

Award Number 14338

Docket Number TE-13628

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYES UNION
(FORMERLY THE ORDER OF RAILROAD TELEGRAPHERS)**

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atlantic Coast Line Railroad, that:

1. Carrier violated and continues to violate the Agreement between the parties when commencing on March 1, 1961, it requires or permits employes not covered by the Agreement to perform the work and assume the duties and responsibilities in connection with the transmission and receiving of messages and/or reports of record, either or both, required to be performed by means of a mechanical message machine (teletype) in the "Central Reservation Bureau," on 9th floor of the General Office Building at Jacksonville, Florida.

2. The senior available idle employes (extra in preference) covered by the Telegraphers' Agreement, who could have been used to perform such work at the "Central Reservation Bureau" since March 1, 1961, during the hours of the day or night such work was performed by employes not covered by said Agreement, shall be compensated for this work, of which they have been deprived since that date; and

3. If Carrier elects to continue the performance of such work at the "Central Reservation Bureau" the necessary number of positions under proper classification required to meet the needs of the service shall be established and filled in accordance with the rules of the Telegraphers' Agreement.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, as supplemented and amended, is available to your Board and by this reference is made a part hereof.

The Carrier's General Office Building is located at Jacksonville, Florida. On March 1, 1961, Carrier established a "Central Reservation Bureau" on the 9th Floor of the General Office Building at Jacksonville. The Central Reservation Bureau is a part of the Passenger Department, and its main purpose

All communication facilities and/or instruments listed are located in the Central Reservation Bureau, Room 914, General Office Building, except the Company telegraph (teletype) located in "JX" Telegraph Office, Room 731, General Office Building. Messages are transmitted between Rooms 731 and 914 by use of pneumatic tubes.

On March 28, 1961, the General Chairman presented request that the TWX machines (leased from American Telephone & Telegraph Company), located in Room 914 of General Office Building, be manned or operated by employees of the Telegraphers' Craft. There is no requirement in the agreement that the TWX machine must be manned by employees subject to the Telegraphers' Agreement, nor have such machines historically been manned by telegraphers, when not located in telegraph offices. Therefore, the claim was declined.

OPINION OF BOARD: The Carrier, on March 1, 1961, established in its General Offices at Jacksonville, Florida, as part of its Passenger Traffic Department, a Central Reservation Bureau to handle and control all space assignments, for both coach reserved seats and Pullman accommodations, for northbound trains departing from all stations on the Coast Line system whose destinations were to Eastern seaboard cities and to Western and mid-Western cities.

In connection with this operation it installed a mechanical message machine, known as a TWX machine, in the office of its Central Reservation Bureau, which is used by the Passenger Traffic Department for the handling of reservations exclusively. The TWX machine and service is leased from the American Telephone and Telegraph Company and is located in Room 914 of its General Office Building. There is located in Room 731 of the same building certain teletypewriter circuits, which, the Carrier asserts, has no physical connection with the operation conducted by it in Room 914. An employee of the Carrier, not under the Telegraphers' Agreement or the Memorandum of Understanding, was assigned to handle the operation in Room 914.

The issue presented in Claim (a) by the employees is simply whether employees, outside of the respective agreements heretofore referred to, may properly be required to handle and/or man the TWX machine.

The Organization, in support of its claim, relies upon the following provisions of the Memorandum of Understanding entered into between the parties on the 4th day of April, 1946, and which read as follows:

"ARTICLE 1

Scope — Basis of Pay

(a) This schedule will govern the employment and compensation of Telegraphers, Clerk-Telegraphers, Telephone Operators (except switch-board operators), Agent-Telegraphers, Agent-Telephoners, Towermen, Levermen, Tower and Train Directors, Block Operators, Staffmen, Car Distributors and such agents as are shown in the wage scale.

The term 'employees', as hereinafter used, embraces all of the above named classes.

(b) The employees herein specified will be paid on the hourly basis, except as may be otherwise shown in the wage scale.

(c) Articles 3, 4 and 5 do not apply to positions shown in the wage scale at monthly rates."

Articles 2 - Classification; Article 3 - Basic Day, Overtime and Calls; Article 12 - Seniority—Promotion, appear in the submission and will not, therefore, be repeated here.

"PRINTERS

It is agreed that when teletype machines are installed at Jacksonville, Fla., Wilmington, N. C., and at other points on this railroad, the machines will be manned by qualified employees subject to the agreement effective November 1, 1939, between this Company and its Telegraphers, Agent-Telegraphers, and Telephoners, as represented by The Order of Railroad Telegraphers and that all the provisions of the agreement will apply to such employees. (Emphasis ours.)

Employees will be required to qualify for the operation of these machines on their own time and at their own expense. In order to qualify, applicants in addition to being Morse Telegraphers, are required to correctly type by direct keyboard not less than forty words per minute at the beginning of their service as printer-telegraphers and within six months increase this speed to a minimum of fifty words per minute.

At the discretion of the Management, printer-telegraphers may be temporarily assigned to regular telegraphers' work during their assigned hours.

Senior qualified printer-telegraphers will be given preference in assignment to printer-telegrapher positions when vacancies occur.

The rate of pay for operators of teletype machines shall be the same as that for Morse Telegraphers in the office in which the machine is installed."

This Board has held on any number of occasions that our powers are limited by statute. We may not make rules, abrogate rules or alter existing rules. This is the province of the parties. We do, however, have the power to interpret the agreement before us in accordance with and pursuant to established rules and/or principles of contract law.

The primary rule in the construction of contracts is that we must ascertain and give effect to the intention of the parties and that intention is to be deduced from the language employed by them. In arriving at the intention of the parties, it should be construed in light of the circumstances surrounding them at the time it is made so as to judge the meaning of the words and the correct application of the language of the contract. The main object of the contract, or the purpose which the parties sought to accomplish, must be considered in ascertaining their intention. (Emphasis ours.)

It is a well established rule of contract law that in construing and/or interpreting a contract we look to the whole agreement to ascertain the intention of the parties. If there are contained in the agreement general and special provisions, the special provisions must prevail over the general provisions.

In Award 6651—Rader—we said:

"* * * It is the general rule in construing of all contracts that a specific provision dealing with a certain condition will prevail over other rules dealing with certain phases of the situation in a general manner and relating to overall matters which may arise * * *"

In Award 7312—Rader—we said:

"In construing special rules * * * the same take precedence over general rules in the agreement * * *"

In construing a written contract the words employed will be given their ordinary and popular accepted meaning, in the absence of anything to show that they were used in a different sense.

13 Corpus Juris—Contracts
Section 489

We are not concerned, in this dispute, with the practice of the parties with reference to the use of teletype machines by the Carrier prior to April 4, 1946, for on that day, by reason of a dispute between the parties as to the use of teletype machines by the Carrier the Memorandum of Understanding was entered into which disposed of the dispute.

The first paragraph of the Memorandum of Understanding is not ambiguous. It is very definite, specific and clear in its terms.

It states that "IT IS AGREED THAT WHEN TELETYPE MACHINES ARE INSTALLED AT JACKSONVILLE, FLA., * * * THE MACHINE WILL BE MANNED BY QUALIFIED EMPLOYEES SUBJECT TO THE AGREEMENT EFFECTIVE NOVEMBER 1, 1939, BETWEEN THIS COMPANY AND ITS TELEGRAPHERS, AGENT-TELEGRAPHERS AND TELEPHONERS, AS REPRESENTED BY THE ORDER OF RAILROAD TELEGRAPHERS AND THAT ALL THE PROVISIONS OF THE AGREEMENT WILL APPLY TO SUCH EMPLOYEES."

We are fully familiar with our decisions upon the proposition that where the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreements between the parties. In the case before us, however, we are not concerned with that issue as the parties themselves, by their Memorandum of Understanding, agreed, **without any qualification or limitation**, that when teletype machines are installed in Jacksonville, Fla., they **WILL BE MANNED** by qualified employees subject to the agreements of the parties. The only limitation, if we may call it a limitation, is that the employe qualify in the manner set forth in the agreement. There is nothing in the agreement restricting the type of work to be performed by the teletype machine.

(Emphasis ours.)

We next determine as to whether or not the TWX machine is a teletype machine.

Webster's Dictionary defines a teletype machine as follows:

"**TELETYPE**—A trade-mark applied to a kind of teletypewriter. A system of communication in which the Teletype is used."

It defines a teletypewriter machine as follows:

"TELETYPEWRITER—A form of printing telegraph, recording like a typewriter."

The Carrier has a publication known as "The Atlantic Coast Line News." In the May-June 1961 issue we find the following statement in connection with its Central Reservation Bureau at Jacksonville, Florida:

"* * * The Bureau is in direct communication with agents over the system by telephone or TWX (CLOSED CIRCUIT TELETYPE-WRITER PRINTER SERVICE)." See page 15 of record Organization Ex Parte Submission. This statement is NOT denied by Carrier.
(Emphasis ours.)

The Carrier argues that the work performed by the TWX machine is not the type of work that is exclusively performed by Telegraphers and for that reason we must look to past practices. That argument might have some weight were it not for the unambiguous provisions of the first paragraph of the Agreement of Understanding of April 4, 1946.

If the parties to that agreement intended that there should be some limitation placed on the type of work to be performed by the TWX machine and the employe manning the machine, such limitation should have been set forth in the agreement. The agreement is made by the parties themselves, and they are bound by its provisions.

Based on the above definitions and the statement of the Carrier, we hold that the TWX machine installed in Jacksonville, Florida, is a teletype machine and under the specific and unambiguous terms of the Memorandum of Understanding, entered into between the parties, must be manned by an employe who qualifies under the terms of the agreement and that the manning of the TWX machine by an employe other than one covered by the agreements is in violation of the agreements.

With respect to that portion of the Organization's claim (2) while we hold that the work was wrongfully performed by an employe not covered by the agreement, we believe that the proper and appropriate remedy in this case would be to compensate the employees affected for the time lost by reason of the wrongful transfer of this work. The compensation, however, should be reduced by the earnings of the employees in other employment.

We said in Award 11489—Hall:

"As to that portion of the claim which asks that Claimant be compensated for all monetary wage loss sustained by reason of the action taken by the Carrier, restitution should be made to her for her net financial losses resulting from the violation of the Agreement. See Award 10743."

With respect to that portion of the Organization's claim (3) this Board has consistently held that we are without authority to order the establishment and/or reestablishment of positions as requested.

We are not unmindfully of the holding in Award 3902 (Carter) wherein we sustained a claim by the Organization that the Carrier advertise certain

positions with rates of pay in accordance with the provisions of the agreement between the parties involved in that dispute. However, since that award, this Board has consistently held in numerous awards that it is not our function to establish positions.

In Award 6967 (Carter) we had occasion to consider a claim, the language of which is identical with the language of claim (3) and we held:

"* * * Claim (3) is denied. It is not the function of this Board to establish positions. It is the prerogative of Management to determine the manner in which the work shall be performed. So long as violations continue, the Carrier subjects itself to penalty for the violation of the Agreement. It may use any method it sees fit to correct violations without any restraining directives by this Board."

In Award 11489 (Hall) we held:

"* * * The establishment or reestablishment of a position has always been treated as a managerial function and we are not inclined to usurp that right."

This position of the Board is supported by awards commencing with Award 1125, 2126 and continuing down through more recent Awards 13615, 13749, 13773, 13807 and 13840.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreements have been violated.

A W A R D

Claims (1) and (2) sustained as per Opinion and Findings.

Claim (3) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of April 1966.

CARRIER MEMBERS' DISSENT
TO AWARD 14338, DOCKET TE-13628

(Referee Perelson)

The majority award, concluding as it does that a TWX machine used in

passenger reservation work is a teletype machine as contemplated by the Memorandum Agreement of April 4, 1946, demonstrates disturbingly tenuous reasoning which requires a dissent.

The issue has been properly framed, i.e., whether employes outside of the Telegraphers' Agreement may properly be required to handle and/or man the TWX machine. The award further narrows the issue to its basic elements by recognizing that the controlling question to be resolved is whether a TWX machine is a "teletype machine" within the contemplation of the Memorandum Agreement of April 4, 1946. The award further demonstrates a recognition of the problem by properly recognizing "that intention is to be deduced from the language employed by them * * * [and] * * * should be construed in the light of the circumstances surrounding them at the time it is made * * *". Thereafter, however, when the reasoning process is applied against the facts of record, tenuity prevails. Let us demonstrate.

The Memorandum Agreement relates to "teletype machines" and the majority, by resorting to Webster's dictionary, finds that the term "teletype" is a trademark applied to a kind of teletypewriter. It also finds that a teletypewriter is "a form of printing telegraph, recording like a typewriter." Then, by invoking a news release appearing in the railroad's newspaper some 15 years after the Agreement and wherein the TWX was characterized as a "closed circuit teletypewriter printer service," the majority states that the TWX is a teletypewriter which in turn is a teletype machine and, therefore, subject to the Memorandum Agreement of April 4, 1946. We fail to follow this reasoning.

The majority takes a trademark title and clothes it with generic authority. Further, assuming without conceding that the newspaper article printed some 15 years after the signing of the Agreement and presumably written by individuals not one bit concerned with labor contracts or contract interpretations but concerned solely with the dissemination of general information to the employes at large, designated these machines, properly or improperly, as teletypewriters, we fail to find the connecting link that makes a teletypewriter a "teletype machine."

It would have been of far more probative value in resolving this question had the majority considered the recorded fact that TWX machines have been in use on this property for over a decade and have not been manned by the claiming organization—an item of concurrent fact which should have been highly persuasive.

We agree with the majority that the intention of the parties should be construed in light of the circumstances surrounding them at the time an agreement is made. We think that the circumstances of the use of TWX machines for passenger reservation work without dispute for over a decade more clearly demonstrates the intent we seek than does a casual news story printed in an unrelated and unauthoritative medium by one totally unaware of the legal significance of terminology therein used.

For these, and other reasons, we dissent.

C. H. Manogian
R. A. DeRossett
G. L. Naylor
W. M. Roberts

Keenan Printing Company, Chicago, Illinois

Printed in U.S.A.