Award No. 737
Docket No. CL-706

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. De Vane, Referee

PARTIES TO DISPUTE:

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

TEXARKANA UNION STATION TRUST

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

(1) Carrier is and has been violating agreement rules by abolishing, and refusing to maintain, regularly established and assigned positions of Mail Handlers and in lieu thereof requiring and assigning Mail Handlers to work regularly and be paid less than 8 hours per day;

(2) Carrier is and has been violating agreement rules by requiring and assigning employes to work split shifts, and

(3) That such employes shall now be paid for all time computed from original starting time or time required to report for work to time of final release each day, less meal period, with a minimum of eight (8) hours per day for each day worked or entitled to work, retroactive to April 15, 1937."

EMPLOYES' STATEMENT OF FACTS: "(1). Prior to April 15, 1937, all but thirteen (13) regularly established and assigned positions of Mail and Baggage Handlers at Texarkana were abolished.

"(2). In lieu of maintaining established positions with assigned starting time and hours of service and assignment of employes to such positions, the Carrier required all but thirteen employes of its Mail and Baggage Handling force to report daily at a regular and fixed starting time.

"Employes were not permitted any discretion with respect to reporting for work, or holding themselves available for work at the time or times each day stipulated by the Carrier.

"Employes were required to secure permission from the General Foreman to lay off or not report for duty at time or times stipulated by the Carrier.

"In support of allegations above recited in this Item 2, we quote below Bulletins issued by Station Master Griswold under dates of January 24, 1935 and June 2, 1937:

and a General Chairman for the Clerks on that railroad, we went to the trouble of showing him the necessity for the part-time rule due to the fluctuation in the amount of mail handled from day to day.

" 'Exhibit D' attached is the statement which we went over with Chairman McDonald at the conference. It shows the number of part-time men worked on Monday, October 25th, and the number of hours worked, as well as the spread, compared with the following Monday, November 1, 1937.

"This statement also shows the comparison for a two-week period, October 25th to 31st, inclusive, and November 1st to 7th, inclusive, 1937, from which it will be noted that there is a considerable difference even on the same days of consecutive weeks as to the number of hours necessary to work part-time men, as well as the fluctuation from day to day.

"This statement also shows the schedule time of trains, as well as the number of regularly assigned men November 8, 1937, the day prior to the check, and the regular number of assigned men November 10, 1937, the day following the check, when the regularly assigned men were increased five. This statement being gone over with General Chairman McDonald at conference of November 17, 1937."

OPINION OF BOARD: The question presented by this case has been a matter of dispute between the parties for many years. The record shows that in 1923 carrier changed the basis of pay for baggage and mail handlers from a daily to an hourly basis. Then in October 1930 carrier put part of the baggage and mail employes on short hour assignments. Protest of this latter action of the carrier led to the cancellation by the carrier, effective September 5, 1931, of the agreement under which the employes at the Texarkana Union Station were then working. At the same time a new agreement was proposed by the carrier which was not acceptable to the employes and the services of the U. S. Board of Mediation were invoked by the Brotherhood apparently for the purpose of maintaining the status quo during the negotiation of a new agreement. A new agreement was negotiated and executed by the parties effective Sept. 8, 1933 which still remains in effect and is controlling in this case.

The question before the Board is what constitutes regular employment entitling those employes engaged in handling mail and baggage at the Texarkana Union Station to be classified as regular employes under the agreement.

The employes do not deny the right of the carrier to use part-time men in mail and baggage work. The carrier does not deny that under the agreement it is obligated to employ some full time or regular mail and baggage employes. The agreement however, contains no specific formula by which the parties may classify mail and baggage handlers as between full-time and part-time employes.

Petitioners contend that employes who are required to report daily at an assigned hour and who are subject to discipline for failure to do so are in fact "regularly assigned employes" as that term is used in the first paragraph of Rule 19, Article 5, of the agreement.

Carrier contends that it is required to employ only such full-time men as the exigencies of the service require and that it may fill out with part-time men to take care of the fluctuating business that cannot be handled by the regular force.

Carrier further contends that from the time the present agreement was executed, September 8, 1933, until the filing of this complaint its right to work as many part-time men as the exigencies of the service required had never been questioned. This contention should, of course, be considered in the light of the dispute, which existed at the time the agreement was executed, as to the rights of the carrier in the premises.

It is the opinion of the Board that the action or inaction of the parties upon the question in dispute following the execution of the agreement is of no force or effect in this case. The action of the parties in applying an agreement is valuable as an aid to its interpretation only in cases where the agreement itself is ambiguous. That is not the situation here as there is no dispute between the parties, as we have heretofore pointed out, as to the meaning of the agreement but only as to its application to a given situation. One party to an agreement is never estopped from demanding future compliance with the plain terms of an agreement merely because of inaction against the other party for past violations. Such inaction may and frequently does estop the party from claiming damages for such past violations but does not prevent insistence upon future compliance.

Coming next to carrier's other contention, when reduced to final analysis simply means that carrier contends that authority rests with it, under the agreement, to determine ex parte the number of full-time men that may be employed as mail and baggage handlers. The Board is of the opinion that no single rule or group of rules in the agreement gives to the carrier such broad authority. (See Awards 185, 330, 438 and 516). It must be kept in mind that this dispute had its origin when the carrier, in 1930, put part of the baggage and mail employes on short hour assignments. In the negotiations leading up to the agreement of September 8, 1933, carrier insisted upon retaining the right to work some of said employes on short time assignments and the right to do so clearly exists under the agreement. The right to use part-time employes however is not equivalent to the right to determine the number of such employes. In his letter of November 18, 1937, to Mr. E. R. McDonald, General Chairman of the Brotherhood, Mr. W. H. Tobin, who was then representing carrier in this dispute, accurately stated the yardstick to be used when he stated that the carrier is privileged, under the agreement, "to assign as nearly as practicable as many 8 hour continuous service jobs as the exigencies of the service require and employ as many part-time men as necessary." There is no disagreement between the parties as to the correctness of this interpretation of the agreement—they disagree only in its application.

The record shows that for the two weeks beginning October 25 and November 1, 1937, fourteen (14) employes were working full eight-hour assignments and that part-time workers varied from nineteen to thirty-five. On Mondays and Tuesdays the work is comparatively lighter than on other days of the week, which accounts for the large variation. On all other days the variation ranged from thirty to thirty-five.

Employes' Exhibit "M" shows that dividing the total hours worked during the weeks of October 25 and November 1, 1937 by the total men days worked gives an average of 7.288 and 7.489 hours work per man. Moreover, the record shows that work at the Texarkana Union Station is continuous during the twenty-four hours of each day. While the record shows that the number of employes fluctuates greatly during each twenty-four hours it is not convincingly shown that the "exigencies of the service" require the hourly staggering of the work in the manner it is now actually being performed.

There is no need to enter upon an extended discussion of what constitutes fluctuating or temporarily increased work, and when part-time forces may and may not be used. These questions are sufficiently covered in the cases cited **supra** and there is nothing in the record in this case that takes it out of the rule laid down by this Board in those cases, and they are considered controlling here.

Petitioners contend, as stated above, that employes who are required to report daily at an assigned hour and who are subject to discipline for failure to do so should be regarded as full-time employes and compensated as such. It may be found expedient to adopt such procedure for the future but it

would obviously be unfair to apply it to the past for the purpose of allowing compensation for time lost, etc. Ever since the agreement here under consideration has been in effect between the parties, carrier has asserted the prerogative of determining ex parte the number of full-time employes required. While never conceding the right of the carrier to do so, employes took no steps to correct the situation for more than four years after the effective date of the agreement. This inaction of the employes is important only because the question was in dispute and was not specifically covered when the agreement was executed and under the circumstances of this case the employes affected are not entitled to recover compensation, years after the agreement became effective, based upon administrative practices followed by the carrier in applying the agreement as it construed it.

The Board is of the opinion that under the agreement carrier is not privileged to determine ex parte the number of full-time employes that may be assigned to work as mail and baggage handlers at the Texarkana Union Station. The number of such employes is controlled and should be determined by the normal amount of work performed during each twenty-four (24) hours period and such portions of the force as are required to report daily at assigned hours and are used regularly should be classified as "regularly assigned employes" as that term is used in the first paragraph of Article 5, Rule 19, of the agreement and assigned and compensated accordingly—conditions beyond the control of the management, of course, excepted.

This opinion can best be carried out by returning this case to the parties for further study on the property. In reaching final settlement the parties will be governed by the opinion as to the application of the agreement and each party, we are sure, will endeavor to apply the agreement in accordance with the opinion of this Board.

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 claim of the employes is sustained as outlined in the Opinion of the Board.

AWARD

Claim sustained on basis of above findings and remanded for adjustment on the property within ninety (90) days, in accordance with the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of October, 1938.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION No. 1 TO AWARD No. 737
DOCKET CL-706

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Texarkana Union Station Trust

Upon application of the representatives of the employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Sec. 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The prevailing agreement in effect between the parties to this dispute authorizes the use of part-time employes at Texarkana Union Station to take care of the fluctuating business that cannot be handled by the regular force. The question presented for our interpretation is whether, under our former opinion and award in this case, such part-time employes as are used regularly should be classified as "regularly assigned employes" and compensated accordingly.

The language of the Opinion relied upon as chiefly supporting the contention that such part-time employes should be so classified and compensated is the following:

> "The Board is of the opinion that under the agreement carrier is not privileged to determine ex parte the number of full-time employes that may be assigned to work as mail and baggage handlers at the Texarkana Union Station. The number of such employes is controlled and should be determined by the normal amount of work performed during each twenty-four (24) hour period and such portions of the force as are required to report daily at assigned hours and are used regularly should be classified as 'regularly assigned employes' as that term is used in the first paragraph of Article 5, Rule 19, of the agreement and assigned and compensated accordingly—conditions beyond the control of the management, of course, excepted."

However, this language of the Opinion should be considered and its meaning determined in the light of other parts of the Opinion. At the very inception of its Opinion the Board pointed out that the extent to which part-time employes could be used in the mail and baggage work on this property had been a matter of dispute between the parties for many years which led to the cancellation by the carrier of the agreement under which this work was performed effective Sept. 5 1931. The Board further pointed out that the new agreement negotiated by the parties, which became effective Sept. 8, 1933, reserved to the carrier the right to use part-time men to take care of the fluctuating mail and baggage work which could not be handled by regular forces. The Board also found that the carrier had more or less arbitrarily determined the number of full-time men it would use and in the paragraph first quoted above held that it did not have such authority under the agreement but rather that the number of full-time employes should be determined by the normal amount of work performed during each twenty-four hour period. What was meant by this statement had already been made clear in a preceding paragraph in which the Board stated:

"Moreover, the record shows that work at the Texarkana Union Station is continuous during the twenty-four hours of each day. While the record shows that the number of employes fluctuates greatly during each twenty-four hours, it is not convincingly shown that the 'exigencies of the service' require the hourly staggering of the work in the manner it is now actually being performed."

As pointed out above, the prevailing agreement permits the use of part-time employes to help take care of fluctuating work which cannot be handled by the regular forces. The right of the carrier to use such employes is determined by the "exigencies of the service." The test is not whether the part-time employes are used regularly but whether the fluctuating work to be performed must be done at a particular time and cannot be handled by the regular forces within the time limitation imposed by the exigencies of the service.

While both parties to this controversy apparently assumed at the hearing on this case that a considerable part of the work at the Texarkana Union Station consisted of peak loads which had to be handled within short periods of time recurring with the arrival and departure of trains during each twenty-four hours, there is nothing in the record directly supporting this assumption. Moreover, what has transpired on this property since this case originated tends to refute the assumption. When this case was instituted fourteen regularly assigned mail and baggage handlers were employed, and part-time workers varied from nineteen to thirty-five with a daily average of twenty-eight. Today, full-time mail and baggage handlers vary from twenty on Mondays and Tuesdays to thirty-two on Thursday, Fridays and Saturdays, and the part-time workers vary from one to ten, with an average of four per day. No claim is made in this submission that the "exigencies of the service" will permit the creation of one or more regular positions to handle this remaining fluctuating work. We assume that this will be done if, and when, it becomes feasible to do so.

The Board sustained the claims of the employes as outlined in its Opinion and the Award remanded the case to the parties for adjustment on the property within ninety (90) days in accordance with the Opinion. The parties failed to reach an adjustment within said period whereupon the carrier put into effect the findings of the Board as interpreted by it. Petitioner contends that carrier should have taken this action immediately upon rendition of the award and has asked the Board to so interpret its Opinion.

While it was expected that the parties would adjust their differences in conformity with the Opinion of the Board as soon as practicable after the effective date of the Award, nevertheless they were allowed ninety (90) days within which to do so and it was not contemplated that penalties would begin to run until the matter had been adjusted and sufficient time had elapsed for carrier to put the Award into effect or, upon failure to adjust their differences, until after the expiration of ninety (90) days when it became obligatory upon the carrier to carry out the terms of the Award.

Referee Dozier A. DeVane, who sat with the Division, as a member, when Award No. 737 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of June, 1939.