NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24881
THIRD DIVISION Docket Number CL-24747

Robert Silagi, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Baltimore and Ohio Chicago Terminal Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9630) that:

(1) Carrier violated, and continues to violate, Clerk-Telegrapher Agreement beginning with the claim date of June 1, 1981, when it caused and permits employees not covered by said Agreement to perform work and functions in connection with the operation of printing telegraph (teletype) machines and similar devices used for transmitting and receiving communications, including tearing off and separating message reports of cars, at Ashland Avenue and Halsted Street Towers; two (2) locations at Barr Yard, Chicago, Illinois and

(2) As a result of such impropriety, Carrier shall be required to compensate Clerk M. A. Gasper, Barr Yard, Chicago, Illinois, eight (8) hours pay commencing June 1, 1981, and continuing each subsequent date until the foregoing violations of the Agreement cease, and

(3) That Carrier shall also, because of its violative action, compensate Clerk F. Neilson, Barr Yard, Chicago, Illinois, eight (8) hours pay beginning June 1, 1981, and continuing each subsequent date until Carrier ceases to violate the Clerk-Telegrapher Agreement at Barr Yard, Chicago, Illinois, as heretofore described.

OPINION OF BOARD: The issue presented in this dispute is whether the tearing off and separating of 5-ply message reports of cars from teletype machines by yardmasters contravenes Rule 1 - Scope, Rule 18 - Installation of Machines or Rule 67 - Printing Telegraph Machines. The relevant portions of said rules are quoted below.

"Rule 1 - Positions and Employees Affected.

(a) These rules shall constitute an agreement between The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, and The Staten Island Railroad Corporation and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and shall govern the hours of service, working conditions, and rates of pay of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees, which shall include all employees formerly covered by clerical agreement effective July 1, 1921 (as revised December 15, 1969) as amended, and all employees engaged in the work of the craft or class

of Transportation-Communication Employees, which shall include all employees formerly covered by the Transportation-Communication Agreements: The Baltimore and Ohio Railroad Company effective July 1, 1928, as revised June 16, 1960, as amended; The Baltimore and Ohio Chicago Terminal Railroad Company effective June 3, 1963, as amended; and The Staten Island Railroad Corporation effective August 1, 1959, as amended."

"Rule 1(b) - Assignment of Work

When the assignment of clerical work in an office, station, warehouse, freight house, store house, or yard, occurring within a spread of ten (10) hours from the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all employees at a facility specified herein shall not exceed four (4) hours per day."

"Interpretation of Rule 1(b)

The word 'employee' in Rule 1(b) means one in the employ of this Company, whether coming under the Scope of this Agreement, another agreement, or outside the Scope of any agreement."

"Rule 18 - Installation of Machines.

(a) When and where new types of machines or mechanical devices of any kind are used for the purpose of performing work previously handled by such machines, coming within the Scope of this Agreement, such work will be assigned to employees covered by this Agreement."

"Rule 67 - Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operating of printing telegraph machines or similar devices that are used for transmitting and receiving either or both, information, or communications of record, irrespective of title by which designated or character or services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement."

The Organization relies heavily upon Rule 67, second paragraph, which assigns to Clerks the work of "tearing off and separating messages and reports". Such language is, in the Organization's view, "explicit unambiguous, certain, definite and unequivocally clear", consequently it demands an absolute right to insist upon compliance with the Rule. Conflicting past practices are material and relevant in the interpretation and application of a contract only when its

terms are ambiguous (Awards 21130-Blackwell; 18287-Dorsey; 18064-Quinn; and 14338-Perelson). Finally the Organization maintains that sustaining Award 22912 (Kasher), a case identical with the one at bar, is dispositive of the issue. It is, therefore, self evident that tearing off switch lists from printing teletype machines in Barr Yard and separating the 5-ply paper messages is work which must be done by Clerks and none others.

The Carrier's argument is three-fold: (a) that the Organization failed to sustain its burden of proving exclusive right to the work in question, (b) that even if such right exists, there is an exception under Rule 1(b), and (c) that Award 22912 (Kasher) has no precedential value.

To better understand the arguments of the parties the history of the dispute must be examained. A synopsis of the history follows:

Prior to the mid-1930's Morse key telegraph operators transmitted administrative messages on Carrier's sister railroad, the Baltimore and Ohio Railroad Company (B&O). In the late 1930's printing teletype machines were installed. The operation of the machines was a completely new assignment. In 1945 B&O and Order of Railroad Telegraphers entered into a memorandum of understanding assigning such work to telegraphers. Section 5 of said memorandum is almost identical with the second paragraph of Rule 67, supra. About this time the Carrier began to install printing teletype machines in some of its B&O yard offices where non-telegraph employes used this equipment to transmit reports and messages. These reports and messages were transmitted from Yard and Sales offices to a relay office in the same terminal where telegraphers retransmitted this information to other terminals. At the B&O Cincinnati Terminal the Telegraphers claimed exclusive rights to operate the teletype machines. To avoid misunderstanding, in 1947 the parties executed an interpretation of their first memorandum. The parties agreed that:

> "This Memorandum of Understanding does not apply to intra-city communication by direct key-board teletype machines in offices where Morse telegraph has never been in use and the communication service prior to the installation of teletype was being handled by telephone or messenger.
>
> Where intra-city communication by machines referred to in the above Memorandum of Understanding is performed by other than employees coming within the Scope of the Telegraphers' Agreement, the business so handled, except wheel reports, shall not be transmitted by reperforator tape to intra-city points."

In 1948 the B&O Telegrapher's Agreement was reprinted. The 1945 memorandum of agreement and its 1947 interpretation appeared as Article 31 of the new agreement.

In 1948 the Carrier installed printing teletype machines in the Yard-masters' Towers in Barr Yard. Such machines were also installed in the Barr Yard Office where non-telegraphers used them to transmit switch lists to the yardmasters at their towers in Barr Yard. At both towers yardmasters tore off the switch

lists from the machines in their offices and separated the 5-ply papers. No dispute arose between Carrier and Telegraphers nor between Carrier and the Organization as to the right of yardmasters to do these tasks. At this time the telegraphers in Chicago Terminal were covered by a different working agreement than that governing employes on the B&O. Said agreement did not contain the equivalent of Article 31. Clerical employes on both properties were covered by the same working agreement which contained no rule whatever dealing with the handling of teletype transmissions.

In the mid-1950's Carrier installed teletype equipment in yard offices throughout its system. In 1955 Carrier and Telegraphers negotiated a revision of Article 31 to cover employes of the Carrier. The Telegraphers' agreement covering B&O employes was reprinted in 1960 with the 1955 revision of Article 31 appearing as Article 36 which reads in pertinent part:

"Printing Telegraph Machines.

(a-1) Positions in telegraph or other offices requiring the operation of printing telegraph machines ... shall be filled by employees coming within the scope of the Telegraphers' Agreement ... except as herein provided. In offices, other than telegraph offices, persons not coming within the scope of the Telegraphers' Agreement may operate machines ... for transmitting or receiving information directly to or from telegraph offices in the same terminal. Such persons may operate such machines ... for transmitting information ... or receiving information ... to or from offices, other than telegraph offices when the information is confined to reports of the movement of cars or to service messages concerning transmission errors, corrections or modifications...

(e) Except as provided in paragraph (a-1), work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by the Telegraphers' Agreement. In emergency cases, individuals used for such service will not establish seniority."

In 1963 the agreement between Carrier and Telegraphers was reprinted. Article 36, above, appeared as Article 2 with two deletions not relevant hereto. After the 1955 agreement was extended to cover employees of the Carrier no complaint was made by the Brotherhood in regard to the use of yardmasters to tear off or to separate the switch lists sent to them by personnel in the Barr Yard office.

In 1966 Carrier installed a computer at Barr Yard which maintained a perpetual freight car inventory of all cars within defined limits at Chicago Terminal. Yardmasters continued to receive switch lists from Barr Yard office by teletype. In 1971 these machines were replaced by Kleinschmidt Receive Only Printers and in the following year Data Fax machines were added. Since then employes in the Barr Yard office have sent switch lists to yardmasters by use of the Kleinschmidt and Data Fax machines.

In 1972, negotiations began regarding the consolidation of Clerk-Telegrapher work. The eventual result of such negotiations was the current consolidated Clerk-Telegrapher Agreement, effective June 4, 1973. Article 36 of the former B&O Telegraphers' agreement was incorporated into the consolidated agreement, however, deleted therefrom were certain obsolete provisions pertaining

to Morse telegraph and restrictions which conflicted with other rules. The revised Article 36 appeared as Rule 67, reproduced above. In order to provide a continuum of interpretations of the rules extracted from former contracts the consolidated agreement of 1973 contains Rule 75:

> "This Agreement supersedes previous Collective Bargaining Agreements, and interpretations thereof, between the parties, and existing Circulars, Memoranda of Agreement and Letters of Agreement are cancelled unless otherwise agreed between the parties. Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement. Effective National Agreements remain in effect unless, or until, changed in accordance with Railway Labor Act, as amended."

In 1974 Carrier began to open Terminal Service Centers at various locations throughout its system. In most cases these new data centers consolidated yard and agency personnel into one central point leaving only yardmasters in the individual yards. Wherever a Terminal Service Center was opened, Kleinschmidt Receive Only Printers were placed in the yardmasters' offices so that they could receive switch lists. At each such location yardmasters tore off the lists and separated the copies. Thereafter Carrier began to receive claims that such work should be assigned to Clerks pursuant to Rule 67. Since the dispute could not be resolved on the property, the Organization progressed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours' pay "for work that took just a few seconds to perform" to a three-hour call.

The Organization argues forcefully that the merger of the Clerks' and Telegraphers' crafts in 1973 guaranteed to employes covered by the joint Clerk-Telegrapher agreement the exclusive right to perform all work in all offices involving teletype machines including tearing off and separating messages. The Organization acknowledges that hundreds of demands for eight hours' pay based upon claimed violations of Rule 67 were submitted and held in abeyance pending a decision in Award 22912. The Organization asserts that Carrier bargained in bad faith when it refused to honor Award 22912 and apply it to the pending identical claims. The Organization attacks Carrier's reference to former Telegraphers' Agreements with Carrier as outmoded for over 30 years. The Organization also claims that the disputes as to "communication work" over the years was between Clerks and Telegraphers and not with Yardmasters, nor have Yardmasters ever contended for such work. Moreover, the Organization points out that although the Railroad Yardmasters of America were named as an interested third party in the proceedings in the claim leading to Award 22912, the Yardmasters elected not to participate in that case. Nor are the Yardmasters making any claim to the disputed work in the instant case. The Organization rejects the notion that any portion of the operation of a teletype machine, no matter how slight, may be splintered from the jurisdiction of the Clerks, citing Awards 1501 (Shaw) and 2282 (Fox).

The Carrier argues with equal vigor that Award 22912 must be overturned. The doctrine of stare decisis, says the Carrier, is not absolute and should not be followed when an award is palpably erroneous. The history of collective bargaining must be given due consideration. Past practice is an important element in disclosing how the parties themselves interpreted their agreement. In any event claimant's demand for 8 hours' pay is harsh and excessive.

Continuity in the interpretation of contract rules is highly desirable. Such interpretations should not be overruled without strong and compelling reasons, Public Law Board No. 1790, Award No. 98 (Dolnick). Award 22912 involved the Cincinnati Terminal of the Carrier. Nevertheless, there is no honest way to distinguish the decision in this dispute from that decision. The parties are the same, the agreement is the same and the facts virtually identical. Certainly there will be difficulty on this property in having contrary awards in different locations on the same issue under the same basic facts. But it is preferable in the overall interest of the parties to give the best direction to the parties, as this Board sees it, as to how the rule should be applied, rather than follow the precedent set in another award, particularly as that decision is recent and, therefore, could not have developed substantial precedent, Award 22024 (Ables). With due deference to the distinguished referee who wrote the opinion in Award 22912 and to the members of this Board who concurred in his views, we feel obliged to reach a different conclusion for the following reasons:

The origin of Rule 67 may not be disregarded. Said rule derived from the 1945 memorandum of understanding between B&O and Order of Railroad Telegraphers as later elucidated by the 1947 interpretation. It surfaced as Article 36 in the Telegraphers' agreement and then metamorphosed into Rule 67 in the 1973 Clerk-Telegrapher agreement. To be sure Article 36 consisted of 18 paragraphs while Rule 67 has but 4 paragraphs. Therefore Award 22912 held that the rule was not adopted unchanged on June 4, 1973. Yet a careful comparison of Article 36 with Rule 67 shows that the essential parts of the former are retained in the latter. As noted earlier, obsolete portions and those parts which were in conflict with other rules were deleted. That being the case we are compelled to construe Rule 67 in the light of Rule 75 which enjoins upon the parties the obligation to continue to apply previous interpretations in existence prior to June 4, 1973. In contract construction a reasonable interpretation should prevail over one which leads to harsh and unjust consequences, Public Law Board No. 2895. Award No. 2 (Lieberman).

It is alleged by the Carrier, and not denied by the Organization, that since 1948, 5-ply paper had been used for the transmission of switch lists at both towers in the Barr Yard and that yardmasters tore off and separated these switch lists. It was not until subsequent to 1973 that claims were made that such work belonged to clerks. Award 22912 states that had the parties wished to preserve prior agreements they should have done so specifically. But nothing in Rule 75 negates 25 years of an unabated, unchallanged practice, Award 20514 (Lieberman). The parties own conduct for a quarter of a century simply cannot be ignored, it is the best evidence that there was no intent to terminate this minimal work assignment to yardmasters. Had they so desired they could have easily expressed that intent. Rule 67 must be read as modified by Rule 75.

Without abandoning its position that the Organization failed to show exclusivity to the work in question and that past practice must be considered, the Carrier argues that the remedy of 8 hours' pay is not justified. Even the remedy of 3 hours' pay, as granted by Award 22912, is not warranted for tearing off and separating 5 pices of paper, a task which takes but a few seconds. We agree with the Carrier. It is impossible to harmonize organized labor's legitimate demand for an honest day's wages for an honest day's work with a pay claim that has the earmarks of a lottery. The record in this case does not reveal that claimant ever performed the work in question. This Board is not inclined to award a clerk a windfall of 8 hours' pay, or even 3 hours' compensation, for services not performed and which are incidental to the work of a yardmaster. Such a claim is clearly excessive, Award 18804 (Franden) and should be denied on this ground alone.

Having given careful consideration to the entire record, the arguments and to the awards cited by the parties, it is the opinion of this Board that the disputed work comes within the exception contained in Rule 1(b). For all of the reasons stated above the claim is denied.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984

LABOR MEMBER'S DISSENT TO
AWARD 24881, DOCKET CL-24747
(REFEREE SILAGI)

This award is palpably wrong!

The Majority acknowledges that there is no honest way to distinguish this dispute from the dispute decided in Third Division Award 22912 because the parties are the same, the agreement is the same and the facts virtually identical. Nevertheless, the Majority undertakes a review of provisions of prior agreements which were superseded by Rule 67 of the currently effective agreement, in order to reach a result opposite to that decided in Award 22912. But the provisions of Rule 67, which is quoted on page 2 of the award, are clear. That was decided in Award 22912 and it is apparent from reading the language of Rule 67. There is nothing whatever contained in Rule 67 which may be said to be ambiguous. Consequently, the Majority's resort to prior rules which have been superseded and practices under those superseded rules, had no proper place in the consideration of the dispute to be decided herein.

The principle is aptly stated by Special Board of Adjustment No. 929:

> "When confronted with a contract interpretation issue, an arbitration board is required first to look at the language in dispute. If the language is clear, the Board must give to it the meaning that any reasonable person who is knowledgeable about the case would give to it. If the language is clear, the Board need look no further. It is not required to consider past behavior of the parties. It is not required to consider other arbitration board awards. It is not required to read into the language meaning and intent that does not exist or cannot be justified by a review of the language."

In any event, the consideration of prior rules was most faulty in failing to note the very significant changes made in current Rule 67 from the rules it was said to have replaced. Apparently, the Majority only considered the fact

that prior Article 36 of the Telegraphers' Agreement consisted of eighteen paragraphs while current Rule 67 has but four paragraphs. In itself, a simple revision in the number of paragraphs existing in the two rules would not be significant and that was all the Majority noticed. However, this obviously ignores the very definite changes made in Rule 67 from superseded Article 36 of the Telegraphers' Agreement and the 1947 Interpretation of a 1945 Memorandum of Understanding.

The superseded 1947 Interpretation clearly contemplated that the Telegraphers' Agreement would not apply to intra-city communications by direct key-board teletype machines in offices where Morse telegraph has never been in use. This may be seen from the quotation of that Interpretation appearing on page 3 of the award. In other words, as long ago as 1947 the parties interpreted the Telegraphers' Agreement as basically applying to inter-city teletype communication. However, there is neither a reference to nor a distinction made between intra-city and inter-city communication by printing telegraph machines in current Rule 67. This is a very substantial and significant change made in current Rule 67 from provisions contained in prior superseded agreements. This is not simply a change in the number of paragraphs, the number of sentences or the number of words but a change in content of the rules. The Majority should have noted this change, made by the parties as a result of negotiations and agreement, and recognized that something new was intended in Rule 67 from that which had been discarded from prior agreements.

On page 4 of the award, Article 36 of the Telegraphers' Agreement is quoted in pertinent part and on page 2 of the award relevant portions of Rule 67 of the current agreement are quoted. It is obvious from the award that

the Majority either ignored or elected to close their eyes to the very startling changes made in Rule 67 from prior Article 36. For clarity of comparison between the two provisions, I will quote them next below exactly as they appear in the award except I shall underline provisions of Article 36 substantially changed in Rule 67:

"Article 36 - Printing Teletype Machines.

(a-1) Positions in telegraph or other offices requiring the operation of printing telegraph machines ... shall be filled by employees coming within the scope of the Telegraphers' Agreement ... except as herein provided. In offices, other than telegraph offices, persons not coming within the scope of the Telegraphers' Agreement may operate machines ... for transmitting or receiving information directly to or from telegraph offices in the same terminal. Such persons may operate such machines ... for transmitting information ... or receiving information ... to or from offices, other than telegraph offices when the information is confined to reports of the movement of cars or to service messages concerning transmission errors, corrections or modifications...

(e) Except as provided in paragraph (a-1), work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by the Telegraphers' Agreement. In emergency cases, individuals used for such service will not establish seniority."

"Rule 67 - Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operating of printing telegraph machines or similar devices that are used for transmitting and receiving either or both, information, or communications of record, irrespective of title by which designated or character or services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement."

The portions of superseded Article 36(a-1) which I have underlined above make it clear that under old Article 36 Carrier was privileged to utilize persons not coming within the scope of the Telegraphers' Agreement to operate printing telegraph machines in certain circumstances involving the performance of certain work thereon. Looking at current Rule 67 one cannot find authority given the Carrier to utilize anyone not covered by the agreement to operate printing telegraph machines nor perform any work in connection therewith. The provisions of Rule 67 require operation of all printing telegraph machines, etc., be done by employes within the scope of the parties' agreement. Where Article 36 permitted outsiders to the Telegraphers Agreement to operate printing telegraph machines and Rule 67 requires all such operation be done by employes subject to the agreement, a very emphatic and decisive change has been made in the provisions of the two rules.

The change referred to in Rule 67 from the language of paragraph (a-1) of Article 36 just referred to, is echoed by elimination of the first five words and one number designation from the language of paragraph (e) of Article 36 of the old Telegraphers' Agreement. This elimination is underlined above. The second paragraph of Rule 67 is very nearly the same language in former Article 36(e). But, the elimination of the first five words and the number designation of old Article 36(e) is most significant and cannot be ignored. Paragraph (e) of Article 36 contained a specific exception which permitted employes not covered by the Telegraphers' Agreement to tear off and separate messages and reports - the very work which is involved in this case. In current Rule 67, the specific exception for non-covered employes was eliminated and that exception does not appear in Rule 67.

The deletions which were made from paragraphs (a-l) and (e) of old Article 36 of the Telegraphers' Agreement when current Rule 67 was adopted were not simply changes in the number of paragraphs, the number of sentences or the number of words in old Article 36. Instead, these deletions took away the authority of the Carrier to utilize strangers to the agreement in the performance of work involving operation or use of printing telegraph machines. These deletions were extremely significant changes from the language and provisions of old Article 36. Consequently, it simply cannot validly be said that current Rule 67 remained unchanged from old superseded Article 36.

The Majority's long, drawn out effort to retain a prior interpretation from a superseded agreement is untenable. They may contrast eighteen paragraphs with four paragraphs and say that obsolete portions and conflicting parts of the old rule were deleted. All of this, however, is not germane to the dispute. The reference to these items is no more than a smokescreen designed to hide the very real changes that were made by the parties in Rule 67 from prior Article 36. That the changes are real and significant will be apparent to anyone who will take the time to contrast the provisions of paragraphs (a-l) and (e) of old Article 36 with the specific provisions of current Rule 67.

Rule 75 of the current agreement does not require any modification in Rule 67 despite what the Majority says. Rule 75 contemplates prior interpretations to rules would be continued where the rules have been adopted unchanged. Here, it is abundantly clear that Article 36 was significantly changed. Further, nothing in Rule 75 ever considered that a new rule, such

would be modified as the award suggests. The logic here is backwards. Rule 67 of the new agreement certainly modified or changed Article 36 of the old agreement. It is rather irrational to suggest that an old superseded rule modifies or changes a new rule in a collective bargaining agreement as here urged. One might ask what the parties were realistically doing when negotiating a new rule but at the same time modifying or changing the new rule by the old rule which they obviously changed. Behavior of that kind, which is what the Majority suggests, simply does not exist in this industry

In the penultimate paragraph of the award, the Majority shows a lack of real understanding of the claims in this case. The award observes that the claims were for services not performed and that the claimant never performed the work in question. That some were incensed by those claims seems apparent. The record is clear that the Organization progressed the claims for the very fact that the claimant was not permitted to perform the work. The very dispute here was over jurisdiction to the work involved and the Organization quite proper brought the dispute to this Board to preserve the rights of employes it represent to that work. There is nothing new or novel in that type of claim brought before this Board and the claims should not have been described as having the "earmarks of a lottery".

Seven awards have been adopted by this Division in disputes which have decided exactly the same issues as are present in this case and every one of those seven awards decided the claims in favor of the position advocated by the Organization. In this lone award, the Majority is just as wrong as they can be.

For the above reasons, I dissent.

Date July 25, 1984

Elmer F. Thias

Elmer F. Thias Labor Member