Award No. 4297
Docket No. CL-4221

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

CHICAGO UNION STATION COMPANY

STATEMENT OF CLAIM: A. Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that Carrier violated and continues to violate the provisions of an agreement dated July 17, 1940, when on February 1, 1948, it required Ushers and Red Caps to collect from passengers 15 cents instead of 10 cents for each bag or parcel and other personal effects handled in Red Cap Service.

B. That all Ushers and Red Caps in service of the Carrier on and after February 1, 1948, be compensated for wage loss suffered because of Management's arbitrary action as set forth above (a) on the basis of the difference in earnings of each employe for the preceding month (January, 1948) and actual earnings in each subsequent month commencing with February, 1948.

C. That all Ushers and Red Caps in service of the Carrier on January 15, 1948 who were subsequently laid off by reason of Carrier's arbitrary action, as set forth in preceding paragraph (A), be reinstated to service and compensated for all wage loss by reason of such unemployment as Red Cap or Usher from such date of lay-off subsequent to January 15, 1948, until reinstated to service.

EMPLOYES' STATEMENT OF FACT: 1. Prior to the enactment of the Fair Labor Standards Act, approved June 25, 1938, and the issuance of regulations relating thereto by the Inter-State Commerce Commission, particularly those embodying "regulations concerning employes under Railway Labor Act, 229 ICC 410, decided September 29, 1938", persons serving carriers as Red Caps and Ushers were not generally considered as within the term "employe" as used in the fifth paragraph of Section I of the Railway Labor Act as amended. During that period of time, such employes of the Chicago Union Station Company were not included within the scope rules of agreements covering working conditions of employes. During the year 1938, however, Red Caps and Ushers employed by the Chicago Union Station Company petitioned the Brotherhood of Railway Clerks to represent them for purposes of the Railway Labor Act. These petitions were presented to the Management and its General Manager, Mr. O. A. Frick, under date of December 1, 1938, advised that Carrier was agreeable to accepting such statements from the employes of their having chosen the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as their representative for the purposes of the Railway Labor Act.

OPINION OF BOARD: The claim is fully stated in the record.

The historical background of the service rendered by claimants and their status under the effective Agreement is in brief as follows: Prior to the year 1938, claimants were not generally considered as within the term "employe" as used in the fifth paragraph of Section 1 of the Railway Labor Act as amended. The Fair Labor Standards Act, approved June 25, 1938, and the issuance of regulations relating thereto by the Interstate Commerce Commission, changed this situation. Subsequent thereto, the Brotherhood of Railway Clerks became claimants' representative. On July 17, 1940, an Agreement was negotiated between the Carrier and the Brotherhood which provided in effect that the Chicago Union Station Company will, effective August 1, 1940, inaugurate a plan whereby the Chicago Union Station Company will charge passengers for handling their hand baggage and other personal effects at the rate of 10 cents for each piece handled and said money shall be collected by Ushers and Red Caps and remitted to the Company. Under this arrangement the employe received as wages 8¾ cents, leaving the Carrier 1¼ cents, for each bag or parcel carried. The amount taken by the Carrier was considered sufficient to take care of its expense for accounting, supervision, etc. Also a certain wage scale was agreed upon to further compensate the employes.

On December 20, 1947, Management advised that effective February 1, 1948, a charge of 15 cents would be made for this service and such change was put into effect at the date stated. Under this new arrangement no change was made in the existing rate basis of pay for Ushers and Red Caps. It continued to be that employes were required to perform 8 hours' service and be paid $3.12 therefor, or at the rate of 8¾ cents per check used, whichever is greater, to be determined daily, and, in addition, to receive 54 cents per hour for each hour of service so rendered.

Claimants contend that this action on the part of the carrier was arbitrary and violated the Agreement previously made, in that such change was made without the giving of notice in accordance with Section 6 of the Railway Labor Act, as amended, relating to intended changes in the Agreement affecting rates of pay, hours or working conditions. Further, that such arbitrary action caused claimants to suffer monetary loss as stated in the claim. This loss is estimated as averaging approximately $1.38 per day per employe. A chart appears in the record comparing revenues of the first 16 days in February, 1948 with the first 16 days of the preceding month. It is stated that the traveling public became accustomed to the 10 cents charge and the employes' earnings were in excess of the $3.12 provided in the Agreement. However, when the increased charge was placed in effect, they contend that the traveling public resented the increase in the charge per parcel and discontinued to a considerable extent the practice of placing their baggage or other parcels with Ushers and Red Caps.

Carrier cites the decision of the Interstate Commerce Commission, September 7, 1943, Dayton Union Railway Company Tariff for Red Cap Service, 256 I.C.C. 289, to the effect that the handling of baggage for passengers was a transportation service, and if a charge was made, the charge must be filed as a tariff. Following this decision, the Chicago Union Station joined with other Carriers in filing a tariff, effective December 15, 1943, establishing the 10 cent rate as a tariff charge subject to the provisions of the Interstate Commerce Act. Also, during the period both prior and subsequent to the issuance of such tariffs, the Carrier sustained increasing deficits from its Red Cap service operations, citing a deficit for the year 1941 of $5,741.00 and by the year 1947 the total annual deficit had mounted to nearly $92,000.00. Therefore, as a result, the Carrier joined with other railroads in plans to issue a new tariff increasing the charge from 10 cents to 15 cents. Thereupon the Carrier with other railroads filed with the I.C.C. tariffs stating the increased charge. The Carrier contends that the Agreement of July 17, 1940, did not obligate it to maintain the 10 cent charge; that the first tariff of December 15, 1943, superseded the Agreement of July 17, 1940, to any extent to which that Agreement may have regulated the amount of charge or duty of Red Caps to collect the charge; that when the 15 cent tariff charge be-

came effective February 1, 1948, the performance of any obligation on the Carrier's part to maintain a 10 cent charge became illegal and was, therefore, excused; that whether or not the Agreement of July 17, 1940, was violated by institution of the 15 cent charge, Red Caps continuing in the service are not entitled to have their January 1948 earnings continued thereafter. Further, that whether or not said Agreement was so violated, Red Caps furloughed since January 15, 1948, are not entitled to be recalled to service or compensated for alleged wage losses.

In support of its position as above outlined, the Carrier contends: effective December 15, 1943 the I.C.C. ruled that such service was a transportation service and a duly published tariff did fix the charge at 10 cents. On February 1, 1948, a new tariff became effective, which fixed the charge at 15 cents. Therefore, the matter of the charge is governed by the Interstate Commerce Act and is not within the competence of the parties to vary it either by prior or subsequent agreement; any such agreement would be automatically superseded the moment the Commission took affirmative action in the matter; and that subservience of collective bargaining agreements in the railroad industry to competent legislative or administrative action by the Government of the United States, or any State, follows, citing Missouri Pacific Railroad Co. v. Norwood, 42 F. 2d 765, affirmed in 283 U. S. 249, and Terminal R. R. Ass'n. v. Brotherhood R. R. Trainmen, 381 U. S. 1. They also cite part I of the Interstate Commerce Act, Section 6, (7):

> "(7) No Carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said Carrier have been filed and published in accordance with the provisions of this part; nor shall any Carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any Carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

and Section 10 (1) of Part I of the Act on the theory that it is an obligation on all employes of a Carrier to comply with any and all requirements of the Act.

The Carrier further contends that a party to a contract is relieved of any obligation thereunder when an intervening law renders the performance of that obligation illegal, citing from Williston on Contracts, (Revised Edition, 1938), in Section 1938:

> "It would obviously be a gross injustice if the law should hold a promisor liable for failing to perform the promised act after the law itself had prohibited its performance, though at the time of the contract the undertaking was legal; that it may be said broadly that where domestic law forbids or prevents the performance of a promise, legal when made, the promisor is freed from liability."

Also:

> "The fact that the promisor himself is active in bringing about the change of the law making performance of his promise impossible is immaterial, since the change must be deemed to have been made for the public good."

The Carrier alleges that if claimants believed the charge of 15 cents was unreasonable or otherwise invalid under the Interstate Commerce Act, they had an appropriate forum in which to press their claim, the I.C.C., as they had advance notice of the filing of the tariff which became effective February

1, 1948. Therefore, claimants cannot now be permitted to make a collateral attack on this tariff before this Board.

It is further contended by the Carrier that fluctuations in the volume of passenger traffic and variations in character of the same make impossible the determination of comparable earnings by any competent evidence in charging a violation of the Agreement by claimants as to earnings for any given period, as the same would be speculative and therefore not competent evidence. Also, they contend that the number of Red Caps employed by the Carrier, at any time, is a discretionary matter for determination by the Carrier, depending on passenger traffic and anticipatory needs for the same.

Claimants base the claim on the following provisions of the Agreement of August 1, 1940:

> "1-Money will be collected at the rate of 10¢ per check by ushers and redcaps from passengers for handling hand baggage and other personal effects, and will be remitted to the Station Company, and for each tag or check so used an usher or redcap will receive as wages on the payroll 8¾¢."

and

> "5-Upon request of the General Chairman, the Station Company will review with him the earnings of the redcap force, and make such adjustment in the force as appears necessary, to meet fluctuations in the business."

The Claimants further contend that the two figures given in the Agreement have direct relationship to each other and that the changing of either must be the result of negotiations between the parties thereto; also, that the I.C.C. has no status in the field of establishing conditions to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions between the Carrier and their employes and for other purposes that are embodied in the Railway Labor Act, nor, except as provided for in the latter, have they any voice in the function of conditions prescribed in said Railway Labor Act. They further contend that the cases cited by the Carrier are not in point on the questions presented under this claim, in that the said rulings are based on the proposition that where collective bargaining agreements are inconsistent or in conflict with statutory enactments that the principle applies, and that is not involved in this case.

The first proposition as presented in this claim for determination by the Board is that raised by the Carrier, i.e., did the establishment of a tariff of 15 cents per parcel by the I.C.C. supersede the Agreement of July 17, 1940, between the Carrier and the Organization? The answer to this question must be in the negative. The nature of the action taken by the I.C.C. is not one which supersedes the provisions of an Agreement, such as here existed. The Agreement on which this claim is based is unique, in that it provides that based on a certain charge (10¢), which is to be collected by the employe, the employe is to retain 8¾ cents and the Carrier is to have the remaining 1¼ cents. In this, its provisions vary from the usual provisions in such Agreements and by the same token from published tariffs on rates, etc., of the I.C.C. as the same would apply to employes. Therefore, this Agreement does not come within the usual category of tariff rates as the same might apply to employes. It is viewed that the situation here presented makes the provision of this Agreement of vital importance to the employe as a 50 percent increase in the amount to be collected might easily influence the amount of business done. In other words, the average increase of 50 percent in the price of any commodity or for any service performed, will, in the usual sequence of events, make for a decided difference in the volume of business. It is contended by claimants that such was the result by the change made.

This Board does not have any authority to change, alter, modify or amend any provision of a collective bargaining agreement, but is limited to the function of interpretation of provisions of agreements negotiated by the parties.

Accordingly, on (A) of the Claim the ruling will be that the Agreement dated July 17, 1940 was violated in the action taken by the Carrier on February 1, 1948, when it required Ushers and Red Caps to collect from passengers 15 cents instead of 10 cents for each bag or parcel handled. The cases cited by the Carrier in its presentation are not in point on the question before us.

On (B) of the Claim, the point made by the Carrier is well founded, in that the record submitted by the claimants as to difference or loss of earnings is too meager upon which to base a finding which would not be speculative in its nature.

On (C) of the Claim the same situation applies as outlined in the ruling on Claim (B), with this addition: that under paragraph numbered (5) of the Memorandum Agreement there is outlined a method of procedure, as follows:

> "* * * and make such adjustments in the force as appears necessary, to meet fluctuations in the business."

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

In accordance with the above Opinion of the Board, Claim (A) is sustained. The Agreement of July 17, 1940, was violated for the reasons stated.

On Claim (B), the ruling will be that the same be remanded back to the parties for action on the premises and undoubtedly over a longer period of time than that recited in claimants' presentation, the true situation as to earnings of employes under the new tariff will be more truly reflected in that the evidence should now be available reflecting the change in its true light.

Claim (C) is likewise remanded for further proceedings under paragraph 5 of the Agreement of July 17, 1940. The evidence presented in the record is to the effect that Carrier has taken the position that this Agreement was superseded by the action taken by the I.C.C. in the matter of the tariff. As we have made a Finding on Claim (A) that this is not the true situation, the parties should proceed in accordance with the procedure outlined in paragraph 5 of said Agreement relative to review of the earnings of the Red Cap force to meet the fluctuation of the business. In so doing, there can be a determination, if the parties see fit, as to the number of the force necessary to meet the business demands and reinstatements could be made with adjustments if such is deemed to be necessary.

AWARD

Claim (A) sustained.

Claims (B) and (C) remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 25th day of January, 1949.