Award No. 5303
Docket No. CL-5209

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

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

JACKSONVILLE TERMINAL COMPANY

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

1. That the Jacksonville Terminal Company improperly applied Article II, Section 2 (a) of the Chicago Agreement of March 19, 1949, to four (4) positions designated Yard Train Dispatchers, when it failed and refused to maintain the special allowance paid the incumbents of such positions prior to September 1, 1949, so as to provide the same pay for forty hours when the work week was reduced to five days effective September 1, 1949, as was previously received for forty-eight hours, and

2. That the Jacksonville Terminal Company shall now properly apply Article II, Section 2 (a) of said Agreement of March 19, 1949, to the four (4) positions involved and compensate the incumbents of such positions for wage loss suffered, retroactive to September 1, 1949, by reason of carrier's failure and refusal to properly apply said agreement.

EMPLOYES' STATEMENT OF FACTS: Prior to Rules Agreement revised effective November 16, 1944, the four (4) Yard Train Dispatchers involved in this dispute were worked six days per week and were paid straight time pay for seven days, each Yard Train Dispatcher being allowed one day off per week for rest purposes, without deduction in pay.

Rule 47 of the revised agreement, effective November 16, 1944, reads as follows:

> "Work performed on Sundays and the following legal holidays —namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday the day observed by the State, Nation or by proclamation, shall be considered the holiday), shall be paid at the rate of time and one-half, except that employes necessary to the continuous operation of the railroad and who are regularly assigned to such service will be assigned to regular day off duty in seven (7), Sunday, if possible, and if required to work on such regular assigned 7th day off duty will be paid at the rate of time and one-half; when such assigned day off is not Sunday, work on Sunday will be paid for at straight time rate.

August 31, 1949, which rate was adjusted in conformity with the Chicago Agreement of March 19, 1949, effective September 1, 1949, as follows: By first eliminating the .07c per hour increase effective October 1, 1948, which made the base rate $11.43 per day, to which was added 20% increase of the daily rate of $11.43 or $2.286, making a total of $13.716. After the 20% of the daily rate was added, the .07c per hour, 56c per day, increase of October 1, 1948, was applied, making a total of $14.276 per day. Fractions over half cent counted as one cent, made a total of $14.28 per day, effective September 1, 1949. Yard Train Dispatchers have at no time been paid on a monthly basis; and at all times the positions occupied by them have carried a daily rate, not a monthly rate; therefore, the daily rate was increased 20% in order to provide 48 hours' pay for 40 hours' work under Article II, Section 2 (a) of the Chicago Agreement of March 19, 1949, effective September 1, 1949. In effect the employes are requesting 56 hours, 7 days pay, for 40 hours, 5 days, work which under the Chicago Agreement above referred to there is no basis for their contention. The claim is totally without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves the effect of a 40-hour week amendment of the Agreement upon a Special Agreement dealing with the rates of pay, vacation rights and the work week of the positions filled by Claimants.

FIRST. The Special Agreement was dated April 17, 1945. It is quoted in full in Exhibit 1 of the Brotherhood's ex parte submission. If it had been no more than a unilateral act of the Carrier or an understanding between the Carrier and the incumbents of the positions, it would have been ineffectual to alter the terms of the Agreement. Award 5302. However, it is admitted by all hands that the Special Agreement was arrived at by agreement with the Brotherhood; and it has been in effect since April 1, 1945.

The point in controversy is over what rates of pay were established for these positions by the Special Agreement and whether they were properly adjusted to the 40-hour week pursuant to Article II, Section 2 (a) of the National 40-Hour Week Agreement (now Rule 49 (b) of the current Agreement).

There is no dispute over the manner in which the Carrier applied 7c increase effective October 1, 1948 and it was done consistently with the conclusions here reached.

SECOND. Before the Special Agreement was adopted, the positions were 7 day positions and Claimants worked without relief 6 days at straight time and one day at time and one-half. In adjusting a situation such as this to a 40-hour week, it is clear that the daily rate of pay for the 6 days would be increased 20% to maintain the same rate to be paid for 5 days' as for 6 days' work. The fact that the incumbents held an assignment by which they regularly earned 7½ days' pay would not figure in the computation. This because the number of hours worked on the 7th day were not comprehended or used in fixing the rates of the positions; nor was the time and one-half paid for the work on the 7th day a differential, an arbitrary or a special allowance (National Agreement Article II, Section 2 (a)).

When the Special Agreement was adopted, "the work had lightened up" to a point where Claimants could be furnished relief on the 7th day and "they preferred to have the day off." No change was made in the basic work week of 6 days with the minor exception of some emergency overtime work which was to be performed at straight time only "during the peak movement in December." At all other times Claimants were entitled to time and one-half for all work performed on the 7th day: the operation of Rule 47 of the Agreement was not superseded by paragraphs B and D of the Special Agreement except during the peak movement in December.

Although the fundamental basis of the Claimants' work week was not changed by the Special Agreement, the rates of pay were changed. The arrangement was not one whereby Claimants' earnings of 7½ days' pay per week were to be maintained, subject to call on the 7th day without additional compensation. Apart from the December emergency exception, the work week assigned was 6 days and the pay established for it was 7 day's pay.

It is true that the Special Agreement was not written with words of art, but the fundamental intention was clear enough, although the change in rate was stated in terms of equivalence to a monthly rate and also indirectly in terms of 6 days' work at a rate of pay equal to 7 times the daily rate. The positions remained what they had always been before—daily rated positions —but in the view we take, the Special Agreement fixed the true daily rate at 1/6 of 7 times the daily rate shown in the Schedule in exchange for the daily work, the absorption of vacations and the overtime work during December. Therefore the daily rate before application of the 7c increase and the 20% adjustment was $13.335; and the daily rate thereafter was $16.56.

THIRD. The claim speaks in terms of the incumbents rather than the positions; but apart from the language of the claim, the Special Agreement itself throughout shows that it was made in a shortage of qualified men during the war; and the concluding paragraph states that "these arrangements supersede all previous ones made in regard to **these 4 men.**" It seems clear therefore that the Special Agreement did not affect the positions as such but is effective as long as the incumbents remain in the positions.

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 work week established by the Special Agreement dated April 17, 1945 was superseded by the adoption of Rule 49 (b) and that the daily rates of the positions occupied by Claimants for the duration of their incumbency were not, and should have been, established effective September 1, 1949 in the manner indicated in the foregoing Opinion.

AWARD

Claim sustained in accordance with the foregoing Findings and Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of April, 1951.