Please file

Report

TO

THE PRESIDENT

BY THE

EMERGENCY BOARD

APPOINTED FEBRUARY 4, 1950, BY EXECUTIVE ORDER 10105, PURSUANT TO SECTION 10 OF THE RAILWAY LABOR ACT, AS AMENDED

To investigate and report in respect to a dispute between the Denver & Rio Grande Western Railroad Company, a carrier, and certain of its employees represented by the Brotherhood of Railroad Trainmen

(NMB Case No. A-3065)

DENVER, COLORADO

FEBRUARY 28, 1950

(No. 79)

DENVER, COLO., *February 28, 1950.*

THE PRESIDENT,
The White House.

MR. PRESIDENT: We have the honor to hand you herewith our report as an Emergency Board created by you on February 4, 1950, under the provisions of the Railway Labor Act to investigate and report respecting disputes between the Denver & Rio Grande Western Railroad and certain of its employees represented by the Brotherhood of Railroad Trainmen.

Respectfully submitted.

ROBERT G. SIMMONS, *Chairman.*
ROBERT O. BOYD, *Member.*
HAROLD R. KOREY, *Member.*

The Executive order is as follows:

EXECUTIVE ORDER

CREATING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE BETWEEN THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND CERTAIN OF ITS EMPLOYEES

Whereas a dispute exists between the Denver and Rio Grande Western Railroad Company, a carrier, and certain of its employees represented by the Brotherhood of Railroad Trainmen, a labor organization; 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 section 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 the said dispute. No member of the said board shall be pecuniarily or otherwise interested in any organization of railway employees or the 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 Denver & Rio Grande Western Railroad Company or its employees in the conditions out of which the said dispute arose.

(Signed) HARRY TRUMAN.

THE WHITE HOUSE,
February 4, 1950.

The Board appointed by the President consisted of Robert O. Boyd of Portland, Oreg., Harold R. Korey of New York City, and Chief Justice Robert G. Simmons of the Supreme Court of Nebraska.

The Board convened at Denver, Colo., on February 13, 1950. Robert G. Simmons was selected as chairman. The National Mediation Board arranged for reporting service by the Alderson Reporting Co. of Washington, D. C. That arrangement was approved. Reporting service was furnished by them.

The Denver & Rio Grande Western Railroad Co. will be referred to herein as the Carrier, and the Brotherhood of Railroad Trainmen as the Brotherhood.

Appearances for the Brotherhood were made by E. B. Welcome, Denver, Colo., deputy president, and R. H. McDonald, Denver, Colo., chairman, general grievance committee, on the system.

Appearances for the Carrier were made by E. B. Herdman, manager of personnel, B. J. Schorr, and L. G. Heinlein, assistants to the manager of personnel, and H. M. Boyle, attorney at law.

The Board held public hearings beginning February 13, 1950, to February 17, 1950, inclusive, and February 20 to February 24, 1950, inclusive. During the progress of the hearings the Board undertook to examine into the question as to whether or not the dispute could be adjusted or satisfactorily referred to an established tribunal to determine the issues. Our efforts were unavailing. At the close of the hearings Mr. Boyd for the Board undertook to mediate the dispute. Our efforts were not successful.

The threatened interruption of interstate commerce which was the occasion for the appointment of the Board was a strike called by the Brotherhood. The ballot which was the basis for the call of the strike set out 76 grievances of the Brotherhood concerning the interpretation or application of the contract between the Carrier and the Brotherhood dealing with rates of pay, rules or working conditions. The ballot also contained a mediation docket case wherein the Brotherhood sought a new rule concerning rates of pay for switching at the Geneva Steel Plant, Geneva, Utah, and a request for a new rule as to the crew consist of trains performing local service. Details of the ballot are set out beginning volume I, page 19 of our hearings.

These grievance cases and the request for rules constituted the questions submitted to us for favorable determination by the Brotherhood. During the progress of the hearings five of the grievance cases were withdrawn by the Brotherhood leaving 71 submitted to us.

Grievance Cases

These 71 cases were divided by the Brotherhood into classifications as follows: Road crews, switching in a yard where yard engines are employed; cases under article 19 of the contract involving extra and special passenger service; additional service; communications; coupling air; deadhead mileage; double-header cases, Diesel engine cases; terminal switching and starting cases.

The Brotherhood submitted its evidence to us in the above order as to each classification. The Carrier submitted its position on each category of cases in the order presented by the Brotherhood. Both parties were permitted full freedom to present all material, evidence, and argument. The result being that during the hearing 48 exhibits were offered by the Brotherhood and 47 exhibits by the Carrier and in all a record of approximately 1,800 pages resulted.

For the purpose of this report we classify the cases somewhat differently. One case is pending before the National Railroad Adjust-

ment Board, First Division, in a claim presented by another Brotherhood. Substantially similar cases in principle to several of those before us are pending before the First Division NRAB. It appears that several of the cases before us have in principle been decided by the First Division NRAB adverse to the contentions of the Brotherhood. It also appears that several of these claims are substantially the same in principle to cases decided by an emergency board adverse to the contentions of the Brotherhood on this system in 1946, and that as to those cases the effort herein is to secure a reversal of those recommendations or a declaration of a distinguishing difference and a decision favorable to the Brotherhood. In some of the cases the Brotherhood seek an application of favorable awards of that emergency board to existing disputes. There is one group of cases that are involved in principle in litigation pending in the courts of the State of Colorado. In that action the Carrier sought and secured a declaratory judgment that it was not in violation of the contract in a number of grievance matters. This Brotherhood, among others, is a defendant in that action. This defendant has appealed that decision to the Supreme Court of Colorado where the action is now pending. The presentation to the court is being delayed at the instance of the Brotherhood pending decisions by the Supreme Court of the United States in other cases where the same issues have been or will be presented to that court. In several of the cases before us, to sustain the position of the Brotherhood, would require, in effect, either a modification of existing contract provisions or a new provision. Concededly, all of the 71 cases now being discussed are grievances which are within the jurisdiction of the First Division NRAB under the Railway Labor Act. Concededly, the Brotherhood has made no move to submit these cases to the Adjustment Board as ex-parte matters. Before us they declared their unwillingness to undertake to so submit them. They likewise declined before us to agree to submit them by joint submission. The principal reasons given being that of the delay involved in that procedure and the claimed refusal of the carrier to apply precedents so established to other cases.

The petition of the Carrier in the declaratory judgment action is set out in full in our hearings, volume VII, beginning on page 1047. The answer of the Brotherhood in that proceeding is set out in full in the same volume beginning page 1121. With reference to the disputes involved in that action it is noted that the Brotherhood in its Answer took the position that the Carrier by seeking a declaratory judgment was attempting to bypass and avoid its duties and obligations under the Railway Labor Act and to bypass the remedy contained therein for the settlement and adjustment of disputes and particularly the provi-

sions of the act as to the right to submit and obtain a hearing and determination of disputes by the National Railroad Adjustment Board and the right of the Brotherhood to make effective under the act awards favorable to its contentions. It is noted also that the Brotherhood in its answer contended that the Carrier and Brotherhood had an "absolute right" to present grievances to the Adjustment Board, referred to the "skilled and trained " men who constituted said Board and that the purposes sought to be obtained by the Congress by the Railway Labor Act should not be thwarted or destroyed; that grievances of this character ought to be referred to the experts familiar with the subject matter of said disputes, the interpretation of the technical terms and the usages and customs in the trade and that the Adjustment Board has "primary exclusive jurisdiction" of such disputes. We are advised that the rules of procedure in Colorado courts do not require a reply. The Carrier advises us that its position in that action as to these matters was that the jurisdiction of the courts and the National Railroad Adjustment Board are concurrent and that whichever tribunal first secured jurisdiction of a dispute retained it to the exclusion of the other. The Carrier cited to us an award of the National Railroad Adjustment Board declining to take jurisdiction of a dispute pending in the courts.

It accordingly appears that, if the Carrier's position is correct, the Brotherhood can avoid judicial determination of these matters by the simple method of submitting them to the National Railroad Adjustment Board.

Nevertheless, as we have pointed out, the Brotherhood heretofore refused and before us refused to submit the grievances here involved to the National Railroad Adjustment Board and has taken a course which results in the failure to secure an authoritative determination of the grievances presented under the Railway Labor Act.

In almost all, if not all, of the cases here involved the parties have presented to us references to awards of the divisions of the Adjustment Board which they contend sustain their several positions. To determine those contentions would require exhaustive investigation and study of the cited awards, and other matters upon which reliance is had. There is not time under the limits placed upon us to perform this work, neither are emergency boards equipped with the reference materials that such a study would require. We concur with the view of the emergency board created by your Executive Order No. 10037 on this property who in their report dated March 5, 1949 said, "Under the design of the act it is not its purpose to create emergency boards to pass on grievances."

We recognize that under certain conditions the time for our report can be extended beyond the 30-day time provided in the Executive order herein set out. We concur in the view of the emergency board above referred to that "this board is powerless to render any binding adjudication with respect to these claims." With these two situations in mind we asked the parties to this dispute if they would be willing to accept our decisions as binding in the event we decided the grievances here involved. The Carrier agreed. The Brotherhood declined and took the position that it would expect the Carrier to comply with decisions favorable to the Brotherhood, but that it (the Brotherhood) reserved the right to accept or decline to accept any of our awards contrary to its contentions. This reservation is one of substance. By Executive Order No. 9749 an emergency board was created involving the same parties as are here, and many grievances were submitted to it. That board undertook to make recommendations on the grievances presented in its report dated August 14, 1946. The Brotherhood declined to accept several of the recommendations so made, and before us present substantially the same questions involving the same rules, seeking to secure a more favorable determination. Under these circumstances, in the language of the emergency board's report of March 5, 1949 (above cited), "It would be a distinct disservice to make definitive recommendations with respect to the individual grievances," here presented. Accordingly, we do not do so.

Failing in our efforts as above summarized we asked the parties if they would be willing to submit these grievances to a system board of adjustment with a neutral referee participating, the decisions to be accepted as binding by the parties. The Carrier agreed. The Brotherhood declined to do so. Failing in that we asked if the parties would be willing to submit the grievances to arbitration, the arbiter's award to be binding. The Carrier agreed. The Brotherhood declined. Further, we suggested that the parties agree that the neutral or arbitrator so acting should be called upon to apply the decisions to subsequent cases, should dispute arise concerning their application. The Carrier agreed. The Brotherhood declined. It is our view that were these suggested solutions adopted the Brotherhood's contentions as to delay and refusal of the Carrier to apply awards as precedents would be met. We finally asked the Brotherhood if there existed any tribunal, State or National under the Railway Labor Act or otherwise, having authority to make a binding adjudication of these grievances to which it would be willing to submit them. The Brotherhood replied that it knew of no such tribunal.

We are accordingly driven to the conclusion that the Brotherhood seeks to retain the benefits of the Railway Labor Act in matters of this

kind and is unwilling to accept its remedies and obligations, procedural or otherwise, save to create a situation which compels the Government to invoke the services of an emergency board. Paraphrasing its answer in the Colorado declaratory judgment action the effect of this position is to impair if not to destroy attempts in good faith to compose, settle, and adjust grievances by the processes of collective bargaining as well as by the further orderly procedures devised and created by the Congress in the Railway Labor Act. Again, we concur with the views of the emergency board in their report of March 5, 1949, if the procedure here followed by the Brotherhood is to be carried out, the usefulness of the Railway Labor Act will soon be destroyed.

Accordingly, our recommendation is that these 71 disputes be submitted to the National Railroad Adjustment Board, First Division, for decision, or failing that, the more expeditious means of submitting them to a system board of adjustment or arbitration be followed to the end that the disputes be determined by the orderly processes provided by law rather than the might of economic force. The record made before us is complete and furnishes the basis for such a final and binding disposition.

Request for A New Rule

For convenience in making this report we next discuss the request for a new rule appearing last on the strike ballot. The requested rule was that, "Trains performing local service will be manned by a train crew consisting of not less than a conductor and three brakemen. Mine run crews will also consist of a conductor and three brakemen." The Brotherhood advised us that the purpose of this rule was to promote safety and relieve trainmen from performing service under hazardous conditions. The Brotherhood offered evidence as to the need of the third brakeman on certain runs under certain conditions.

However, concededly, this rule would supplant rules agreed to by the parties on May 1, 1945, which provide for a conductor and one brakeman on certain trains and a conductor and two brakemen on other trains.

The Brotherhood's witness admitted that three brakemen could not be justified under conditions where the present rules called for one brakeman. It was also conceded that the rule, if agreed to in its present form, would require the use of three brakemen on what are now one-brakeman trains.

It also appeared that the parties had not prior to our hearings come to an understanding of the meaning of the term "local service" in the proposed rule.

It further appears that the proposed rule had been discussed in conference between the parties only on one occasion and for a 15-minute period. The Carrier having declined to grant the rule as requested, the Brotherhood made no effort to secure further conferences and placed the proposed rule on its strike ballot.

Specifically, it appears that the services of the Mediation Board have not been invoked by either party under the provisions of section 5, first, of the Railway Labor Act. The procedures and remedies therein provided have not been followed nor used. Procedurally and factually, this matter has not progressed to the point where it may properly be the subject on its merits of a recommendation by an emergency board. We recommend further conferences on the Carrier as to this proposed rule, and failing of a solution there that the services of the Mediation Board be invoked.

As to all matters hereinbefore discussed in this report we find that the Brotherhood has not used nor exhausted the available remedies under the Railway Labor Act and that accordingly, this emergency Board should not undertake to make recommendations on the merits of the disputes involved.

Mediation Docket Case A–3065

This brings us to Mediation Docket Case A–3065 which is a request for additional compensation to train crews switching at the Geneva Steel Plant, Geneva, Utah. The request is that the crew be paid the amount of time actually consumed with a minimum of 1 hour. It appears that as to this request the Brotherhood have exhausted their remedies under the Railway Labor Act and that the matter is one which calls for our recommendation.

The showing made is that employees of the Union Pacific Railroad do comparable work at the same point. The Brotherhood contends the Union Pacific employees were paid an arbitrary such as the proposed rule calls for. They ask comparable pay for comparable services. They ask in short for equalization of pay at that point with Union Pacific crews.

The Carrier's position is that article 50 (d) of the current agreement (conversion rule) covers this service.

The Carrier shows that the Union Pacific had such a rule some years ago, that it has now been superseded by other rules, that the work is now being done by Union Pacific yardmen, and that the Denver & Rio Grande Western trainmen now receive a higher rate of pay than Union Pacific yardmen on the work involved. This showing stands uncontradicted before us.

The reason for the request being no longer in existence and the rate of pay being favorable to Denver & Rio Grande trainmen we see no reason for recommending the granting of this requested special pay provision. We do not do so.

Summary

The call for a strike which in the judgment of the Mediation Board threatened substantially to interrupt interstate commerce to a degree such as to deprive the section of the country served by this Carrier of essential transportation service resulted in the creation of this Board to investigate and report concerning such dispute. In the language of the Brotherhood they proposed to settle these issues by force of economic strength. The Congress has provided methods for the settlement of such disputes by the orderly processes of the law. At considerable expense to the Nation it has created tribunals vested with power and equipped with the means to make a determination of such matters here involved. Decisions by processes of the law and not by force is the orderly American method of settling controversies between men. We have heard the parties fully as to all matters here in dispute. It is our seasoned judgment that the issues here involved may be and should be resolved within the provisions of the Railway Labor Act.

Respectfully submitted.

ROBERT G. SIMMONS, *Chairman.*
ROBERT O. BOYD, *Member*
HAROLD R. KOREY, *Member.*

U. S. GOVERNMENT PRINTING OFFICE: 1950