Award No. 4277

Docket No. CL-4199

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN RR CO.; THE ST. LOUIS, BROWNSVILLE & MEXICO RY. CO.; THE BEAUMONT, SOUR LAKE & WESTERN RY. CO.; SAN ANTONIO, UVALDE & GULF RR CO.; THE ORANGE & NORTHWESTERN RR CO.; IBERIA, ST. MARY & EASTERN RR CO.; SAN BENITO & RIO GRANDE VALLEY RY. CO.; NEW ORLEANS, TEXAS & MEXICO RY. CO.; IBERIA & NORTHERN RR CO.; SAN ANTONIO SOUTHERN RY. CO.; HOUSTON & BRAZOS VALLEY RY. CO.; HOUSTON NORTH SHORE RY. CO.; ASHERTON & GULF RY. CO.; RIO GRANDE CITY RY. CO.; ASPHALT BELT RY. CO.; SUGARLAND RY. CO.

(Guy A. Thompson, Trustee)

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

(a) The Carrier is violating the Clerks' Agreement at Mart, Texas, by failing and refusing to assign the work of supplying cabooses to employes covered by the Clerks' Agreement. Also,

(b) Claim that Carrier be required to correct the violation by assigning the caboose supply work to employes holding seniority rights and working under the Clerks' Agreement in proper seniority district and at the rate of pay shown in wage agreement of District 22 for Caboose Supplymen. Also,

(c) Claim that all employes involved in or affected by the agreement violation be compensated for all losses sustained.

EMPLOYES' STATEMENT OF FACTS: Mart is a freight division point and all cabooses are checked and supplied before moving out of Mart. (Exhibits "H" and "M".)

The Carrier is having all cabooses supplied by employes who do not hold seniority rights and do not work under the Clerks' Agreement.

employes covered by the Firemen and Oilers Agreement were performing the work of supplying cabooses at Mart at the time the clerical employes negotiated their several agreements and the fact that the employes covered by the Firemen and Oilers were performing the work of supplying cabooses at Mart was known to the clerical employes when they negotiated their agreements, there is no basis for the contention of the clerical employes that they now be given this work to the detriment of the Firemen and Oilers.

CONCLUSION: The Carrier has shown that—

1. The work of supplying cabooses at Mart has always been performed by Mechanical Department employes.

2. This work is not included in the scope rule of the current and governing clerks' agreement although it was known by the Committee at the time this agreement was negotiated that it was being performed by Mechanical Department employes.

3. This work of supplying cabooses at Mart, having been continuously performed by employes of another class since 1902 and never having been performed by clerical employes and no complaint from the Clerks' Organization having been registered as to its performance by laborers covered by another agreement, is not work belonging to the Clerks' Organization.

Therefore, the claim in this case that the Carrier is violating the Clerks' Agreement in having this work performed by other than Clerical employes, that the work be assigned to Clerical employes, etc., is entirely without basis and should be denied in toto.

Exhibits not reproduced.

OPINION OF BOARD: Employes claim that the work of supplying cabooses at Mart, Texas, comes within the scope of their Agreement. Carrier claims that it does not and asserts that Clerks have never performed such work at Mart for about thirty years, that it has always been done by Mechanical Department employes, and argues that acquiescence by the Clerks over such a long period of time in that arrangement constitutes an admission that the work was not covered by the Scope Rule of said Agreement.

Of prime importance in the consideration of the issues raised by this claim is a determination of the question of whether or not the work involved is **clearly** within the provisions of the Scope Rule of the Clerks' Agreement. If there is any ambiguity in the rule or lack of convincing evidence of the clear intention of the parties in its writing then the claim must be denied, for it is a principle of such long standing as not to require the citation of authority, that the actions of the parties over a long period of time in the application of a rule whose meaning is not clear is the best evidence of the meaning to be attributed thereto. On the other hand, if the language or the meaning is clear and unequivocal, acquiescence in a practice over a long period of time does not operate to change or alter the rule and does not estop either of the parties from requiring present or future compliance therewith, although it may defeat a recovery for compensation because of past violations.

With these principles in mind we examine the record in this case. An examination of the Scope Rule reveals no description of work as such. However, work is incident to a position and therefore the Scope Rule has been interpreted to cover work which is incident to the positions therein listed. What was in the minds of the parties to this Agreement at the time the Agreement was entered into and was the work of supplying cabooses considered by them as incident to any of the positions mentioned in its Scope Rule? As to these questions the Carrier argues with some persuasion that the fact that mechanical employes were performing the work at Mart for many years indicates that it was not the intention of the parties that the work of supplying cabooses at Mart should be encompassed by the Scope Rule of the Clerks' Agreement.

As indicating that the work of supplying cabooses was encompassed by the Scope Rule of the Clerks' Agreement, the Employes introduce in evidence a letter dated August 8, 1938 from the Master Mechanic at San Antonio to the General Chairman of the Firemen and Oilers, in which it is stated:

> "The supplying of cabooses has been recognized over a long period of time as coming under the Clerks' Agreement, this being borne out by the fact that the classification of caboose supplyman is covered in the Clerks' Wage Schedule as far back as 1929."

and one dated May 24, 1939 from the General Manager of Carrier, also addressed to the General Chairman of the Firemen and Oilers, in which he states as follows:

> "The work of supplying cabooses belongs to store department laborers and is covered by clerks' agreement which became effective December 1, 1926, and renewed effective April 1, 1939. The fact that this work was improperly assigned to shop laborers does not establish their right to these positions, which is clearly borne out by the fact that at every other point on line store department laborers have been assigned, and were assigned at San Antonio until during the depression it became necessary to reduce forces to an absolute minimum and shop laborer was put on the job. The clerks' committee protested at that time and later agreed to allow this man to remain on job with the understanding that when position became vacant, store department laborer would be assigned."

This statement was reiterated in a second letter to the same person dated July 10, 1939. The Carrier asserts, however, that the General Manager was in error in his letter as is borne out by the fact that at the time the work at Mart and other places on the line was being performed by employes other than those covered by the Clerks' Agreement. As to specific places there is no doubt that the General Manager was in error but as to the general statement that the work belongs to store department laborers and is covered by the Clerks' Agreement, there is further evidence of the General Manager's concept of the Agreement. In 1941 a claim was made by the Clerks' Organization for the supplying of cabooses at Kingsville, Texas, and was denied by an official subordinate to the same General Manager, and in January 1942 he allowed the claim in conference with the General Chairman and stated in confirming letter to the General Chairman:

> "It was agreed in conference today that storehouse laborers would be assigned to supply cabooses and work in connection therewith * * *"

Now, if the General Manager were in error in 1939 he had a period of two and one-half years in which to discover and correct that error. It is significant to note that it was this same General Manager who negotiated the agreements then in effect. Those agreements also contained the same designation of Group 3 positions in the Scope Rule as is contained in the present agreement, to wit; "Laborers employed in and around stations, stores and warehouses."

It seems apparent from the interpretations placed upon the Scope Rule by Carrier's officials that it was clearly and unequivocally intended that the work of supplying cabooses was to be considered as incident to the position of store department laborers and hence encompassed by the Scope Rule of the Agreement. That being so, the long acquiescence of the Clerks in the practice at Mart would not estop them from obtaining present and future compliance with their agreement. This principle was apparently recognized by the Carrier in its disposition of the Kingsville claim for in that instance the work in question had been performed for a period of twelve years by Maintenance of Way employes.

Carrier has made the point that the work should not be taken from the jurisdiction of one class of employes and placed under the jurisdiction of another. Carrier asserts that it has a 1944 agreement with the Firemen and Oilers and that their representatives claim the work of supplying cabooses at Mart. Carrier is somewhat inconsistent in this contention for it appears from the record that the work in question was being done by Carmen as late as 1947 and further that in 1938 and 1939 its officers took the contrary position in correspondence with officials of the same Union.

In view of what has been said above it follows with respect to the claim herein that part "A" should be sustained, and part "B" sustained to the extent that the Carrier be required to correct the violation in accordance with the rules of the Agreement.

With respect to part "C" it is our view that considering the acquiescence by the Organization in the arrangement over such a long period of time they are estopped from claiming compensation, accordingly that part of the claim is denied.

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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of January, 1949.