

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

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

**GULF COAST LINES, INTERNATIONAL-GREAT NORTHERN
RAILROAD COMPANY, SAN ANTONIO, UVALDE & GULF
RAILROAD COMPANY, SUGARLAND RAILWAY COMPANY,
ASHERTON & GULF RAILWAY COMPANY**

(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The carrier violated the wage agreement of 1937 by failing and refusing to apply the five cents (5¢) per hour increase to all clerical positions in the Chief Engineer's Office at Houston. And

(b) Claim that the five cents (5¢) per hour increase be applied retro-active to August 1, 1937.

EMPLOYEES' STATEMENT OF FACTS: The following clerical positions in the chief Engineer's office at Houston, Texas have never been excepted from the agreement between the carrier and the Brotherhood and are covered by all of the agreement rules:

Asst. Engineer (Accountant)	\$11.76
Asst. Engineer (Accountant)	11.76
Valuation Accountant	8.82
Valuation Accountant	7.45
Accountant	7.45
Accountant	6.86
Insurance Assistant	6.47
Valuation Accountant	5.88
Signal Clerk	5.84
File Clerk	5.29
Stenographer	5.25
Stenographer	4.90

The following positions were not excepted from the agreement in effect on August 1, 1937:

Lease Agent
Secretary to Asst. Chief Engineer

but have been excepted from the promotion, assignment and displacement rules of the agreement since April 1, 1939.

(2)—In 1929, when the Carrier appropriated \$50,000.00 for the purpose of applying the same as an increase in rates of pay for clerical positions coming under the scope of the Clerks' Agreement, the same was applied to only five positions in the Chief Engineer's Office, four of which were abolished as indicated in the position of the Carrier and indicating that the positions which the representative of the Organization now claims 5¢ per hour should have been applied to as of August 1, 1937, were not included in the Clerks' Agreement.

(3)—When reductions in salaries were made on August 1, 1931, statement was made showing amount of special deductions to be made from pay of officials, supervisory and clerical forces that were not covered by schedule. Carrier's Exhibit No. 1 indicates the positions in the Chief Engineer's Office from which the special deductions were made and indicates that those positions were not included in the Clerks' Agreement.

(4)—Up to April 1, 1939, all positions in the Chief Engineer's Office to which the representative of the employees is claiming that the 5¢ per hour increase should have been applied were on a monthly basis. Effective that date, as indicated in the Carrier's Position, all of the positions involved in the instant case were changed to a daily rate, which further indicates that prior to April 1, 1939, said positions were not included in the Clerks' Agreement, as had they been included they would have been changed from a monthly to a daily rate December 1, 1926.

(5)—On August 1, 1937, when the 5¢ an hour increase was applied by agreement to all employees covered by agreement with the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees, the increase was only applied to one position in the Chief Engineer's Office, which was position of Stenographer in the Office of Valuation Engineer and a statement of the application was furnished to the General Chairman of the Clerks' Organization who waited for a period of almost two years after the increase was applied; that is, from August 1, 1937, until July 3, 1939, and four months after the Agreement of April 1, 1939, had become effective before any contention was made that the rules agreement in effect prior to April 1, 1939, covered all clerical positions in the Engineering Department with exception of the Chief Clerk and the Secretary and requested that the 5¢ per hour increase be applied to all clerical positions retroactive to August 1, 1937, which would indicate that at the time the August 1, 1937, increase was applied the positions which he claims were under the rules agreement prior to April 1, 1939, did not cover the clerical employees in the Engineering Department.

It is the contention of the Carrier that the evidence it has introduced in the instant case clearly establishes the fact that the clerical positions, the subject of this dispute, were not included in the scope of the Clerks' Agreement until April 1, 1939, and, therefore, were not subject to the 5¢ per hour increase granted effective August 1, 1937, to employees covered by agreement with the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees and your Honorable Board is respectfully requested to render an award to that effect.

OPINION OF BOARD: August 5, 1937 Mediation Agreement A-395 was signed effective August 1, 1937. It provided in part as follows:

"1. It is understood and agreed that all hourly, daily, weekly monthly or piece rates will be increased effective August 1, 1937, in the amount of five cents (5¢) per hour, applied so as to produce the same increase irrespective of method of payment. This applies to all employees represented by the labor organizations signatory hereto."

The wage increase was not applied to certain clerical positions in the Chief Engineer's office at Houston. In explanation the carrier calls attention to the fact that the agreement according to its terms applied only to employees "represented by the labor organization signatory hereto"; and bases its justi-

fication for not advancing the pay of these claimants on the ground that they were not covered by the Clerks' Agreement in effect August 1, 1937.

The claimants rely on the terms of the agreement, the scope rule of which provides that it covers (1) clerks (2) other office and station employes, and (3) laborers employed in and around stations, storehouses and warehouses. Then follow two clauses excepting certain employes from this coverage. Section B reads in part as follows:

"(b) This agreement shall not apply to employes ***** covered by special memorandum, occupying positions of a direct and confidential nature or whose duties and responsibilities are such that their selection must remain in the hands of the employing officer."

The special memorandum which is a part of the agreement excepts but two positions in the office of the Chief Engineer, neither of which is here involved. The Claimants, therefore, pointing to the coverage of the agreement and calling attention to the fact that they are not among those excepted from such coverage, argue that they come within its provisions and were entitled to the advance in wages called for by the Mediation Agreement. It is true that the letter of the Clerks' Agreement would seem to sustain their claim. But the Carrier points out many practices acquiesced in by the employes inconsistent with the theory that they were covered by the agreement. It claims that the positions in question were not shown on seniority rosters, and were carried on monthly rates of pay, that vacancies in the engineering department were not bulletined, that with respect to certain wage reductions and certain wage increases these employes were not treated as coming under the agreement. On the other hand the employes show that when the claimants were definitely included under the agreement of April 1, 1939 a seniority roster was issued showing dates for computing seniority of the employes, a number of which antedated the time when the Mediation Agreement took effect in 1937. Significant also as the committee points out is the carrier's statement in a memorandum of positions reclassified under the agreement effective April 1, 1939. Certain of the positions here involved are there set out with this notation as to their former status: "Covered by agreement but provisions of agreement were not applied."

We do not get much help in the solution of the present problem from a consideration of all these divergent practices, some of them inconsistent with each other, some inconsistent with the agreement itself. As a matter of fact we are only justified in looking to surrounding circumstances to interpret the meaning of an agreement when there is an ambiguity in its terms. And the language of Rule 1 read in connection with the memorandum is not in this instance ambiguous.

There is, however, one factor which seems to us controlling. It is the conduct of the parties with respect to the very controversy before us. The wage agreement became effective August 1, 1937. The increases were not granted to these employes. December 13th the carrier was requested to furnish a statement of positions and rates of pay as of August 1. That statement was furnished January 20, 1938. January 21 the general chairman of the committee replied calling attention to the fact that certain positions including those here in question were omitted. The letter ended with the request: "Won't you please check up on this and advise?" February 1, 1938 the carrier replied explaining its reasons for not granting the increases. That part of the letter which relates to the Chief Engineer's Office reads as follows: "As to Chief Engineer's Office and General Purchasing Agent's Office, there are no positions in either of these offices at present covered by the schedule." To this determination of the status of these employes no protest was made for a period of nearly a year and a half during which time these men received each pay day remuneration on the old basis. July 3, 1939, a request was received from the general chairman that the 5¢ per hour increase be granted to them effective

August 1, 1937. This was after the effective date of the new agreement which included them. The carrier in reply to this letter said:

"Exhibit E

Mr. J. L. Dyer
General Chairman, BRC
Houston, Texas

Houston, Texas
July 10, 1939

Dear Sir:

Prior to entering into agreement dated April 1, 1939, the employees in Engineering office were considered and treated as excepted positions, and not under agreement. We reached agreement with your Committee and placed them under new agreement closing same out with the effective date of agreement, namely April 1, 1939.

Yours very truly,

/s/ W. G. Choate"

The reply of the general chairman to this letter seems to have left the controversy open for general discussion. Nothing further, so far as the record shows, was done until the submission was made to this Board June 5, 1941 after the lapse of another two years.

Under the circumstances shown by this record the claims of these employees cannot be maintained. The letter of the general chairman of January 21, 1938 was not a claim. It was in the nature of an inquiry and an offer to discuss the matter. The fact that no protest to the carrier's reply of February 1, 1938 was made for a year and a half would naturally lead the carrier to conclude that its view had been accepted.

The committee has called our attention to numerous awards which hold that repeated violations of a rule do not change it. There is no doubt of this principle. But repeated violations acquiesced in by employees may bring into operation the doctrine of estoppel or there may be a bar because of laches. Awards 1289, 1606, 1640, 1645. It seems to us that this is particularly true where the controversy concerns simply the rates of pay. Employees do not ordinarily accept wages over a period of a year and a half or longer without protest if they believe they are not receiving what is due them according to terms of their contract. They should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay.

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 employees involved in this dispute are respectively carrier and employees 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 these employees are barred from maintaining their claims.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of May, 1942.