Award No. 1492
Docket No. CL-1289

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Elwyn R. Shaw, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

GULF, COLORADO AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that carrier violated and continues to violate the rules of the Clerks' Agreement when it fails and refuses to assign available work of the kind and class covered by the Agreement, as hereinafter described, to employes within the scope of said Agreement; and

"Claim that the work of carrying messages, switch lists, reports, etc., between offices and departments at Galveston, Texas, shall now be classified, rated and assigned in accordance with the rules of the Clerks' Agreement; and

"Claim that all employes involved in or affected by said violation of rules shall be compensated to the extent they would have enjoyed such work had they not been deprived of it, retroactive to July 23, 1938."

EMPLOYES' STATEMENT OF FACTS: "The Local Freight Office and Yard Office at Galveston, Texas are, by air line distance, some two miles apart; via the most desirable route over city streets the distance is approximately 2.75 miles. Regular messenger service between the two offices is maintained from 7:30 A. M. to 5:30 P. M. on week days and from 8:30 A. M. to 11:30 A. M. on Sundays and holidays. This service is performed by employes subject to the wage and working agreements between the parties. Their names, hours of assignment and rates of pay being as follows:

NAME	HOURS OF ASSIGNMENT	RATE OF PAY
Adolph Perthius	7:30 A.M. to 11:30 A.M. and 12:30 P. M. to 4:30 P. M.	$3.88
Raymond D. Hart	8:30 A.M. to 12:30 P. M. and 1:30 P. M. to 5:30 P. M.	
	Sundays and holidays	
	8:30 A.M. to 11:30 A.M.	$2.46

"Messenger Perthius reports for work each morning at the Yard Office, picks up waybills, mail, reports, etc., and delivers them to the Local Office, or the uptown General Office, as the case may be. At or near 10:00 A. M. he makes a messenger trip from the Local Office to the Yard Office and return. These two trips are a part of his regular assignment and are made regularly each week day. Occasionally emergencies arise requiring that he make an additional trip. His tour of duty ends at 4:30 P. M. at the Local Office.

case because the regularly assigned employes were not required to work overtime or to respond to calls to perform the service referred to. The employes contend that these rules contemplate that regular employes shall be required to work overtime or be recalled for service that cannot be performed during the hours of their regular assignment. The Carrier submits, however, that there is no such obligation in the rules, but that those rules merely provide how the employe shall be compensated if they are required to work overtime or respond to calls. The employes also attempt to convey the impression that these particular rules prohibit the Carrier from entering into any such arrangement as is in effect at Galveston, their specific statement being that 'the Carrier has no right to withhold work from the operation of the agreement rules simply because it can make a contract with an individual which may be more favorable to it than its contract with the Brotherhood.' The Carrier has not withheld the work in question from the operation of the agreement rules; that work has never been considered as affected by the agreement; those who perform it have been considered as exempted from the scope thereof ever since we have had an agreement with Clerical Employes.

"Article XIII, Section 15.

'Section 15. This agreement shall be effective as of December 1, 1929, and shall continue in effect for two years and thereafter until thirty (30) days' written notice of a desire to change is served by either party on the other.'

"This is merely the usual terminating clause found in practically all wage agreements and there is nothing connected with the arrangement at Galveston that contemplates any revision or changes in the agreement requiring formal notice as referred to therein. The Employes state that if the Carrier desires 'to remove the work in dispute from the scope and operation of the agreement rules it can only be accomplished by following out the provisions of this rule.' The Carrier can only reiterate that it has not removed the work in dispute from the scope and operation of the agreement rules because such work has never been included in the scope of those rules."

OPINION OF BOARD: The facts in this case are not in dispute. The record shows that for approximately twenty years it has been the custom in the Galveston office of the carrier regularly to send messages, way bills, etc., from the local freight office to the yard office on shipments and for trains made up in the evening after the two regularly employed messengers had gone off duty. These messages have been handled by the carrier on a contract per trip basis and until July 23, 1938, no complaint had ever been made by the various messengers regularly employed, nor by any association of employes on their behalf. The carrier claims that this long acquiescence in its interpretation of the rules in question constitute a construction of the rules by the parties themselves and that under a familiar and applicable rule of law this interpretation must be followed by the Board. They further claim that regardless of this acquiescence, the rule itself excepts this particular service from the clerks' agreement. The exception to the scope rule which is relied upon is as follows: "These rules shall not apply to individuals where amounts of less than $50.00 per month are paid for special service which takes only a portion of their time from outside employment or business; or to individuals performing a special service not a part of the duty of the carrier." This exception to the scope section of the agreement has been in effect in substantially the same form for nearly twenty years, first under the National Railroad Administration after the first World War, then from 1920 to 1928 under agreement with the Brotherhood of Railway and Steamship Clerks, then from 1929 until 1935 or 1936 under an agreement with the Association of Clerical Employes of the A. T. & S. F. Ry. System and since then and to the present time by automatic continuance of that agreement with the present Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

It is undoubtedly true as claimed by the carrier that long acquiescence in an interpretation of a contract made and continuously acted upon between the parties themselves has great weight in the guidance of a court when it is called upon to determine the meaning of the agreement. The rule, however, is never conclusively binding, but depends upon the circumstances under which the acquiescence is indulged, the relative position of the parties and the intention with which the acquiescence is given. It is also true that one person cannot by his acquiescence or interpretation of a contract made for his benefit, bind some other person who has never agreed to any such interpretation. It is nowhere shown by this record that any representative organization or brotherhood ever consented to this interpretation for or on behalf of all of its members in any class or representative capacity. Neither is it shown that the two employes who are here complaining, ever agreed to any such interpretation after the present Brotherhood began to represent them in about the year 1936.

However that may be, and even if it might be found that there has been acquiescence in the carrier's interpretation of this rule, the rule of construction would not apply to the present situation, because that rule can be invoked only as an aid for interpretation of that which would otherwise be of uncertain or ambiguous meaning. A clear statement of the general rule as to interpretation by the parties with citations from most of the States in the Union, as well as all of the Federal Courts will be found in 17 C. J. S. 757 where it is said: "The rule permitting a consideration of the practical construction of the contract by the conduct of the parties may be applied when the language of the contract is ambiguous, uncertain, indefinite, obscure, equivocal or not clear, so that there is doubt as to the meaning and proper construction thereof, and only when such is the case and the practical construction is reasonable and material. The practical construction put on the contract by the parties cannot control or vary the express unambiguous provision of the instrument itself and the legal effect thereof * * * and the fact that the parties have placed an erroneous construction on an unambiguous contract will not prevent the court from giving the true construction of the contract."

Webster defines the word "special" as: "Distinguished by some unusual quality; uncommon; noteworthy; extraordinary; as a special occasion; relating to a single thing or class of things; having an individual character or trait; particular, peculiar; unique. It is synonymous with particular, peculiar, specific, individual. It is the opposite of ordinary, usual, unexceptional and typical."

The word "special" as it occurs in the exception to the rule relied upon by the carrier is not a technical word and has no technical meaning. It is an ordinary word commonly used and easily understood by laymen without the aid of lawyers or judges and it is not such an adjective as can be applied to the messenger service here in question.

There is nothing unusual, uncommon, noteworthy or extraordinary in the messenger service here involved. On the other hand, that service was ordinary, usual and a matter of daily routine. The work involved did not fall under the exception to the scope rule, but on the contrary came clearly within the rule itself. The collective agreement here in question embraced all of the messenger work regularly required and the performance of that work falls within the terms of the agreement.

For the reasons indicated, we are of the opinion that the fact of this acquiescence is not material in the interpretation of the agreement, but it does not follow that it is totally immaterial as to all of the issues presented. The employes themselves and the various associations of employes who have represented them have never heretofore questioned the carrier's interpretation of the rule and so far as the record shows that interpretation has been made in entire good faith, probably as a matter of mere convenience and

without any intent or purpose to wrong or defraud any employe. This is the first time the rule has been called in question and so far as the record shows, the matter has been diligently pressed to a final decision that it might be clarified. There is nothing before us upon which we can found any specific award for retroactive pay in any certain sums to any designated individuals and to attempt to do so now would be merely to impose a penalty and would not be equitable. The award must therefore be that the first two claims are allowed and the third one denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That claims 1 and 2 are sustained; claim 3 is denied.

AWARD

Claims 1 and 2 are sustained; claim 3 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 2nd day of July, 1941.

DISSENT TO AWARD No. 1492, DOCKET No. CL-1289

Dissent is registered to the holding by this award that carrier did not have the right to engage the services of individuals to whom the rules of the agreement are not applicable for the performance of the involved work. Such misinterpretation of the quoted portion of Exception (a), Rule 1, which stipulates that these rules shall not apply to individuals paid less than $50.00 per month for:

> "* * * special services which take only a portion of their time from outside employment or business; * * *"

was arrived at by relying only upon the literal meaning of the word "special" as defined by a dictionary to give meaning to this rule. The circumstances of record in this case plainly exhibited that at the time the rule was negotiated the object of the parties was of such definite, practical character as to indicate that an abstract dictionary definition of the word "special" would be inadequate to determine that which they had in mind.

Rules of contract construction which require consideration of an individual word of an agreement provision in the light of the context in which it is used and of the entire rule in the light of the circumstances surrounding the parties incident to its negotiations were more accurately applicable for a proper decision in this case and would have overcome the deficiency of this award in determination of the true meaning of the rule here involved according to the intent of the parties and their object.

It can only be concluded that the award is contrary to the agreement and to the meaning and purpose of the rule.

(S) A. H. Jones
(S) R. H. Allison
(S) C. C. Cook
(S) R. F. Ray
(S) C. P. Dugan