Award No. 4999
Docket No. CL-4893

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

1. Carrier has violated agreement dated April 1, 1943 (Saturday Afternoon Relief) when it refused and continues to refuse to make provisions of this agreement effective.

2. All employes affected by this violation now be compensated in accordance with the agreement for all Saturday Afternoons they were required to work since April 1, 1943 until agreement was terminated in accordance with the provisions thereof.

EMPLOYES' STATEMENT OF FACTS: Effective April 1, 1943 agreement as follows was consummated:

> "By Executive Order 9301 issued by the President of the United States February 9, 1943, it is provided that:
>
> > For the duration of the war, no plant, factory or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum work week therein is less than 48 hours per week.

The War Manpower Commission, in accordance with that order had made mandatory the adoption of the 48 hour week in certain designated labor shortage areas some of which are located in Union Pacific territory.

It has been the practice to relieve the incumbents of certain clerical and office positions included within the scope of the agreement with the Brotherhood from work on Saturday afternoon. Rule 42 of the current agreement with the Brotherhood, effective July 1, 1934, provided for a continuance of the practice then in effect with respect to Saturday afternoon relief. The practice in effect prior to July 1, 1934 was in conformity with a rule of a previous agreement, effective February 1, 1930, which provided that:

> Employes, so far as practicable, will be excused Saturday afternoon where it can be done without detriment to the service.

The claim is therefore without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier raises a jurisdictional question and objects to the assumption by the Board of this claim because no specific claim with any particular person is here asserted as having been handled on the property, as required by Section 3, First (i) of the Railway Labor Act, and also because the claim is so ambiguous, uncertain and indefinite as not to constitute a dispute susceptible of decision and award by this Board. This Board has held in other Awards that the fact that the claim is general and fails to name the claimants except as a class is not a bar to the disposition of the claim. Awards 3251, 3687, 4821, and 4898.

From a very careful reading of the submissions of the parties, the sole question to be determined is whether or not the April 1, 1943 Agreement needed approval of the National Railway Labor Panel before it could become effective.

The Agreement of April 1, 1943 reads as follows:

"Agreement

between the

Union Pacific Railroad Company

and the

Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express & Station Employes

SATURDAY AFTERNOON RELIEF

By Executive Order 9301 issued by the President of the United States February 9, 1943, it is provided that:

> For the duration of the war, no plant, factory or other place of employment shall be deemed to be making the most effective utilization of its manpower if the minimum work week therein is less than 48 hours per week.

The War Manpower Commission, in accordance with that order had made mandatory the adoption of the 48 hour week in certain designated labor shortage areas some of which are located in Union Pacific territory.

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> Employes, so far as practicable, will be excused Saturday afternoons where it can be done without detriment to the service.

The general practice in effect July 1, 1934 under the foregoing rule varied in different offices and departments, and in the same department and office over a typical period of normal conditions. There is no office in which all employes were relieved on all Saturday after-

noons. In some offices all employes were relieved on some Saturday afternoons, but in other offices Saturday afternoon relief was afforded by an alternating agreement under which some employes worked one out of two or more Saturday afternoons.

It is not considered consistent with the Executive Order and Orders of the War Manpower Commission to regularly relieve employes on Saturday afternoon. Generally, clerical and office employes, including those in offices where Saturday afternoon relief is in effect, work in excess of 48 hours per week by additional overtime on week days or on Sundays or holidays. The continued shortage of employes with the requisite training for positions requiring experience makes it necessary not only to continue the present practice of overtime on week days and on Sundays and holidays but to require employes who have generally been relieved on Saturday afternoons to work on such afternoons.

The Brotherhood contends that the general practice of requiring employes to work on Saturday afternoon because of the shortage of experienced employes, or in conformity with the spirit and intent of the Executive Order and Orders of the War Manpower Commission concerning the 48 hour week, is a requirement of additional service at variance with past practice under the rule pertaining to Saturday afternoon relief; and that additional compensation should be paid for such service on Saturday afternoon in those offices where it has been customary to relieve employes after five hours service on Saturday, and that such additional service should be compensated on an overtime basis at the rate of time and one-half.

It is agreed that:

1. Employes in the following departments or in the offices specified in certain departments, in which it has been the general practice to relieve employes on Saturday afternoon, will be paid at the rate of time and one-half for service performed in excess of 5 hours on Saturday:

Accounting Department
Treasury Department
Traffic Department
Freight Claim Department
Dining Car and Hotel Department-Manager's office
Telegraph Department—Superintendent's office
Purchasing Department—District Purchasing Agent's office
Store Department-Assistant General Storekeeper's office
Motive Power and Machinery Department
    Office of General Superintendent M.P. & M.
    Office of Superintendents M.P. & M.
    Office of Superintendents of Shops
Operating Department
    Office of General Manager
    Office of General Superintendent
    Office of Superintendents

The application of this agreement to any other employe in any other office where it may be claimed it was the former practice to relieve such employes on Saturday afternoon will be subject to joint check by a representative of the management and a representative of the Brotherhood of past practice with respect to such positions in such offices as of July 1, 1934.

2. This agreement will not apply to the following positions:

(a) Positions included in Rule 1, Section (d) paragraphs 1, 2 and 3 of agreement effective July 1, 1934, as amended.

(b) Positions included in Rule 1, Section (c) of the agreement effective July 1, 1934.

(c) Positions necessary to the continuous operation of the carrier.

3. The performance of work on Saturday afternoon will be at the discretion of the Management and this agreement shall not be construed as imposing any obligation on Department Heads to work employes Saturday afternoon.

4. This agreement shall be effective April 1, 1943 and will automatically terminate upon the issuance by the President of the United States or the War Manpower Commission or other authorized government authority of an order terminating or amending Executive Order 9301, or Orders of the War Manpower Commission or other government authority in conformity therewith, reducing the minimum work week to less than 48 hours per week, or shall automatically terminate thirty days after service of written notice by either party upon the other of desire to terminate it, at which time the schedule rules affected by this agreement will again be in full force and effect.

5. The present agreement rule covering Saturday afternoon relief and practice thereunder, does not contemplate relief of all clerical and office employes on all Saturday afternoons, and when conditions requiring performance of work on Saturday afternoon beyond former practice are abated, the present rule and practice as restored will not contemplate relief of all employes on all Saturday afternoons.

FOR UNION PACIFIC
RAILROAD COMPANY:
E. J. Connors
Vice-President-Operation

FOR THE EMPLOYES:
Leo Cunningham
General Chairman, B. of R.C.
Eastern District
J. R. Grayson
General Chairman, B. of R.C.
Western Districts

Omaha, Nebraska
April 1, 1943."

On October 2, 1942, Public Law 729, 77th Congress, 2nd Session, 56 Stat. 765, 50 U.S.C.A. Appendix, Sec. 961, et seq., became effective. This was known as the Wage Stabilization Law.

Section 1 of the Wage Stabilization Law reads:

"That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first

gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

Section 5 reads:

"(a) No employer shall pay, and no employe shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulation shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

Section 11 reads:

"Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment."

The above sections referred to the freezing of wages as of September 15, 1942; the payment and receiving of wages in contravention of the Act; and the penalty if the Act was violated.

General Order No. 9250, dated October 3, 1942, provided for approval by the War Labor Board of increases in wages. Title II, paragraph (1) reads:

"No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases."

This clearly shows the necessity of the approval of the War Labor Board for an increase in wages on April 1, 1943.

Executive Order 9299 was issued on February 4, 1943, relative to wage and salary adjustments of employes subject to the Railway Labor Act. Paragraphs (1) and (2) read:

"1. No increases in the wage rates or salary of any employe subject to the provisions of the Railway Labor Act, whether granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in such wage rates or salary, shall be made except in accordance with the provisions of this order; provided, however, that nothing contained in this order or Executive Order No. 9250 (Par. 10,200) shall be construed as affecting the procedure or limiting the jurisdiction of either the National Mediation Board, as defined in the Railway Labor Act, or the National Railway Labor Panel, as defined in Executive Order No. 9172 (Par. 1175), except as herein specifically set forth.

2. No carrier shall make any change in wage rates, except such changes as by general order of the National War Labor Board, or by regulations of the Commissioner of Internal Revenue, are permitted to be made without the specific approval of the Board or the Commissioner, as the case may be, unless notice of such proposed change shall have been filed with the Chairman of the National Railway Labor Panel, created by Executive Order No. 9172, and shall have been permitted to become effective as hereinafter provided.

Notwithstanding Sec. 4001.2 of the Regulations of the Economic Stabilization Director (Par. 10,404), for the purpose of determining what wage and salary adjustments may be made without any specific approval, the general orders of the National War Labor Board shall be applicable to all employes subject to the Railway Labor Act, except those receiving salaries at the rate of $5,000 or more per annum in regard to whom the regulations of the Commissioner of Internal Revenue shall apply. But any adjustment of salary under $5,000 heretofore approved by the Commissioner shall not be affected by this order."

This shows that employes under the Railway Labor Act needed approval of wage increases.

When the April 1, 1943 Agreement was entered into, it provided for a wage increase: "Employes in the following departments * * * will be paid at the rate of time and one-half for services performed in excess of 5 hours on Saturdays."

For some reason this Agreement was not sent to the Railway Panel until May 22, 1945 for approval and on July 10, 1945 the parties were notified that the application was denied. This Agreement, without approval, was illegal and unenforceable.

On August 20, 1945, Executive Order 9607 was issued, repealing Executive Order 9301. Under the terms of the April 1, 1943 Agreement, the Agreement then terminated under paragraph (4) which reads as follows:

"This agreement shall be effective April 1, 1943 and will automatically terminate upon the issuance by the President of the United States or the War Manpower Commission or other authorized government authority of an order terminating or amending Executive Order 9301, or Orders of the War Manpower Commission or other government authority in conformity therewith, reducing the minimum work week to less than 48 hours per week, or shall automatically terminate thirty days after service of written notice by either party upon the other of desire to terminate it, at which time the schedule rules affected by this agreement will again be in full force and effect."

Therefore, the claim of the Employes that subsequent to August 30, 1945 that they should be compensated under the Agreement, fails because by the Agreement's own language, when Executive Order 9607 was issued, the Agreement terminated.

Another claim of the Employes is that after Executive Order 9607 was issued, the Carrier was free to put into effect, retroactively, the April 1, 1943 Agreement. This could not be done as the Agreement was unenforceable until approval was obtained from the Railway Panel. 12 American Jurisprudence 652 states that an agreement which violates a provision of a constitutional statute or which cannot be performed without violation of such provision is illegal and void. 223 U.S. 85, 94; 60 Fed. Sup. 709; and 107 F. 2d 712, Fitzsimons v. Eagle Brewing Co. reading:

"The appellant urges that the validity of the agreement does not depend upon the law at the time it was made. In so doing, he runs counter to the overwhelming weight of authority. 6 Williston on Contracts, sec. 1758, above cited, 12 Amer. Jur. sec. 165; 15 Amer. & Eng. Ency. of Law (2nd Ed.) p. 942; 2 Restatement of Contracts, sec. 609, p. 1128. The cases cited in support of these texts held that the subsequent repeal of a prohibitive statute does not authorize recovery under the contract originally forbidden."

Woolsey v. Panhandle Refining Company, 116 S.W. 2nd 675 reads:

"(2) The great weight of authority supports the general rule that an agreement which violates a valid statute is illegal and void, and cannot be enforced. 10 Tex. Jr., p. 185, Sec. 107, and cases cited; 6 R.C.L., p. 692, Sec. 98, and cases cited; 12 Am. Jr., p. 652, Sec. 158, and cases cited; 13 C.J., p. 410, and cases cited.

The foregoing rule rests upon sound reason, and has existed too long to be questioned now."

Because this Agreement was unenforceable, illegal and ineffective until approved by the Railway Panel and because it terminated with the issuance of Executive Order 9607, this claim was denied.

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

Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of August, 1950.