Award No. 7296

Docket No. CL-7536

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(a) That the Carrier violated and continues to violate national wage agreements dated April 4 and May 25, 1946; September 3, 1947; March 19, 1949; March 1, 1951; and March 18, 1953, by and between the participating Carriers, one of which was The Chesapeake and Ohio Railway Company, represented by the Carriers' Conference Committees, and its employes, represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, when it failed and refused to increase the rates of pay of certain monthly rated employes by multiplying the hourly increase provided therein by 243⅓, the number of hours comprehended by the employes' monthly rate in conformity with the terms and conditions of said wage agreements, and

(b) That the Carrier now be required to properly apply the provisions of these agreements, namely Section 1, Paragraph (d) thereof, as of the effective date of each agreement, namely January 1 and May 22, 1946; September 1, 1947; October 1, 1948; February 1, 1951; and cost-of-living adjustments provided for in the March 1, 1951, agreement, including the so-called Guthrie Award providing annual improvement wage increase, effective December 1, 1952, to all the employes whose rates of pay have heretofore not been increased in conformity therewith.

EMPLOYES' STATEMENT OF FACTS: On October 1, 1945; April 15, 1946; March 25, 1947; April 10, 1948; and October 25, 1950, formal notices were served upon the Chesapeake and Ohio Management in accordance with provisions of Section 6 of the Railway Labor Act, as amended, of the Employes' desire to change the rates of pay, effective thirty days subsequent to the date of each Employe's notice, for all employes that the Brotherhood represented on this property (Employes' Exhibits "1", "2", "3", "4", and "5"). Conference upon the Employes' several requests were held in due course, and while no agreements were reached on the local level or in the initial conferences, the Carrier did advise us on November 6, 1945; May 13,

evidence as to what the monthly rates in question have comprehended with respect to increases, the doctrines of laches and estoppel should be adopted as a subordinate conclusion, to the end that those who have proper contentions must make them in due season and not gain unfair advantage by unjustifiable delay.

Attention is called to the following from Third Division Award 2137 (Referee Thaxter):

> "* * * Wages are not accepted over a long period of time without protest if an employe believes that he is not receiving what is due him. Employes should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay. * * *" See also Award 1806 (Referee Thaxter).

CONCLUSIONS

The Carrier summarizes its position as follows:

1. The claim, though vague and broad, could not cover more than the 85 positions shown by CARRIER'S EXHIBIT 16.

2. The 85 positions are Excepted (a) positions covered by Memorandum Agreement No. 1, which are excluded from all rules of the agreement having to do with rates of pay and hours of work, this being emphasized by Rule 30(a) and Memorandum Agreement No. 1.

3. The Carrier has shown by competent evidence that at no time as far back as 1937 has 243⅓ hours been used as the basis of increase for the 85 positions.

4. No change in increases allowed is warranted by the evidence in this case, so that on this basis and the doctrine of laches, the claim should be denied in its entirety.

All data contained in this submission have been discussed in conference or by correspondence between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim by approximately 85 employes who assert that the Carrier has improperly applied to them certain wage increases arising out of a number of national wage agreements. The claim is that the Carrier be required to properly apply the provisions of these wage agreements to all employes whose rates of pay have not been increased in conformity therewith.

The wage argeements involved herein are: The agreement of April 4, 1946, providing an increase of 16¢ per hour; the agreement of May 25, 1946, providing an increase of 2½¢ per hour; the agreement of September 3, 1947, providing an increase of 15½¢ per hour; the agreement of March 19, 1949, providing for a 40 hour week without a change in pay and a subsequent increase of 7¢ per hour; and the agreement of March 1, 1951, providing an increase of 12½¢ per hour and cost of living adjustments to be made in the future. Subsequent cost of living adjustments were made as follows: On April 1, 1951, increase of 6¢ per hour; on July 1, 1951, an increase of 1¢ per hour; on January 1, 1952, an increase of 4¢ per hour; on April 1, 1952, a decrease of 1¢ per hour; on July 1, 1952, an increase of 2¢ per hour; on December 1, 1952, (improvement factor increase, Guthrie award) an increase of 4¢ per hour; on January 1, 1952, a decrease of 1¢ per hour; on March 1, 1953, a decrease of 3¢ per hour; and on October 1, 1953, an increase of 3¢ per

hour. By the agreement of December 3, 1954, the net increase in adjustment was made a part of the basic rates of pay and the cost of living provisions were cancelled. The agreements providing for the foregoing increases provided that they applied to all employes represented by the Organizations on whose behalf notices had been served. It is not disputed for the purpose of this dispute that the increases were for the benefit of all employes within the scope of the Clerks' Agreement.

The claim here made begins with the application of general increases following the effective date of the Organization's Agreement which became effective January 1, 1945. Prior to this date, all excepted positions were excepted from all rules of the Agreement other than special rules dealing with bulletining, filling and retention of seniority in connection with such positions. By a Memorandum Agreement effective January 1, 1945, excepted positions were placed within the scope of the Agreement but divided into two groups designated as (a) and (b), each group being subject to a different group of rules of the Agreement. It will be here noted that (a) positions were excepted from all pay rules of the Agreement while (b) positions were not. When the 40 Hour Week Agreement was negotiated, effective September 1, 1949, the (b) positions were included within its provisions while (a) positions were specifically excepted from its terms. During the course of the negotiations of the 40 Hour Agreement, the Organization contended that both (a) and (b) positions should be included within the 40 hour week provisions as both groups were then six day positions, a position from which the Organization recedes in the present dispute. In any event, it is not disputed in the present case that (b) positions are within the 40 Hour Week Agreement and that the employes occupying such positions are not claimants in the present dispute. In other words, the only claimants presently before this Board are the occupants of the excepted (a) positions approximately 85 in number.

There is no dispute that these (a) positions are monthly rated and that the employes occupying such positions are paid a monthly rate for all services rendered—that they may be called for service at any time without penalty. Being paid on a monthly basis without the necessity of assigned hours and without applicable provisions for overtime, holiday or rest day penalty pay, the question of applying an hourly increase in pay is the underlying cause of this dispute.

The National Wage Agreement of April 4, 1946, provided that monthly rated employes should have their pay increased in accordance with the following provision:

> "Determine the equivalent hourly rate by dividing the existing monthly rate by the number of hours comprehended by the monthly rate. Sixteen cents (16¢) per hour multiplied by the number of hours comprehended by the monthly rate shall be added to the existing monthly rate."

Subsequent national agreements contained provisions to the same effect. It is readily apparent that the crux of the dispute is the meaning to be given to the words "hours comprehended by the monthly rate". It is the contention of the Organization that the comprehended hours prior to the agreement effective August 21, 1954, are 243⅓ hours, and after such agreement the total of 245⅔ hours. It is pointed out also that rank and file employes working six days per week and subject to all the overtime, holiday and other penalty pay rules were increased in pay on the basis of 204 hours per month prior to September 1, 1949. After the adoption of the 40 hour week they were increased on the basis of 169⅓ hours until the effective date of the agreement of August 21, 1954, after which the monthly hours were 174 due to the inclusion of seven holidays. It is the position of the Carrier that the comprehended hours of service of the occupants of these (a) positions never reached 243⅓ hours, nor was it even so considered by the Carrier. In other words, the determination of this dispute must rest

on the meaning to be given to the words "hours comprehended by the monthly rate" as we have heretofore stated.

In determining the meaning of this language, it would seem appropriate at this point to examine the awards of this Board dealing with the subject. In Award 3916, it was found from the evidence that the Carrier had considered and treated the positions involved as comprehending a 243⅓ hour month and that divisor was applied. In Award 4060, we said:

> "* * * The correctness of the increase * * * depends upon the meaning of the words 'the number of hours comprehended by the monthly rate.' Certainly the words do not mean that the hours worked in a month are a fixed number, for if this had been intended, it would have been a very simple matter to have said so. We think the hours comprehended by the monthly rate are to be determined from the available evidence surrounding the position. If the monthly rate is set up by formula, the same formula should be applied in making the wage increase effective. If reports to outside agencies indicate the number of hours used in calculating a monthly salary, it is evidence to be considered. If the Carrier indicates the hours comprehended in paying for a partial month's employment, it is competent evidence of the fact. The number of hours actually worked, in the absence of any other yardstick, may be the controlling factor. We hold therefore, that the Wage Agreements do not establish the hours of the month to be worked at any precise figure. The comprehended hours of the month are those which were contemplated by the parties in calculating the pay assigned to the position. It is from the evidence and not the Agreements that this must be determined. * * *"

In Award 4087, it was held that payment of wages on the basis of calender days in the month was sufficient to find the comprehended hours to be 243⅓ per month. In Award 4429, we followed the holdings in Award 4060. We adhere to the holdings of these awards.

This being true, we necessarily hold that the national wage agreements did not fix the comprehended hours of a monthly rated position at any precise number. If any such intention had existed, the number could easily have been inserted. The record does not show how the basic rate was fixed or what monthly hours were used in arriving at such rate. The record shows that these (a) employes were reported to the Interstate Commerce Commission on a 365 day per year basis. They were carried on the Carrier's payrolls on a calendar day basis. The evidence shows that prior to the wage agreement of April 4, 1946, Carrier had generally made wage increases to monthly rated employes on the basis of 204 monthly comprehended hours. The wage increase made under the April 4, 1946 agreement indicates a flat increase slightly in excess of what it would have been on the basis of 243⅓ monthly comprehended hours. The wage increase of May 25, 1946, also indicates a flat increase slightly less than one based on 243⅓ monthly comprehended hours. Wage increases subsequent to that of May 25, 1946, appear to have been applied on the basis of 204 monthly comprehended hours. The Carrier offered evidence, which does not appear to be disputed by the Organization, that (a) employes were not expected to and did not work seven days a week, although they could properly have been called to do so without the Carrier incurring penalty pay. Carrier contends that (a) position employes worked approximately the same number of hours as did employes subject to all the rules of the agreement. Carrier asserts that occupants of (a) positions were granted time off to compensate for time worked outside of normal hours and, in some instances, that vacations were extended to compensate for such abnormal work. It is shown also that during the negotiations leading up to the 40 Hour Week Agreement, effective September 1, 1949, the Organization contended that excepted (a) and (b) positions were six day positions and, because of that fact, they should be reduced to five day positions and be placed under all the rules of the agreement. Excepted

(b) positions were so placed under the 40 hour week provisions but the (a) positions were specifically excepted therefrom. This is, of course, evidence that the Organization considered such positions to be six day positions with 204 monthly comprehended hours. On the other hand it is shown that pending conference and negotiation of this claim on the property, settlements of some (a) positions involved in this dispute were had in which it was stipulated:

> "(e) In applying general wage increases or decreases to positions referred to in paragraphs (a) of this section, a basis of 245⅔ hours per month shall be used. Such positions will be paid on a monthly salary basis."
>
> Memorandum of Agreement, effective February 16, 1955.

While it is true that the settlement of differences on certain designated (a) positions cannot be properly used against the Carrier in the present dispute, it does indicate that there are some 243⅓ monthly comprehended (a) positions (245⅔) hours after August 21, 1954) and consequently that there may be more. We offer this only to show that these positions should be considered singly and not as a group, except where positions are shown to be in identical situations.

The previous awards of this Board appear to hold that where positions are carried on the Carrier's payrolls on a calender basis and reported to the Interstate Commerce Commission as working 365 days of the year, they have been treated as comprehending 243⅓ hours per month for the purpose of applying hourly pay increases. Where the evidence indicates a lesser number of comprehended hours per month, such as where work in excess of 204 or 169⅓ hours is compensated for, either by time off, extended vacations or additional pay, it is conclusive of monthly comprehended hours in a less number than 243⅓. These and other factors shown by evidence must be considered in determining the monthly hours comprehended for the purpose of an hourly wage increase on a monthly rated position.

The Carrier contends that it has made no contractual arrangement by which it is obliged to apply the national wage agreements to monthly rated positions on the basis of any specific number of hours and that it has therefore reserved to itself the right to determine the comprehended hours. We are in accord with Carrier's basic conception of a collective agreement, i.e., that the prerogatives of management are unlimited except to the extent that it has limited itself by contract. We agree also that it is the function of this Board to interpret agreements, and not to disregard or add to any of their provisions. But we point out that this Carrier was a party to all of the national wage agreements involved in this dispute and that it did therefore agree to make wage increases on monthly rated positions on the basis of the hours comprehended. This was a contractual provision and not a retained prerogative. It seems clear to us that if the parties were unable to agree on the monthly comprehended hours of a position, it involved a dispute which this Board had jurisdiction to resolve. The contention that the Carrier reserved the right to determine monthly comprehended hours has no merit.

The Carrier also asserts that claimants are barred by laches from presenting the appeal to this Board. On this point, it appears quite clear that both parties were dilatory in the handling of this dispute. The parties seem to agree, to some extent at least, that matters between management and the Organization which were considered more pressing, were given priority over the present dispute. The submissions of the Carrier do not indicate that it protested any unreasonable delay on the property. When conferences were broken off, Carrier joined with the Organization in a joint submission to this Board. By joining in the submission and requesting a determination of specific issues, the Carrier has waived any procedural defenses. Awards 1314, 3891, 5572.

The submissions of the parties in the present dispute are voluminous, the docket alone containing 447 pages. Approximately 85 (a) positions are involved, some of which are similar and some of which are not. Carrier asserts that a sustaining of the claim in toto would cost the Carrier for the period ending April 1, 1955, the sum of $72,743.85. Notwithstanding these evidences of the scope and importance of the claim, the parties appear to have misconceived the meaning of the term "monthly comprehended hours" and the method to be employed in reducing the term to specific hours. It would be manifestly unjust and improper for us to declare upon the evidence before us that each of the 85 (a) positions had 243⅓ monthly comprehended hours. On the other hand, it would likewise be unjust and improper for us to declare upon the evidence before us that each of the 85 (a) positions had 204 monthly comprehended hours, or less. But from this record, we are unable to precisely determine the monthly comprehended hours of each. Because of the delays in handling that have already occurred, the nature of the claim, and the fact that the best interests of the parties require that disputes of this kind be expeditiously settled, we hesitate to remand this claim for further handling. There is, however, no other alternative. Consequently, we remand it with directions to the parties to consider each position or group of similar positions separately. If it be found that a position is subject to being worked 243⅓ hours per month, without any compensatory time or pay, such hours will be the monthly comprehended hours of the position. If it be found that compensatory time or pay is provided over and above certain hours per week or month, such hours shall be calculated on a monthly basis and the hours thus found shall constitute the monthly comprehended hours of the position. If an agreement cannot be reached as to the comprehended monthly hours of any such position, the dispute may be resubmitted to this Board or determined in any other manner agreeable to the parties.

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 a remand of the dispute is required.

AWARD

Claim remanded in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of April, 1956.