Award No. 5107
Docket No. CL-5069

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated the Clerks' Agreement, and the National Rules and Wage Agreement of March 19th, 1949, when on July 1st, 1949, at Weehawken, New Jersey, it arbitrarily discontinued tonnage rates of pay, and,

That carrier shall compensate employes J. Steinhauser, M. Gill, J. Frett, J. Lenehan, C. Jones, N. Prospero and approximately seventy (70) other employes, the difference between straight time day work rates and amount properly due under the tonnage schedule, and,

That employes on vacation during the period subsequent to July 1st, 1949 shall be paid the difference between daily work rates allowed and their tonnage earnings.

EMPLOYES' STATEMENT OF FACTS: For several years prior to July 1st, 1949, employes engaged in the handling of freight at the Erie Railroad Company's Docks, Weehawken, New Jersey, were paid under a tonnage and bonus system. The tonnage rate last having been increased pursuant to the National Wage and 40-Hour Agreement dated at Chicago, Illinois, March 19th, 1949.

On or about May 31st, 1949, the Superintendent of the New York Terminal Division posted a notice of cancellation of tonnage agreement at Weehawken, New Jersey, effective July 1, 1949. Copy of notice was sent to the General Chairman who advised the Superintendent that his notice was an illegal notice. See Employes' Exhibit "A". Under date of June 1st, 1949, Assistant General Manager, Mr. M. G. McInnes, addressed letter to the General Chairman advising of the notice of cancellation. See Employes' Exhibit "B". The Employes replied that the notice was not a proper notice. See Employes' Exhibit "C". Under date of June 8, 1949, Mr. Randall, Vice President, Erie Railroad, advised that he had authorized both Mr. McInnes and Mr. McGranahan to cancel the tonnage Agreement at Weehawken, New Jersey. See Employes' Exhibit "D".

Under date of June 28th, 1949, the Brotherhood invoked the services of the National Mediation Board under Section 5, First, of the Railway Labor Act,—as amended. See Employes' Exhibit "E". The case was accepted by the National Mediation Board and docketed as case No. A-3175.

On June 29th, 1949, the carrier was advised by the National Mediation Board that its services had been invoked and its attention was specifically

The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it.

(Exhibits not reproduced.)

OPINION OF BOARD: There is an Agreement between the parties, effective December 1, 1943, amended July 1, 1945, also a Memorandum Agreement, dated February 18, 1947, titled Tonnage and Bonus System.

The Memorandum of Agreement just referred to is the source of the instant dispute and should be quoted in toto. It reads:

"(a) The tonnage and bonus system at freight houses and/or transfer platforms as and where now in effect shall remain in effect until or unless changed, revised or modified, in accordance with this Memorandum of Agreement.

"(b) The Management may at any time on thirty (30) days' written advance notice to the Employes involved and to the general Chairman discontinue the tonnage and bonus system at any point.

"(c) Should the Management desire at any time to extend this tonnage and bonus system to any freight house or transfer platform where not now in effect the same provisions as to notice, conference, and mutual agreement as is provided for in section (d) of this rule shall apply.

"(d) Should either party desire to change, revise or modify this Memorandum of Agreement or any tonnage and/or bonus system covered by it, (except as provided in Paragraph B) written advance notice containing the proposed changes shall be given to the other party and the first conference shall be held within 30 days after date of notice served on the other party. Further conferences, if necessary, shall be held promptly and in compliance with the provisions of the Amended Railway Labor Act. Pending final settlement of any dispute no change shall be made."

For several years prior to July 1, 1949, some of the work of the Carrier's operations at its Weehawken Docks was performed by platform employes under a tonnage and bonus and/or piece work system and they were paid on that basis.

On May 31, 1949, the Carrier's Superintendent gave written notice to all employes and to the Brotherhood's Local and General Chairman of the Carrier's intention to discontinue the Tonnage and Bonus System at Weehawken Docks at the close of operations on June 30, 1949. Thereafter and on June 1, 1949, the Carrier's General Manager by letter gave the General Chairman a copy of the notice issued by the Superintendent and advised him the action was being taken pursuant to Paragraph B of the Memorandum of Agreement heretofore quoted. On June 1, 1949, the General Chairman by letter advised the Superintendent the Organization would not accept the latter's letter as a legal notice under the Memorandum because it had no notice that official had authority to cancel agreements entered into by the Carrier's Vice President. On the same date he sent the General Manager a letter to the same effect. June 8, 1949, the Vice-President advised the General Chairman that prior to May 27, 1949, both the Superintendent and the General Manager had received authority to give the cancellation notices in question on behalf of the Carrier.

On June 28, 1949, the Brotherhood invoked the services of the National Mediation Board. In requesting that action it stated in substance that the Carrier had given notice of its intention to change the existing Agreement by discontinuing the Tonnage and Bonus System at Weehawken Docks; that it had declined to confer with the Employes' Representative respecting the pro-

posed change; that further handling of the dispute through direct negotiations on the property would be of no avail and that the mediatory services of the Board were necessary. Following receipt of such information and request the Mediation Board took jurisdiction of the cause and on June 29, 1949, advised the Grand President of the Brotherhood it had called the Carrier's attention to provisions of Section 6 of the Railway Labor Act.

At the close of operations on June 30, 1949, the Carrier discontinued the Tonnage and Bonus System at Weehawken Docks and thereafter Employes who had been working under such system were paid at straight time day work rates instead of on a tonnage and bonus basis.

The record discloses the Mediation proceedings commenced July 29, 1949, and were carrier on intermittently until December 14 of such year when the parties were advised the proceedings were recessed indefinitely. May 12, 1950, the Mediation Board gave notice to all concerned such proceedings would be resumed in Cleveland on May 15, 1950. A few days later the Secretary of the Mediation Board advised the Grand President of the Brotherhood by telegram the proceedings had been postponed indefinitely at the request of the Carrier. So far as the record discloses no further action has been taken in such case since that date and it appears the cause is still in process of Mediation.

The Brotherhood insists it is entitled to a sustaining award upon any one of three (3) different grounds to which we now direct our attention.

It is first urged the Memorandum Agreement was violated because no legal notice was given by the Carrier in conformity with its terms. The theory on which this claim is based is that no official of the Carrier, other than the Vice President, who signed all Agreements herein involved for and on behalf of the Carrier, could give a legal notice of the proposed cancellation of the Tonnage and Bonus System at Weehawken Docks. The point has little merit and we are not disposed to labor it. It will be noted that Section (b) of the Memorandum Agreement provides that the **Management** may give the notice contemplated by its terms. We note further Rule 2 of the current Agreement provides that "where the words 'Management' . . . are used, it means the Erie Railroad Company or the officer or officers who are designated to represent it in any matters arising under this Agreement." The Superintendent who gave the notice on May 31, 1949, as well as the General Manager who gave a like notice on June 1, 1949, were officials of the Carrier. It cannot be denied that under the facts of record they were authorized to give such notices prior to the date on which they were given. Therefore, they were officials designated to represent the Carrier, within the meaning of that term as used in Rule 2 and the notices signed by them were just as valid as if they had been signed by the Vice President himself.

The next contention advanced is that Article 8 of the National Wage Agreement executed on March 19, 1949, and a Supplemental Agreement, particularly Rule 33 (b) thereof, superseded and nullified the Memorandum Agreement of February 18, 1947. Limits of time and space preclude the quoting of the Sections of the two Agreements heretofore just mentioned. It suffices to say Article 8 has to do with the settlement of disputes arising in April, 1948, and has no application to the instant controversy. Rule 33 (b), supra, so far as it pertains to this contention, merely provides that all rates in force and effect under current Agreements on September 1, 1949, the date on which the National Wage Agreement became effective, should be increased by 20 per cent in order to provide 48 hours' pay for 40 hours' work. As we understand it the only changes in existing Agreements contemplated by the National Wage Agreement were such as might be required in order to effect the transition from a 48 to a 40 hour week. Those deemed necessary to the attainment of that result were embodied in the Supplemental Agreement, to which we have heretofore referred. With that in mind we have examined such Agreement in its entirety and have been unable to find anything in its terms which, either directly or by inference, warrants a conclusion the Memo-

randum Agreement was abbrogated. It follows the Brotherhood's claim that Article 8, supra, Rule 33 (b), supra, or for that matter any other Agreements executed by the parties to conform with the requirements of the National Wage Agreement, have superseded or nullified the Memorandum Agreement cannot be sustained.

When carefully analyzed and stripped of all excess verbiage the essence of the third and final ground on which the Brotherhood relies to sustain its claim is that the Memorandum Agreement conflicts with the basic law, namely, the Railway Labor Act, authorizing its execution and that hence the rights of the parties depend upon and are governed by existing provisions of the basic law instead of provisions of such Agreement in conflict therewith.

The particular provision of the Railway Labor Act claimed to be in conflict with such Agreement in Section 6, which reads:

> "Carriers and representatives of the employes shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The Brotherhood's position on the point in question is that the Carrier's action in giving notice of its intended cancellation of the Tonnage and Bonus System at its Weehawken Docks was tantamount to an intended change in the current Agreement affecting rates of pay and therefor a matter which came within the scope of and was governed by the provisions of the Section heretofore quoted.

The language of Section 6 is so clear and unambiguous as to require little, if any, interpretation. It simply means that when a change in an Agreement affecting rates of pay is intended a thirty day notice thereof must be given and the proposed change accomplished by negotiation. It means also that in every case where notices of such intended change has been given and one of the parties invokes the services of the National Mediation Board that rates of pay involved shall not be altered until the controversy has finally been acted upon by such Board.

Upon careful analysis of the provisions of the Memorandum Agreement and those of Section 6 it can, we believe, be stated without fear of contradiction that if the Carrier's proposed action under provisions of the Memorandum involved a change in the current Contract affecting rates of pay there is a definite conflict between its terms and those of Section 6, i.e., the Memorandum provides for a unilateral change whereas Section 6 requires the change be made by negotiation.

Assuming, without for the moment deciding, the proposed change falls within the classification to which we have just referred, we are convinced the conflicting provisions of the Memorandum must yield to those of Section 6 and that the provisions of such Section are decisive of the rights of the parties.

The universal rule is that laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and

form a part of it as fully as if they had been expressly referred to or incorporated in its terms and take precedence over other of its terms in conflict therewith. See 12 Am. Jur., Contract, 769 Sec. 240; 17 C.J.S., Contracts, 782 Sec. 330; 13 C. J., Contracts, 560 Sec. 523; Wood v. Lovett, 313 U.S. 362, 61 S. Ct. 983, 85 L. Ed. 1404; Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254; Farmers & M. Bank v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A. L. R. 635; Von Hoffman v. City of Quincy, 71 U. S. 535-550, 18 L. Ed. 403-408. Numerous other decisions to the same effect can be found by reference to the American Digest System, Contracts, Sec. 167.

From what has just been stated it becomes apparent the all decisive issue remaining for decision is whether the action proposed by the Carrier involved an intended change in the Agreement affecting rates of pay.

Rule 20 (b) of the current Agreement reads:

> "Employes paid on a tonnage or piece work basis with an hourly, daily or monthly rate required to perform service in excess of eight (8) consecutive hours exclusive of meal period on any day or on their rest days or any of the specified holidays, shall be paid earnings for tonnage or piece work for the entire tour of duty plus one-half of the hourly pro rata rate for the overtime hours worked, but in no case less than as provided for in paragraph (a) of this Rule 20."

Rule 23 (d) of such Agreement provides:

> "Employes paid on a tonnage or piece work basis will be paid for the actual tonnage or piece work on a daily basis, but in no case less than they would have earned for each eight (8) or four (4) hour tour of duty at their hourly, daily or monthly rate."

Heretofore we have pointed out that for a period of several years, in fact prior to the date of the execution of the Memorandum Agreement, the Employes here involved, under provisions of an Agreement then and now in effect, had been regularly assigned to Platform positions at the Weehawken Docks and their rates of pay established on a Tonnage or Bonus basis. In addition it is to be noted that when so assigned they were guaranteed certain pay under the provisions of the 2 Sections of the Agreement just quoted. Under such conditions and circumstances we are convinced their rates of pay became fixed under the Tonnage and Bonus System and that when the Carrier gave notice of a cancellation of that System at its Weehawken Docks that action constituted notice of "an intended change in the Agreement affecting the rates of pay" within the meaning of such phrase as used in Section 6 of the Railway Labor Act.

The conclusion just announced, as we have heretofore demonstrated, compels an additional conclusion that the Carrier violated the Agreement by failing to comply with the requirements of Section 6, supra, in discontinuing tonnage rates of pay at its Weehawken Docks.

The Carrier concedes the question whether the National Mediation Board had the right of jurisdiction was necessarily decided by that body. But nevertheless it strenuously insists the fact it did take jurisdiction does not deprive it of the right to cancel the involved Tonnage and Bonus System by virtue of the provisions of the Memorandum Agreement. Heretofore, we have definitely indicated we are not in accord with that view because, under the existing factual situation, the provisions of that Agreement must yield to those of Section 6 of the Railway Labor Act. It should perhaps be pointed out, however, that since the proposed action constituted an intended change in the Agreement affecting rates of pay, the result would be the same even if we agreed its position on this point was well taken. Section 6, supra, expressly provides that in such a situation when—as here—services of the Mediation Board have been requested by either party rates of pay shall not be altered until the controversy has been finally acted upon by that Board.

Another contention advanced by the Carrier is to the effect that the claim with respect to employes other than those specifically named therein cannot be considered or entertained because as to them it was not filed in accordance with Rule 42 of the current Agreement. One answer to this contention is that this point was not pressed on the property or asserted until the hearing before the Board and hence is not entitled to consideration (see Award 3950). The other, and the one on which we choose to dispose of the contention is that this Division of the Board has repeatedly held the fact a claim is general and fails to name the Claimants except as a class is not a bar to its disposition.

See, i.e., Award 4821, where it is said:

> "We think the correct procedure is to permit the filing of general claims where the question at issue operates uniformly upon a class of employes that is readily determinable. There is no reason why the work of this Board should not be so expedited. Technical procedures are not contemplated. The policing of an Agreement ought not to be made unnecessarily difficult by requiring the filing of a multitude of claims when the disposition of a single issue decides them all. The Organization is authorized to represent the employes and where no prejudice arises out of group handling, we think it is entirely proper. Awards 4482, 3687, 2809, 2240."

See, also, Award 4999 and other Awards there cited.

We are not unmindful that there is some diversity of opinion among inferior courts as to the correctness of our view on the question just disposed of. However, we know of and have been cited to no decisions of the court of last resort holding that it is erroneous. In that situation we are disposed to adhere to the Rule announced in our previous Awards.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of November, 1950.

Dissent to Award No. 5107, Docket CL-5069

The functions of this Adjustment Board under the Statute are limited to disputes arising out of grievances or out of the interpretation or application of Agreements. (Elgin J & E R Co. v. Burley, 325 U. S. 711 (723-26).)

"The Act authorizes the Board to interpret and to apply the collective bargaining contracts of the crafts in controversies between the crafts and the carriers involving the contracts." (O.R.T. v. New O T & M Ry Co., 156 Fed. 2nd, 1, at page 5.)

There is here no permissible attack on the Memorandum of Agreement dated February 18, 1947, which supplemented an agreement of December 1, 1943, amended July 1, 1945. The memorandum of the latest date carried out the intention that in a system-wide operation, entered into by an authorized Organization, alternate methods of computing compensation might be used.

On January 21, 1946, the Organization served notice in accordance with Section 6 of the Railway Labor Act of its desire to revise the existing tonnage and piece work schedule in effect at Chicago, Illinois, to the extent indicated in a Memorandum Agreement which was enclosed with their communication.

Initial meeting was held on February 18, 1946, and at that time Carrier declined to enter into a piece work agreement. However, it was agreed that piece work schedules would be reviewed and that consideration would be given to adjusting the rates if such review developed that an adjustment was in order. Following a review of the matter and after several conferences a new piece work schedule was made effective. This still did not satisfy the Organization and on August 15, 1946, another notice was served on the Carrier again requesting that an agreement be signed to cover the piece work operations at Chicago, Illinois, and again the Carrier declined.

Shortly thereafter the Organization invoked the services of the National Mediation Board. Mediation failed and an agreement to arbitrate the question was signed. Before arbitration was started the Organization made a suggestion to settle without arbitration. Carrier accepted the offer and subsequent negotiations resulted in the Memorandum of Agreement, dated February 18, 1947, being signed with the distinct understanding by both parties that the Carrier could, on 30 days' notice, cancel piece work at any point.

The contract in explicit terms gave the Carrier the right upon notice to discontinue in operations at Weehawken, N. J., one of the alternatives provided in the contract. In that event the hourly rates theretofore agreed upon survived and applied, at Weehawken. That is what the duly negotiated contract expressly provided. The memorandum of agreement of February 18, 1947, was arrived at as a result of arms-length bargaining on an over-all system basis with a national organization in accordance with the terms of the Act. The contracts which it amended had likewise been legally entered by legally constituted representatives. No action has been taken which has abrogated the arrangement which results from or is evidenced by the original writing and the amendments.

Paragraph (b) of the Memorandum of Agreement in question reads:

"The management may at any time on thirty (30) days' written advance notice to the Employes involved and the General Chairman discontinue the tonnage and bonus system at any point."

Some of the Carrier's operations at Weehawken Covered Docks location, in question, had for some years been performed by platform employes on a tonnage basis or piece work bonus and although the rates have varied in accordance with the several wage adjustments, the payment method had remained substantially the same.

The Carrier elected to discontinue the tonnage and bonus system at the point in question at the close of operations on June 30, 1949. Notice in accordance with the agreement was accordingly given, and on June 30, 1949, the tonnage and bonus system was discontinued at the point mentioned.

The action so taken by the Carrier was not a change in an agreement affecting rates of pay, rules, etc., or a change of contract relationships, as embraced and defined in Section 6 of the Act. The contract in all other respects and constituting a complete bargaining arrangement remained in effect. The action was a step taken in operation under the existing contract and was strictly within its terms. The rates which were established and maintained on an hourly basis, and which were always involved in computing wages, were not affected. In our opinion, the majority ruling which eliminates or abrogates the plainly granted right of the Carrier to select for the period after June 30, 1949, at Weehawken, N. J., the alternative of hourly basis, as established by the contract (and kept current by adjustments since authorized and agreed upon), would seem plainly to violate the obligation of the contract. This Board is not authorized to make a new contract for the parties, and it should not treat the exercise of the right given by paragraph (b) as quoted, as making a new contract or arrangement or as departing from the terms of the existing agreement. The rights of the Carrier to act under Section (b) of the Memorandum of Agreement, dated February 18, 1947, continued in effect until changed by mutual agreement. Under the circumstances the claim should have been denied.

* * * *

The four cases decided by the United States Supreme Court, which the decision cites, seem to lack pertinency.

Wood v. Lovett, 313 U. S. 362, concerned the validity of title to lands in Arkansas derived from a deed by the State, where the lands had been offered earlier for sale, because of delinquent taxes, and in effect bid in by the State for lack of adequate statutory bid.

Great Northern Railway Company v. Sunburst Company, 287 U. S. 358, involved a suit for claimed overcharge of freight on intrastate movements in Montana, and disposed of an unsuccessful complaint against the action of the Montana Supreme Court in construing the rate laws of that State and recognizing a subsequent rate revision, and upholding the common law right of a shipper to recover an excess over reasonable charges.

Farmers Bank v. Federal Reserve Bank, 262 U. S. 649, arose out of an effort of the Federal Reserve Bank to avoid a charge, provided by the North Carolina State legislation in 1921 in the interest of State bank solvency, on the collection of drafts and checks presented for payment on clearance.

Von Hoffman v. City of Quincy, 71 U. S. 535 (decided in 1866), dealt with the power of a city to sell bonds, and levy taxes to service and pay them, and directly concerned a subsequent law restricting taxation, bound to result in inability to discharge the bonds. The latter law was declared unconstitutional as impairing the obligation of the initial contract.

* * * *

In conclusion we record our dissent and express the opinion that the award herein should have been a denial of the claim.

/s/ R. H. Allison
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ A. H. Jones