Award Number 450
Docket Number CL-410

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

John P. Devaney, Referee

PARTIES TO DISPUTE:
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
GULF COAST LINES

STATEMENT OF CLAIM.—

"Claim that Carrier violated the Clerk's Agreement in December 1935 by assigning clerical work to employees not covered by said Agreement and failing and refusing to assign such clerical work to employees holding seniority rights thereto under the rules of the Clerks' Agreement; also, claim of employes for all wage losses sustained as a result of such agreement violation at Mercedes, Texas."

STATEMENT OF FACTS.—Mercedes is located in the lower Rio Grande Valley of Texas. The business of the carrier at this point is seasonal, due to the movement of fruit and vegetables. This movement begins in the early fall and continues until about the middle of June each year. The force of station employees at this station varies with the volume of business available.

In 1929 there were about five clerks employed at Mercedes. During the fruit and vegetable season it was the custom to put on one additional telegrapher and from one to three additional clerks.

Beginning the year 1931 the force was reduced, leaving only one regular clerical position and two telegrapher positions.

In 1935 two additional telegraphers were put on during the fruit and vegetable movement, which made one clerk and four telegrapher positions. This was the first time that two additional telegraphers had been put on during the regular fruit and vegetable movement.

Two of the telegrapher positions overlapped for a period of four hours and two overlapped for a period of three hours. Telegraphers are doing clerical work. There is in evidence an agreement between the parties bearing effective date of December 1, 1926.

POSITION OF EMPLOYEES.—When the additional telegraphers were put on at Mercedes the organization protested the assignment of clerical work to them as being in violation of the rules of our agreement, and called the carrier's special attention to the "overlapping" of the hours of assignments, during which time one telegrapher spent his entire time performing clerical work and the other telegrapher a majority of his time performing like work. The Superintendent stated that it was necessary to "overlap" the hours so that a telegrapher would be available for telegraph service while the other telegrapher was outside checking cars, making switch lists, and sealing cars, which work is strictly clerical.

The organization requested the Superintendent to join in making a check of the duties of the positions in dispute to determine what the exact duties and requirements were. The Superintendent refused to join in the check. The organization then made a detailed check of the work performed on a minute basis for a period of 24 hours, beginning at 8:35 A. M., February 18, and ending at 8:35 A. M., February 19, 1936. This check showed that the Agent-Telegrapher spent 15 minutes telegraphing during his tour of duty. The next telegrapher did 1 hour and 5 minutes of telegraphing, the next 25 minutes, and the last only 9 minutes. The remainder of their work was strictly clerical work.

Rule 1 of our agreement is the scope rule. It sets out the employees that are covered, and specifically "spells out" those that are not covered. This rule places all clerical work under the agreement except that which is set out in the excep-

tions to the rule. Had it been contemplated that such positions as those now in dispute were not to be covered by the agreement, then such positions would certainly have been mentioned in the exceptions. The carrier violated this rule when it assigned the clerical work at Mercedes, Texas, to employees covered by another agreement, and denied clerical employees, holding seniority on that seniority district, the right to bid on the positions and perform the work.

Rule 2 defines clerks and the other employees covered by the agreement. In this definition you will note that such employees as are not to be considered as clerks are specifically mentioned. Rule 1 states that the agreement covers clerks, etc., and Rule 2 defines those employees who are clerks; therefore, the carrier in refusing to assign the clerical work to clerks violated Rules 1 and 2. This Honorable Board, in Award 147, upheld the principle that employees should be classified in accordance with the majority of the work they perform. This principle applied in this instance supports our contention that the carrier acted in violation of the rules of the agreement in refusing to bulletin these positions to, and fill them from, the clerical employees holding seniority in this seniority district.

Rule 10 provides for the bulletining of new positions and vacancies to the employees in the seniority districts where the position or vacancy is located. The Carrier was requested to do this, but declined, thereby depriving the clerical employees of the positions.

Rule 19 provides for the return to service of employees in their seniority order when forces are increased. The rule was disregarded when the positions were filled by other employees from a different class and who held no seniority as a clerk.

Rule 76 provides that established positions shall not be discontinued and others created in their place for the purpose of evading the rules or reducing the rate of pay. A review of the change made in the force at Mercedes will disclose that this rule has been violated—that clerical positions have been abolished and new ones created, performing relatively the same class of work, for the purpose of evading the rules of the Clerks' Agreement.

Rule 82 provides the method of changing the provisions of the agreement, and if the carrier desired to remove this work from the scope of the agreement they should have handled in accordance with Rule 82. Instead they merely ignored the rules and arbitrarily took the work from under our agreement and turned it over to another craft.

POSITION OF CARRIER.—The assignment of the employees at Mercedes, Texas, by the officials of the carrier is necessary to meet the requirements of the service and was made in line with the agreements which we have made with the different organizations affected. In making the assignment the same was done without violation of any of the agreements in effect on the property.

The management reserves the right to determine what force is necessary to carry on the business of the company and does not recognize the right of any organization to dictate to it in such matters.

The three telegrapher-clerks assigned at Mercedes are properly classified as coming under the telegraphers' agreement and employes listed as coming under the purview of the telegraphers' agreement were assigned. We have an agreement with the Order of Railroad Telegraphers that telegraphers may be required, in addition to their telegraphic duties, to perform clerical service. It is the contention of the carrier that the assignment of the force at Mercedes was proper and that the agreement with the Brotherhood of Railway Clerks was in no way violated.

OPINION OF THE BOARD.—The material facts in this case are not in dispute. They apparently are substantially as contended by the employees.

It is the opinion of the Board that the carrier is violating the Agreement by refusing to assign clerical work to employees covered by the Clerks' Agreement.

The subject matter of the Agreement between the Brotherhood and the carrier is the performance of clerical work. This is so clear as to require no extended discussion. It is unnecessary to detail the various Rules which might be considered particularly applicable. It is sufficient to state that the Agreement itself covers work of this kind.

We do not assume to state that no incidental clerical work could be done by other than clerical employees, but on the facts in this case there is no question but that the amount of clerical work involved is clearly within the Clerks' Agreement. It appears to be uncontroverted that the clerical duties performed by the so-called Telegraphers require in each case over seven hours per day,

while the telegraph work done by these same telegraphers requires considerably less than two hours per day. Therefore, there is no question involving Rule 2 of the Agreement, which defines clerks as employees who devote not less than four hours per day to keeping records, accounts, etc.

We do not overlook the hardship that may be imposed upon the carrier because of the effect of the Agreement with another Brotherhood such as the Order of Railroad Telegraphers. There is no doubt that in many cases requirements of Agreements with different Brotherhoods, impose upon a carrier certain hardships in particular instances where there is not enough work to employ full time men under each Agreement. However, this is a matter that cannot be solved by violating one agreement in order to abide by another. The solution lies rather in proper conferences and agreements with the respective Brotherhoods. Such conferences should be held with a view of reaching an amicable and reasonable result which would impose no hardship upon either side. It is, however, not within the province of this Board to uphold one such agreement and at the same time strike down the other. When such Agreements are fairly made this Board can but construe them. We cannot excuse the violation of the terms of one agreement by invoking the terms of another.

Such agreements are analogous to separate contracts and the parties themselves must adjust the hardships resulting from overlapping.

We have no alternative but to sustain claim of employees.

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 the carrier is violating the current Clerks' Agreement by assigning clerical work to employees not covered by said agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 1st day of June, 1937.

DISSENT ON DOCKET CL–410

The Referee, in his opinion and award, totally disregards the clear intent and purpose of the agreements in effect, and the practices and customs of long standing under said agreements.

From the earliest history of the transportation industry, telegrapher-clerks and other employes covered by the Telegraphers' Agreement have performed clerical work, and this practice was well known and understood by the parties when entering into agreements. As each succeeding agreement was written and took place of the former agreement, the parties knew of the recognized practices under the preceding agreement, and brought forward the same or similar rules in the succeeding agreement. At each schedule negotiation the parties knew and understood the practices which had prevailed under the former agreements, and knew that those practices would continue under the new agreement unless specifically changed.

Those practices and the acts and conduct of the parties constituted an interpretation of the agreements, and the interpretation thus placed upon the contracts and rules by the parties to the agreements by their acts and conduct thereunder is evidence of the greatest probative value as to what the parties mutually intended the contracts to mean.

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 has been in effect for many years and has been applied while in prior agreements by the acts and conduct of both the organization and the management, held that the practical interpretation 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 record is clear that no positions coming under the Clerks' Agreement were abolished when the carrier put on two positions of telegrapher-clerk. When business increased, requiring additional telegraph service, the carrier put on two telegrapher-clerks, this being in accordance with their practice and custom of years' standing, and these telegrapher-clerks clearly came under the provisions of the Telegraphers' Agreement. There can be no question of the right of the carrier to augment its force in this manner, as is clearly indicated by not only the practice on this property, but also by innumerable precedents which were presented to the Referee.

The rule in the Clerks' Agreement giving "Definition of Clerk" as devoting "not less than four hours per day" to work requiring clerical ability was for the purpose of distinguishing such employes coming under the Clerk's Agreement from other employes referred to by that rule and listed in the agreement whose work did not require clerical ability. This is an undeniable fact as is evident from the history of negotiations of the respective agreements with the telegraphers and with the clerks, the former antedating the latter by many years. The telegraphers, prior to the time of existence of any agreements and continuing throughout the years of their existence, until a current decision by the referee acting in the instant case, have devoted to clerical work any number of hours in excess of four hours or otherwise, which could be made available outside of their actual telegraphic work without violation of the provisions of the Clerks' Agreement or other agreement. Nor has any violation or infringement of the four-hour rule or other provision of the Clerks' Agreement been indicated through an award by any tribunal during all of those years.

The Referee seeks to construe the agreement applying to clerical employes as constituting a guarantee that all positions requiring four or more hours of clerical work during the majority of the working days of the month as being guaranteed to exclusive clerks. Such a conclusion cannot be justified under any logical, fair, and unbiased construction of the agreement. It thoroughly ignores the fact that telegrapher-clerks have, for many years prior to the carrier entering into any agreement with the clerical employes, performed clerical work in addition to telegraph duties, and when the carrier entered into the agreement with the clerical employes this was as well known to the clerical employes as it was to the carrier.

It cannot be said, with reason, logic, or justice, that it was the intention of the parties in entering into the agreement of December 1, 1926, to change a practice that had been in effect for many years. Had this been the intention of the parties, they would have written a rule providing that all clerical work, which regularly required more than four hours per day, would be performed by exclusive clerks.

An Agreement is merely an expression of the intent of the parties, and the very best evidence of their intent is their conduct under the agreement. The opinion and award totally disregard the rules, practices, and customs in effect on this property, and are nothing less than the writing of a new rule, a power which this Board does not possess under the law.

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