Award No. 735
Docket No. CL-721

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: "Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that

"1. The Carrier violated the Current Clerks' Agreement when it failed and refused to permit the following named employes to perform work and be paid on the days stipulated:

James B. Burke, Foreman	— Dec. 27, 28, 29, 30, 31 — 1937 Feb. 7, 8, 9, 10, 11, 12 — 1938
Frank Brynda, Clerk	— Dec. 27, 28, 29, 30, 31 — 1937 Feb. 7, 8, 9, 10, 11, 12 — 1938
Thomas J. Burke, Stockman	— Dec. 27, 28, 29, 30, 31 — 1937 Feb. 7, 8, 9, 10, 11, 12 — 1938
Albert L. Thornton, Stockman	— Dec. 27, 28, 29, 30, 31 — 1937 Feb. 7, 8, 9, 10, 11, 12 — 1938

and

"2. That said employes shall be reimbursed for wage losses suffered on said dates."

EMPLOYES' STATEMENT OF FACTS: "James B. Burke, seniority date 10-18-22, is the regular incumbent of position classified and rated as Foreman at $5.50 per day.

"Frank Brynda, seniority date 11-15-23, is the regular incumbent of position classified and rated as Clerk at $4.97 per day.

"A. L. Thornton, seniority date 2-26-23, is the regular incumbent of position classified and rated as Stockman at $4.60 per day.

"Thomas J. Burke, seniority date 11-6-23, is the regular incumbent of position classified and rated as Stockman at $4.60 per day.

'The real controversy in the case is as to whether the carrier when work becomes slack can temporarily abolish weekly guaranteed work for a few days in order to escape payments under the guarantee and thus avoid the rule.

'The right of the carrier to abolish a position is recognized in all schedules but it is not, so far as we know, very definitely defined. It has always been recognized as existing when a reduction of force is necessary by means of the disappearance of work, except of a very temporary character, which the rules unquestionably contemplate. But it must be exercised with due respect to other rules, the reason for the enactment of which is to assure the employes some stability of employment. Clerks of the class involved in this dispute formerly worked largely on a monthly basis. Rule 3 of the schedule altered that but its concluding paragraph provides that the working days of employes covered shall not be reduced below six per week except by holidays. Evidently this was intended to guarantee the integrity of at least a week's employment.'

"The organization admits that the employes were notified by the Storekeeper that they were to be laid off. That expression is the common one for furlough, in other words 'laid off' and 'furloughed' mean the same. We again insist that a furlough is a furlough whether or not its duration is known and that any furlough equaling or exceeding six days is not a violation of the guaranty rule under any conditions. Apparently, Referee Corwin is of the same opinion.

"Aside from the issue involved, we protest the inclusion of the claims of the two stockmen as they are not even covered by Rule 53, which is limited to the employes included in paragraphs (a) and (b) of Rule 1. They come specifically under paragraph (c) of that rule.

"The provisions of Rule 53 must be construed and interpreted in conjunction with other provisions, including those relating to furloughs; in other words, Rule 53 does not modify or abridge the provisions of the furlough rule, which gives the management the right to reduce forces when they are not needed. It simply guarantees employes retained in the service six days' work per week."

OPINION OF BOARD: The record in this case shows that the Brooklyn shops were closed for the entire week commencing December 27, 1937, and for the entire week commencing February 7, 1938. During the same period the carrier furloughed the entire force of employes at its Brooklyn Storeroom adjoining its shops that come under the provisions of the Clerks' Agreement with the exception of the Chief Clerk.

Carrier contends the employes were furloughed in accordance with Rule 19 of the agreement which is as follows:

"RULE 19. Reducing Forces.—When reducing forces seniority rights shall govern. When forces are increased, employes shall be returned to service in the order of their seniority rights. Employes desiring to avail themselves of this rule must file their addresses with the proper official at the time of reduction, advise promptly of any change in address and renew address each ninety (90) days. Employes failing to renew their address each ninety (90) days or to return to service within seven (7) days after being notified by mail or telegram sent to the address last given or give satisfactory reason for not doing so, will be considered out of service."

It is necessary to abolish positions when reducing forces to give employes any rights under, or in fact any meaning at all to, the first sentence which is the very heart of this rule. Moreover neither Rule 19 nor any other rule of the agreement gives to the Carrier authority to furlough employes. Con-

sidered in its entirety the agreement may be said to condemn the practice. Seniority generally governs throughout and no provision is made anywhere in the agreement for distribution of work among employes.

The record in this case shows that the positions held by the employes involved were not in fact abolished. They continued to exist and the employes returned to and assumed their respective duties on the positions after each lay-off. Therefore, technically, the lay-offs in question were made in violation of the terms of the agreement.

Carrier in substance contends that should it be found that the procedure followed was not a technical compliance with the terms of the agreement, nevertheless the practice followed was in complete accord with past practices for a long period under the same rules in the same agreement, which either amounts to a modification of the agreement or an estoppel against the employes asserting any claims for its violation.

The record shows that the Brooklyn Storeroom constitutes a separate seniority district and employes at this storeroom hold point seniority and do not have seniority at any other point. The entire force of employes at this storeroom coming under the Clerks' Agreement consists of the four furloughed employes and the position of Chief Clerk. The four furloughed employes involved alone held rights to return to the positions they occupied. The record further shows the Brooklyn shop was previously closed for a week at a time during the following periods:

(1) Christmas, week of 1930.

(2) The last full calendar week of each month from May to September, 1931.

(3) Every other week from October, 1931 until February, 1933.

(4) Every other week from April, 1933 until October, 1934.

In every instance mentioned above, the storeroom forces were furloughed without any protest ever being made as to the method employed to meet the situation. While it may be said that such acquiescence in the practice followed is evidence of satisfaction with the method used, it does not amount to a modification of the agreement. In agreements of this character more conclusive proof is required than evidence of mere acquiescence in practices followed to warrant a finding that an agreement has been modified. Definite proof is required of an understanding between the parties that **for the future** such practices may be continued. There is no evidence of any such understanding in this case. In fact this controversy is evidence to the contrary. Unquestionably the employes have the right to insist upon compliance with the terms of the agreement in the future as they are now doing.

There is some merit to the carrier's contention that the employes are estopped from asserting claims for compensation for the two periods they were furloughed. However, an examination of the decisions of this Board discloses that acquiescence in past practices of a carrier is not recognized as alone sufficient to defeat a claim for compensation where there has been a clear violation of the terms of an agreement as in this case. No other facts are shown by the record that would warrant the application of the doctrine of estoppel and the claims for wage losses will be sustained.

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 carrier violated the agreement as claimed by the petitioner.

AWARD

Claims (1 and 2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of October, 1938.

DISSENT ON AWARD 735—DOCKET CL-721

I dissent from the award because it honors words instead of substance, ignores the contract's terms, and gives no effect to the practices of the parties which have given meaning to their undertaking, and in result adds new conditions to the contract having the effect of an amendment thereto.

The employes' claim is bottomed on Rule 53:

> "Employes contend carrier violated Rule 53 and should, therefore, be required to reimburse employes for wage losses as stipulated in this claim."

No other foundation for the claim is set forth. Award 332, cited by the employes, held such a rule as Rule 53, here involved, at most was only "intended to guarantee the integrity of at least a week's employment"; and, accordingly, to sustain the claim it was necessary to find a basis therefor not only not adopted by the employes, but which would never have occurred to them for the reason that it is so foreign to anything in the contract and practices that have long prevailed on this road and others, and even foreign to common sense.

I now analyze the process of arriving at the conclusion which is criticised.

Rule 19 is made the basis of the opinion. It relates to reducing forces, or, as the carrier styles it, "furloughing employes." The term "furlough" is well understood among railroad men to mean release of employes for a temporary or indefinite time because positions formerly occupied by them are temporarily or indefinitely without function to perform and are therefore temporarily or indefinitely abolished. The contract and the law do not require the carrier to say any particular words or phrases to accomplish such indefinite or temporary abolition of positions. The railroad world is a practical one and not one operated by pronouncement of mystic formulas or set phrases. The referee in effect says that because the carrier has used the word furlough, which is well understood by all to mean just what is contemplated by Rule 19, instead of using some other word, the contract has been violated though in substance every requirement of Rule 19 appears. The referee says:

> "Moreover, neither Rule 19 nor any other rule of the agreement gives to the carrier authority to furlough employes."

With this I most emphatically disagree.

I challenge next the statement,

"Considered in its entirety the agreement may be said to condemn the practice."

This bald conclusion is reached without any attempted express analysis of the contract, and with reference to an agreement which cannot be analyzed fairly and judicially in such a way as to support such a conclusion. Indeed, "considered in its entirety," the agreement demonstrates that the carrier is not only not forbidden to do what it did, but expressly permitted such action.

Rule 19 provides that forces shall be reduced in accord with seniority, and when increased shall be increased in accord with seniority. These sole requirements were observed by the carrier.

There is no basis in the record to support the conclusion that the positions held by the employes were not in fact abolished. There was no work for them to do. In substance they were temporarily abolished and were recreated when there was work to perform.

Before considering the effect of practice, I desire to challenge a fundamental error which is made by the referee in stating that,

"Moreover, neither Rule 19 nor any other rule of the agreement gives to the carrier authority to furlough employes."

I have already stated my disagreement with his interpretation of the contract, but the reason for the statement just quoted can only be a basic misconception of the governing law.

Prior to the making of a contract between employer and employes, and under legislation requiring negotiations for contracts, the employer was and is perfectly free to conduct its business as it sees fit. Only to the extent that it has restricted itself by contract, (which is encouraged by law but not compelled—Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515)—is the carrier limited in what it may do in the performance of its work. It is only in the event that the contract forbids furlough that the carrier has violated any right of the employes in furloughing them. As pointed out above what was done in substance is not only not prohibited, but is expressly permitted by Rule 19 and in strict accord with every limitation imposed either by Rule 19 or Rule 53.

The action of the carrier complained of by the employes is just such action as has been followed since 1930 and so acquiesced in by the employes that the referee finds, and the evidence is undisputed, that their conduct was "evidence of satisfaction with the method used"; but he disposes of this showing by a holding that such practice was not sufficient to constitute a modification of the agreement. In so holding the referee has set up and answers an argument never made to him and not advanced by the carrier. At the same time he has evaded a contention which is controlled by plain law. That contention is briefly:

(1) That the contract is a technical one in a technical field;

(2) That if the language is not clear, as I contend, certainly my contention is not without reasonable support, and there is no absolute certainty to be derived from the language to support the referee's holding; and

(3) That under circumstances outlined in either (1) or (2) above, the practice of the parties is necessarily determinative.

The technical nature of the contract is perfectly apparent from its examination and from even a slight knowledge of the field which it covers. Further, I am persuaded that the language, which to me has only one mean-

ing, does not have to the judicial mind an undoubted contrary meaning. Under such circumstances the following rules of law are controlling.

In the leading American authority on contracts, Dr. Williston, Section 618, primary rules of interpreting a contract are given as follows:

> "1. The common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to it.
>
> "2. Technical terms or words of art will be given their technical meaning, unless the context or local usage shows a contrary intention.
>
> "3. The writing will be read as a whole, and every part will be construed with reference to whole.
>
> "4. The circumstances under which a writing was made may always be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made; and all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract."

Under Section 619, Dr. Williston states that if after applying the four primary bases above given it is still uncertain what the contract means, the following rule may be applied:

> "5. The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court."

Under Section 648, importance of usage or custom in construing contracts is discussed, and the conclusion is drawn that usage or custom may be important to construction in two different ways here pertinent:

> "1. To aid in the interpretation of the meaning of the express language of a contract;
>
> "2. To annex terms to the contract, and thereby to contradict or vary implications which, otherwise would be drawn from the written or oral expression of the parties."

In Volume 12 of the recently published work **American Jurisprudence,** now only partially complete, Section 249, the authors say:

> "Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled them to resort to law and one of them seeks an interpretation at variance with their practical interpretation of its provisions."

The particular application of the foregoing principles to the field of railroad contracts is established in two typical cases which are here quoted:

In **Burton** v. **Oregon-Washington R. R. & Nav. Co.,** 148 Ore. 648, 38 Pac. (2d) 72, 73-4, the court says:

> "The schedule under consideration is couched in the language of railroad men. Some of its terms are meaningless to persons not engaged in, or familiar with, railroad operations. Hence, when courts are called upon to construe such agreements or schedules, they are often compelled to resort to parol evidence in order to ascertain what the contracting parties had in mind. How did the parties themselves construe the schedule? How was it applied in the actual operation of the railroad? Did the terms used have a meaning peculiar to such business? These are questions with which this court is concerned."

And in **Piercy** v. **Louisville & N. Ry. Co.**, 198 Ky. 477, 248 S. W. 1042, 1045, the court says:

"(2) These seniority rights provided for in interdivisional service are provided for in such an ambiguous, uncertain, and remote manner as that we must be driven to a well-known rule of interpretation in ascertaining what was meant thereby. That rule is that, when the language of a contract is so remote, uncertain, and ambiguous as that its meaning may not be readily discerned, the courts, in interpreting it, will give to it such meaning as the parties themselves have given to it in operating or acting under it, and we may, without exaggeration, say there is, in interpreting such ambiguous writings, no safer rule for the courts to follow.

"(3) Guided by that rule, we have for a long number of years, before the seniority rights became effective, these trains operated by six Kentucky division conductors and three Knoxville division conductors, the two senior conductors on the Kentucky division were assigned to these desirable fast day trains, and the one senior conductor on the Knoxville division also assigned thereto, and we find, in the operation of the other trains from Cincinnati to Knoxville, two Kentucky division conductors assigned on each run and one Knoxville division conductor, and evidently they were all assigned according to their seniority. This situation continued throughout the period of partial recognition of seniority, and thereafter continued during the period of full recognition of seniority.

"From these admitted facts it is apparent that the quoted section has been construed by the parties acting under it to mean that, inasmuch as the mileage on the Kentucky division is approximately two-thirds of the total mileage, and the mileage on the Knoxville division is approximately one-third of the mileage, and it required nine conductors to run these series of trains from Cincinnati to Knoxville over these two divisions, that there would be assigned to each pool of these trains two conductors from the Kentucky division and one conductor from the Knoxville division, and those assignments made from the respective divisions according to their seniority. Notwithstanding this long course of conduct and action clearly showing a contemporaneous construction, by the order here complained of, the three Knoxville division conductors entitled to assignments on these runs are all required to take the undesirable night runs, and the more desirable day runs are given wholly to the Kentucky division conductors, and all this without reference to the rule of seniority."

As before stated, we have never contended that there was a novation, but merely an interpretative practice and usage which gave a meaning to the contract, not inconsistent with any of its terms, but perfectly consistent with both its language and purpose. The intent of the parties, if not textually clear to all as it is clear to me, is placed beyond controversy by the legally determinative acts of all parties who contracted and who best of all people knew the meaning and object of the terms they employed.

It is not our function to add to or take anything from agreements; indeed, that function is to us prohibited (Award 42). I submit that the Referee's opinion goes beyond our jurisdiction and necessarily violates the governing law.

In passing I desire to protest the statement,

". . . an examination of the decisions of this Board discloses that acquiescence in past practices of a carrier is not recognized as alone sufficient to defeat a claim for compensation where there has been a clear violation of the terms of an agreement."

There has been no violation of the terms of the agreement in this case; I have no way of knowing what awards are referred to; but in my opinion if such awards result as does this award, they and it are beyond the authority conferred upon us by law, and void.

/s/ J. G. TORIAN

We concur in this dissent.

/s/ R. H. ALLISON
/s/ A. H. JONES
/s/ GEO. H. DUGAN
/s/ C. C. COOK