

Award No. 14900

Docket No. CL-14295

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

David Dolnick, Referee

PARTIES TO DISPUTE:**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES****UNION PACIFIC RAILROAD COMPANY****STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-5349) that:

(a) Carrier violated the Clerks' Agreement when it failed to call Otis Bush, Kazel Pugh, J. E. Tyus, W. H. Jones, A. J. Hamilton, W. J. Martin, Max Strom, Robert A. Sonora, R. S. Rost and A. A. Carrejo to perform overtime service as Truckers and Loaders at Los Angeles Freight Station on March 26, 27, 28, 29, 30, April 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, May 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18 and 21, 1962, and used outsiders who were not bona fide employees instead.

(b) Carrier now be required to reimburse claimants named in part (a) three (3) hours' pay each at time and one-half rate at Truckers' rate of pay for the above dates and for each subsequent date outsiders are used until the violation is corrected and the work assigned under the provisions of the Clerks' Agreement.

EMPLOYEES' STATEMENT OF FACTS: The Union Pacific Railroad at Los Angeles maintains a work force in their Warehouse of approximately seven (7) regularly assigned positions, as follows:

1 Trucker — 9:00 A. M. — 5:30 P. M.

1 Trucker — 11:30 A. M. — 8:00 P. M.

5 Loaders — 11:30 A. M. — 8:00 P. M.

Approximately 90% of all the Warehouse tonnage handled daily at Los Angeles facilities occurs between the hours of 5:00 P. M. and 8:30 P. M. To handle the work occurring during the foregoing hours, the Carrier utilized the services of outsiders who hold regular positions with outside firms, or who are full time students. The number of outsiders used in this manner averaged fifteen (15) men each work day, they report for work at 5:00 P. M. and work until approximately 8:00 or 8:30 P. M., Monday through Friday.

"... as you know, we have had previous claims in connection with this operation at Los Angeles but these claims were withdrawn due to their having been on improper appeal to your office under the terms and provisions of Rule 46 (Time Limit on Claims)."

The Carrier's Assistant to Vice President, under date of July 26 (Carrier's Exhibit Q), advised the Organization's General Chairman of the Carrier's position taking exception to the improper claimants, as well as a continuation of the same claim contrary to Rule 46, together with ambiguity of claim as presented.

Under date of August 3, 1962, the Organization's General Chairman replied to the Carrier's communication of July 26, asserting dissatisfaction on the position taken by the Carrier in this dispute and attempting to compensate for their time limit failure, asking for conference discussion (Carrier's Exhibit R). General Chairman Eoff was frank to point out:

"The present claims are as a result of and on the basis of **Carrier's failure to comply with the Letter Agreement of July 28, 1961** as in my opinion that agreement constitutes a waiver on the part of the Carrier and while the involved claim was disposed of, the Carrier made a definite commitment to meet and confer on the subject thus indicating the matter was not closed." (Emphasis ours.)

A conference was held on December 11, 1962, and the parties were unable to reconcile their differences and confirmation of the conference was given by the Carrier to the Organization's General Chairman under date of December 12 (Carrier's Exhibit S).

(Exhibits not reproduced.)

OPINION OF BOARD: An identical issue between the same parties was before this Division in Docket CL-13762 and was resolved by Award 13695. We held in that Award that to qualify for a minimum of eight (8) hours for each day of service under Rule 37 (b) the Employees must show that the Claimants "are used with regularity, and are required to report at a regular starting time." There is no showing in the record that the Claimants are "Regularly assigned hourly rated employees . . . who are required to report at a regular starting time . . ." On the contrary, the probative evidence in the record is that Claimants were day to day, voluntary employees, paid at the end of each day, who acquired no seniority, and who were not required to report at any regularly stated time. They were selected daily among those who indicated a desire to work for whatever hours they were needed. Thus, they are "fluctuating and temporary forces" as provided in Rule 37 (c) and were properly compensated as therein set forth.

Employees contend that the Carrier has not complied with the agreement reached in conference and contained in the jointly executed letter of July 28, 1961. That letter, addressed to the General Chairman, says:

"In connection with your file S-337 and our exchange of correspondence involving claim of 15 extra truckers and loaders at Los Angeles freight station for 8 hours' pay for various dates listed:

In our conference discussions at Salt Lake City July 27, it was concluded that the claim was on improper appeal to this office under

the terms and provisions of Rule 46 (Time Limit on Claims). You were therefore agreeable to withdrawing this claim, and it was our subsequent mutual understanding reached in conference that your organization and the Carrier would make every cooperative effort to compose the situation involved herein by conducting further research in an effort to institute an acceptable arrangement whereby the Carrier would establish as many regular 8-hour assignments as consistent, after which we would endeavor to formulate a mutual understanding as to the number of extra part-time employees that could be retained under present conditions and based on present forces.

If you will confirm this handling, I will undertake a prompt evaluation and submit a proposal for further consideration."
(Emphasis ours.)

Whether Carrier complied with the spirit of this letter is an issue which is not before this Board. We are not called upon, and we have no authority to decide whether the Carrier acted in good faith to carry out the purpose of that agreement. There is nothing in that letter which is a firm and fixed undertaking by either party. They merely agreed to conduct research to enable the parties "to institute an acceptable arrangement" that would establish more regular eight (8) hour assignments. Whether it failed or not, and whether more eight (8) hour regular assignments should have been established is not the subject of this claim.

For these reasons it must be concluded that there is no merit to the claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier did not violate the Agreement.

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 October 1966.

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