

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

John P. Devaney, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYES
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY**

STATEMENT OF CLAIM.—

"Claim for restoration position of Cashier, at West Memphis, Arkansas, with payment of all wages and time loss, retroactive to December 14, 1931, to all employes affected by the discontinuance of this position and the creation of cashier-operator."

STATEMENT OF FACTS.—West Memphis, Arkansas, is a joint station with the Missouri Pacific, the Frisco being what is generally referred to as the operating line. The station is not on the main line of either railroad. No through passenger or freight trains are operated out of, into or through this station. The service is performed by a switch engine. The office at the station is not equipped with telegraph or telephone instruments such as is maintained at all regular telegraph offices. It is equipped with telephone connection with the Frisco exchange in exactly the same manner as is Memphis Freight Station or any other railroad office in Memphis.

The position of Cashier, with daily rate of \$6.80, has been in existence at this station for a long period of time, and it is covered by the rules of the Clerks' Agreement. The rate of pay of \$6.80 per day was fixed by agreement between the Brotherhood of Railway Clerks and the carrier. On November 10, 1931, the Superintendent bulletined this position to employes covered by the Telegraphers' Agreement under the title of Cashier-Operator, rate 66¢ per hour (\$5.28 per day), and was assigned to an employe covered by that agreement on December 14, at which time the Cashier was checked out. The employes protested this action, maintaining that it was in violation of Rules 1, 2, and 83 of the Clerks' Agreement.

There is in evidence an agreement between the parties bearing effective date of July 1, 1922, and Rules 1, 2, and 83 thereof are cited, reading:

"SCOPE—RULE 1. These rules shall govern the hours of service, wages, and working conditions of the following employes of St. Louis-San Francisco Railway Company; St. Louis, San Francisco and Texas Railway Company; Fort Worth and Rio Grande Railway Company; the Brownwood North and South Railway Company, and their owned, leased, and or operated lines (subject to the exceptions noted below under Section (a) and (b):

"(1) Clerks.

"(2) Other office and station employes, such as office boys, messengers, chore boys, station helpers, train announcers, gatemen, checkers, baggage and parcel room employes, train and engine crew callers, operators of certain office or station equipment devices, telephone switchboard operators, elevator operators, ticket and waybill assorters, machine operators, employes operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers, adjusting dictaphone cylinders, office, station and warehouse watchmen, and janitors.

"NOTE.—It is agreed typists come under the classification of Clerks.

"NOTE.—The term 'Machine Operators' as used in this section does not include comptometer operators or operators of calculating machines. These two occupations come within classification of Clerks.

"(3) Station, platform, warehouse, transfer, dock, store-room stock-room, and team track freight or material handlers or truckers, and others similarly employed; sealers, scalers, fruit and perishable inspectors, stowers, stevedores, callers, leaders, locators, coopers, and others similarly employed; and laborers employed in and around stations, offices, store-houses and warehouses, and stock yard laborers.

" * * *.

"DEFINITION OF CLERK—RULE 2. Employees who regularly devote not less than four hours per day to the writing and calculating incident to keeping records and accounts, dictating letters, vouchers, bills, statements, and reports, and similar work including employees who examine or verify such work, shall be designated as Clerks.

"The above definition shall not be construed to apply to:

"(1) Employees specified in Paragraph (2) Rule 1 nor to

"(2) Employees specified in Paragraph (3) Rule 1."

"RATES OF PAY—RULE 83. Established positions shall not be discontinued and new ones created under same or different titles covering relatively the same class of work serving the purpose of reducing the rate of pay or evading the application of these rules."

POSITION OF EMPLOYEES.—Employees contend that the action of the carrier is contrary to and in violation of the agreement cited; that the duties performed on the position in question are exclusively clerical duties, as specified in Rule 1 and defined in Rule 2; that clerical duties continued to exist in the same manner, volume, and character as they existed prior to December 14, 1931; that the rendition of this clerical work is accomplished by the carrier through an employee who holds no seniority rights thereto; that there was no change in the operations at West Memphis Agency either generally or in any real detail; that the responsibilities and duties which constituted the substance or essence of the Cashier's position were not abolished but merely assigned to another employee who held no seniority rights under the Clerks' Agreement.

POSITION OF CARRIER.—Carrier contends there was no violation of agreement, as it has been a universal practice, recognized by both parties, before and subsequent to first agreement with Clerks' and Telegraphers' Organizations, to have agents and telegraphers covered by the Telegraphers' Agreement to perform any and all clerical work, in addition to their duties as telegraphers.

OPINION OF BOARD.—The Board is of the opinion that Rules 1 and 2 of the Clerks' Agreement are definitely applicable and that the position of cashier was a clerical position within the meaning of Rule 2 hereinbefore quoted. There was in connection with the position of cashier more than four (4) hours per day of clerical work. Such work constitutes a clerical position. The rule is well stated by Referee Corwin in Award No. 322:

"In order to be fair to the management, we believe that if it can prove that more work was consolidated than is indicated by the only definite evidence we have before us, it should be credited therewith. Under Rule 2, Clerks of the character of those involved are entitled to classification and protection of the agreement if they devote not less than four hours a day. We feel that in an adjustment of our award between the Brotherhood and the carrier the latter should be allowed the transfer of one employee for each four to eight hours of service per day of substantial regularity * * *."

The only question remaining is whether or not Rule 83 has been violated by the carrier. We hold that it has been violated.

The record in this case discloses that the duties required to be performed on the position in question were on and after December 14, 1931, almost identically the same as those required to be performed prior thereto. The duties set out in the Bulletins contained in the record are not duties covered by the Telegraphers' "Scope Rule." Rather they are duties which fall within the meaning of Clerical work.

Our conclusion is that when the position in question was bulletined, and assigned as Cashier-Operator under the Telegraphers' Agreement, the char-

acter of work or assigned duties were substantially the same as they were when it was classified as Cashier under the Clerks' Agreement. Therefore the action of the carrier was a clear violation of Rule 83.

We recognize the possible conflict between various agreements a carrier may have with different Brotherhoods. Apparently in this situation there is some alleged conflict between the effect of the Telegraphers' Agreement and the Clerks' Agreement. Assuming for purposes of argument that the Telegraphers' Agreement both authorizes and requires the action of the carrier in this matter the carrier cannot be excused for violation of the Clerks' Agreement. We cannot agree that such agreements are not analogous to contracts. The negotiations between the carrier and each of the Brotherhoods are negotiations directed toward several separate and distinct agreements. In analogy to the theory of contracts in law each agreement imposes upon the respective parties duties entirely separate and distinct from the duties imposed by another contract. There is no overlapping and none of these agreements can be interpreted in order to avoid the effect of another. Therefore the carrier's violation of the Clerks' Agreement cannot be excused on the basis of any duties imposed by the Telegraphers' Agreement.

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 the position in question is, in fact, a clerical position and one which is covered by the scope of the agreement between the parties hereto, that Rules 1, 2, and 83, were violated by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary.

Dated at Chicago, Illinois, this 22nd day of April, 1937.

DISSENT ON DOCKET CL-377

The positions of the respective parties are only briefly related in the award, but the facts of record undeniably show that the practice and custom of years' standing on this property in respect to the action of the carrier, which resulted in this claim, were not contested by the employees until this claim was presented.

The best evidence of the intent of parties to agreements is the conduct of the parties under agreements, and the long practice and conduct of the parties in respect to the issue here involved definitely established their mutual interpretation of the rules. This the referee has set aside completely, without any indication in the award as to reasons therefor. The acquiescence of the employees to the practice and customs over a long period of years, is conclusive evidence of admission on their part that there was no violation of agreements between the parties.

Williston on Contracts, Volume 2, page 1206, states:

"The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered."

The above principle is accepted by the courts; to cite only one instance, the Kentucky Court of Appeals, in a case involving the meaning of a certain rule in an agreement which had been in effect for many years and had been applied while in prior agreements, by the acts and conduct of both the organization and the management, held that the practical interpretations as made by the

parties themselves was controlling; the court used the following language (92 SW (2nd) 749):

"* * * it must not be overlooked that railroad men speak a language of their own, and that the terms which they employ in their agreements with the carrier are not always intelligible to the uninitiated, but have a technical meaning which those charged with the duty of construction must seek and ascertain by putting themselves in the place of the men. Because of this ambiguity and uncertainty in meaning, the rule of practical construction by the parties is peculiarly applicable to such agreements * * *."

The award in this case is not justified by the facts in the record.

A. H. JONES.
J. G. TORIAN.
R. H. ALLISON.
GEO. H. DUGAN.
C. C. COOK.