



Award No. 14531
Docket No. TE-14345

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)**

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Western Pacific Railroad Company, that:

1. Carrier violates the terms of an Agreement between the parties hereto when, effective May 12, 1962, it assigned junior Telegrapher R. A. Hay to the reclassified Agent-Telegrapher-Car Distributor's position at Elko, Nevada and failed and refused to assign senior qualified applicant Telegrapher Richard A. Dore thereto.

2. Carrier shall, because of the violation set out in paragraph 1 hereof, assign senior qualified applicant Telegrapher Richard A. Dore to the reclassified position of Agent-Telegrapher-Car Distributor, Elko, Nevada and pay him the difference between the Agent-Telegrapher-Car Distributor's position rate of \$525.00 per month, plus any increase that may be added to the position or positions to which assigned, until such time as he is properly assigned to the position in question.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties hereto, effective June 16, 1940, revised January 1, 1953, and otherwise amended. Copies of said Agreement, as prescribed by law, are assumed to be on file with your Board, and are, by this reference, made a part hereof.

At page 39 of said Agreement (Rule 45, Wage Scale) are listed the positions at Elko, Nevada, covered by the Agreement on the effective date thereof. The listing for your Board's ready reference reads:

| Station | Occupation | Hourly Rate | Monthly Rate |
|-----------|-------------------------------|-------------|--------------|
| *Elko | Agent | | \$368.27 |
| Elko "KN" | Manager-Wire Chief | 2.04½ | |
| | Second Wire Chief | 1.98½ | |
| | Third Wire Chief | 1.98½ | |
| | Telegrapher-Printer Operators | 1.80½ | |
| | Car Distributor | 1.91½ | |

Under the foregoing circumstances I am unable to agree that any provision of the Telegraphers' Agreement has been violated by the appointment of Mr. Hay. Carrier acted strictly in accordance with the provisions of paragraph (d) of Rule 45 which were held by both parties to be applicable to the reclassified position of Agent-Car Distributor-Telegrapher at Elko.

The basis of your claim is set forth in your letter dated July 29, 1962, in which you state:

' . . . the work heretofore performed by the Telegraphers, on the Car Distributor position, would remain with the Telegraphers, and a Rule 45(d) position would make this work available to the Traffic Department as well as to the Operating Department.'

Paragraph (d) of Rule 45 has never been interpreted or applied in such manner. Applications from employees under the Telegraphers' Agreement only are considered jointly by the Traffic and Operating Departments and only employees under the Telegraphers' Agreement are appointed to fill vacancies on positions marked with an asterisk. The word 'telegrapher' commonly refers to any employee covered by the Telegraphers' Agreement, whether the position occupied is Agent, Agent-Telegrapher, Wire Chief, Telegrapher, etc.

Claim is denied.

Very truly yours,

/s/ W. A. Tussey
Assistant to Gen. Mgr.,
Labor Relations

cc: Mr. J. F. Lynch
Mr. L. D. Michelson"

There is on file with your Board a copy of the Agreement between the parties bearing an effective date of June 16, 1940 (revised to include changes to January 1, 1953) which by this reference is made a part of this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization claims that the Carrier violated the terms of the Agreement between the parties when, on May 12, 1962, it assigned junior telegrapher R. A. Hay to the reclassified Agent-Telegrapher-Car Distributor's position at Elko, Nevada, and failed and refused to assign senior qualified applicant Telegrapher Richard A. Dore thereto.

An examination of the record in this case discloses that BOTH parties to this dispute, in their respective Ex Parte Submissions have interposed issues that were not discussed on the property and also submitted certain evidence that was not discussed on the property. This Board has on any number of occasions ruled that issues not raised or considered on the property and evidence not submitted or considered on the property, may not, and cannot be considered by this Board.

We are concerned with the following rules of the Agreement between the parties:

"RULE 7.

CLASSIFICATIONS OF EMPLOYES, NEW POSITIONS, ETC.

* * * * *

(d) Changes in classification of positions shall not be made except through negotiations between the General Manager and General Chairman.

RULE 45. WAGE SCALE

* * * * *

| Station | Occupation | Hourly Rate | Monthly Rate |
|-----------|-------------------------------|-------------|--------------|
| *Elko | Agent | | \$368.27 |
| Elko 'KN' | Manager-Wire Chief | \$2.04½ | |
| | Second Wire Chief | 1.98½ | |
| | Third Wire Chief | 1.98½ | |
| | Telegrapher-Printer Operators | 1.80½ | |
| | Car Distributor | 1.91½ | |

* * * * *

(d) Positions marked with an asterisk (*) are to be filled jointly by Traffic and Operating Departments. When vacancies occur, positions shall be bulletined and employes will have the right to make application for them and their applications will be considered and given preference; all things being equal, fitness and ability, together with seniority, will govern.

RULE 47.

This agreement and the addenda attached is a revision of the agreement effective June 16, 1940 and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, amended."

In October of 1960, the Carrier, pursuant to and in accordance with the provisions of Railway Labor Act, served a Section 6 Notice upon the Organization, in which it advised the Organization that it desired and was its intention to effect changes of classification under Rule 7(d) of certain positions. Among the positions listed was the Agent's position at Elko. The new title was to be Agent-Car Distributor-Telegrapher. The General Chairman of the Organization at that time was one C. R. Bliss. Several conferences were held between the parties and joint checks made. No affirmative action was taken at that time to reclassify the position at Elko. The Carrier contends that it was understood between the representative of the Carrier and the General Chairman at that time, Mr. Bliss, that the change requested would be made effective upon the retirement of the incumbent of the car distributor position, Mr. R. A. West. The Organization, on the other hand,

denies that the change would become effective on the retirement of Mr. West, and claims that the matter of reclassification of the Elko Agent's position and consolidation of the Car Distributor's position would be revitalized upon the retirement of Mr. West. It is, therefore, evident that until Mr. West retired, no affirmative action with reference to the reclassification of the Agent's position at Elko would take place.

Mr. West's retirement took effect on April 25, 1962.

Prior to April 25, 1962, the record discloses that several conferences and communications were had between the parties with reference to the matter.

Under date of April 25, 1962, the following agreement prepared by the Carrier was signed by the respective parties:

"April 25, 1962
D-114 - Rule 7

Miss A. B. Bettger
General Chairman, ORT
942 South Pilgrim
Stockton 5, California

Dear Miss Bettger:

Confirming conversation between you and Mr. Adams today:

Mr. R. A. West, regularly assigned to the Car Distributor's position at Elko, took his retirement effective today.

In accordance with the understanding reached here between Vice President Jones, General Chairman Bliss and the undersigned on June 20, 1961, in connection with Carrier's Section 6 Notice dated October 19, 1960, served on the employees of its desire and intent to effect the reclassification of the Agent's position at Elko under Rule 7(d), the reclassification will be made effective May 1, 1962.

Accordingly, the position of Car Distributor, Elko, Nevada, will be abolished at the end of the shift Monday, April 30, 1962 and the position of Agent at Elko, Nevada will be reclassified Agent-Car Distributor-Telegrapher, which constitutes full and final disposition of that portion of the aforementioned Section 6 Notice pertaining to Elko.

Please confirm and indicate your concurrence by executing in the space provided below, returning four (4) signed copies to this office.

ACCEPTED AND AGREED TO: /s/ W. A. Tussey

Subject to Agreement between parties, in regard to a joint check after six months, if requested, and that the work now being performed by the Car Distributor shall remain the work of the Telegraphers.

/s/ A. B. Bettger
General Chairman,
The Order of Railroad
Telegraphers"

After the signing of the agreement of April 25, 1962, Carrier, on May 2, 1960, in accordance with the provisions of Rule 45, subdivision (d) issued Bulletin No. 9, advising that bids for the reclassified position at Elko would be received until 12:01 P. M., May 12, 1962. After the issuance of Bulletin 9 the General Chairman requested that the rate of pay listed be adjusted upwards. The Carrier under date of May 4, 1962, agreed and increased the rate of pay. That Bulletin No. 9 was thereafter corrected by the Carrier to include the increase of pay rate.

Under date of May 14, 1962, Carrier issued Bulletin No. 14, which reads as follows:

"THE WESTERN RAILROAD COMPANY

Elko, Nevada
May 14, 1962

Agents and Telegraphers Bulletin No. 14

Assignment on Bulletin No. 9 which closed May 12, 1962, is Mr. R. A. Hay, Seniority February 24, 1960.

Agent-Telegrapher-Car Distributor. Elko, Nevada

This position is awarded in accordance with Rule 45(d) of the Telegraphers' schedule.

M-80 G. W. Naylor"

Both Mr. Hay and Mr. Dore on whose behalf claim is made herein submitted bids for the position.

Under date of May 16, 1962, Mr. Dore personally wrote to the Superintendent at Elko, Mr. Lynch, protesting the awarding agent-telegrapher-car distributor position to Mr. Hay under Rule 45(d) and further that there was discrimination on the part of the Carrier in the making of the appointment.

The issue to be determined by this Board is whether or not the position, which was reclassified by the agreement of April 25, 1962, continues to be a Star Position and subject to the provisions of Rule 45(d).

The Organization contends that after the position was reclassified it was the intention of the parties, by the agreement of April 25, 1962, that it would no longer be a Star Position.

The Carrier contends that the parties never intended to remove the reclassified position from the Star Position category, and that it was agreed that the reclassified position would retain its Star Position status.

The parties are in sharp disagreement with reference to the question as to whether or not, after reclassification, the position was to be or not to be a Star Position.

This Board has held on any number of occasions that we follow the basic and ordinary rules of contract interpretation and construction. We are

bound by the terms and provisions of the Agreement before us. We have no power or authority, and we may not make new provisions, abrogate provisions or alter existing provisions of the Agreement. That is the province of the parties themselves. 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 interpreting and construing the provisions of an agreement, we inquire into what was the meaning of the writing at the time and place it was made between the persons who were parties to the writing; the surrounding circumstances under which the writing was made in order that we may judge the meaning of the words and the correct application of the language of the agreement; the main object of the agreement, or the purpose which the parties sought to accomplish must be considered in ascertaining their intention. We also give common or normal meaning to the language used in the agreement unless the circumstances under which it was made show that a special meaning should be attached to the agreement.

The Agreement speaks for itself.

The Agreement was prepared by the Carrier. If the Agreement is an ambiguous one, it is to be interpreted against the Carrier, the one who prepared it. However, in the case of *Rosenthal et al, v. American Bonding Co. of Baltimore*, 207 N. Y., 162, it was held that although an ambiguous contract is to be interpreted against the one who prepared it, if the meaning is not uncertain, the Court may not make a new contract under the guise of construction.

In the case of *Hartigan et al, v. Casualty Co. of America*, 227 N. Y. 175, it was held that although the wording of the contract was selected by one of the parties thereto, it was the duty of the Court to give effect to the parties' clearly expressed intent.

The Organization contends that it was orally agreed and understood and contemplated by the parties that a reclassification would change the status of the position and remove it from the Star Position category. This is denied by the Carrier.

In the case of *Sokoloff v. National City Bank of New York*, 239 N. Y. 15, the Court held that a statement by one of the parties to the contract that it was understood and contemplated by the parties as to the terms of the contract is not sufficient or binding, since understanding and contemplation cannot take the place of the written agreement.

It is evident from the record that before the agreement of April 25, 1962 was signed, that conferences were had between the parties with reference to the reclassification of the position, and what was to be the effect of such reclassification. If and when the agreement was presented for signature to the General Chairman and it did not set forth the agreement of the parties, it was the duty of the General Chairman not to sign the agreement, but request that it be amended to properly set forth the agreement of the parties. The General Chairman having signed the agreement on behalf of the Organization, the Organization is bound by its terms.

In the case of *Metzger as Receiver v. Aetna Insurance Co.*, 227 N. Y. 441, the Court held that in the absence of fraud, one who signs an agreement or contract is presumed to have read its contents and assented thereto.

It is noted that before the General Chairman executed the Agreement, the following proviso was added: "Subject to agreement between the parties, in regard to a joint check after six months, if requested, and that the work now being performed by the Car Distributor shall remain the work of the Telegraphers."

The Organization contends that the word "agreement" made reference to the main agreement between the parties. We do not agree with such contention. The facts indicate, from a reading of this statement, that if requested, a joint check would be made after six months in order that the situation might be then re-evaluated. It does not in any way refer to the main agreement between the parties.

The burden of proving its case is on the Organization. We require it to submit competent supporting evidence to prove its case and to establish violation of the Agreement. We hold that the Organization has failed to meet its burden.

We hold that the Agreement executed by the parties under date of April 25, 1962, did not remove the reclassified position from its Star Position category.

Claim is also made by Mr. Dore in his letter of May 16, 1962, that the Carrier discriminated against him in making the appointment. There is no competent evidence in the record to show that the actions of the Carrier in the making of the appointment was discriminatory, arbitrary and/or capricious.

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 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1966.

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