Report

TO

THE PRESIDENT

BY THE

EMERGENCY BOARD

CREATED MARCH 18, 1948
BY EXECUTIVE ORDER 9936
PURSUANT TO SECTION 10
OF THE RAILWAY LABOR ACT

To investigate and report upon a dispute between the Terminal Railroad Association of St. Louis and certain of its employees represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen

St. Louis, Missouri

APRIL 7, 1948

(No. 58)

ST. LOUIS, MO., *April 8, 1948.*

THE PRESIDENT,
The White House.

MR. PRESIDENT: We have the honor to report as the Emergency Board created by you by Executive Order 9936, March 18, 1948, upon certain disputes between the Terminal Railroad Association of St. Louis and certain of its employees represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen.

Annexed is the report containing a detailed statement concerning the controversy together with our recommendations.

Respectfully submitted.

FRANK M. SWACKER, *Chairman.*
GEORGE CHENEY, *Member.*
JAMES H. WOLFE, *Member.*

REPORT TO THE PRESIDENT BY EMERGENCY BOARD CREATED BY EXECUTIVE ORDER 9936, MARCH 18, 1948, ISSUED UNDER THE RAILWAY LABOR ACT TO INVESTIGATE AND REPORT UPON CERTAIN DISPUTES BETWEEN THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS AND CERTAIN OF ITS EMPLOYEES REPRESENTED BY THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND THE BROTHERHOOD OF RAILROAD TRAINMEN

Executive Order 9936, March 18, 1948, follows:

EXECUTIVE ORDER

CREATING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE BETWEEN THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS AND CERTAIN OF ITS EMPLOYEES

Whereas a dispute exists between the Terminal Railroad Association of St. Louis, a carrier, and certain of its employees represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen, labor organizations; and

Whereas this dispute has not heretofore been adjusted under the provisions of the Railway Labor Act, as amended; and

Whereas this dispute, in the judgment of the National Mediation Board, threatens substantially to interrupt interstate commerce to a degree such as to deprive a large portion of the country of essential transportation service;

Now, therefore, by virtue of the authority vested in me by section 10 of the Railway Labor Act, as amended (45 U. S. C. 160), I hereby create a board of three members, to be appointed by me, to investigate said dispute. No member of the said board shall be pecuniarily or otherwise interested in any organization of railway employees or any carrier.

The board shall report its findings to the President with respect to the said dispute within thirty days from the date of this order.

As provided by section 10 of the Railway Labor Act, as amended, from this date and for thirty days after the board has made its report to the President, no change, except by agreement, shall be made by the Terminal Railroad Association of St. Louis or its employees in the conditions out of which the said dispute arose.

HARRY S. TRUMAN.

THE WHITE HOUSE,
March 18, 1948.

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Pursuant to said Executive order, on March 22, 1948, the President designated Justice James H. Wolfe (Supreme Court of Utah, Salt Lake City, Utah), Mr. George Cheney (641 Spreckels Bldg., San Diego, Calif.), and Mr. Frank M. Swacker (120 Broadway, New York, N. Y.), to constitute said Emergency Board. The Board convened at St. Louis, March 31, 1948, and agreed upon Frank M. Swacker to act as Chairman thereof, and approved designation of Messrs. Ward and Paul as reporters.

The following appearances were entered:

For the Brotherhood of Locomotive Engineers:
John E. Donnelly, York Hotel, St. Louis, Mo.
R. H. Wadlow.
Albert Fults, 4569 Oakland Avenue, St. Louis, Mo.

For the Brotherhood of Locomotive Firemen and Enginemen:
Walter Keiser, DeSoto Hotel, St. Louis, Mo.
G. A. Andrews.
W. C. Lash, vice president of the Brotherhood of Locomotive Firemen and Enginemen, DeSoto Hotel, St. Louis, Mo.
C. J. Schlanger, 3926 Virginia Avenue, St. Louis, Mo.

For the Brotherhood of Railroad Trainmen:
W. F. Donoghue, DeSoto Hotel, St. Louis, Mo.
C. J. Jenkins.

For the Terminal Railroad Association:
Armstrong Chinn, president.
Warner Fuller, vice president and general counsel.
George P. Mueller, attorney.
John A. Wicks, director of personnel.
Harry D. Andrew, assistant to director of personnel, Terminal Railroad Association, St. Louis, Mo.
Tom M. Davis, attorney, Sixteenth Floor, Esperson Building, Houston, Tex., appearing for Terminal Railroad Association of St. Louis.

The dispute involves two awards, Nos. 11825 and 11826 of the National Railroad Adjustment Board, Division 1, rendered December 15, 1947, with the aid of a referee and an interpretation thereof rendered February 27, 1948, with the aid of the same referee.

The cases involved two yardmen employed by the Terminal Railroad Association of St. Louis who had been discharged by it and who had brought claims that the discharges were wrongful. Reinstatement was demanded with full seniority rights unimpaired and pay for all time lost.

The facts out of which the cases arose are not material. The Adjustment Board in its first awards held that they should be reinstated, one on the ground that he had been wrongfully dismissed and the other that the discipline administered was too severe and that he should have been reinstated after a lay-off and that they should be compensated for loss of earnings, the first during the time held

out of service and the second subsequent to the expiration of the modified discipline.

After these decisions were rendered by the Adjustment Board, the carrier petitioned it for an interpretation of the awards. The petition represented that the employees' organization claimed that the awards meant that the men in question would receive full compensation for all time which they would have worked had they not been discharged without any deduction for earnings realized by them in other employment during such interval.

The carrier, on the other hand, maintained that it was entitled to offset such potential earnings by any sum realized by the employees in other employment. It was shown in the case of the first employee that he had earned the sum of $14,359.20 in the employ of another carrier during the time he was held out of service, approximately the same amount he would have earned had he not been discharged.

The dispute before the first division involved the interpretation of article 31 (c) of the agreement between the Brotherhood of Railroad Trainmen and the Carrier, which provides as follows:

> (c) Yardmen or switch tenders will not be suspended, dismissed, or otherwise disciplined without cause. When suspension or dismissal has been assessed, full investigation of the case will be held within 5 days at which all parties interested may be present, together with their representatives if desired. If at such investigation the suspension or dismissal is upheld, the party disciplined will have the right to appeal, such appeal to be made in writing within 15 days after result of the investigation is made known. If, at the appeal, the suspension or dismissal is found to be unjust, the accused will be reinstated and paid for all time lost. The decision arrived at upon appeal shall be made known within 5 days. When stenographic record of an investigation is taken and written up, the accused or his representative will be furnished a copy upon request.

This rule, or one substantially like it, is contained in nearly all the working agreements between carriers and their employees. The meaning of the phrase "paid for all time lost" has been in dispute between the carriers and their employees for at least the last three decades. The disputes have been taken to various boards, predecessors of the National Railroad Adjustment Board with varying results, and since the organization of the Adjustment Board, the question has been decided both ways, including with and without referees.

The brotherhoods contend that the rule should be construed to require the reinstated employee to be paid everything he would have earned during the period of suspension or dismissal irrespective of what such employee may have received during that period in other employment.

The carrier contends that the employee should be paid the amount that he would have earned during that period, less what he earned from other sources, upon days for which he should have been paid had he not been dismissed or suspended.

In these particular cases, the organizations claim that the so-called interpretations were really not such but actually an unauthorized reversal by the Adjustment Board. They point out that the original awards were rendered by the referee and the labor members of the Adjustment Board, whereas the interpretations were rendered by the referee and the carrier members of the Board.

It is obvious that an Emergency Board cannot and should not attempt to review actions of the Adjustment Board. The Railway Labor Act does make provision for enforcement of awards and the organizations can procure a review of the actions complained of by application to the United States district courts where a judicial determination of these two particular cases may be had. In these circumstances, a strike to attempt to change the result in these two cases would be utterly unjustifiable.

However, should the organizations not see fit to take those cases to court, the controversy will continue in succeeding cases before the Adjustment Board ad infinitum, in the hope that some other referee would reach the opposite conclusion on the merits, just as the carriers had done while the precedents were the other way. This, however, would but serve to prolong the controversy indefinitely and to the certain dissatisfaction of the losing side each time the question arises.

We, therefore, are constrained to recommend to the parties that they attempt to reach an agreement on how the rule shall be applied for future application. One such solution which occurs to us is that the proposed rule could provide that the employee would receive full pay for all time lost without set-off up to the time the highest management official handling the matter may deny the claim; that if the claim is thereafter prosecuted before the Adjustment Board, which frequently entails a long lapse of time, the carrier should be entitled to set off any earnings of the employee between the time of the declination of the highest management official and reinstatement. We make this suggestion because we believe there is some merit on each side of the controversy.

The rule was evolved at a time when disputes of this character would normally be settled within 2 or 3 months and in that situation it was unreasonable to expect the employee to seek other employment which might frequently involve a change of residence and other conditions finally proving unwarranted. That was doubtless the

reason why the great majority of such claims were settled without inquiry on the part of the carriers as to whether there had been any outside earnings. Presently, however, it may take 3 or 4 years between the time of discharge and final decision of the Adjustment Board.

Generally after final declination by the management, an employee would seek other employment and it would be unconscionable for him to be awarded full pay for the entire elapsed time, notwithstanding he may have earned substantially as much in other employment. This suggestion would be a modification of the common law rule of damages in that if confined merely to money actually earned it would avoid such incidents of the common law rule as special damages on the one side and diligence in seeking other employment on the other side, issues that the Adjustment Board would be ill equipped to dispose of.

This Board made every effort to conciliate the dispute, but without success.

Respectfully submitted.

FRANK M. SWACKER, *Chairman.*
GEORGE CHENEY, *Member.*
JAMES H. WOLFE, *Member.*

SEPARATE CONCURRING OPINION

The undersigned Board Member joins in the findings of fact contained in the foregoing report made by the present Emergency Board to the President, but he hereby expressly abstains from joining in any recommendations which may appear therein. It should be observed on the basis of the facts developed, that individually and collectively the members of the present Emergency Board made every effort to adjust the current controversy.

Prior to making its present report, this Board suggested to the interested parties that they continue their efforts to adjust their differences through the time honored practice of offer and counter-offer until their minds meet. It must be observed further that this Board suggested as one possible solution: Relative to similar future claims that full pay be allowed for all time lost without set-off up to the time the highest management official handling the claim may deny it; but if such claim is thereafter prosecuted before an Adjustment Board, that the carrier affected be entitled to set off any earnings of the employee between the time declination of reinstatement is made by the highest management official, and the date reinstatement actually takes place.

This Emergency Board also called the interested parties' attention to voluntary arbitration as another possible means of peacefully resolving their present differences. In addition, this Board suggested that all parties involved consider availing themselves of remedies, if any, afforded by any declaratory judgment act, or afforded prevailing parties in an Adjustment Board proceeding by the Railway Labor Act, to seek court enforcement of such awards. Unquestionably all parties are seriously considering adopting one of the foregoing suggestions, or some other method of settling the present controversy short of a resort to economic force.

Neither Executive Order No. 9936 creating this Emergency Board, nor the letter of the President dated March 22, 1948, notifying the undersigned of his appointment on this body, expressly enjoins the Board to make a recommendation. On the contrary these documents simply command this Board to investigate promptly the facts as to such disputes and report its findings to the President within 30 days from the date of Executive Order No. 9936.

Such circumstances, together with others appearing in this controversy, persuade the undersigned Board Member that he should abstain from joining in the making of any recommendation.

GEORGE CHENEY, *Member.*

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