Award No. 13627
Docket No. CL-13575

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Ross Hutchins Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYES

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY

STATEMENT OF CLAIM:

1. The disciplinary action taken by the Chicago and Western Indiana Railroad Company against Messrs. Ralph M. Besley and Samuel W. Rhyne red cap employes at Dearborn Station which caused their records to be assessed thirty (30) demerit marks was unjustified under the circumstances.

2. The Chicago and Western Indiana Railroad Company violated Rule XI of the existing agreement between the parties when it instituted unilaterally other methods not covered by the agreement of notifying employes to respond to call for duty.

3. The Chicago and Western Indiana Railroad Company did not afford the employes involved in this dispute an impartial hearing; the officer who violated the agreement set in judgment at the hearing and rendered his decision on the merits of his violation.

We now ask the Chicago and Western Railroad Company to remove the thirty (30) demerit marks assessed against Messrs. Besley and Rhyne and their records cleared of all charges which relate to the instant dispute.

OPINION OF BOARD: On October 28, 1961, Ralph M. Besley and Samuel W. Rhyne, the Claimants herein, were laid-off through a reduction in force. On November 4, 1961 at 7:25 A.M. and 7:50 A.M. the Carrier called the Claimants instructing them to report for an eight hour assignment on November 4, 1961. The Claimants refused to respond stating the Carrier's call was in violation of the agreement in that the Carrier was required to give notice by mail and that the Claimants were allowed five days in which to report. The Carrier disciplined the Claimants for their refusal to respond to the orders of the Carrier by assessing 30 demerits against each of the Claimants.

The portion of the agreement upon which the Claimants rely to justify their refusal to comply with the order of the Carrier is Rule 11 (a):

"RULE 11—INCREASING FORCES:

"(a) Employes laid off in reduction in force will retain their seniority for a period of one year, and will be returned to service in the order of their seniority, provided they file their name and address with Station Master or other properly designated representative of the carrier at time of layoff, and keep him advised of any change of address; and **must respond to call for service promptly, and must report for duty not later than five days after being notified by mail at the last address on file.**" (Bold face added.)

Rule 11 (a) taken alone leaves doubt about the difference between responding to call and reporting to duty. However, Rule 11 (b) also applies to the circumstances of this docket.

"RULE 11—INCREASING FORCES:

"(b) Temporary work of less than thirty (30) days duration will be offered to senior laid-off employe who is available but failure to **respond to call** for temporary work will not cause loss of seniority." (Bold face added.)

Rule 11 (b) identifies work of less than 30 days as temporary work. The work for which the Claimants were called in this docket was for eight hours, therefore, of less than 30 days and accordingly, temporary work. Rule 11 (b) states that temporary work shall be "offered", utilized the term "respond to call", and we, accordingly, conclude that the work shall be offered by call. Rule 11 (a) provides that an employe must respond to call for service promptly. "Call" is not defined, but as Rule 11 (a) provides that an employe shall respond to call immediately and report to duty after being **notified by mail, a call and notification by mail** are two different things. We do not hold that a "call" is only a telephone call, but we do hold that a telephone call would be a "call" **as used in Rule 11.**

Accordingly, we do not find that the Carrier's telephone calls on November 4, 1961, were in violation of the agreement, but rather we find that the telephone calls were in conformity with the agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1965.

LABOR MEMBER'S DISSENT TO AWARD 13627, DOCKET CL-13575

On October 28, 1961, Claimants were furloughed. At that time, and all subsequent time insofar as this dispute is concerned, they were governed by the Agreement effective September 1, 1949, which contained the following rule bearing on the subject matter out of which this claim arose:

"RULE 11—INCREASING FORCES:

(a) Employes laid off in reduction in force will retain their seniority for a period of one year, and will be returned to service in the order of their seniority, provided they file their name and address with Station Master or other properly designated representative of the carrier at time of layoff, and keep him advised of any change of address; and must respond to call for service promptly, and must report for duty not later than five days after being notified by mail at the last address on file.

(b) Temporary work of less than thirty (30) days duration will be offered to senior laid-off employe who is available but failure to respond to call for temporary work will not cause loss of seniority."

On March 8, 1961, notice was served under the provisions of the existing Agreement and the Railway Labor Act. The subsequent handling is best illustrated by the following (Record pp. 29, 30, 31, 32, 33, 34, 35, 36 and 37 inclusive):

"CHICAGO AND WESTERN INDIANA RAILROAD COMPANY

Dearborn Station 47 West Polk St., Chicago 5, Ill.

J. C. Sidor
Manager Labor Relations

October 18, 1961

Mr. Walter G. Davis
Executive Vice President
United Transport Service Employes
Chicago and Western Indiana Railroad Co.
444 East 63rd Street
Chicago 37, Illinois

"Dear Sir:

This will confirm our discussion and understandings reached in conference in my office on October 10, 1961, attended by you and Messrs. Ross, Rhue and Rhyne, representing the red caps employed by the Chicago and Western Indiana Railroad Company, and Messrs. Swislow, Mousteiko, and myself representing the Company.

On March 8, 1961, President Eugene E. Frazier of the United Transport Service Employes served on the Carrier, thirty day notice under the Railway Labor Act, as amended, of desire to revise and supplement all existing agreements in accordance with the employes' proposal set forth in 'Appendix A' attached to their notice dated March 8, 1961.

The initial conference at which the employes' proposals were discussed was held on April 6, 1961. The Carrier's position on these proposals was outlined in a letter dated April 12, 1961, to Mr. Frazier by the undersigned. Briefly described, that position was:

Item 1 of Appendix A—Cancellation of Memorandum of Agreement effective July 1, 1940, relating to compensation for red caps at Dearborn Station and Englewood Station and otherwise known as the 'Cincinnati' Plan, and substitute therefor a new rule intended to increase the compensation for red caps.

Item 3 of Appendix A—Rule 15. Proposes amendment of Rule 15 —Overtime—in a manner which would have the effect of changing the rates of pay established by the October 11, 1960 Agreement.

The proposals listed as Items 1 and 3 to become effective April 15, 1961, were barred by Article 5 of the October 11, 1960 Agreement and the request of the Employes for the changes proposed was denied.

Item 2 of Appendix A—Suggested changes in Rule 14 in the manner indicated by Appendix A.

The Carrier indicated its willingness to further discuss the proposed change in Rule 14.

In a letter dated May 10, 1961, Mr. Walter G. Davis, Executive Vice President of the United Transport Service Employes addressed to the undersigned, withdrew that portion of the Employes' Section 6 notice which was contrary to the provisions of Article 5 of the October 11, 1960 Agreement, specifically, the proposed changes in Rule 15 (Item 3) and Item 1, which referred to the 'Incentive Plan System'.

Conference were resumed on change proposed in Rule 14, the last of which was held on October 10, 1961 with the following results:

Rule 14 will be revised to read as is shown in the attached draft of Memorandum of Agreement, which is subject to further consideration and acceptance by both parties.

All presently existing regularly established positions including Regular Relief Positions will be abolished on the date the Red Cap Baggage Center at Dearborn Station is established and placed in operation and the necessary new positions rebulletined with changed hours of assignment, rest days, rates of pay, and brief description of duties indicated thereon.

Seniority Roster will be published and extra board established in accordance with provisions of the Memorandum of Agreement to be entered into.

Your courtesy and co-operation in the settlement and disposition of all matters involved is appreciated.

If you will contact me after you have had an opportunity to review and consider the attached draft of Memorandum of Agreement,

we can arrange for a meeting at a time mutually convenient to all concerned to further progress the matters involved.

Yours truly,
/s/ J. C. Sidor, Manager, Labor Rel."

'DRAFT

"MEMORANDUM OF AGREEMENT

Between

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY

And

Its Red Caps Represented By

UNITED TRANSPORT SERVICE EMPLOYES

Affiliated with the AFL-CIO

Effective:....., 1961

"IT IS MUTUALLY AGREED:

"RULE 5—Seniority Roster—of the current working agreement is hereby cancelled in its entirety and the following rule is substituted in lieu thereof.

'RULE NO. 5—SENIORITY ROSTER

(a) A Seniority Roster will be prepared and published in form to indicate the status of the employes shown thereon as to "Regularly Assigned", "Extra, or Furloughed".

(b) The roster will be revised and posted in January of each year and will be open to protests for a period of sixty (60) days from the date of first posting. Upon presentation of proof of error, such error will be corrected. The duly accredited representatives of the employes will be furnished a copy of the roster.

(c) Status Defined.

A "regularly assigned" Red Cap is one whose seniority entitles him to hold a regularly established bulletined position (includes Regular Relief Positions) and who is assigned to such position by assignment notice or who acquired such position in the exercise of displacement rights.

An "Extra" Red Cap is one whose seniority does not permit him to hold a regularly established bulletined position or regular relief position.

A "Furloughed" employe is one whose seniority does not entitle him to hold a regular relief position, regular position, or placement on the extra board list.'

"INTERPRETATION—RULE 7(c)

Rule 7(c) of the current agreement reads:

'Employes declining promotion or declining to bid for a bulletined position shall not lose their seniority.'

It is understood and agreed that in the application of Rule 7(c), the waiving of rights to a bulletined position is applicable only to red caps holding a regular position, but this provision does not permit a Red Cap to move to the extra board when a regular position is available which he can hold. When a regular position is advertised for bid and not filled by a regular man, an extra or furloughed rep cap whose seniority entitles him to such regular position must accept same and report for work thereon within five days after expiration of advertisement bulletin, or forfeit his Red Cap seniority.

Rule No. 11—INCREASING FORCES—of the current working agreement is hereby cancelled in its entirety and the following rule substituted in lieu thereof effective.....1961.

Rule No. 11—REDUCTION AND/OR INCREASE IN FORCE—FILLING TEMPORARY VACANCIES—EXTRA WORK

(a) An employe laid off in reduction in force will retain his seniority for a period of one year from date of lay-off. If No Red Cap service covered by this agreement is performed by such laid off employe within that one year period, his name shall be removed from the seniority roster.

(b) Laid off employes whose name has not been removed from the seniority roster as provided in paragraph (a) above, will be used to perform work on temporary vacancies and extra work in the manner and subject to the terms outlined as follows:

(c) **Temporary Vacancy and Extra Work Defined.**

A Temporary Vacancy of less than thirty(30) calendar days duration in a regular Red Cap position is one that is created in the following manner:

(1) Regularly assigned Red Cap off duty account illness or for other reason of his own accord.

(2) Regularly established Red Cap position vacant during bulletin period pending assignment.

(3) Regularly established Red Cap position, during incumbent's vacation, unless filled by incumbent of Regular Vacation Relief Position.

(4) New Red Cap position established for a period of less than thirty (30) calendar days.

Extra Work Defined.

Work over and above that to be performed by regularly assigned positions is extra work.

(d) To be available for such work, an individual whose name appears on the seniority roster in Extra or Furloughed Status must file his name, address and telephone number with the Station Master or other properly designated company officer, at the time of placement on the extra board or furloughed list and keep him currently advised of any changes in address or telephone number. Failure to do so will automatically result in his forfeiture of rights to work on temporary vacancies, to perform extra work or to recall to service from furloughed list.

(e) Furloughed employes recalled and placed on extra board list to perform service available to extra board men or on regular position must report for such work not later than five days after being notified by mail, telegram, or telephone at the last address given and on file, or forfeit their seniority.

(f) THE METHOD OUTLINED BELOW WILL BE FOLLOWED, WHEN IN THE JUDGMENT OF MANAGEMENT, IT IS NECESSARY TO FILL A TEMPORARY VACANCY IN A RED CAP POSITION OR TO SUPPLEMENT THE REGULARLY ESTABLISHED RED CAP FORCE.

(g) **Extra Board Established.**

A 'rotary' extra board will be established. The number of men carried on the extra board will be regulated in a manner consistent with the requirements for their services.

The Company will endeavor to provide extra men with as much employment as is available for them under this agreement, but this endeavor will not be construed in any way as a guarantee of any number of hours per day, days per week or per month than specifically provided herein, nor shall any claim be filed or entertained on behalf of an extra man when not used to fill a vacancy or perform extra work when in the opinion of the company such work is not required.

Extra board employes will be called or notified to report for available work on a first-in first-out basis. They are required to accept all work for which they are called or notified. They will be compensated at straight time rate on basis of actual time required to remain on duty under orders of management with a minimum allowance of two hours, except when used to fill a vacancy on regular position created by absence of a regularly assigned employe, in which case they will be paid a minimum of eight hours."

"Rule No. 14—Hours of Assignment—of the current working agreement is hereby cancelled and the following rule is substituted in lieu thereof effective....., 1961.

RULE NO 14—HOURS OF ASSIGNMENT.

(a) Eight hours exclusive of meal period shall constitute a day's work.

(b) Where service requirements are intermittent, except as otherwise agreed to, eight (8) hours actual time on duty within a spread of sixteen (16) hours shall constitute a day's work.

(c) It will not be considered a violation of this rule or agreement to employ a temporary force to take care of special rush work.

(d) Employes performing relief service on regularly established positions will be paid on same basis as employe relieved; extra employes on basis of actual time on duty under orders of management with a minimum allowance of two hours.

(e) The hours of work for employes assigned to regular positions will not be reduced below eight (8) on any day in order to absorb extra time, in excess of eight hours, worked on any other day or in any 24-hour period.

(f) Meal periods will not be less than thirty (30) minutes nor more than one hour, unless otherwise agreed to by management and the duly recognized representatives of the employes.

This agreement is in full settlement of disputes growing out of notice served under date of March 8, 1961, by the United Transport Service Employes on the Chicago and Western Indiana Railroad Company of desire to revise and supplement existing agreements in accordance with employes' proposals set forth in 'Appendix A' attached to said notice.

"This agreement is effective as provided herein and shall remain in force until changed in accordance with provisions of the Railway Labor Act, as amended.

Signed at Chicago, Illinois, this.....day of.....1961.

FOR: CHICAGO AND WESTERN INDIANA
RAILROAD COMPANY

.....
Manager Labor Relations

FOR:

Employes Represented By:

UNITED TRANSPORT SERVICE
EMPLOYES, AFL-CIO

.....

....."

The negotiations on the proposals continued; yet, on November 4, 1961, Claimants were called on the telephone, and work amounting to one eight-hour tour of duty was offered them, but they refused such offer. Thereafter, they were disciplined to the extent of being assessed thirty (30) demerits.

They objected to and appealed from this unjust discipline, and their case was deadlocked by the Third Division and brought before the Referee for adjudication.

It is clear from the above, which was all in the record and known to the Referee, that Claimants had every right to accept or reject offers of work of the nature here involved. They also had every right to expect that their rights would be upheld by this Board. Instead, Award 13627, was rendered, thus ending Claimants' right of appeal. All that can now be done is to dissent in hopes that others charged with the responsibility of interpreting Agreements, which necessarily spell out and inhibit the rights of both parties thereto, will not be further led towards the idea that these Agreements are meaningless.

Without Agreement support the question of whether or not Claimants would make themselves available for such work on short notice was entirely up to Claimants. Carrier could not force them to drop what they were doing and immediately respond to work when all the Carrier had to offer them was one eight-hour tour. To have such a source of manpower at its disposal would require agreement similar to that **which Carrier was seeking.**

After having had the full set of facts and the complete record in his possession for over four days, the Referee wanted to know if the Claimants herein were fired. In fact, he "insisted" on a definite answer! How, or why, that would sway his decision is unknown. It does, however, indicate to the writer that "maybe he would do something for Claimants if they had been fired." In other words, the Referee seems disposed to sit with this Board and mete out his own brand of justice which, insofar as the record reveals and the Employes are concerned, amounts to injustice.

In short, this Referee's reasoning, made clear in his oral remarks as well as his Awards, are based not on the rules of any agreement but, rather, on his own feelings. (See dissent to Award 11882 and note in particular the reference thereto with regard to the uninhibited exercise of "such awesome powers" as is reposed in this Board).

Award 13627 is based upon the Referee's obvious confusion concerning his obligations and duties and the rights of the parties under a collectively bargained agreement. The Award is entirely in error. It is based solely on the Referee's own personal "laissez faire" philosophy of non-interference with Management's "divine right to manage", unless, of course, on those rare occasions when, in the Referee's opinion, there is **very good reason** to alter management's actions. The Award is erroneous in every respect and should be shunned by all who take their duties and obligations to interpret Agreements seriously.

Claimants were clearly acting within their rights as spelled out in the Agreement. Carrier had no agreement support whatsoever for its actions.

I, therefore, dissent from this erroneous Award and the rule "interpretation" which represent nothing, but the mental gymnastics the Referee felt obliged to resort to in order to deny the claim.

/s/ D. E. Watkins

D. E. Watkins, Labor Member

6-25-65

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 13627, DOCKET CL-13575

(Referee Hutchins)

The Dissentor makes the unsupportable contention that

> "Claimants had every right to accept or reject offers of work of the nature here involved.'

This opinion was also expressed by the Petitioner in progressing the claim and is squarely contradicted by the language of existing Rule 11, paragraph (b) which places an obligation on the Carrier to offer temporary work to the senior laid-off employe who is available, and that employe "must respond to call for service promptly" (Rule 11 paragraph [a]). Here, the Claimants were contacted and were available, but arbitrarily refused the call.

We might point out in passing, that even in those cases where the responsibility to answer a call promptly was not spelled out in the contract, we have recognized this as a claimant's correlative responsibility when the Carrier has the obligation to offer him the work. In **Award No. 2 of Special Board of Adjustment 538** (Robertson), we said:

> "* * * It is elementary that the right to perform work bears with it the correlative responsibility to be available for that work. It is also fundamental not only for efficiency in the working of an extra list but in fairness to other employes on the extra list that each extra employe be available for service when his turn comes up. When an employe fails to discharge such responsibilities it is patent that he leaves himself open to disciplinary action."

See also **Awards 5189, 8016 and 11047.**

Furthermore, while we decided it unnecessary to reach the question, in view of our finding that Carrier acted in conformity with the Agreement, even if it were a fact as Dissentor asserts, that Claimants' refusal to accept the call was founded upon a sound interpretation of the Agreement, the Claimants nevertheless were compelled to obey the orders of their superiors and file their grievance in an orderly manner. See **Awards 4886, 8512, 8711, 11238, 11323, 12687, 13514, 12996** and many others too numerous to mention.

It is perfectly clear the award is sound and free of error.

/s/ W. F. Euker
W. F. Euker

/s/ R. A. DeRossett
R. A. DeRossett

/s/ C. H. Manoogian
C. H. Manoogian

/s/ G. L. Naylor
G. L. Naylor

/s/ W. M. Roberts
W. M. Roberts