

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**

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: The claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' Agreement.

1. When on January 12, 1948 it discontinued paying Archie LePage, Foreman at Allouez Ore Docks, the monthly salary applicable to Foremen on the Ore Docks at Allouez, Wisconsin during the winter season, at the winter rate of pay.

2. That the Carrier now be required to pay from January 12, 1948 up to and including the date he was put to work as Foreman on the Docks at Allouez, Wisconsin at the start of the ore dock season in the Spring of 1948.

3. That the Carrier be required to compensate Archie LePage, and all other Foremen that are not paid the winter rate of pay when the ore docks are closed account of non-operation during the winter months.

JOINT STATEMENT OF FACTS: The Great Northern Railway Company owns ore docks located at Allouez, Wisconsin. Prior to 1935 the handling of ore over these docks had been performed by a contractor. Inasmuch as this is seasonal operation beginning with the opening of navigation and terminating with its close and particularly in view of the fact that the structure of the docks in question is largely wood, it is necessary to maintain fire protection on them constantly during the periods they are not in operation. For this purpose it had become customary to use a number of the foremen employed by the contractor as watchmen or fire wardens during the winter months.

In 1935 the Carrier terminated its contract covering ore handling and took over the operation itself, and simultaneously following production by such organization of evidence of their right to represent a material majority of the employes on the dock, contracts were entered into with the Brotherhood of Railway and Steamship Clerks to cover such operation, one agreement covering ore handlers and the other (which is the one pertinent to the dispute herein) covering foremen.

The agreement covering the foremen became effective April 15, 1935 and is still in effect with only one or two minor modifications having been made in individual rules since that time. (Copy attached designated as Joint Exhibit J-1.)

In Award 2436, you state:

"The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made."

In Award 3089, the following appears:

"We think that the least that can be said about this language of the rule is that it is indefinite and ambiguous. Under such circumstances the construction placed upon the language of the rule by the parties becomes highly important in determining what was meant by their use."

And, in Award 3539, you state:

"The construction placed upon a rule by the parties themselves over a long period of time ordinarily affords a safe guide in its interpretation."

The above awards are cited as indicative of the recognition given by your Board to the principle that in the case of ambiguity, past practice constitutes evidence of intent. There are, of course, many others, including Awards Nos. 887, 1397, 2090, 3338 and 3603 of your Division; Nos. 974 and 1083 of Division 2 and a long list of Division 1, including: 4230, 7464, 8145, 8169, 8779, 9053, 9217, 9252, 9291, 11630, and 12357.

The Carrier holds, therefore, that in view of the following facts, which are incontrovertible since they are a part of the Joint Statement of Facts, you have no alternative in this case to a full denial of the claim:

1. The side agreement of April 15, 1935, relied upon by the employees, contains no provision regulating the number of foremen who shall be used as watchmen or fire wardens during the winter season but, to the contrary, simply supplements Rule 21 of the basic agreement by established rates of pay to be allowed foremen during both operating and winter seasons, in compliance with that portion of the said rule, reading: "during which period they will be paid rates agreed upon for such assignments."

2. Rule 21 of the current basic agreement governs the use of foremen as watchmen or fire wardens during the winter season.

3. This rule provides for the use of such foremen as watchmen or fire wardens only "insofar as possible".

4. The term "insofar as possible" has been interpreted as leaving the number of foremen used as watchmen or fire wardens to the discretion of management.

5. The acceptance of this interpretation is fully verified by Joint Exhibit 4 which clearly and indisputably shows that such interpretation has been applied through the thirteen years during which the agreement has been in existence.

6. Under such interpretation it was the prerogative of management to regulate the number of foremen who were used as watchmen or fire wardens and, hence, there can be no merit in the claim in behalf of Mr. LePage due to his discontinuance in such capacity when management deemed it unnecessary to continue to use 13 fire wardens as well as a janitor.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood contends Carrier violated their Agreement when, on January 12, 1948, it dis-

continued paying Claimant Archie Le Page, a foreman at the Allouez Ore Docks, at the winter rate of pay applicable to Foremen. It asks that Carrier be required to compensate Claimant from January 12, 1948, up to the date he was put to work as Foreman on the Docks at Allouez, Wisconsin, at the rate of pay applicable to Foremen during the winter months. It also asks that all other foremen not paid during the winter months, when the ore docks were closed, be likewise compensated at the winter rate.

The claim in behalf of Le Page arises out of the fact that on January 12, 1948, Carrier reduced the number of watchmen or firemen it had established at the Allouez Ore Docks for the winter season of 1947-1948 by one, thereby causing Le Page, the youngest in seniority, to be dropped from the pay roll.

Carrier owns ore docks at Allouez, Wisconsin. The work on these docks is seasonal, beginning and ending with navigation. These docks are made of wood and it is necessary to maintain fire protection thereon when they are not in use. To provide this protection and, so far as possible, to compensate foremen used on the docks during the off season, the parties entered into a presently effective Agreement which provides as follows:

"Rule 21. Regularly assigned Foremen, (including General Foremen), will be used during the winter season, insofar as possible, for positions classified as Ore Dock Watchmen and Fire Wardens during which period they will be paid rates agreed upon for such assignments."

These parties also entered into a Memorandum of Agreement relating thereto which provides:

"2. The rate of pay for General Foremen will be \$290.00 per month. The rate of pay for Dock Foremen will be \$235.00 per month. The rate of pay for assistant Foremen will be \$175.00 per month.

These rates to continue for operating season.

For winter season the rate of pay for all foremen, including General Foremen, will be \$150.00 per month."

Rule 21 requires the Carrier, at the end of the regular operating season on the docks, to determine the number of Foremen it is possible to use as Watchmen and Fire Wardens on the ore docks during the coming winter season. During this period the Foremen assigned to these positions will receive the rates agreed upon, as evidenced by the provisions quoted from the Memorandum of Agreement.

Under Rule 21 Carrier is not required to establish as many positions of Watchmen and Fire Wardens as it has used Foremen during the operating season but only as many as it finds it can possibly use for that purpose. However, after Carrier has established the number thereof the same cannot thereafter be decreased during the winter season for it is clear from the quoted provisions of the parties' Agreement and Memorandum that such is the intent thereof.

That such has been the understanding of these provisions by the parties is clearly indicated in the manner in which the record shows they have operated thereunder. In view of the foregoing we find the claim in behalf of Archie Le Page should be sustained but not as to all other Foremen not paid during the winter season.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Claims 1 and 2 sustained. Claim 3 denied except as it may relate to Le Page in Claims 1 and 2.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of September, 1949.