with the present Referee sitting as a member, Carrier's representatives orally conceded that as to many of the involved positions the occupants thereof, if they were to quit their jobs, to illustrate, on the tenth day of a month having thirty-one days, would be paid for time worked on the basis of 10/31sts of their monthly rate and that amounts due for a seven day period in other months would be computed in the same manner but based upon the number of days in the month. That constituted an admission against interest, binding upon the Carrier. It was not new or additional evidence but an admission predicated upon evidence theretofore presented and already in the record. In our opinion it supplied any defects there may have been in Petitioner's proof in the written record, and established, that as to all involved positions coming within the scope of such admission, the hours contemplated by their monthly rate were 243-1/3 as contended by the Brotherhood. For all the Referee knows, the identical admission may have been made on the original presentation of the case but if it was, there is nothing in the record to that effect.

Heretofore we have concluded that under the facts of this case the comprehended hours contemplated by the parties for a position must, under the Wage Agreements, be determined from evidence and not from the current working Agreement. No effort has been made by the parties to produce evidence as to each position involved. In the state of the present record if it had not been for the Carrier's own admission the evidence would not have sustained an affirmative Award. That admission was too general in nature to permit this Division to say that it covered each and every excepted position herein involved. What then must our decision be? We hold: (1) that a position's comprehended monthly hours must be determined on the basis of its own particular surrounding facts; (2) that as to all positions herein involved coming within the scope of the Carrier's admission, or within situations of a character similar to those reasonably contemplated by such admission, the hours comprehended by their monthly rate of pay are to be deemed to have been established on the basis of 243-1/3 hours and wage increases of the occupants of such positions should be computed on that basis and occupants compensated accordingly and, (3) that as to all other positions the number of hours contemplated by the monthly rate, if not agreed upon by the parties, will have to be determined in the future under the rules and tests announced in the portion of Award 4060, heretofore quoted, and upon evidence sufficient to permit their application.

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

The Organization's contentions with respect to sub-section "a" of its claim should be sustained. Sub-section "b" should be sustained as to all positions coming within the scope of the Carrier's admission.

AWARD

Claim, as to sub-section "a" sustained; as to sub-section "b" sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of August, 1948.