Award No. 4513
Docket No. CL-4564

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

(Texas and New Orleans Railroad Company)

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

STATEMENT OF CLAIM: Claim of Senior available clerk—Dallas—Miller Yard, for wage losses sustained by reason of schedule work being farmed out by contract.

(The above description is used for identification only and is a description of the claim as submitted by the Organization to the Carrier, as shown in Carrier's notice of December 29, 1948 to Acting Secretary, Third Division, National Railroad Adjustment Board, serving notice of the Carrier's intention to file ex parte submission of the case with the Board.)

CARRIER'S STATEMENT OF FACTS: This case arises at Dallas, Texas, on the Dallas-Austin Division of this railroad.

On October 27, 1948, Superintendent at Ennis, Texas, received a claim from J. J. Jarvis, Division Chairman of the BofRC, dated October 25, 1948, claiming a day's pay for each senior available Clerk at Dallas-Miller Yard on each shift beginning October 18, 1948, because the Texas Delivery Service was handling the work of interchange of waybills from one railroad to another and handling mail from place to place at Dallas, Texas. This Carrier does not have any messenger service at Dallas and has for many years been served by contractors handling waybills and mail at Dallas. Division Chairman Jarvis did not elaborate on his reasons for claiming that a Clerk should be used as a Messenger Boy, nor did he establish in any way that such service was performed twenty-four hours per day.

Ten railroads operate into Dallas and joint messenger service is provided by the Texas Delivery Service for serving these ten railroads. This service requires two employes, each working approximately 8 hours per day within a spread of 9 hours. There is in general no messenger service provided between 12:40 A. M. and 7:00 A. M. on any day of the week. When this claim was presented to Superintendent Hoefer, he did not understand this demand, as it was well known to all concerned that waybills have been handled in this manner for more than 30 years. The Superintendent declined the claim and it was appealed to the Manager of Personnel by General Chairman Harper on November 23, 1948. The claim was discussed in conference on December 10, 1948, and the claim was declined. General Chairman Harper has not advised that he has accepted the decision contained in my letter of December 14, 1948 and, for this reason, the Carrier is submitting the issue

AWARD 3441: "Ordinarily, one who is damaged as a result of a breach of contract is entitled to be made whole."

AWARD 2263: "The agreement is the solemn contract of the parties resulting from their negotiations, governing the hours and working conditions of the employes covered thereby. Where an employe sustains a loss by reason of a violation of the Agreement by the Carrier, he must be compensated for such loss, even though no specific penalty is imposed by the rule violated."

AWARD 1125: "Under the circumstances of this proceeding, therefore, there was an improper removal of clerical work from the scope of the Agreement, and the employes adversely affected by this removal are entitled to recover all monetary loss sustained."

AWARD 3219: "The work clearly belonged to Maintenance of Way Employes. By farming out the work under the circumstances shown by the present record, the Scope Rule of the Agreement was violated and carrier is obligated to pay wage losses accruing to the employes entitled to the work where such can be shown. Awards 2701, 2812, 2819, 3060 and 3061. An affirmative award is required."

The claim of the Carrier which, in effect, is that it can revise its agreement solemnly made with this Organization by merely violating it should be denied, and the position and claims of the Employes, as set out herein, should be sustained. Any other decision rendered in this dispute will lay the groundwork for future evasions and violations of the Agreement by the Carrier and render the Clerks' Agreement worthless.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier brings this matter before the Board to determine if in contracting with R. W. Nichols of Dallas, doing business as Texas Delivery Service, through the Union Terminal Company of Dallas, an organization representing all of the railroad companies operating lines of railroad into and out of Dallas, it is violating the Scope of its Agreement with the Clerks.

The Scope Rule of the parties' effective Agreement provides, in part, as follows:

"Rule 1. These rules shall govern the hours of service and working conditions of the following employes, * * *

* * *

Group 2. * * * messengers, * * *."

The work, which is herein involved, is messenger service and apparently is usually and customarily performed by messengers of the Carrier at all points on its property except at Dallas.

The record discloses that prior to any agreement of this Carrier with the Clerks the ten railroads operating into and out of Dallas, including this Carrier, created a joint organization known as the Dallas Car Interchange and Inspection Bureau to handle the interchange and inspection of all cars of these carriers at Dallas. This Bureau also entered into a contract with independent contractors for the performance of the messenger service of these carriers at Dallas. This method of handling the messenger service of this Carrier at Dallas existed when the Clerks' Agreement with it was entered into and became effective February 1, 1922.

The parties who performed this messenger service were paid by this Bureau which, in turn, collected the amount paid therefor from the Union Terminal Company of Dallas. The Union Terminal Company of Dallas was another joint organization of these ten carriers. The Terminal Company, in turn, charged the ten carriers their pro rata share of these charges and collected them accordingly.

This method of handling the messenger service of this Carrier at Dallas continued and was in effect when the Clerks' present Agreement, effective November 1, 1939, was negotiated and entered into on October 6, 1939 and continued until December 1, 1948.

In October of 1948 this Carrier withdrew from the joint arrangement for the inspection of cars and preparation of interchange reports, but continued the joint arrangement for the performance of messenger service. On October 25, 1948 this Brotherhood objected to its doing so. Thereafter, on November 30, 1948, the Terminal Company, the joint organization of these carriers already referred to, in place of the Dallas Car Interchange and Inspection Bureau, entered into a contract for the performance of the messenger service of these carriers at Dallas, including this Carrier. This contract was with the same party, namely, R. W. Nichols, dba Texas Delivery Service. It continued in operation the same messenger service and it is presently being handled in this manner.

The Carrier's right to make agreements with independent contractors, either directly or indirectly, to perform railroad work or service we do not find it proper to here determine. However, for a discussion of the question see Award 180 of this Division and Decisions 982, 1077, 1262 and 2080 of the United States Railroad Labor Board.

The Scope Rule of the Agreement herein involved embraces all work on the Carrier's property of the kind and class which employes of the named positions included therein usually and customarily performed at the time of the negotiation and execution thereof. See Awards 180, 323, 602, 757, 779, 906, 1492 and 2812 of this Division. In view thereof we find the parties have, by their Agreement, placed all the Carrier's messenger work, such as is here being performed for the Carrier in Dallas by the Texas Delivery Service, within the Scope of the Clerks' Agreement.

Where work is within the scope of a collective agreement and not within any exception contained therein or any exception recognized by the Board as inherently existent, that work belongs to the employes under the agreement and may not be taken therefrom with impunity. See Awards 323, 757, 1647, 2465, 2812, 2988, 3251, 3684, 3687 and 3746 of this Division.

If Carrier had desired to except the messenger work at Dallas from the Agreement it could and should have so provided therein, as it did with reference to many positions. When the scope of an agreement relates to the subject matter thereof in general terms, but makes specific exceptions thereto, such an agreement covers all of the work not specifically excepted therefrom. Consequently, we find no implied exception thereto by reason of the fact that the Wage Agreement entered into by these parties on October 4, 1939, effective November 1, 1939, which fixed the rate of pay for positions in effect August 31, 1939 and stated that there were pending unadjusted claims on that date concerning or relating to rates of pay, failed to list any messenger positions at Dallas in the Dallas-Austin Division. This work not being within any exception contained in the Agreement, not being impliedly except therefrom, and not being of such a nature that it can be said that this Board has recognized as being inherently excepted therefrom, Carrier must give the work to employes covered by the Clerks' Agreement.

Considering the negotiations had and settlements made by the Organization representing employes of the Union Terminal Company and Dallas Car Interchange and Inspection Bureau, with reference to the work here involved and the right of the employes of either or both of those organizations thereto, we find they are not relevant or binding as to the organization before us and the employes it represents.

The record establishes, as we have already set forth, that the practice here complained of has extended over many years. While long continued practice of the parties may be resorted to in an effort to interpret a rule that is not clear or ambiguous, See Awards 561, 2326, 3603, 3727 and 3890 of this Division, such long continued acquiescence does not operate to alter or change a rule of the Agreement that is clear and unambiguous. See Awards 422, 757, 1492, 1518, 1551, 2812, 3603 and 3890 of this Division.

An interpretation given a contract by the parties themselves, as shown by their conduct, can only be utilized when the contract is ambiguous in regard thereto and cannot control or vary the express and unambiguous provisions of the instrument itself and the legal effect thereof. The fact that the parties have placed or acquiesced in an erroneous construction of an ambiguous provision in a collective agreement will not prevent us from giving it the correct construction. The long continuing violation of existing rules that are clear and unambiguous does not change or diminish the binding effect thereof but does limit any monetary claim, based thereon, to the date when protest against the continuation of the practice is made which, in the claim before us, was October 25, 1948. See Awards 906 and 3323 of this Division.

The fact that a claim is general and fails to name the claimants is not a bar to the disposition thereof but it may be allowed for all employes adversely affected thereby for all monetary loss they have sustained by reason thereof. See Awards 137, 1125, 2282, 3251, 3376, 3687 and 4370 of this Division.

As to the individual employes, if any, who have been adversely affected by the acts of the Carrier in its violation of the Agreement and their rights because thereof, we do not here determine as it has neither been presented nor sufficiently brought out in the record. What we do determine is that there has been a violation of the Scope Rule of the parties' effective Agreement and that any employes covered by the Clerks' Agreement, who have been adversely affected by reason thereof, have a right to recover whatever they may be entitled to under the rules of their effective agreement and that the messenger work of the Carrier at Dallas be placed under and assigned to employes covered by the Clerks' 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 Carrier has and is violating the provisions of the Agreement.

AWARD

That the Carrier has and is violating the Scope Rule of the parties, effective Agreement by the manner in which it is handling its messenger work at Dallas; that the Carrier's messenger work at Dallas be placed under and assigned to employes covered by the Clerks' Agreement; and that any employes covered by the Clerks' Agreement, who can establish that he has been adversely affected by this violation, may recover whatever amount he is entitled to under the rules of the Agreement by reason thereof, but not because of any violation prior to October 25, 1948.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of August, 1949.