Award No. 4543
Docket No. CL-4478

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHEHOOD 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.; NEW 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 Brownsville, Texas, by failing and refusing to pay the Station Porters at Caller's rate of pay. Also

(b) Claim that Carrier be required to pay these porters the negotiated and agreed upon Caller's rate of pay retroactive to March 23, 1948, the date the work in question was assigned to the porters. Also

(c) Claim that the Carrier is further violating the Clerks' Agreement by requiring a Yard Clerk, a Group 1 employe, to call crews for one train, number 60. And

(d) Claim that Carrier be required to assign all crew calling to the Group 2 employes and that the evening porter be paid on an overtime or call basis on each date the Yard Clerk has been required to call crews.

EMPLOYES' STATEMENT OF FACTS: On January 30, 1948 claim was filed because of employes not covered by the Clerks' Agreement being required or permitted to perform work that is covered by the Clerks' Agreement, namely, the calling of train, engine and yard crews.

boarding house or bunk houses, all of which are in close proximity to the station. No clerical force is employed at this station. The principal work of the three laborers who have been calling the crews is cleaning fires, applying grease and disposing of cinders from locomotives. None of the three spends as much as four hours in his shift calling crews.

The Organization relies chiefly on the fact that crew callers are expressly mentioned in group 2 of Rule 1 as one of the classes of employes embraced in the Scope Rule of the Agreement. It is admitted that this classification has appeared in the Scope Rule of the Clerks' Agreement continuously since 1920. Rule 2 which defines or gives the qualifications of certain classes of clerical employes does not attempt to define crew callers or set up rules as to qualifying employes as such.

The situation at Horace has existed for many years and this Docket appears to be the first claim presented by the Organization that the work at this station belongs under the Agreement. The failure of the Organization for more than twenty years to make any claim to the work at Horace would seem to indicate rather conclusively that it was not the intention of the parties that the work of calling crews at such a station be considered as coming under the Agreement.

When the Agreement fails to define crew callers we must resort to the common definition or understanding of the term. We would not ordinarily speak of a person as a crew caller if he only spent a small portion of his time at that work and the major portion of his time at some other work. The fact that the Employes made no claim to this work for so long would indicate that they have interpreted the Agreement as not applying to positions when the major portion of the work of the position did not consist of calling crews.

Where the intention of the parties in the Agreement is not clear, their interpretation as shown by their actions is persuasive as to their intention.

In their claim the Employes ask that this work be 'placed' or 'established' under their Agreement. This we have no power to do. If the Agreement by its terms did not 'place' the work under the Agreement, it can only be placed under the Agreement by the negotiation of the parties. This Board can only interpret and apply agreements. It cannot change them at the request of either party."

The logical reasoning of your Board in Award 2326 discussed next above, as well as the equally logical reasoning of your Board in Awards 1844, 2012 and 2011 herein previously discussed, is entirely consistent with, in fact parallels the reasoning of the Carrier in the instant case, which reasoning of the Board is clearly indicative of the intended flexibility of the agreement in its application to situations such as here involved. It necessarily follows, therefore, that in the interest of continued uniform consistency your Board should likewise deny the contention and claim of the Employes in the case under consideration.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood bases its claims (a) and (b) upon the Carrier's refusal and failure to pay the Station Porters at Brownsville, Texas, the negotiated and agreed upon Caller's rate of pay since March 23, 1948, the date the work of calling train and engine crews was assigned to them. The Carrier continued to pay them at Porter's rate of pay. In claims (c) and (d) the Committee contends that the Carrier has required a Yard Clerk, a Group 1 employe, to call the crews for train No. 60. Based thereon it asks that all crew

calling be assigned to Group 2 employes and that the evening Porter be paid on a call basis, under Rule 43, on each day, since March 16, 1948, that the Yard Clerk has been required to call crews.

The claim involves the calling of train and engine crews at Brownsville, Texas. Effective as of March 23, 1948, Carrier assigned the calling of crews for all trains at Brownsville, except No. 60, to the two Station Porters. Effective as of March 16, 1948, Carrier assigned the calling of the train and engine crew for train No. 60 to a Yard Clerk. Train No. 60 is a freight train and apparently varies considerably in its leaving time. This results in the calling time of its crew varying between 11:00 P. M. and 5:00 A. M. Since the second porter's assignment ends at 11:00 P. M. and the first does not begin until 6:00 A. M. the crew of this train is generally called when there is no porter on duty. During the porter's assignments the crews of two trains and three switch engines are called and also any extra members of the crew of train No. 16. This calling involves a total of about one hour's work each day for each of the Porter assignments, the same being scattered through the course of the day's work.

Rule 1—Employes Affected provides:

> "(a) These rules shall govern the hours of service and working conditions of all of the following class of employes * * *."

and included in Group 2 thereunder are "train and engine callers."

By Memorandum of Agreement the parties provided as to Rule 1 as follows:

> "(a) It is recognized and agreed that all of the work referred to in Rule 1 of the Agreement dated November 1, 1940, between the Carrier and the Brotherhood belongs to and will be assigned to employes holding seniority rights and working under the Clerks' Agreement, * * *."

By the Memorandum of Agreement it is expressly provided that Rule 1 refers to the work of a position and that the work ordinarily and customarily performed by such position must be assigned to employes within its scope. Thus the work of calling train and engine crews is specifically within the scope of Group 2 employes as that group includes "train and engine callers."

Rule 50 (a) of the parties' Agreement provides:

> "Employes temporarily or permanently assigned to higher rated positions or work shall receive the higher rates for the full day while occupying such position or performing such work; * * *."

It will be observed that the rule applies to either position or work and does not specify the amount of the latter before the higher rate is applicable. In the absence thereof we think the rule contemplates there shall be a reasonable amount of the higher rated work performed during the course of the day's work to justify being paid on the basis thereof. We find the amount of caller's work here done by each Station Porter during the course of each day's assignment to be sufficient to entitle him to pay under this rule at the agreed to and established rate thereof.

Reference is made to past practices and the lateness of having the Agreement enforced. Long continued practices of the parties on the property are pertinent and may be controlling if the subject matter to which they relate is not clearly set forth and covered by the parties' Agreement and when it can be said that the Agreement is ambiguous with reference thereto, but, if as here, the parties' Agreement as it relates thereto is clear and unambiguous then such long continued practices do not prevent the Agreement from being enforced according to its terms but monetary claims prior to the complaint asking for a proper application are generally denied.

Station Porters are Group 2 employes and a Yard Clerk is a Group 1 employe. Rule 3 (b) provides:

"Seniority begins * * * in the seniority district and group where assigned."

Rule 1 divides the "Employes Affected" into Groups 1, 2, and 3. That the Agreement intends that seniority rights shall exist according to these groups is further evidenced by Rules 5 (b) and (c), Rule 6 (b) and Rules 7 (d) and (e). Seniority being by groups the Carrier therefore cannot turn the work of employes falling in one group to employes falling in another. See Award 1306, 2354, 3271, 3656, 3746 and 4385, of this Division.

Carrier should have had one of the porters, or some other employe falling within Group 2, call the crew for train No. 60 during his regular assignment or have "called" someone within Group 2, as provided by Rule 43 (a), to perform the service and paid him accordingly. Consequently we find claim (d) to be meritorious.

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

Claims (a), (b), (c), and (d) are all sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of September, 1949.