Award No. 6735

Docket No. CL-6561

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

NORFOLK & WESTERN RAILWAY 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. The Carrier failed to properly apply certain provisions of the National Wage Increase Agreement of December 15, 1941, effective December 1, 1941; January 17, 1944, effective February 1, 1943 and December 27, 1943; April 4, 1946, effective January 1, 1946; May 25, 1946, effective May 22, 1946; September 3, 1947, effective September 1, 1947; March 19, 1949, effective October 1, 1948 and March 1, 1951, effective February 1, 1951 and subsequent applicable provisions thereof to employes of the carrier occupying positions embraced within the Scope Rule of the Agreement in effect on December 17, 1940, the date that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes were duly designated and authorized to represent the craft or class of clerical, office, station, and storehouse employes of the Norfolk and Western Railway Company for the purposes of the Railway Labor Act, as certified by the National Mediation Board in their Case No. R-680, copy of which is attached and made a part hereof and known as Exhibit No. 1, which agreement was effective June 1, 1939 between the Norfolk and Western Railway Company and the Association of Railway Clerks and Associated Employes of the Norfolk and Western Railway Company and subject to Memorandum Agreements of June 1924, copy of which is attached and made a part hereof and known as Exhibit No. 2, and of September 1, 1936, copy of which is attached and made a part hereof and known as Exhibit No. 3. The agreement of June 1, 1939 was revised and superseded by agreement between the Norfolk and Western Railway Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, executed June 15, 1944, effective July 1, 1944, and Supplemental Agreement executed July 15, 1949 to become effective September 1, 1949; said Supplemental Agreement being in accordance with the applicable provisions of the National Agreement of March 19, 1949 and Memorandum Agreements subsequent thereto covering decisions of the 40 Hour Week Committee, which are incorporated in the Agreement executed July 15, 1949, effective September 1, 1949.

2. The Carrier shall now be required by an appropriate order and award to properly apply provisions of the National Wage Increase Agreements set forth in Section (1) hereof to the involved employes, with retroactive compensation for the month of December 1941 and subsequent thereto until the condition is corrected.

EMPLOYES' STATEMENT OF FACTS: Prior to the effective dates of the National Wage Increase Agreements cited in Statement of Claim, and in accordance with Section 6 of the Railway Labor Act as amended, formal notices were served upon Carrier by the Employes desiring to change the rates of pay of all employes embraced within the Scope Rule of the then current Agreements.

The foregoing requests of the Employes were ultimately composed by agreements between the conference committees representing carriers and employes to which this Carrier and the Brotherhood were parties, viz; Agreement dated Chicago, December 15, 1941, providing for wage increase of ten cents (10¢) per hour effective December 1, 1941, Agreement dated Washington, January 17, 1944, providing for graduated wage increase of nine to eleven cents (9¢ to 11¢) per hour, four cents to ten cents (4¢ to 10¢) effective February 1, 1943 and one cent to five cents (1¢ to 5¢) effective December 27, 1943, Agreement dated Chicago, April 4, 1946, providing for wage increase of sixteen cents (16¢) per hour effective January 1, 1946, Agreement dated Washington, May 26, 1946, providing for wage increase of two and one-half cents (2½¢) per hour effective May 22, 1946, Agreement dated Chicago, September 3, 1947, providing for wage increase of fifteen and one-half cents (15½¢) per hour, effective September 1, 1947, Agreement dated Chicago, March 19, 1949, providing for wage increase of seven cents (7¢) per hour, effective September 1, 1948, and Agreement dated Washington, March 1, 1951, providing for wage increase of twelve and one-half cents (12½¢) per hour effective February 1, 1951, which Agreement also provides for "Cost of Living Adjustment" to be determined in accordance with "Changes in the Consumers' Price Index for Moderate Income Families for Large Cities Combined"—all items (1935-1939—100), as published by the Bureau of Labor Statistics, United States Department of Labor, using as an arbitrary base index of 178, and adjustments to be made each three (3) months thereafter based on the BLS Consumers Price Index as of February 15, 1951, and the BLS Consumers Price Index each three (3) months thereafter.

Each of the aforementioned Agreements provided that all hourly, weekly, monthly and piece work rates of pay for employes covered by the Agreements be increased a stipulated amount (cents per hour) applied so as to give effect to the increases in pay irrespective of the method of payment.

Each National Agreement further provides for method of applying wage increases and decreases as shown on excerpts set forth below—

Agreement dated December 15, 1941—Section I.

"(e) **Piece Work**

Where piece-work rates of pay are in effect on railroads having special rules as to the application of any increase or decrease in such rates, such rules shall apply. In the absence of any definite rule governing, the equivalent of ten cents (10¢) per hour shall be added to the unit of compensation."

Agreement dated January 17, 1944—Section II.

"(e) **Piece Work**

Adjustment of piece-work rates shall be based on the amount of increase applicable to the basic hourly rate for the class of work performed. Where piece-work rates of pay are in effect on carriers

It is the position of the Carrier that the Employes' claim is without merit, and denial of the claim is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: In June, 1924, the Carrier entered into a collective bargaining agreement with its employes in its Auditor of Revenue Department, which said Agreement contained the following provision:

> "Under this piece-work or bonus arrangement the monthly rate of $102.00 will be continued and in addition 1¢ per waybill will be paid to each individual for all waybills abstracted in excess of an average of 500 by the number of days engaged in abstracting in any month and subtracting this total fro mthe total waybills individually abstracted. This extra allowance for each period will be included on the pay roll for the last half of each month."

Thereafter, on September 1, 1936, the Carrier entered into a similar agreement with its employes in its Statistical Bureau, which provided as follows:

> "Under this arrangement the present basic rate of $110.00 per month will be continued and in addition thereto the following incentive rates will be paid for cards purchased in excess of the hourly average specified herein, subject to penalty deductions for errors as specified, the excess for each class of cards to be determined by subtracting from the total of each class punched by each employe during any calendar month the sum obtained by multiplying the average required for that class of cards by the actual number of hours in which the employe was engaged in punching that class of cards."

Effective June 15, 1937, the last mentioned agreement was amended to include an additional key punch operator.

The petitioning Organization became the bargaining representative of the Carrier's clerical employes on December 17, 1940.

On July 1, 1944, the Organization here representing the Claimants and the Carrier entered into a Supplemental Agreement, by the terms of which the aforementioned Agreements of June, 1924, and September 1, 1936, were continued in effect, subject to being changed under the provisions of the Railway Labor Act, as amended.

Pursuant to the National Wage Agreement, which became effective on September 1, 1949, the so-called piece-work, bonus or incentive rates referred to in the aforesaid Agreements of June, 1924, and September 1, 1936, were increased 20 per cent. By this Claim the Organization seeks to compel the Carrier to apply to said piece-work, bonus or incentive rates the proportionate wage increases established by the National Wage Agreements which became effective on December 1, 1941; February 1, 1943; January 1, 1946; May 22, 1946; September 1, 1947; October 1, 1948; February 1, 1951; and subsequent National Agreements, retroactively.

All of the National Wage Agreements that were entered into between 1941 and 1951 provided, in substance, that piece-work rates should be adjusted in accordance with the increases in the basic hourly rates, and that in the absence of a definite rule, the equivalent of a specified hourly increase should be added to the unit piece-work prices.

It may be noted that while the Agreements of June, 1924, and September 1, 1936, refer to "piece-work", "bonuses" and "incentives" somewhat synonymously, the National Wage Agreements provide, consistently, for the adjustment of "piece-work" rates only. The terms "piece-work", "bonus" and "incentive", as applied to compensation for service, have different meanings but since

this Claim is predicated on the increases authorized by the National Agreements we are here concerned with piece-work rather than with bonuses or incentives. The law books define a piece-worker as one who is paid by the piece and who has no contract to do any certain amount of work or to work any given number of days, and it has sometimes been held that such piece-workers are to be considered independent contractors and do not come under the protection of Workmen's Compensation laws, in the absence of a statute covering them. Strictly speaking, therefore, the employes with whom we are here concerned could not technically be regarded as piece-workers, though they might have certain bonus or incentive rights notwithstanding. On that view of the case Claimants would not come within the coverage of piece-workers as that term was used in the National Wage Agreements.

The 20 per cent increase of the piece-work, bonus or incentive rates made in 1949 resulted from the inauguration of the 40-Hour Week, which was accomplished on the understanding that employes should not suffer a reduction in earnings as a result of the shorter work week. That increase stands on a different basis than those which the Organization here seeks, which is that all wage increases should be automatically extended to these piece-work, bonus or incentive rates. We, therefore, cannot regard the 20 per cent increase of 1949 as constituting a binding precedent or a recognition of the validity of the Claim by the Carrier.

It is also to be noted that this Claim was first called to the attention of the Carrier by the General Chairman at a conference held on March 16, 1951, and that it was formally presented in writing on April 1, 1951. Thus, it will be seen that the Organization is now undertaking to have applied to these so-called piece-work, bonus or incentive rates all of the wage increases from 1941 to date, in so far as the particular groups of employes here involved are concerned. The Claim was first asserted nearly ten years after it might have been pressed in the first instance.

While it is well settled that there are no statutes of limitations applicable to the prosecution of claims before this Board, the equitable principles of laches and estoppel have frequently been applied. This is upon the theory that when the parties have consistently applied their contract over a long period of time, their conduct in so doing is considered the best evidence of their intentions when they entered into it.

In view of the provisions of the various Agreements here involved and the long continued conduct of the parties with respect thereto, it is our considered judgment that the special benefits provided for in the 1924 and 1936 Agreements are merely incentive inducements and cannot be regarded as piece-work rates within the meaning of the National Wage Agreements promulgated between 1941 and 1949. Award 5906 relied on by the Organization is not in conflict with our conclusion. That Award involved a controversy as to how piece-work rates, to which the employes were admittedly entitled, should be calculated.

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 evidence does not establish that the Carrier violated the Agreements.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 27th day of July, 1954.