Award No. 4110
Docket No. CL-4134

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 OGDEN UNION STOCK YARDS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that The Ogden Union Stock Yards Company and/or its Officers violated the terms of the existing agreement:

(a) By establishing position of Night Superintendent on an excepted basis on October 1, 1947, in violation of all rules of the Agreement and appointing thereto one Mr. Boyd D. Rowan; and

(b) The Company shall now be required to classify, rate, bulletin and assign the position to employes within the class and craft embraced within the scope of agreement between the parties; and

(c) Commencing October 1, 1947, the Company shall compensate Mr. Rowan four (4) hours' overtime for each week day and for eight (8) hours' overtime on each Sunday based on General Foreman's rate of pay, such claim to continue until the claim of the Brotherhood is satisfied.

EMPLOYES' STATEMENT OF FACTS: On September 29, 1947, Mr. R. C. Albright, General Manager of The Ogden Union Stock Yards Company issued bulletin to all employes advising Mr. R. J. Rushton was appointed as General Superintendent of the stock yards in complete charge of the yard, more particularly from 6:00 A. M. until 6:00 P. M.; and Mr. B. D. Rowan was appointed Night Superintendent in complete charge of the yards 6:00 P. M. until 6:00 A. M. daily, effective October 1, 1947. See Employe's Exhibit A.

There being but one position classified as Superintendent prior to October 1, 1947 which was wholly excepted from the rules of the agreement to which Mr. B. D. Rowan was previously assigned or appointed.

In effectuating the above notice of September 29th, Mr. Rushton, who was a former employe—but who was presently a non-employe was permitted to displace Mr. Rowan from position of Superintendent under the guise of retitling this position to that of General Superintendent, after which, by unilateral action, the Company created an additional position of Night Superintendent which they considered excepted from all rules of the agreement and appointed Mr. Rowan to this position. Thereby violating the agreement by creating one additional excepted position of Night Superintendent without the concurrence of the Brotherhood.

The original agreement with the Brotherhood at Ogden effective October 1, 1942 under the Scope Rule provided for the "exception" of one superintendent and two assistant superintendents, it being the idea that we would then have supervisory officials on duty at all times. After the contract became effective the General Chairman at Ogden alleged that these assistant superintendents were performing work other than of a supervisory nature. In a spirit of cooperation at the inception of the contract the Company, therefore, changed the title of the two assistant superintendents to that of general foremen and brought them under all the rules of the contract except Rule 6 or the seniority rule. At that time it was felt the general foremen would assume responsibility and work for the interests of the Company the same as they had prior to the organization of the property. It has not worked out that way. If the Brotherhood has any complaint of supervisory officials performing work which the employes claim is theirs, we insist it was corrected by this change. The appointment of another general or several assistant foremen would not correct the bad conditions existing at Ogden prior to October 1, 1947.

In appointing a superintendent nights it was not the intent of the Company to remove work from non-"excepted" positions but rather to improve service. The action taken has accomplished that. We submit that for the handling of over four million head of livestock annually, the Brotherhood at Ogden has an extremely favorable contract and a minimum number of "excepted" positions. We insist that this matter does not belong before the Adjustment Board, and should be dismissed. If the Board feels it has jurisdiction, then we insist there has been no violation of the contract and that it should be dismissed for that reason.

(Exhibits not Reproduced.)

OPINION OF BOARD: A memorandum of Agreement between the parties reads:

> "The rules agreement effective August 1, 1942 covering the working conditions of the Denver Union Stock Yard Company employes at Denver, Colorado, shall be applied to the employes of the Ogden Union Stock Yards Company, effective October 1, 1942. Except positions agreed to:
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> 1 Superintendent
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> 2 Assistant Superintendents
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> 1 Secretary
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> All Solicitors."

Pertinent portions of the scope rule of the Agreement referred to in the foregoing memorandum, and hence the original collective bargaining contract of the parties, provides:

> "These rules shall govern the hours of service and working conditions of all employes. . . ."

By a subsequent memorandum, dated October 29, 1942, the parties contracted as follows:

> "It is hereby agreed: To amend the Agreement covering the employes of the Ogden Union Stock Yards Company, effective October 1, 1942, as follows:
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> > 'Change the titles of the two Assistant Superintendents shown in the scope as excepted positions to that of General Foremen and further agree to place these positions under all the rules of the Agreement covering the Stock Yard employes, with the exception of Rule 6, effective November 1, 1942.' "

On September 29, 1947, the company posted the following bulletin and since its effective date the persons therein named have been regarded by it as occupying the positions therein described, as positions excepted from the Agreement, viz:

> "Effective October 1, Mr. R. J. Rushton is appointed General Superintendent in complete charge of the Yards, more particularly from 6:00 A. M. to 6:00 P. M. daily; and Mr. B. D. Rowan is appointed Night Superintendent in complete charge of the Yards from 6:00 P. M. to 6:00 A. M. daily."

Rule 19 of the original Agreement provides:

> "Established positions will not be discontinued and new ones created under different titles covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules."

For some time prior to October 1, 1947, the position of Superintendent in charge of the Company's yards had been occupied by B. D. Rowan, whose usual assignment covered the daylight hours but whose authority extended over the entire 24 hours of the day. Following such date his hours, as indicated in the quoted bulletin, were 6:00 P. M. to 6:00 A. M daily and he was in charge of the yards during that period of time only. At all times since the date last mentioned R. J. Rushton has been filling the Company created position of General Superintendent with complete charge of its yards during the 24 hours of each day with usual working hours from 6:00 A. M. to 6:00 P. M.

Thus it appears the Carrier in effect discontinued the position of Superintendent on October 1, 1947, and attempted to establish two new positions, designating one as General Superintendent and the other as Night Superintendent, notwithstanding provisions of the scope rule then in force and effect excepted the position of one Superintendent only, with the result it actually had two Superintendents where theretofore it had only one.

In passing it should be stated the record discloses the Company did not abolish any other positions or take work away from any employes covered by the Agreement by this action and that in reality it merely resulted in a division of the identical work of the former position of Superintendent and in the splitting up, distribution and assignment of such work to the two new unilaterally created positions. The company asserts its action was necessary because of a pressing need for supervisory control essential to the efficient operation of its business and therefore not in violation of the Agreement. The Brotherhood fails to strenuously deny existence of the cause asserted for the action but insists that even so the Agreement was violated and the Company should be required to pay the penalty.

Preliminary to all else we reject as untenable the Company's position that because supervisory authority was deemed necessary it could bulletin the positions of General Superintendent and Night Superintendent and fill them as herein indicated, without violating the Agreement. Contracts are made for a purpose and are binding upon those who are parties to their execution. However, inept the instant Agreement may have been the parties thereto had agreed by its terms that but one position of Superintendent would be excepted. Conceding, as is suggested, such positions need not have been included within the scope of the Agreement is of no avail to the Company. The parties had a right to include them and did so. The very fact they excluded one such position conclusively indicates that all others, however designated, were within the comprehension of its terms.

Likewise rejected as entitled to little, if any, weight is an argument the fact the position of Superintendent is excepted under the Agreement has the effect of automatically excepting a position of General Superintendent. Under our decisions the converse is the Rule. See Awards 2009 and 3825 recognizing and approving the principle that where there is an express exception to the terms of a contract no other or further exception will be implied.

We also disregard as fallacious the contention, strenuously urged by the company, that notwithstanding its action the status of the position occupied by Rowan was the same after the posting of the bulletin as it was before i.e., it was regarded and considered by it as the excepted Superintendent's position. The record completely disproves this claim. After October 1, Rowan was regarded more of an Assistant Superintendent than anything else.

What has been heretofore stated compels the conclusion, and we hold, the bulletining of the two Superintendent positions was in violation of the scope rule of the Agreement. That, however, does not end this case or even indicate its ultimate decision.

The Brotherhood's claim is founded upon the premise the Company violated all rules of the Agreement by establishing the position of Night Superintendent on an excepted basis and appointing Rowan to the position and the penalty asked is based upon the theory he thereby became a General Foreman and was entitled to the pay of such a position.

Heretofore we have stated it is our view the scope rule was vioalted when the two positions therein described were bulletined. However, it does not follow such positions were established, within the meaning of that term as used in the contract by the Company's attempt to establish them or that Rowan's position of Superintendent was abolished or effectively discontinued because of that action. No principle is more firmly established in this jurisdiction than the one that attempted abolishment of positions will not be recognized or allowed if action taken with respect thereto is in contravention of the terms of an existing Agreement. We now go further and say we are convinced, from our examination of the record that as a result of dissension between officials of the Company and the Brotherhood and a seeming lack of desire on the part of those concerned to cooperate in working out a reasonable solution of the problems leading up to this dispute, the two positions mentioned were bulletined with the deliberate intent and purpose of circumventing existing provisions of the Agreement, in particular the scope rule. We therefore conclude that in this case the primary offense against such Agreement consists in a violation of Rule 19 providing that "new positions will not be discontinued and new ones created under different titles covering relatively the same class of work for the purpose of . . . evading the application of these rules."

Since it cannot be denied the newly bulletined positions covered relatively the same work as the already established position of Superintendent and Rule 19 precluded discontinuation of the latter or creation of the new ones under different titles we believe the action of the Carrier did not affect a discontinuance of the old position of Superintendent or a creation of new positions under the Agreement. It follows the current contract requires and the Company is therefore directed to disregard and set aside its attempted creation of the new positions of General Superintendent and Night Superintendent and, until such time as it may see fit to take action not prohibited by the Agreement, to accord the position of Superintendent existing at its yards prior to October 1, 1947, the same status it had prior to such date.

The violation of the Agreement requires that the Company be penalized.

The parties have not given us the rate of pay Rowan received prior to or after October 1, 1947. We assume he is paid a monthly rate. Neither have they produced proof of the hours worked by him on his position in excess of 8 hours per day. Under the facts and circumstances disclosed by the record we think an adequate penalty will be the difference between what he has received from the Carrier since October 1, 1947 and what he would have received as an Assistant Superintendent, now regarded as a General Foreman, at the regular straight time rate, plus overtime for Sundays and for all hours worked in excess of 8 on week days. This compensation to be paid up to and until the date on which the Carrier restores the old position of Superintendent to its original status and ceases to treat the two new positions as having been established.

Since there can be no computation as to the penalty with the record in its present state payment thereof will be deferred until the parties have had a reasonable time to compute and agree on its amount.

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 Company violated the Agreement.

AWARD

Claims (a) sustained, (b) denied and (c) sustained to the extent indicated in the opinion, payment of the penalty awarded to be computed by the parties from the records on the property and made within a reasonable time.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.