REPORT

OF

EMERGENCY BOARD

CREATED FEBRUARY 8, 1937, UNDER SECTION 10 OF THE RAILWAY LABOR ACT, ON BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND SWITCHMEN'S UNION OF NORTH AMERICA vs. CHICAGO GREAT WESTERN RAILROAD COMPANY (PATRICK H. JOYCE AND LUTHER M. WALTER TRUSTEES)

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

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REPORT OF EMERGENCY BOARD CREATED FEBRUARY 8, 1937, UNDER SECTION 10 OF THE RAILWAY LABOR ACT

On Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Trainmen, Order of Railway Conductors, and Switchmen's Union of North America v. Chicago Great Western Railroad Company (Patrick H. Joyce and Luther M. Walter, Trustees)

On the 8th day of February 1937, the President of the United States, His Excellency Franklin D. Roosevelt, proclaimed an emergency upon the Chicago Great Western Railroad after having been notified by the National Mediation Board in accordance with the provision of Section 10 of the Railway Labor Act, amended, of the announced intention of certain of the employes of this carrier to withdraw from its service on the following day. He thereupon created an Emergency Board composed of the Honorable John P. Devaney, Mr. Walter C. Clephane, and Dr. Harry A. Millis to investigate, to make every effort to adjust the differences between the carrier and its employes, and within thirty days to report to him its action and findings.

Pursuant to the President's proclamation and letter of authorization, the Board as thus constitutedmet in the Stevens Hotel, Chicago, Illinois, February 15, 1937, with all members present. It selected Judge Devaney to serve as chairman and Mr. Leon M. Golding as secretary and reporter. It held hearings in the Stevens Hotel the morning and afternoon of February 15 and the morning of February 16. Following the hearings, from February 16 to March 5, the Board held numerous conferences with the representatives of employes and carrier in an effort to effect an amicable settlement. While these conferences have not resulted in a final settlement of the dispute, a plan suggested by the Board has been accepted by the Parties in immediate interest such that with the exercise of patience and reason and with a due sense of responsibility on the part of all concerned, should lead to an early settlement of the entire matter. The Board herewith reports at necessary length facts, contentions, and observations.

Appearances at the hearings, on behalf of the employees, were Mr. Leo J. Hassenauer, Counsel ; Mr. J. P. Farrell, Vice-President, Brotherhood of Locomotive Firemen and Enginemen, and Chairman

of the Officers' Committee, composed of the following gentlemen, also present : J. F. Emerson, Assistant Grand Chief Engineer of the Brotherhood of Locomotive Engineers; C. A. Montooth, Senior Vice-President of the Order of Railway Conductors; J. H. McQuaid, Vice-President of the Brotherhood of Railway Trainmen; Thomas-Clohesey, Vice-President of the Switchmen's Union of North America. Appearances on behalf of the carrier were: Mr. Luther M. Walter, Trustee; Mr. Frank H. Towner, Counsel ; and Mr. Harry Stearns, Counsel.

The numerous conferences have been with the above mentioned persons and also with others only less directly concerned. The cooperation of the institutional Railroad Security owners—life insurance companies and savings banks—was sought and received to assist in the work of mediation between representatives of carrier and employes. Their representative reflected a broad public interest of such institutions in the question at issue and-competently counselled and' assisted the Board in its task.

THE DEVELOPMENT OF THE DISPUTE

The dispute involves as the single issue the nonpayment by the carrier of penalties and of lost wages as required by three decisions rendered by First Division of the National Railroad Adjustment Board, these penalties and lost wages aggregating some $40,000.. The three awards rendered were No. 1247, dated June 18, 1936; No. 1248, dated June 18, 1936; and No. 1322, dated July 27, 1936. However, the dispute involves chiefly the penalties imposed in awards Nos. 1247 and 1248.

In the operation of railways there are of necessity many working. rules, these relating to starting time, allocation of work, and various other matters. The major cases involved here had to do with starting time in yard service. Though supplements have been made, the rules, for the most part, date from the war period. They have become a part of the joint agreements entered into between the railroad companies and the railway unions, and have the same standing as wage scales and other parts of the contracts. Therefore the dis-, pute before this Emergency Board has only to do with compliance with agreements, as interpreted and applied by an authority duly established under the Railway Labor Act.

Award No. 1247 sustained a complaint by employes that the car rier was using improper starting times in its yard service in Kansas City. The rules had for many years required that where service was continuous, the starting time of the first shift should fall between 6: 30 and 8: 00 a. m., that of the second shift immediately upon the conclusion of the first, and that of the third, immediately

upon the conclusion of the second. There were also rules relating to the starting time of independent assignments, etc., the whole body of rules evidently being designed to give considerable elasticity in the starting times of necessary crews while giving protection to the men whose convenience and volume of work are very much involved. Differences in interpretation of the rules developed from time to time. Finally, in a case on which the representatives of the carriers and of the employes on Division 1 had deadlocked, the referee undertook to interpret and make clear the starting time rules (Docket No. 705, Award No. 1043, dated April 3, 1936).

The starting times and shift periods for crews engaged in the carrier's general yard service at Kansas City in June 1934 did not conform to the rule applied for many years in continuous service, as interpreted not only by the referee in Award No. 1043, but also as interpreted by boards back to the war period. This nonconformity was by letter called to the attention of the carrier shortly after the 'Award No. 1043 was made. On July 13, 1934, new assignments were made which were in accord with the rule applying to continuous service. Effective December 6, 1934, February 2, 1935, April 11, 1935, and June 12, 1935, however, new assignments were made which did not accord with that rule.

The assignments made effective on some of these occasions, as stated by the carrier, were as follows:

1. Beginning on June 30, 1934, the first date for which a claim was made :
   6 : 30 a. m. to 2 : 30 p. m. (2 crews) ; 1 : 00 p. in. to 9 : 00 p. m.; 11: 59 p. m. to 7: 59 a. m.
2. Effective July 13, 1934:
   6 : 30 a. m. to 2 : 30 p. m. (2 crews) ; 2 : 30 p. m. to 10 : 30 p. in.; 10: 30 p. m. to 6: 30 a. m.
3. Effective December 6, 1934:
   6: 30 a. in. to 2: 30 p. 1: 30 p. in. to 9: 30 p. m.; 11: 59 p. m. to 7 : 59 a. in.
4. Effective June 12, 1935 :
   6:30 a.m. to 2:30 p.m. 1:30 p. m. to 9:30 p.m.; 4:00 p.m. to midnight ; 11: 59 p. m. to 7 : 59 a. m.

Complaints were made against these assignments in so far as they varied from the assignments effective as of July 13, 1923, but no understanding was reached. The carrier had not been a party to the adjustment machinery established and operated before 1934, when the present National Railroad Adjustment Board was created. All the while its yard service schedules had not conformed to the rules generally operative. Because of this fact and because of an interest in economy in yard service, the company was unwilling to

apply the starting time rules as interpreted. Conferences not resulting in a settlement, a complaint on behalf of the employes was filed with Division 1 of the Adjustment Board in November 1935. The case was heard in due course and in accordance with rules of procedure which the Board had been authorized by the Act to establish. An agreed statement of facts was presented to Division 1 and the proper application of rules was argued before it by representatives of the employes and of the carrier. The Committee, on behalf of the employes, claimed that the Kansas City yard service in question should be treated as continuous and that crews should be assigned under Section (b) of Article XVI. That section reads, "Where three 8-hour shifts are worked in continuous service, the time for the first shift to begin work will be between 6 : 30 a. m. and 8: 00 a. the second, 2 : 30 p. m. and 4: 00 P. m., and the third, 10 : 30 p. m. and 12 midnight." The carrier, on the other hand, contended that the rule just quoted was not applicable in this case, that the assignments were independent assignments and were established under and governed by Section (e) of Article XVI, and that to have complied with Section (b) it would have been required to employ two additional yard crews. Under this section the carrier is privileged to start independent assignments working regularly at any time between 6: 30 a. m. and 12: 00 midnight.

In view of the facts in the case and the interpretation of rules and particularly the definition of "independent assignment" made in Award No. 1043, which interpretation had been applied in other awards subsequently made, the National Railroad Adjustment Board, First Division, by unanimous agreement, made the following Findings and Award :

Findings : The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that :

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

Various Awards of the Division on disputes involving the same principle as in this case sustained the employes' claim. The rules involved, together with the Awards of this Division, support the claims.

Award :

Claims sustained.

Notification of the award included a requirement of payment of any money that might be due. The order read:

> The Chicago Great Western Railroad Company is hereby ordered to make effective Award No. 1247, made by the First Division of the National Railroad Adjustment Board (copy of which is attached and made a part hereof), as therein set forth; and if the award includes a requirement for the payment of money, to pay to the employe (or employes) the sum to which he is (or they are) entitled under the award on or before July 18, 1936.

From war time, in addition to a full day's pay for the part of shift falling within the appropriate shift period, the carrier making improper crew assignments has been liable to payment of overtime at the rate of time and a half for any part of the time worked beyond the appropriate quitting time, and a full day's pay, with overtime penalty, for any part of the time worked prior to the appropriate starting time. Thus, the members of a crew in continuous general yard service starting at 1 : 30 p. in. and working eight hours, would be entitled to a full day's pay for the seven hours between 2 : 30 and 9: 30 and a full day's pay at the rate of time and a half for the one hour worked between 1 : 30 and 2: 30. In this particular instance the total would be equivalent to twenty hours' pay, at straight time, instead of eighty hours' pay at straight time. The dispute in this case involves only nonpayment of such penalties to members of yard crews with improper assignments.

The case at South Des Moines (Docket No. 2160, Award No. 1248), though differing in detail, involved the same issue.

The third case (Docket No. 2161, Award No. 1322) was of minor importance and of a different nature. Here, in Council Bluffs, the carrier on occasions had trains made up by a train crew instead of by yardmen. The yardmen, under their agreement, claimed this work and sought payment for the time they should have put in. The Adjustment Board, First Division, deadlocked and the Referee sustained the yardmen's claim.

FURTHER DEVELOPMENTS IN BANKRUPTCY PROCEEDINGS

Meanwhile, in February 1935, the carrier, by action of the U. S. District Court for the Northern District of Illinois, Eastern Division, had been placed in bankruptcy for reorganization purposes, and Trustees appointed, the -order of appointment restraining and enjoining "all persons, firms, and corporations * * * from interfering with * * * or in any manner whatsoever disturbing any portion of the assets, goods, moneys, railroads, equipment, premises, or properties of the Trustees, or of the Debtor, now or

hereafter coining into the possession of the Trustees, or to which they have title as Trustees, or from taking possession of or in any way interfering with the same or any part thereof, or from inter fering in any manner with the manner of the operation of the Debtor's - railroad or properties, or the carrying on of its business by the Trustees." The Court reserved jurisdiction to enter such further orders as might be deemed proper, including the jurisdiction "in all respects to regulate and control the conduct of said Trustees."

The claims upon which the awards referred to were based, were reached on the call of the docket before the Adjustment Board after the Trustees had been in operation of the property for seven or eight months.

The employes promptly made demand upon the Trustees to put the awards into effect, but the Trustees, while agreeing to change the yard-engine assignments, which were the subject of the claims, in accordance with the awards, declined to comply with those portions of the awards which provided for money payments as a result of the violation of the rules under the practice complained of.

On September 15, 1936, the Trustees operating the properties under the supervision of the Court petitioned the Adjustment Board for a rehearing on the Kansas City case, and, if this was denied, for an interpretation of the Award (1247) made on June 18, 1936. Under date of September 23, the Secretary of First Division notified the Trustees that their petition for a rehearing had been denied. With reference to their petition for an interpretation of the Award, the Trustees were informed that:

> * The conclusions given in Award No. 1247 are based upon the facts certified by the respective parties to the dispute, and the First Division finds no exception to the facts thus certified.
>
> The claims made subject to dispute in Docket No. 2156 are held to be definite and certain, and the Award, "Claims sustained", is hereby held to be also definite and certain.

After the awards referred to had been made, claims were pre sented by locomotive engineers employed in Kansas City for an alleged violation of a starting time rule contained in an agreement with the Brotherhood of Locomotive Engineers, which claims had not been presented to the National. Railroad Adjustment Board. The Brotherhoods were advised by the Trustees that it would be satisfactory to them that the engineers involved in the starting time disputes, but who had not joined in the submission before the Adjustment Board, should be given the same treatment as the firemen and yardmen embraced in Award 1247.

The general position taken by the Trustees in connection with Awards No. 1247 and 1248—(the Council Bluffs case was treated as an incidental matter)—was that the complaining employes had been paid for all the hours they had worked and had no rightful claim to the penalties they sought to collect. Payment for twenty hours when only eight had been worked was extortionate. Moreover, the Trustees were adversely critical of the procedure of the First Division and desired to have the claims adjudicated in a court of law. This the Officers' Committee would not do by bringing suit under Section 3 (p) of the Railway Labor Act, for the Unions had accepted (of necessity) adverse decisions, various other carriers, some in bankruptcy and others not, had settled similar claims, and were they to go into .court to collect, it would not only involve risk but would also tend to invite the carriers generally to refuse to make payment until claims had been litigated. Litigation would undermine, if not destroy, the machinery which had been created to settle peacefully, uniformly, quickly, and at the hands of those who were familiar with railway matters, such differences as came within the jurisdiction of the Adjustment Board.

On October 2, 1936, the Trustees filed in the District Court a petition for instructions with respect to these claims, and it was therein alleged (as was the fact) that some of the alleged improper acts of the management had occurred prior to the time the Trustees commenced operation of the property.

To the petition was attached a copy of a letter to one of the Trustees, signed by officers of the five Brotherhoods mentioned, in which it was stated that the general committees of the interested organizations would be convened without delay for the purpose of placing the subject before them for consideration and determination as to further procedure. The further procedure adopted was the announced intention of certain employes to withdraw from service as mentioned in the first paragraph of this report.

Upon the filing of the petition above described the Judge of the District Court entered an order on October 2, 1936, requiring all the parties in interest to answer said petition within twenty days from that date and setting the hearing for November 2nd.

Thereupon the committee for the holders of the common stock of the railroad filed an answer requesting the Court to instruct the Trustees not to pay any of the claims or awards set forth in the petition unless and until a proper adjudication and determination should first be made by the Court. This was followed by an answer of the Protective Committee for the carrier's preferred stock, stating that the Committee had not been fully advised as to the facts and that they believed the facts should be fully considered and the

Trustees should receive directions from the Court with respect to the disposal of the employees' claims.

Neither the employes concerned nor the Brotherhoods as representing them filed any answer to the petition, but the Brotherhoods, without reciting any facts and without stating that they represented the employes affected, and without asking or receiving leave to intervene, filed a motion to dismiss the petition of the Trustees.

On January 20, 1937, the District Judge handed down an opinion in which he declined to pass upon the validity or invalidity of the awards, inasmuch as that question was not involved in the proceedings before him, stating that the validity of the awards is seriously and in good faith contested; that the law under which the awards were made provides an orderly, expeditious, and simple procedure by which a money award (and he held that these were money awards) may be enforced, which was:

(a) By a suit to enforce the award under Section 3 (p) of the Railway Labor Act in which the order of the Adjustment Board should be prima facie evidence of the facts therein stated, and in which, if the employe shall finally prevail, he shall be allowed a reasonable attorney's fee; and

(b) Inasmuch as the railroad is now subject to the provisions of the Bankruptcy Act, the employes may file the awards as a claim against the debtor estate, in which event issues could then be made up and the validity of the awards determined in the Bankruptcy Court.

In the opinion the Trustees were instructed to refrain from paying the awards "Unless and until they are established and adjudicated as valid by the final judgment and decree of a Court of competent jurisdiction."

The opinion further stated that the Brotherhoods had not answered the petition nor asked leave to intervene, and that they were therefore not parties to the record and had not subjected themselves to the power of the Court, because of which their joint motion was improperly filed, and it was ordered stricken. An order in accordance with this opinion was filed January 27, 1937.

Meanwhile, being unwilling to forego the penalties or to bring suit to collect them in a court of law, the organization had taken a strike vote. The officers were empowered to set the date for withdrawal of the employes from the property of the carrier. The date set by the officers was February 9th.

It was in this posture that this Emergency Board found the case when it entered upon its deliberations on February 15th.

CONTENTIONS MADE BY THE PARTIES IN INTEREST AT THE FORMAL HEARINGS

At the formal hearings held various contentions were made by counsel for the employes and the carrier respectively. The more important of these may be set clown here.

The main contentions made by counsel for the employes were as follows :

1. That the carrier is bound by the terms of the Railway Labor Act, even though in Bankruptcy Court.

2. That from the date of its organization to December 31, 1936,, the Adjustment Board, First Division, had decided or disposed of 1,615 disputes between employes and carriers.

3. That all carriers, including carriers subject to court proceedings, had placed all such awards of the First Division in effect without court action and that the employes have, without. exception, complied with such awards.

4. That Section 3 (p) of the Railway Labor Act, as amended,. providing that "the petitioner, or any person for whose benefit such order was made" * * * "may file" an action at law to enforce the same, is permissive and not mandatory.

5. That these employe organizations have never instituted an action at law to enforce an award of the Adjustment Board.

6. That a policy of accepting the decisions of the Adjustment Board as final has been recognized by all other carriers, including carriers subject to court proceedings, since the establishment of the Adjustment Board.

7. That there is a sound practical reason for these employee groups assuming this position and adopting a policy not to litigate, since more than two thousand cases are now pending before the First Division (one of four divisions), of the Adjustment Board, and the establishment of a precedent to enforce money awards through court action would lead to endless litigation, attended by great expense and delay.

8. That the carrier, having accepted the rule applied by the decision in this case, and having placed the same in effect, with. attendant future possible penalties, has no principle at stake, but, on the contrary, has waived its right to object to the payment of a penalty attending prior violation of the starting time rule.

9. That there is nothing for a court or any tribunal to review, since the dispute has been passed upon by the Adjustment Board, composed of experts conversant with rules, schedules, and interpretation thereof, and since the decision is in line with precedent to reverse which would be destructive of the work of the Adjustment Board.

10. That following the refusal of the carrier to comply with the decision of the Adjustment Board in respect to money awards there were open to the employes three courses

First : To forego the money award.

Second : To proceed under Section 3 (p) by an action at law.

Third : To leave the service.

The main contentions made by counsel for the carrier were as follows :

1. That there has been no violation of rules or breach of contract by this carrier.

2. That the awards or decisions of the Adjustment Board are void and without effect, since they do not state to whom the money is payable, nor do they give computation of the amount thereof.

3. That the only amount or penalty the Trustees could in good conscience pay is the actual damage suffered by individual employes and not the amount fixed as penalty for violation of rule.

4. That the awards are not sustained by the evidence submitted to the Adjustment Board.

5. That the awards are based upon evidence received not under oath and are therefore void.

6. That the employes have open to them a legal method by which they can enforce the money awards, if any money is due them.

7. That they should proceed to collect any money award due by an action at law under Section 3 (p) of the Railway Labor Act, even though it be admitted that this is only a permissive course.

8. That the money awards are arbitrary and unconscionable and should not be paid by the Trustees.

9. That for many years prior to the institution of the action before the Adjustment Board employes of the carrier had acquiesced in starting times not strictly in conformity with the starting time rule as now interpreted, and, therefore, by acquiescence and falure to demand change, had waived the right to claim penalty.

EMERGENCY BOARD OBSERVATIONS

The Board cannot and, of course, is not expected to pass on the merits of starting time rules as interpreted by the machinery set up by the Act. Nor is it a function of this Board to pass judgment upon the procedures which the Adjustment Board has adopted, acting under authorization of the Railway Labor Act. It may, however, make the observation that in these cases the facts were

jointly presented to the Adjustment Board. The question in the two important cases was what rule was applicable in the concrete. situations. On that the decisions of the Adjustment Board, with its: five employe and its five carrier representatives, were unanimous. This Emergency Board is of the opinion that one should be careful not to press his individual interpretation over against interpretations made by various boards from 1917 on, as well as by the present Adjustment Board.

The penalties for violation of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case. Yet, experience has shown that if rules are to be effective there must be adequate penalties for violation. The penalties imposed in this case were penalties which had been imposed in cases of violation from 1917 on. Moreover, the carrier, after being apprised of the interpretation in Award No. 1043: and, therefore, knowing the risk involved in not conforming to the starting time rules as interpreted, went ahead and made a number of assignments of crews out of conformity with the rules.

With the carrier unwilling to pay the penalties until adjudicated by a court of law, the employes had, as they have said, a choice between bringing suit under Section 3 (p), foregoing the penalties altogether, or going on strike.

Of course, if the employes did not press their claims and collect damages, it would be an open invitation to carriers violating rules: to make no settlements at all. The rules would tend to become ineffective.

The Emergency Board is in sympathy with the positions of the organizations here involved that they cannot afford to bring suit in a court of law. It would involve a second trial and in a court not expert in the matters involved; the method would be time-consuming and costly; it would place a premium on litigation when the Act was intended to reduce litigation to the unavoidable minimum; with a number of cases litigated, perhaps diversity of rules, as interpreted, would result, whereas the desire has been for uniformity; litigation, once begun, might well undermine and even destroy the machinery created to maintain peace and further justice in this very important industry.

While the employes have a lawful right to strike, it is a rigid which should be used very sparingly and with due regard t injury wrought and adequacy of cause. The men participating in risk much; the carrier stands to lose traffic far beyond period; most important of all, there is the injury to the public and investors. A strike to enforce awards would perhaps the established machinery quite as much as going into a law court, Carriers must not lightly accept responsihiliiv and in a real :411

force their employes to strike. And, of course, an equal responsibility rests upon employes, especially when they collectively have fared not badly at the hands of carriers and public. After all, a strike only shows which contestant is the stronger at the time. The Railway Labor Act was designed to end strikes in the railway service by providing machinery and procedures which would enable fair-minded carriers and employes to solve their problems and work in peace.

As has been observed, this matter has been in the Bankruptcy Court, and the Court issued an order which had tied the hands of the Trustees in making any settlement involving the payment of money. In view of this and in view of sound principles in the settlement, of disputes, the Emergency Board suggested to the parties in interest the following plan :

That application be made by the employes to have vacated the order signed by the District Judge, which for the time being forebade theTrustees to pay any of these claims, in order that the parties in interest might be placed on an equal basis, with full opportunity to negotiate further, unembarrassed by the handicap of the order.

It was suggested also that when the order referred to was vacated a period of at least two weeks should be permitted in order that the parties might negotiate an adjustment. This plan has been accepted by the parties in interest ; and on the 6th day of March 1937, an order was made by the District Judge vacating his prior order. Therefore, the plan suggested by this Emergency Board has been fully carried into effect..

It is a pleasure to record here that this Board has received the full and cordial cooperation of Judge Woodward, the District Judge under whose jurisdiction these bankruptcy proceedings have been had, to the end that the parties might together work out a solution for the best interests of all concerned.

The Board is convinced that if the representatives of the parties in interest, will now confer in good faith, with full realization of their responsibilities to themselves and the public and with proper appreciation of the facts that they have mutual interests and that. the morale of the service is involved, they will not meet any insuperable obstacle in reaching a settlement mutually satisfactory.

The Board is happy to report that the representatives of the parties in interest have assured us that they will proceed to act in this spirit.

Respectfully submitted.

JOHN P. DEVANEY, *Chairman.*
WALTER C. CLEPHANE.
HARRY A. MILLIS.

CHICAGO, ILLINOIS, *March 7, 1937.*

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