Award No. 13229

Docket No. CL-13741

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5259) that:

1. The Carrier violated the Clerks' Agreement when it failed and refused to compensate Baggage and Mail Messengers J. Grutzner and S. Mungen for overtime after eight hours on duty on the actual minute basis at the time and one-half rate.

2. The Carrier shall now compensate Baggage and Mail Messengers J. Grutzner and S. Mungen and/or their successors, the difference between what they have been paid and two (2) hours and 46 minutes additional time on Baggage and Mail Run #10, at the time and one-half rate, effective September 5, 1961 and each date thereafter until the violation is corrected and they are properly compensated in accordance with the agreement.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective July 1, 1945 and an Agreement (Appendix "A") made on February 15, 1951, effective February 1, 1951, abrogating the Baggage and Mail Messengers Agreement which had been effective since February 1, 1938. The Rules Agreement will be considered a part of this Statement of Facts, various rules and memoranda therefore shall be referred to from time to time without quoting in full. Copy of agreement referred to as Appendix "A" appears on Pages 51-54 of the agreement book. We also attach copy of Appendix "A" to this submission as Employes' Exhibit A.

Claimant S. Mungen is regularly assigned to Baggage and Mail Messenger Run #10 and Claimant J. Grutzner covers this assignment when Mungen is off during the cycle period. Run #10 is scheduled as follows:

Ex Saturdays			Report Jamaica	10:35 AM
246	Lv Jamaica	10:50	Arr Ronkonkema	12:04 PM
257R	Lv Ronkonkoma	1:10	Arr Jamaica	2:23 PM
3035	Lv Jamaica	2:39	Arr Brooklyn	2:56 PM

"The Carrier violated Rule 9-A-2"—This rule set forth the procedure to be followed by the parties, in accordance with the provisions of the Railway Labor Act, to revise or modify any of the rules in the agreement.

The Carrier did not violate this Rule as the modification of the basic rules to fit Baggage and Mail Messengers was accomplished through negotiations.

In conclusion, the Carrier desires to reiterate that there has been no violation of any of the rules of the schedule agreement covering Baggage and Mail Messengers.

The original claim and the claim presented to your Honorable Board by Mr. Harrison lacks merit by not being supported by any provisions of the schedule agreement and should, therefore, be denied by your Honorable Board.

(Exhibits not reproduced).

OPINION OF BOARD: Before considering the merits of this claim we must dispose of a jurisdictional question raised by the Carrier who asks that this case be dismissed for the reason that the claim presented to this Board for adjudication is not the same claim that was submitted to the Carrier on the property. Though the first paragraph of the Statement of Claim presented to this Board is not couched in the identical language used in the claim originally presented to the Carrier on the property it raises substantially the same issue as originally raised. It cannot, therefore, be seriously urged that the Carrier has been misled as to the issue or claim confronting it. Unless there is a real and substantial variance between the claim presented to this Board and the one presented to the Carrier on the property, this Board would not be justified in dismissing this claim; therefore, the request for a dismissal of this claim is denied. See Award 3256—Carter; Award 6656—Wyckoff.

Petitioner contends that the Carrier violated the Clerks' Agreement when it failed and refused to compensate Baggage and Mail Messengers J. Grutzner and S. Mungen for overtime, after they had been on duty for eight hours, on the actual minute basis at the time and one-half rate as required by Rule 4(c) of Appendix "A" of the Agreement.

For the purpose of simplification the Baggage and Mail runs hereinafter referred to will be called the B & M Runs. Following is an agreed upon statement of facts:

"JOINT STATEMENT OF AGREED UPON FACTS:

"Prior to the pick and change of B & M Runs in September of 1961, the Carrier had always paid two (2) hours and 46 minutes overtime for B & M Run #10.

"Since the pick and change of B & M runs in September of 1961, the Carrier now deducts one (1) hour for meal period and pays only (1) hour and 46 minutes overtime on B & M Run #10.

"The B & M Messenger starts his assignment on B & M run #10 at 10:35 A. M.

"The one (1) hour break for the meal period comes at 6:44 P. M. eight (8) hours and nine (9) minutes after the start of the B & M Messengers' run #10 at 10:35 A. M."

The interpretation of the following rules is in controversy:

APPENDIX "A"

"It is agreed, effective as of February 1, 1951, to abrogate the Baggage and Mail Messengers Agreement which became effective February 1, 1938 and place Baggage and Mail Messengers under the coverage of the Clerks' Agreement which became effective July 1, 1945 with the following exceptions and understandings:

* * * * *

"4. In lieu of Rule 4-A-1 of the Clerks' Agreement, the following shall apply to Baggage and Mail Messengers:

* * * * *

"(b) Time of employes for each day worked shall begin when they are required to report for duty and so report and end when they are released from duty and shall be computed continuously except on assignments covering a spread of nine hours or more, where there is a continuous break of one hour or more in the on duty time when one hour shall be deducted from the total elapsed time.

"(c) Overtime shall be allowed after 8 hours on duty and will be paid for on the actual minute basis at the rate of time and one-half. * * * "

It is Petitioners' contention that Rule 4(c) applies and that Claimants should have been paid full overtime up to the end of the overtime period without any deductions.

Carrier maintains that in compliance with Rule 4(b) that if there is a continuous break on the duty time during the spread of nine hours that this time shall be deducted from the total elapsed time; that the ninth hour of the assigned time was up at 7:35 P. M. and Carrier deducted a "swing" or meal period from 6:44 P. M. or 51 minutes in the application of Rule 4(b).

It is not disputed by Carrier that since 1951, when the Agreement contained in Appendix "A" was entered into, and up to September 1961, the Baggage and Mail Messengers had been paid two hours and forty-six minutes overtime after their 8 hours on duty.

It is the contention of the Carrier that this was wrongfully paid and was not in accordance with the clear and unambiguous language contained in Rule 4(b) of the Agreement; Carrier further contends that Rule 4(b) of the Agreement of February 1, 1951, has the same application that governs passenger trainman engaged in short turnaround passenger service, such as involved here.

We are not concerned here with what some other Agreement requires or contemplates. The Agreement effective here requires that an exception to any Rule in this Agreement will only be made by Agreement in writing and an exception such as here claimed cannot be unilaterally picked out of some other Agreement and used to abrogate the accepted interpretation of any of the Rules here involved.

Petitioner urges that in order to give effect to both Rule 4(a) and Rule 4(b) it must be concluded that when Carrier has held employes continuously on duty for 8 consecutive hours it is the duty of Carrier to pay to the employe for all of the overtime accumulated after the eight hour period; that Rule 4(b) applies only when the meal period or "swing time" occurs within the first eight hour period.

It is a recognized and sound principle of contract interpretation that the past practice of the parties shall be accepted as an aid in establishing the intent of an ambiguous contract. See Award 4323—Elkouri.

In Award 6011—Messmore we note this statement:

> "As stated in Award 2436: 'The conduct of the parties to a contract is often just as expressive of intention as the written work and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made."

We find support for the foregoing in Award 11329—Coburn:

> "Mutual acquiescence in a past practice over such a long period of time not only establishes binding conduct on both parties under the doctrine of equitable estoppel—it also leads logically to the conclusion that the practice reflects what the parties intended or had in mind when the Agreement was made."

Carrier cannot properly modify or abrogate the practice followed for many years by the parties here involved except by negotiation.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1965.