

BEFORE THE UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
WASHINGTON, D. C.

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In the matter of	:	
	:	
Hearing on Proposed Amendments of	:	
Part 516 (Records to be Kept by Em-	:	FINDINGS AND RECOMMENDATIONS
ployers) of the Regulations Issued	:	
Under Section 11(c) under the Fair	:	OF THE
Labor Standards Act of 1938.	:	
	:	PRESIDING OFFICER
Red Caps or Hand-baggage Porters :	:	
----- x	:	September 28, 1939

The International Brotherhood of Red Caps, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and sundry other parties having filed petitions with the Administrator for an amendment to Part 516 of Regulations issued by the Administrator under authority of Section 11(c) of the Fair Labor Standards Act of 1938 -- Title 29, Labor, Chapter 5 -- Wage and Hour Division, the Administrator gave notice of a public hearing to be held at 939 D Street, Northwest, Washington, D. C., at 10 o'clock A. M., June 27, 1939, before the undersigned as Presiding Officer. Subsequently, when it was found necessary to provide larger seating capacity, the place of the hearing was changed to the auditorium of the Department of Commerce Building.

Pursuant to notice, the undersigned convened the hearing and an opportunity was afforded to all who appeared during a two day session to

present testimony and to question witnesses through the Presiding Officer. At the hearing, the International Brotherhood of Red Caps and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, and Express and Station Employees, claiming to represent together the majority of the Red Caps, filed petitions with the Administrator to amend Part 516 of the Regulations. The petitions were supported by other interested parties. The Association of American Railroads, which appeared on behalf of substantially all of the employers of red caps in the United States, opposed any changes in the present regulations. Briefs and additional statements were filed subsequent to the hearing by various parties. At the request of the Association of American Railroads, the record was kept open until August 15 for this purpose. The three main parties in interest were then given until September 15 to furnish argument upon the final briefs submitted.

Proposed Amendments to Records Regulations; the
Position of The Association of American Railroads

The term "red cap" as used hereafter includes any employee whose duties consist of, or include, handling passengers' baggage and other articles at various passenger stations. There was no argument on the supposition that these employees, of which there are approximately 6000 in the United States, ^{1/} are "engaged in commerce" and

^{1/} The International Brotherhood of Red Caps estimates that there are between 6000 and 8000 of these employees. Returns to a questionnaire of the Interstate Commerce Commission filed in 1938 by 250 carriers covering their operations at 350 stations indicated approximately 4300 red caps in cities of over 100,000 population.

are entitled to the benefits of the minimum wage provisions of the Act. ^{2/}

The Administrator, having received many complaints alleging that in a number of instances red caps were not being paid the minimum wage, called the hearing on the question:

"What, if any, amendment should be made to Part 516 of the Regulations issued by the Administrator under Section 11(c) of the Fair Labor Standards Act of 1938 to require special or additional records to be kept by employers of red caps or hand-baggage porters."

An employer subject to provisions of the Act is required under Section 516.1 of the Regulations to make and preserve records showing, among other things, "total wages paid for each workweek." Paragraph (d) of Section 516.4 defines the term "wage or wages" as follows:

"For the purpose of these Regulations, the term 'wage' or 'wages' means all remuneration for employment of whatsoever nature whether paid on time work, piece work, salary, commission, bonus, or other basis."

^{2/} The receivers of the Seaboard Air Line, through counsel, indicated that their participation in the proceeding was not to be taken as constituting an admission on their part that red caps "under all circumstances" were employees within the meaning of the Railway Labor Act. (99) The Association of American Railroads, representing substantially all the carriers, recognizes that red caps are employees of the railroads (365). (Figures in parenthesis here and elsewhere in this Report, refer to pages of transcript.)

Under this definition, the carriers at present show in their records as "wages paid" to red caps in their employ the tips and gratuities reported as received by the red caps from passengers or other persons. The two principal petitioners request that the Regulations be amended to prohibit the recording of tips as "wages" paid by the employer.

The International Brotherhood of Red Caps proposes an amendment to accomplish this purpose which would be known as Section 516.6 and would provide that:

Employers of red caps or hand-baggage porters shall not include directly or indirectly in their records of wages, extra wages, additions to wages or total wages required to be kept by Section 516.1 hereof any amounts received by red caps or hand-baggage porters as tips or gratuities from person other than their employers, such as passengers and the like. In no event may tips or gratuities to red caps or hand-baggage porters be counted as part of the wages required by the Fair Labor Standards Act.

The Brotherhood of Railway and Steamship Clerks proposes that:

Part 516, Section 516.4(d) be amended by adding after the final words of said paragraph (d) "or other basis" the following language: "but shall not include tips or gratuities received by employees of employers specified in Section 13(b) of the Act from passengers or persons other than the employer."

The Association of American Railroads contends that the present records regulations are "definite and clear" (363) and adequately serve the purpose for which they were intended. The Association contends that the amendment of the records regulations as proposed by petitioners would constitute an administrative ruling not authorized by the terms of the Act. Their position is that the amendments attempt under the guise of a records regulation to determine a matter of

substance which only the courts can decide; that is the question whether the present arrangement by which red caps record the tips and gratuities received and the railroad terminal companies agree to guarantee that each and every red cap will receive at least the minimum wage is in conformity with Section 6 of the Fair Labor Standards Act.

In order to understand clearly the issues raised by the contentions of the parties, it is necessary to consider the history and details of the present arrangement by which the carriers compensate red cap employees. This report will therefore consider in turn:

The "Accounting and Guarantee" Arrangement
Adopted by the Carriers

Results Growing Out of the Operation of the
"Accounting and Guarantee" arrangement

Finding and Recommendation

The "Accounting and Guarantee" Arrangement
Adopted by the Carriers

Prior to the enactment of the Fair Labor Standards Act, most red caps were forced to rely upon tips and gratuities given them by the traveling public as their sole source of income. In only exceptional cases and these were generally where red caps also had additional assignments, were they paid small regular salaries to supplement the receipt of tips and gratuities. Prior to October 24, 1938 in the Union Station of Omaha, Nebraska red caps were called

"ushers" and were paid \$3.40 per day under a union agreement; in the St. Paul, Minnesota terminal red caps were called "porters" and were paid about \$70 a month. (Exhibit 27) By far the majority of the red caps, perhaps up to 80 per cent or more of those employed in these duties, received only the amounts which accumulated as tips from the traveling public. Of an estimated 4300 red caps employed in 1938 in cities of over 100,000 population, returns to a questionnaire filed with the Interstate Commerce Commission by employers of red caps show that 3,150 received compensation only through tips.^{3/}

Red caps were employed on the premises of the carriers subject to the regulation and control of the railroad or terminal companies, to carry baggage and packages and to perform other services for passengers. From time to time they were asked to carry out various other duties for the terminal, such as cleaning the station platform, carrying messages, and paging passengers.

Since October 24, 1938 one railroad entered an agreement with a union covering all red caps employed and classifying them as "porters". This agreement provides for the payment of wages by the railroad at or above the minimum provided in the Act and excludes tips. (21, 49, 50 and Exhibit 27) By far the majority of red caps, however, receive compensation only through the tips received from the traveling public.

^{3/} Interstate Commerce Commission, Ex Parte 72 (Sub-No. 1), Decided September 29, 1938.

When the Fair Labor Standards Act was enacted, the carriers, according to their testimony, gave serious consideration to the problems raised by the Act to determine "whether they could devise any way to avoid having saddled upon them an additional cost of operation of upwards of two million dollars per year," (365). While red caps were admittedly their employees, they did not feel impelled to pay them 25¢ per hour out of payroll funds. Instead the carriers instituted the "accounting and guarantee" arrangement which they believed would meet the requirements of the law. Under this arrangement, each red cap is requested to report the amount of tips received every day. There is no change in the method of compensation of red caps; but if the total amount received from the public is less than 25¢ per hour the carrier agrees to make up the difference.

This arrangement was designed to avoid as far as possible any payment to red caps from the payroll funds of the carriers. As the spokesman for the carriers expressed it:

"The only change it proposed to make from the one that had been in effect all the years before was simply to add the element of a guarantee to these men. These men had been working all the years, generally speaking, for the tips they could get. The change that was proposed was to let them continue to do that, but add the one additional element of a guaranty to them that if they didn't make the minimum required by the law, the railroad would make it up to them." (369-370)

Pursuant to this plan each carrier issued the following notice to its red caps (or another notice similarly phrased):

(Place and Date)

TO THOSE CARRYING HAND BAGGAGE OF PASSENGERS
OR OTHERWISE ASSISTING PATRONS OF THE RAILROAD
ON RAILROAD PREMISES, COMMONLY CALLED RED CAPS.

(LOCATION)

IN VIEW OF THE REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT, EFFECTIVE OCTOBER 24th, 1938, AND IN CONSIDERATION OF YOUR HEREAFTER ENGAGING IN THE HANDLING OF HAND BAGGAGE AND TRAVELING EFFECTS OF PASSENGERS OR OTHERWISE ASSISTING THEM AT OR ABOUT STATIONS OR DESTINATIONS, IT WILL BE NECESSARY THAT YOU REPORT DAILY TO THE UNDERSIGNED THE AMOUNTS RECEIVED BY YOU AS TIPS OR REMUNERATION FOR SUCH SERVICE.

THE CARRIER HEREBY GUARANTEES TO EACH PERSON CONTINUING SUCH SERVICE AFTER OCTOBER 24, 1938 COMPENSATION WHICH TOGETHER WITH AND INCLUDING THE SUM OF MONEY RECEIVED AS ABOVE PROVIDED, WILL NOT BE LESS THAN THE MINIMUM WAGE PROVIDED BY LAW.

YOU ARE PRIVILEGED TO RETAIN SUBJECT TO THEIR BEING CREDITED ON SUCH GUARANTEE ALL SUCH TIPS OR REMUNERATION RECEIVED BY YOU EXCEPT SUCH PORTION THEREOF AS MAY BE REQUIRED OF YOU BY THE UNDERSIGNED FOR TAXES OR ANY CHARACTER IMPOSED UPON YOU BY LAW AND COLLECTIBLE BY THE UNDERSIGNED.

ALL THE MATTERS ABOVE REFERRED TO ARE SUBJECT TO THE RIGHT OF THE CARRIER TO DETERMINE FROM TIME TO TIME THE NUMBER AND IDENTITY OF PERSONS TO BE PERMITTED TO ENGAGE IN SAID WORK AND THE HOURS TO BE DEVOTED THERETO, TO ESTABLISH RULES AND REGULATIONS RELATING TO THE MANNER, METHOD AND PLACE OF RENDITION OF SUCH SERVICE, AND THE ACCOUNTING REQUIRED.

(Name of Railroad)

(Name & Title of Officer Signing) ^{4/}

^{4/} Exhibit 8 of Record of Hearing

In most instances copies of the notice were served personally upon each red cap and a receipt was required (89, 169, 175, 228). Verbal and written protests were made by some of the employees, but they were told that they must sign the receipts or cease working (82, 159, 160, 169, 204, 226-228, 239, 270-272). The record shows that in one instance the notice was posted on the bulletin board and no request was made that the red caps employed in that station sign it (324-325).

The contention of the Association of American Railroads is that these notices served upon the employees constituted enforceable contracts entered into as a condition of employment and resulting in a constructive turning over of tips to the employer and payment back to the employee.

Results Growing Out of the Operation of the
"Accounting and Guarantee" Arrangement

Testimony offered at the hearing shows convincingly that the records kept by the carriers of tips reported as received by red caps do not represent accurately the tips received by these men. Under the present minimum, red caps must receive wages at the rate of two dollars for working an eight-hour day. The record is replete with statements that red caps, unable to earn the minimum in tips during the day, falsely register that amount on the record slips provided by the employer (32, 57-63, 82-84, 161, 192). Numerous red caps testified at the hearing that they padded their reports when they made less than twenty-five cents an hour in tips (192, 328). The reason for this false reporting of tips was said to be the fear of

discipline or discharge by the carriers for failing to report the minimum (146, 161, 171, 177, 310-314). However, it appears to have become well-nigh the universal practice to report \$2 each and every day, even in cases where the men have always received considerably more than \$2 in the past; such falsification, initiated by the red caps themselves and continued on the advice of their union officers, presumably on the ground that the railroads themselves are not interested in accurate records beyond the receipt of \$2 per day, (349) must have its basis in other considerations than the fear of discipline or discharge. The railroads have acquiesced in this practice.

There was testimony that a station master told the employees to report 25 cents an hour regardless of whether the amount reported was actually earned (170). One witness testified that the station master in a large city had discontinued requiring the men to report and advised the red caps that henceforth the railroad would report 25 cents an hour for the men (137). Witnesses testified that several of the red caps were discharged for failing to report twenty-five cents an hour (160, 171). The record contains allegations that false reports of tips were made by red caps from fear of discipline or the possible loss of employment, whether such fears were justified or not. On the other hand, the Association of American Railroads has submitted documentary evidence supported by affidavits to show that at many of the stations where these specific charges were made the railroads have repeatedly made up the difference between amounts reported by the men and the guarantee and that at these stations

no reductions in the number of red caps employed have been made as a result of the guarantee.^{5/}

The "accounting and guarantee" arrangement by which most of the carriers compensate their red caps is of necessity applied by minor company officials — local officers such as station masters, head porters, and station agents. It appears from the record that many of these officials have made it be known in one way or another that the red caps ought to report the receipt of two dollars for eight hours work regardless of the amount actually received. The possible misapplication of the arrangement by subordinate officials is admitted by Counsel for the Association of American Railroads in the following statement (392):

"I have had personal experiences, and everyone else has had, of subordinate officers not carrying out strictly the intent of the instructions that they get from above, and I wouldn't be surprised to find that in some instances there have been actions of the sort that have been charged here — that is, certain men in immediate charge of these fellows, for fear of criticism by someone above them, indicated to these fellows what they wanted them to do."

The testimony substantiates this statement and fully demonstrates the impossibility of determining from the records of carriers kept to conform with the regulations of the Wage and Hour Division whether red caps are receiving the minimum wage provided by the Act.

Part 516 are Regulations and Records to be Kept by Employers issued Pursuant to Section 11(c) of the Fair Labor Standards Act.

^{5/} Memorandum submitted subsequent to Hearing, passim.

The carriers appear to have taken rather lightly their own obligations to keep accurate records. In answer to a charge made at the hearing that "red caps are required to turn in slips showing checks of \$2 in tips before they can go to work so that the records will be in shape" (137), the carrier replied in an affidavit that the slips of the red caps "are deposited in a box * * *. It may be that they are placing the report in the box before they complete their day's work. For this the company is not responsible." (Memorandum, Caption 5). This is a totally unwarranted assumption. It is the Company's obligation to keep accurate records under the law and the regulations and this shedding of responsibility, directly traceable to the "accounting and guarantee" arrangement, is indicative of the lighthearted attitude taken by some of the officials of the carriers toward their obligation under the Act. In another terminal the form of the slip required to be filled out by the red caps was changed after the Act was in effect 5 months and thereafter it did not even have a provision for reporting tips received. The Company alleges, however, that "red caps have specific instructions at the end of each payroll period when they report to the auditor's office to pay Railroad Retirement Act taxes to report at that time if during the period they failed to receive in tips an amount equal to the sum they were entitled to receive under the Fair Labor Standards Act. It is generally understood by the red caps that the Terminal Company will pay any difference upon red caps reporting the amount necessary to meet the minimum requirements." (Memorandum, Caption 5) This is only another indication of the casual handling by subordinate

officials of the obligations of the carriers under the Act.

In many instances testimony of petitioners' witnesses has been controverted by affidavits filed by the Association. These affidavits have been studied with care and have been given full weight in the consideration of this problem. Thus in many cases dismissal of red caps was shown to have been not for the purpose of coercing them to report earnings of at least \$2 a day but because of infractions of rules, neglect of duty, or merely to reduce costs. Furloughs have often been made on a strict seniority basis. The testimony of the representatives of the Association at the hearing shows that in numerous cases tips when below the minimum wage established by law are in fact regularly and consistently supplemented by payments from the carriers (266-268, 406-409)^{6/}. In these cases the amount of the check received by the individual red cap from the carriers is usually small, ranging from a few cents to five or six dollars each fifteen-day payroll period. The record indicates that the red caps at a few stations receive make-up checks from the railroads each period (406-409, 413). These stations usually have little of the more lucrative tipping assignments and additions to the tips received by red caps must be made constantly.

In many cases where red caps are unable to earn two dollars for eight hours of work, the assignments given them by the

^{6/} One large railroad in the seven months preceding April 30, 1939, paid \$12,075.59 to its red caps as the difference between their reported tips and the minimum wage required by statute (412-413).

carriers are responsible. For red caps are at times required to perform other duties which prevent them from carrying the bags of passengers and thereby diminish their opportunities to earn tips.^{7/} In many stations red caps perform janitor work for the carriers in addition to their red cap duties. (258, 259, 288) The record shows that red caps often mop, sweep, and clean the stations and station platforms, wash windows, page passengers, care for children traveling alone, assist in transporting ill passengers, call trains, collect and deliver mail, run errands, and perform other services which are not expected to yield tips and which therefore diminish their opportunities to earn at least 25 cents per hour in tips. (12-13, 152, 172, 256, 259, 263). In some stations the small amount of traffic or the type of people traveling (commuters and college students) prevent the red caps from receiving amounts in tips equal to 25 cents an hour. As indicated in the record, some of the railroads recognize these deficiencies in such stations and have consistently made up the difference between the tips actually received and the legal minimum. However, it does not appear that this is a common practice and all too often the red cap for fear of discipline or the possible loss of his job is forced to bear the burden of the poor location or assignment.

Even in terminals with a large flow of passenger traffic some red caps are assigned to watches and tricks which cannot yield

^{7/} For example, in one terminal the red caps are each required to run an elevator one day a week. In order to comply with this requirement the red caps have themselves hired a man to run the elevator. (148).

an average earning of twenty-five cents an hour. The assignments are sometimes for a few hours in a single day, one day in the week, or permanent. In order to prevent the concentration of such assignments some but not all terminal companies provide a complete rotation of the red caps in the various posts of the station; the taxicab stand, the day coaches, the Pullman coaches, the locals, and the entrance usually used by passengers arriving and leaving the station on street cars (315-318). Of course if red caps were free to work in the terminals wherever they thought they could best earn tips, they would not work the less desirable positions.

Since the effective date of the Act, most of the carriers have taken the position that if the tips reported by the red caps consistently fall below the minimum wage the logical inference is that the particular station has too large a number of red caps in proportion to the amount of traffic and as a consequence red caps are laid off. However, in the situations set forth in the preceding paragraphs where red caps sweep, clean, and perform other services around the stations or work in positions or in stations where they have little opportunity to earn twenty-five cents an hour by carrying bags for passengers, a failure to list the minimum as being received in tips would not necessarily indicate a lack of diligence and assiduity on the part of the red caps or even an excessive staff of red caps. In such cases it is doubly important that red caps be

protected in their right under the law to be paid no less than twenty-five cents per hour.

The present form of time cards kept by the carriers for red cap employees makes no provision for a segregation of the various types of work which they perform and hours worked on each type of work. The records kept by the carriers, although they differ slightly from company to company, usually provide columns for listing the number of hours worked by each red cap, tips received, deductions made for taxes or other purposes, and the additional sum paid by the carrier to make up the difference between the reported tips and the applicable minimum wage (397-404). At the small stations and terminals it is common for red caps to do janitorial and related work, but in these places it is also more common to hire men as cleaners and to assign them at various times during the day to red cap duty. The usual wage for cleaners, while it is different in different areas, is said to be considerably more than the minimum required by the Fair Labor Standards Act. In only one notable instance was the record kept by the carrier substantially different. At this terminal the daily report form in use at the date of the hearing provided spaces for itemizing (1) time consumed in waiting on each passenger; (2) number of parcels handled; (3) tips received from each passenger. Each red cap, according to the testimony, received credit as hours worked only the time spent in waiting upon the passengers. The remaining time during which he was held for work at the terminal was not included in the computation of his hours on duty (57-63). Counsel for the carriers conceded at the hearing

that this was improper and in the memorandum filed subsequent to the hearing stated that a retroactive adjustment is being made and that in the future this terminal will calculate the earnings of red caps on the basis of time held for work (Memorandum p. 9).

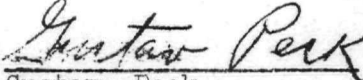
According to the testimony of many of the red caps there has been an appreciable decline in the amount received as tips since the passage of the Act. (38, 39, 70, 88, 165, 171, 181, 185, 186, 192, 205, 206, 450-460) The usual explanation is that the public has mistakenly been given the impression through the press that red caps now receive a regular wage from the carriers and that tips are no longer their sole support. Several witnesses estimated that their own income from tips had declined about one-third. (71, 171) Another witness testified that tips had declined but that the cut in the force had had a counteracting effect upon his receipts. (88) The carriers subsequently submitted affidavits by stationmasters and some red caps that to the best of their knowledge where tips may have declined after the effective date of the Act, they soon returned to customary levels (Memorandum, Captions 3 and 5).

Finding and Recommendation

In the light of all the evidence there can be no conclusion other than that the pay roll records of the carriers for Red Caps generally do not accurately record the data as to wages paid. It also appears that there is grave legal doubt as to the validity under the Fair Labor Standards Act of the accounting and guarantee arrangement which the carriers have used. It is, therefore, recommended:

1. That the Division take immediate steps through court action to determine the validity of the accounting and guarantee arrangement under which many Red Caps are employed.
2. And, pending an authoritative Court decision determining the validity of the accounting and guarantee arrangement, that employers be required to keep records which show separately from other amounts paid as wages, the amount of tips which are claimed by the employer to be wages paid.
3. It is also desirable that records kept by employers for employees engaged in occupations in which tipping may occur shall record the number of hours worked each week in such tipping occupations separately from the number of hours worked in other occupations, if the employee accounts for or turns over to the employer the amount of tips received from third persons.

October 12, 1939


Gustav Peck
Presiding Officer