Award Number 244
Docket Number TE-230

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE.—

"Request of Telegraphers' Committee that operators be restored at Byers Junction and pay allowed extra men who were available since the interlocking station and block office at Byers Junction was discontinued."

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

This dispute being deadlocked, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

There is in evidence an agreement between the parties, bearing effective date of May 16, 1928, as to rates and July 1, 1928, as to rules. This case involves the meaning and the application of Article 21 of the Agreement reading as follows:

"It is not the disposition of the Railroad to displace operators by having trainmen or other employees operate the telephone for the purpose of blocking trains, handling train orders or messages, except in bona fide cases of emergency. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator."

The parties have jointly certified to the following facts:

"Effective March 21, 1933, interlocker and telegraph office Byers Junction was closed and telephone line constructed from Ray to West Junction, connecting with existing line between Ray and Byers Junction. Since that time any Form A's and orders for trains at Byers Junction have been handled over the telephone through the operator at West Junction.

"On the same date double track operation between West Junction and Byers Junction was discontinued and single track operation established; the former eastbound main track being used as a running track in either direction on instructions of train dispatcher.

"Instructions covering operation between West Junction and Byers Junction are covered in the current time table and read as follows: 'The south track between West Junction and Byers Junction will be used as a running track in either direction on authority of train order. All eastward trains moving via Wellston Sub-Division will report clear at Byers Junction. Eastward Ohio Sub-Division trains using running track will not foul main track at Byers Junction until proper authority is received from operator West Junction. Westward trains using the running track from Byers Junction will report clear of the main track at Byers Junction.'"

"A check of train orders and Form A's issued to trains over the telephone at Byers Junction from August 11th to September 10th, 1933, inclusive, indi-

cated there were 160 Form A's, an average of 5.2 per day, and 120 train orders, an average of 3.8 per day."

On June 1, 1933, a spring switch was installed at the end of the running track at Byers Junction, and instructions by General Notice and General Order for government of train crews and others were issued.

This spring switch was set for normal movement westward on the single track, and permitted non-stop movement eastward from the running track as it returned to its normal position following passage of each set of wheels of an eastward train, and remained in permanent normal position thereafter for westward train.

On September 1, 1934, double track operation was resumed and still continues. Instructions by General Order were issued to govern. The spring switch continued in operation and certain signals were restored to operation, with revised indications permitting continued non-stop movement of trains, further reducing the necessity for train crews to secure train orders or Form "A" at Byers Junction.

Westward trains from the Wellston Sub-Division stop at Byers Junction to secure Form "A" before fouling the Ohio Sub-Division. It is not necessary for them to copy train orders as special instructions in the time table confer the right to proceed with the current of traffic between Byers Junction and West Junction. Eastbound trains from the Wellston Sub-Division stop when clear of the Ohio Sub-Division at Byers Junction and so report by telephone to the operators at West Junction.

A check made by the Carrier for a period of 46 days beginning June 1, 1935, showed that during this period 39 train orders, an average of less than one per day, and 175 Forms "A", an average of less than four per day, were copied by train crews at Byers Junction. There is no evidence in the record regarding the present volume of Forms "A" and train orders copied by train crews at Byers Junction; but we may assume that the volume still continues to be small. The employees contend that Article 21 set forth above is nevertheless being violated.

The first question to be decided is whether or not Article 21 constitutes a binding undertaking on the part of the carrier. Article 21 states that "It is not the disposition of the Railroad to displace operators by having trainmen or other employees operate the telephone", etc. This is not the ordinary language of a contract. There are no words of agreement but merely a statement by the Railroad of what its disposition is. If the clause stood alone, we would have to say that it constitutes no more than a declaration of intended policy not binding upon the Carrier. But Article 21 does not stand alone. It is incorporated into the agreement between the parties as one of 24 articles or rules which govern all the relationships between the parties. If Article 21 had been intended merely as a statement of policy and not as a binding undertaking, it is hard to say why the parties would have made it an integral part of their agreement; but further than that, the article has been a part of successive agreements between the parties since 1917, including the revised schedule of March 1, 1920, the rules effective Oct. 1, 1925, and the present agreement effective July 1, 1928. During this long series of years, the Article has consistently been treated and applied by the parties, by the U. S. Railroad Labor Board, and by the Telegraphers' Adjustment Board (on which the carrier had equal representation with the Employees), on the basis of its constituting a binding contractual undertaking. These prior applications of the Article may be briefly summarized as follows:

1. *"A" Yard.*—Clerks in this yard were giving train reports to dispatchers, keeping records of trains, and securing block for trains leaving that point. The employees protested and the general superintendent by letter, dated September 13, 1920, instructed that these activities by the clerks be discontinued except in cases of emergency.

2. *Mineral, Ohio.*—A Conductor used the telephone on a holiday in the office at Mineral to get orders for his train to move. The regularly employed telegrapher could have been called and in a letter to the General Chairman, dated Nov. 23, 1920, Mr. F. E. Blaser, Assistant to the Vice President, wrote the General Chairman that there had apparently been a violation of the Article and that the Operator would be paid for the call.

3. *Renfrew, Pa.*—During the year 1919 the Third Trick Telegrapher's position at Renfrew was abolished and a telephone was installed at the nearby station at Ribold and was used by train crews for the purpose of communicating with the train dispatcher at Butler during the time the third trick was closed.

Pursuant to a protest by the General Chairman, Mr. Blaser on Dec. 16, 1920, wrote that instructions had been given to use the telephone only in cases of emergency as provided for under the Article.

4. *Barrackville.*—By letter dated July 26, 1921, the General Superintendent arranged for the payment of a call to the operators at Barrackville on account of the copying of train orders by conductors.

5. *U. S. Railroad Labor Board Decision #3418, Apr. 24, 1925.*—During 1922 three train dispatchers at Pittsburgh were moved to Rand, Pa., displacing three telegraph operators. Two months later they were moved back to Pittsburgh and the operators' positions were restored. The employees contended that this action violated both the scope rule of the Agreement and Article 20 (the present Article 21). The carrier sought to justify the action on the ground of decrease in business and the need of economy. The Board ruled that the Agreement had been violated.

6. *Bridge 198, Benwood-Hartzel Sub-Division.*—To protect a crane car occupying the main track, a conductor was detailed to use the telephone for the purpose of getting from a nearby block operator information regarding the movement of trains and any orders which might be necessary. By letter to the General Chairman, dated July 8, 1927, Mr. Blaser allowed the Telegrapher (who had been taken off during the operation) pay for the period in which he was not on duty at the Bridge.

7. *Schenley Tunnel, Pa.*—During the repair of the Tunnel walls, flagmen handled a detour movement between Schenley and a Pennsylvania Railroad crossover by keeping in touch by telephone with the Operator at Schenley. The employes contended that this was a violation of Article 21 but Mr. Blaser for the management held otherwise on the ground that no operators had been displaced. The case was jointly submitted to the Telegraphers' Adjustment Board on November 28, 1929, and the Board, composed of two representatives of the carrier and two representatives of the employees, sustained the contention of the employees.

8. *Reduction, Pa.*—On Sept. 9, 1930, a one-trick instead of a three-trick telegraph office was arranged for at Reduction and at the same time a telephone was placed on the outside of the building to enable train crews to get permission to leave the siding and clear the block to operators at Vista and Layton. These were the facts jointly submitted by the parties to the Telegraphers' Adjustment Board, the Employees claiming a violation of Article 21. In the report of the decision of the Board sustaining the position of the carrier, the carrier took the position that regardless of the statements in the joint submission the fact was that the train crews reported themselves clear of the main track to the operator at Vista and also secured permission to leave the siding from the operator at Vista; therefore, they were not required to do anything more than they had been doing before the two tricks had been closed at Reduction; and that Article 21 had not been violated because the crews were not "blocking the trains." The Board's decision was that "The position of the management is sustained." It would appear from the decision that the train crews were not in fact handling train orders or messages or blocking trains within the meaning of Article 21 and the case is cited here simply as further evidence that both parties and their Board treated Article 21 as a contractual undertaking.

9. *Stoyestown, Connellsville Division.*—At its session on July 20 and 21, 1932, the Telegraphers' Adjustment Board ruled that Article 21 had been violated when a conductor at Rowena copied two train orders by telephone from the operator at Jerome Junction at a time when the operator at Stoyestown (where the train could have stopped) was available, though off duty.

10. *Harper's Ferry Tunnel, Va.*—During November 1930 certain freight conductors during the widening of the tunnel communicated by telephone with the operators at Harper's Ferry for the purpose of holding trains until notified that the track through the tunnel was clear. The employees contended that the duty should have been performed by telegraphers and their position was sustained on March 22, 1932, by the Telegraphers' Adjustment Board.

11. *"GU" Tower.*—During October 1931 a conductor and a trainman were assigned to handle cross-overs and flag trains around a slide near the tower, these employees communicating by telephone with the dispatcher, two operators being displaced for a portion of the time. The employees contended that this displacement was in violation of Article 21 and their position was sustained by the Telegraphers' Adjustment Board in its session July 20 and 21, 1932.

12. *Temporary Cross-over Between Gratztown and West Newton.*—During a portion of July and August 1933 train crews communicated with the operator at Vista for the purpose of single-lining trains while a new rail was being laid. The employes contended that this was in violation of Article 21 and by letter, dated March 12, 1934, Mr. Blaser sustained the contention.

Thus, it will be seen that, beginning in 1920, and stretching on down to 1934, Article 21 has consistently been treated and applied by the parties as a binding contractual undertaking like all the other articles of the Agreement. In view of this history and of the incorporation of the Article in successive agreements between the parties, we are constrained likewise to view it as a binding contractual undertaking. We must, in other words, treat the words, "It is not the disposition of the Railroad", as an express promise by the Railroad not to do the things described in the Article. That may or may not have been the original intention when the formula was originally drafted in 1917 as result of mediation; as to this, there is nothing in the record. But whatever the thought of the draftsman may have been in 1917, the usage and the understandings of the parties have given the article an obligatory interpretation too clear for us to ignore.

It was suggested in argument at the hearing before the Referee that, while Article 21 may properly be considered as a contractual undertaking, the use of the word "disposition" should at least be recognized to the extent of somewhat softening the binding restrictions of the Article and of justifying a not too literal application of the Article to the hard facts of the case before the Board. But we do not think that such an interpretation would be possible. Either the effect of the word "disposition" is to render the Article nugatory as a contract or else the parties by their own usage and interpretation have converted the word "disposition" into the language of a promise. There is no middle ground between something that is not a promise and something that is a promise. By the usage and interpretation of the parties, we must treat the clause as a promise and, that being so, if there are any exceptions to the promise, we must find them elsewhere in the Article.

It will be noted that the cases enumerated above do not cover the kind of situation with which we are now dealing where, because of falling off of business, a telegraph office is closed and train crews perform the small remaining work of the telegraphers. So far as the record discloses, it was not until 1931 that such a case arose at Frederick, Md., where as a result of reduced traffic only two trains stopped at the station, both in the early afternoon, within ten minutes of each other. The position of ticket agent-operator was abolished and the conductor reported in the clear and received Form A from the operator at Frederick Junction over the telephone at Frederick. On March 7, 1932, the Carrier declined the General Chairman's request to reopen the telegraph office and the General Chairman thereafter held the case in abeyance without further action to date.

A somewhat similar case arose at Childs, Md., and was protested by the employees some time in December 1933, or early in 1934, but no action has been taken. Another similar case at Aikin, Md., was appealed to the Telegraphers' Adjustment Board and deadlocked July 18, 1934. Another case arising at Holmes was deadlocked on July 29, 1933, in the Telegraphers' Adjustment board, but the carrier contended that the case was similar to that at Reduction and it does not appear from the record whether train orders or Forms "A" were involved. Finally the carrier cited a case at Armco Junction where in 1930 an operator-clerk's position was abolished on account of closing down of Hamilton Furnace. Later, in 1931, the furnace was reopened and hot metal trains started running again, but the operator-clerk's position was not restored; the request of the committee for its restoration was declined on March 5, 1932, and no further action has been taken. Again we do not know whether or not train orders or Forms "A" were involved.

These cases are too recent to warrant us in holding that the employees have acceded to an interpretation of Article 21 to the effect that, where business falls off very substantially, the Article will not apply. We must then proceed to consider the question on its merits as an original question not yet decided by any board or by any accepted interpretation between the parties themselves.

We must first inquire into the purposes and objects of Article 21. Both parties have cited a letter dated Nov. 23, 1920, to the General Chairman by Mr. Blaser, referred to above, as containing the carrier's understanding of the intent of the Article. At the time the letter was written the Article was

then numbered "20" and previously it had been numbered "22" but it is word for word the same as the present Article 21. It appears from this letter that the Article was drafted to quiet the fears of the operators that they would be displaced as a result of the installation of telephones and their use by other employees. Thus, Mr. Blaser wrote:

> "It is my understanding that present Article 20, which was old Article 22, was originally agreed to in conference as a result of statement made that offices were being closed and operators displaced as result of the installation of telephone circuits for train dispatchers' use. Operators either were being displaced or there was a fear that they would be displaced, and in order to quiet such fear the article above referred to was made a part of the agreement, * * *."

Mr. Blaser, it will be noted, spoke of the installation of telephone circuits "for train dispatchers' use" and it is now contended that, since in this case the train crews are not communicating with the dispatcher but are merely communicating with the operator at West Junction, there is no violation of Article 21, whereas the result might possibly be different if they were communicating with the train dispatcher. But Article 21 makes no such distinction, and none of the cases which have been cited and are described above lay any stress upon the distinction. In the Schenley Tunnel, Gratztown and West Newton, Harper's Ferry Tunnel, Bridge 198, Stoyestown, and Reduction cases, the communication was with the operator and not the dispatcher. In all of these cases, except Reduction, a violation of Article 21 was established, and in the Reduction case the fact that the communication was not with the dispatcher was not mentioned. Article 21 itself implies that communicating with an operator for the particular purpose described would be covered quite as fully as communicating with the dispatcher, for the second sentence of the Article states that it does not apply to communications with the operator from the ends of passing sidings or spur tracks, thus indicating that communication with the operators at other than passing sidings or spur tracks for the purposes described would be improper.

There is nothing technical about the Article. Its purpose was to protect telegraphers from having their work performed by others. Thus Mr. Blaser in his letter stated that the language of the article "seems to be very plain and unequivocal and has always been construed by me at least to mean that operators would not be displaced by trainmen or others handling their business by telephone *where it had previously been handled by operators* or where it would be handled by operators." [Italics ours.] Further he states:

> "I should say that Article No. 20 never intended to prohibit train or enginemen from using the telephone at points where no telegraph office had ever been established and there was no need for a telegraph office such as at an intermediate passing siding. It could not be said if the train or engine crews used the telephone at such a point that they were *displacing operators nor taking the place of operators.*" [Italics ours.]

These two quotations indicate clearly that the object of the Article was to prevent the displacing of operators by other employees through the use of the telephone. Mr. Blaser does not say that this can be done when it becomes economical to do so. He does state that the Article would not apply "where no telegraph office *had ever been established* and there was no need for a telegraph office *such as at* an intermediate passing siding." There is no similarity in that illustration to the case now before us and Mr. Blaser justifies the illustration by pointing out that it would not involve "displacing operators nor taking the place of operators."

Article 21 itself contains two express and very clear exceptions. It does not apply to "bona fide cases of emergency" and it does not apply "to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator." It is conceded that neither exception applies to this case. There is no passing siding or spur track at Byers Junction, and Mr. Blaser indicates in his letter what was meant by "emergency" by stating that it was not the intention of the Article "to prohibit train or enginemen talking to the dispatcher on the telephone or taking an order from the train dispatcher on the telephone direct when it became necesary in an emergency as a result of unforeseen conditions in order to keep trains moving or avoid serious delay so long as it did not in any manner *displace operators* as heretofore outlined in this letter." [Italics ours.]

The question is really whether we are at liberty to write into the Article an exception in addition to the two exceptions it contains. The carrier has shown that in two instances or types of cases the parties themselves have departed from the strict and literal application of the Article.

Mr. Blaser in a letter of October 24, 1922, addressed to officials of the Carrier, with copies to the Employees' representatives, stated the following understandings:

> "SUNDAY RELEASE.—
>
> "In a general discussion of this question the general committee were in full accord with the idea that employes should be released from Sunday service wherever it could be done consistent with the requirements of the service and the provisions of the wage schedule, and also concurred in our opinion that the spirit and intent of Article 20 would not prohibit temporarily closing an office on Sundays when train service was curtailed and the services of a telegrapher would be required only for a few minutes during the day in connection with the movement of one or two trains at unimportant points or the ends of branch lines.
>
> "It is understood that at present there are a number of offices regularly closed on Sundays where no protest of violation of Article 20 has been made; therefore no action is necessary with those offices so far as Article 20 is concerned.
>
> "The general committee stated that they were agreeable to a liberal and reasonable application of Article 20 in order to release employes from service on Sundays, provided the local committee was consulted regarding the proposed arrangement in order to avoid controversies; it is therefore understood that in the future when the division officers desire to close an office on Sundays, where it is known that a minimum amount of work may be required of a telegrapher, the matter will be taken up with the local committee who will be instructed by the general committee to deviate from a literal application of Article 20 in order to permit of a liberal and reasonable application. In the event the local officers and local committee cannot agree on the closing of an office as above outlined, the matter should be referred to this office to be handled with the general committee."
>
> "WEEK DAY RELEASE.—
>
> "On other than Sundays where offices are closed a portion of the 24-hour period, and it becomes necessary for crews to obtain orders, the telegrapher will be called to handle the order if he is available so the order can be obtained in time for the train to be moved without material delay. If the telegrapher is not available to perform the service as herein outlined and it is necessary for some other employee to take the order, no compensation will be allowed the telegrapher. It should be understood, however, that the telegrapher will be used to handle the order if he is within reach."

It is urged that we should now give to Article 21 the same "liberal and reasonable application" which was given to it in providing for the Sunday and week day releases and hold that the "spirit and intent" of Article 21 would justify our finding in its language an implied exception such as the Carrier contends for. Clearly it is our duty in the interpretation of the Article to read it fairly and not technically, and to give to its words the meaning which the parties can reasonably be supposed to have had in mind. We are not at liberty to go beyond that and add to the Article by interpretation the substance of something neither found in the language nor understood or intended by both parties.

In the case of the Sunday and week day releases it should be noted, first, that the Employees' representatives were called into conference and agreed with the carrier "to deviate from a literal application" of the Article; secondly, that on Sundays and during closed hours on week days the regularly employed employees would presumably not insist upon an arrangement requiring them to remain on duty; thirdly, and most important, that the understanding arrived at did not result in the displacement of any workers. In the case of the Sunday release, the telegrapher affected would have his regular weekly assignment, and in return for giving up the right to a Sunday call would be freed from having to hold himself in readiness. In the case of the week day release during the closed portion of the day, when the telegrapher might not wish (as he normally would on Sunday) to be thus freed, he was to be called if available, relinquishing his right to a call only if he chose to be unavailable. Thus

the understanding arrived at was in harmony with what the men themselves would normally desire, and took from them nothing whatever of any substance; and to the extent that there was a slight deviation from the strict language of the Rule it was agreed to by the parties.

But, in the case before us, we are asked without agreement by the parties to read into the Rule an exception permitting the outright displacement of employees for whose protection the Rule was made. The whole object of the Rule was to guard against such displacement. The Sunday and week day releases involved no displacement, and yet even the very small departure from the Rule in those instances was first agreed to by the parties. It would be difficult indeed for us to justify a major departure from the Rule without any agreement between the parties.

It seems reasonable to suppose that the Carrier's temptation to displace telegraphers by assigning the work to train crews would only become acute when the volume of work to be performed had substantially fallen off, and for all that we know Article 21 may have been intended to protect the telegraphers from displacement in times of diminished business. And for all that we know the number of train orders and Forms "A" in the cases enumerated above and decided in favor of the employees may have been very few; at any rate the particular volume in each case seems not to have been regarded as significant.

But, if, as is also possible, the parties, when Article 21 was agreed to, simply did not have in their minds the contingency of a drastic decrease in work due either to a depression or to mechanical improvements or both, it is not for us to go back into time and write into the Rule what we imagine they might have written into the Rule had they addressed their minds to the problem. We simply do not know what they would have done. We may guess that if they had thought to frame an exception they would have taken into account a number of factors. They might have said, "we will restrict the exception to small and unimportant points or the ends of branch lines" (as seems to have been done in the case of the Sunday release); and if so, they might have defined what was meant by a small and unimportant point. On the other had, they might not have so qualified the exception. Again they might have drawn a distinction between a decrease in work due to temporary recession of business and a decrease in work due to permanent recession or to mechanical improvements or both; and if they had done this they probably would have defined the distinction which they had in mind in order to avoid future misunderstandings. Finally, and most important, they would probably have arrived at some formula for measuring the amount of the decrease and determining at what particular stage it would be proper to permit displacements.

But all this is speculation. In the case before us, the point involved is at a junction on a main line. How much importance the parties might have attached to that fact we do not know, but presumably it would have been given some weight. In the case before us, a considerable portion of the decrease in work appears to have been caused by mechanical or other changes in signaling and in the method of routing trains. No doubt that fact would have been considered and given weight, but to what extent or by what formula of measurement we cannot tell. At least some portion—perhaps a quite large portion—of the decrease has been due to the depression, which we may hope to be temporary. The latest figures on the volume of train orders and Forms "A" at Byers Junction are nearly a year old. We do not know to what extent the volume may since have increased or to what extent it fluctuates from season to season, least of all do we know what formula the parties would have agreed to for measuring fluctuations or determining what number of train orders and Forms "A" over what period of time would justify the displacement of telegraphers. We cannot find the answers either in the language of the Rule or in the customs and understanding of the parties.

This case may be distinguished from the one before us in CL-210, Award Number 236, in which we had to consider the classification of an employe's occupation where his chief responsibilities and the majority of his time were devoted to one type of work, while for his remaining time he was assigned to another and less important type of work. There the problem of degree intruded itself, and had to be met, but the problem was altogether different from the one before us now. There the categories of work listed in the Agreement were expressed in broad general terms; the employee had to be classified somehow, and it seemed altogether reasonable to say that he should have that classification in which his major time and responsibilities were engaged. But here the

Rule is explicit. It says the telegraphers shall not be displaced by train crews using the telephone for certain purposes, and then there are two express exceptions, to which the parties themselves by agreement have added a third but relatively unimportant exception (the Sunday and week day releases) not affecting the main purpose of the rule. What we are asked to do now is to find a fourth exception not mentioned, not agreed to, affecting the main purpose of the Rule (the prevention of displacement), and involving not only problems much more complicated than the problem in CL–210, but also speculative factors such as the period to be measured, the extent of fluctuations, the nature of the causes producing the particular decrease, the character and importance of the stations, etc. To undertake the task of constructing a formula embracing these factors is not to interpret the Rule, but to write a new one.

We may readily admit that this conclusion produces a result which is burdensome to the carrier, and uneconomical, and which the parties might have guarded against had they constructed the necessary formula. The very nature of the result obligates us to find the formula implicit in the Rule, if we can find it. But we cannot find it because it is not there. The result, by which the carrier is compelled to pay for more than it receives, is the kind of result which frequently occurs when written contracts must be applied to changing circumstances. The only remedy is in the modification of the contract itself.

In conclusion the following principles must govern the case:

(1) Where the blocking of trains or handling of train orders of messages by trainmen is not a regularly established practice at a particular point, but is ocasional, unexpected, and exceptional, Article 21 does not require the employment of a telegrapher. We think that this principle is fairly within the meaning of the emergency exception.

(2) Where, however, the blocking of trains or handling of train orders or messages is a regularly established practice even though small in volume, Article 21 requires the employment of a telegrapher, subject to the exception relating to passing sidings or spur tracks.

(3) Where, during a portion of the 24 hour period, work of the category described in paragraph (2) above has to be performed, a telegrapher should be employed for the particular trick in which the work falls, but if during some other portion of the period not comprised within such trick, work of the exceptional character described in paragraph (1) above has occasionally to be done, it is not necessary to keep a telegrapher employed for the extra trick or tricks in question, but the telegrapher employed on the trick in which the established work falls should be called if available. This principle is within the meaning of the week day release rule.

Not wishing to pass upon more than is before us, we confine these principles to cases like the one before us, involving the displacement of jobs by the closing of a telegraph office at an important point on a main line, and the blocking of trains or the handling of train orders or messages by train crews over the telephone as an established regular policy.

The difficulty in framing an award in this case is that we do not know how much of the work during the period in question is of the class described in paragraph (1) above, how much is of the class described in paragraph (2), or whether the work of the sort described in paragraph (2) falls within one trick, or two tricks, or three tricks. Nor do we know during the period in question what changes if any have been made from time to time in the practices and the hours. We must remand the case to the parties to adjust the matter in the light of the facts, upon the basis of the principles outlined above, without prejudice to either party to seek the further advice of the Board in case of disagreement as to the facts or the applictaion of these principles.

AWARD

Claim sustained, subject, however, to adjustment by the parties in accordance with the principles outlined above.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 16th day of April 1936.

DISSENT

The award in this case follows an analysis of Article 21, the only term in the agreement between the parties recognized by the disputants to be involved. The analysis is searching and proceeds in plausible manner to translate the introductory words of the article, reading: "It is not the disposition of the Railroad to displace operators by having trainmen or other employees operate the telephone for the purpose of blocking trains, etc. * * *" to mean that neither trainmen or other employees may operate the telephone for such purposes. It is unnecessary to follow through the analysis in order to arrive at this distortion of the ordinary meaning of the words quoted, for upon interrogation by the writer of this dissenting opinion of the Referee who made the award, *asking if that were not an accurate statement of the effect of the* award, the reply was given that it meant that "The railroad shall not displace" operators by having trainmen or other employes operate the telephone for the purposes stated.

This conclusion is deduced despite the evidence given in explanations by the representative of the carrier, Mr. Blaser, early in the period following adoption of the Article in respect to two certain instances which brought into question the intent of the Article as it related thereto. These explanations are in letters dated November 23, 1920, and October 24, 1922, and are covered by the analysis leading up to the award. The analysis in respect to the letter of November 23, 1920, however, rather than bearing directly upon the positive comments of the letter arising apparently out of an incident relating to use of a trainman in operation of the telephone when an operator was available for call, which comments were extended to discuss certain other purposes of the Article, was extended to comments upon failure in that letter to give specification to another phase applicable to the Article, viz, whether or not displacement of operators by other employes could be effected when it became economical to do so. That Mr. Blaser did state certain circumstances such as locations "where no telegraph office had ever been established and there was no need for a telegraph office such as at an intermediate passing siding", is not to be accepted as a limiting statement of conditions under which the Article may be brought into question.

More particularly were the comments in the next letter of October 24, 1922, related to the two specific circumstances of release of regularly assigned employes on Sundays and where offices are closed a portion of the 24-hour period on week days. Thereupon the action of the parties in joint consideration and the comments of Mr. Blaser in his letter were limited to definite understandings in respect to those two circumstances. The fact that the present circumstance is not allied to those two former circumstances, or that the carrier's representative did not at that time extend his letter in respect to the agreed upon deviation "from a literal application" of the Article, does not establish that other circumstances may not arise that too would justify such deviation from a literal application of the Article, if indeed any literal application of the wording of it could be measured.

The *fact is that literal application in the form of established measure for* every circumstance that might arise, is not embodied in the wording of the Article. Certainly the restrictive interpretation that the railroad shall not displace operators by having others use the telephone for the purposes stated, was not therein expressed nor can ordinary and accepted meaning of the words used in the Article be transmuted into restrictive interpretation which it is admitted this award is based upon.

The proof of the meaning of the Article and of the intention and purposes of the wording of it lies in the application given to it in the experiences on the lines of this carrier in the years following its adoption, as it may be gleaned from the record in this case. That record too is reviewed in the analysis preceding the award: that analysis concluded the review of twelve instances cited by the employees with a proper acknowledgment that they did not cover the kind of a situation with which the instant dispute deals, but it concluded, we think in error, also that the twelve instances showed that Article 21 had been "treated and applied by the parties as a binding contractual undertaking like all the other Articles of the agreement." Quite to the contrary the very origination of the twelve contentions, the disposition of six of them by the carrier's representative upon the protest of the employes that at least certain of them constituted violation of Article 21, and the disposition of the

remaining six by a System Board of Adjustment upon which the carrier and employes had equal representation, was complete verification of the fact that there was not an inviolable prohibition intended or applied. Had there been there would have been no occasion for origination of the contentions and for their consideration, for so far as the descriptions of each incident were given in practically every one wherein Article 21 was cited, it was transparent to all parties interested that the telephone was being used under circumstances which brought this Article 21 into the question, and demanded under that Article a determination according to its intended non-absolute wording. Under an absolute prohibitory phrasing in the Article, there could have been no reason in denying and pursuing through channels of appeal a claim that trainmen were using the telephone for the purposes stated when the facts clearly showed that the telephone had been used for the purposes stated, and the only mitigation was that it was not done under circumstances contemplated by the wording of the Article.

Also are the six cases, cited by the carrier as having value in interpretation of Article 21, dismissed by the Referee by reason of their alleged recent occurrence, despite the fact that in one of the cases (Childs, Md.), during the past five years trainmen had been doing just what an absolute prohibitory phrasing of Article 21 would have been without question in the minds of any one a definite violation of the Article, and it was not therein even contended that it was unknown to the representatives of the petitioner in this dispute; in fact, during the first three years of that period, it being to the advantage of an employe coming under the telegraphers' agreement, there was evidently admitted liberality in application of Article 21 in condonance by the representatives of the telegraphers of that situation.

In two other of these instances cited by the carrier, also originating about four years past, trainmen continued to use the telephone for at least some of the purposes enumerated in Article 21 after the telegraphers had raised question and such use was continued after declination of their request without further complaint by their representatives.

These citations are, however, dismissed in the award as not being of any value as an interpretation of Article 21 for the analysis preceding the award proceeds to a consideration of the question on its merits as an original question. This procedure to a consideration for purpose of arriving at an award in neglect of pertinent instances of practice, which at least to certain extent were undeniably condoned, we believe leads to error in conclusion and in award. For though the correct interpretation of the Article may logically be derived from the wording of the Article itself, as we shall now proceed to analyze it, the very existence of contention in respect to its proper interpretation makes necessary the consideration of every pertinent circumstance in the operations of the carrier and its relation with its employes therein which may be cited to this Adjustment Board.

The question at issue in this case is whether or not Article 21 of the agreement between the parties has been violated by the discontinuance of the telegraph office at Byers Junction, and the consequent abolishment of three positions of operators thereat.

Article 21 is a rule of partial restriction in respect to use of telephones for handling train orders or messages and blocking trains by employes other than operators (telegraphers). The last sentence of the Article specifically excludes from any restrictive provisions of the Article those situations where train crews use the telephone at the ends of passing sidings or spur tracks for communication with the operator. The first sentence also is not a statement of absolute prohibition as it admits such use of the telephone by other than telegraphers in bona fide cases of emergency; this sentence discloses the non-absolute restrictive character and purpose of the Article directly in its opening statement that "It is not the disposition of the Railroad to displace operators by having trainmen or other employes operate the telephone * * * etc." for the purposes stated. Other words such as appear in other agreements stating "No employe other than covered by this agreement will be permitted * * * etc." to use the telephone for the purposes stated, could and doubtlessly would have been used if the absolute restriction suggested by the instant claim were intended.

It, therefore, becomes necessary to examine the record made by the parties during the existence of the agreement containing this Article in order to learn

the procedure which had been followed in giving the reasonable application for which the Article was designed.

For that examination we are limited to the evidence in this dispute wherein was cited a total of eighteen allegedly related cases. The provisions of Article 21 are shown to have been included unchanged in agreements between the parties since the year 1917. The first interpretation cited is one submitted by the petitioner being a letter of November 23, 1920, from the carrier's chief operating officer designated to handle disputes of this character, which described the origin of the rule and gave the carrier's interpretation of it under the several circumstances referred to in the letter.

The carrier cited a letter of October 24, 1922, written by the same officer following a general discussion of Article 21 with the employes' general committee, addressed to the carrier's division superintendents again outlining the interpretation placed upon the rule under the circumstances which brought about that discussion. Reference therein is made to a statement by the general committee of their agreeableness to a liberal and reasonable application of the rule under the circumstance occasioning that discussion.

These two letters, whatever may have been the unrecorded opinions of the parties concerning them, are indicative of the fact that it was the intention of the parties that the rule was not one of arbitrary restriction but that it was designed to have a reasonable application to the various situations arising which might bring it into question.

Citations of eighteen former situations bringing Artcle 21 into question were given; to the degree that they relate to the immediate question in the instant dispute, they provide appropriate evidence of the purpose of the Article and the effect that it has been given on the lines of the carrier.

Thirteen of these situations were cited by the petitioner, none of which involved the re-opening of a telegraph office for permanent use and the assignment of telegraphers in regular service therein, as is here requested. Ten of these cases involved continued telegraphers' work for both permanent and temporary assigned positions; two related to calls at locations where operators on other tricks were regularly employed; one pertained to direct communication by trainmen with the train dispatcher. None of them are illustrative of the situation presented in the instant dispute insofar as reasonable application of Article 21 may be applied thereto.

These thirteen citations embrace the twelve instances credited as citations by the employes in the analysis of the award, previously commented upon, which analysis by the Referee concluded that those twelve instances did not cover the kind of a situation with which the instant dispute deals, in which conclusion we concur. However, as before stated, their existence, and very nature, and the handling through successive stages of appeal of the disputes, thereupon constitute irrefutable evidence of the non-prohibitory character of Article 21.

Five of these situations were cited by the carrier, two relating to cases deadlocked by a System Adjustment Board and as yet undecided, but still exemplary at least of the non-arbitrary intent of the rule. Three relate to circumstances, similar to the instant case, in that there is limited though daily train service diverging from the main line as at Byers Junction. Train service employes have been handling their own Forms "A" and occasional train orders thereat without further complaint after the requests for assignment of telegraphers at these points were declined.

Admitting the proper influence which each of the cited cases should have, it is a fair conclusion that the occasions of their consideration, as well as the continued existence of the situation without pursuit of claim thereupon in certain of the cases cited by the carrier, at least support the non-arbitrary nature of Article 21 and prove the intent of the Article is to provide for reasonable application to such circumstances as may bring it into question.

The citations by the carrier bear pertinently upon the dispute and exemplify the correct and reasonable interpretation of the rule as it had been outlined in the circular letter of October 24, 1922; they constitute evidence that it was not intended to fasten upon the railroad every position, once established, irrespective of the changing volume of business or the improvement in the art of the industry which may render entirely useless or unnecessary the continuance of such position. The instances cited in the records of this case illustrating the conditional application heretofore given to Article 21, clearly

show that the imposition of unnecessary forces, requested because it is alleged this rule provides for them, is unwarranted.

This Third Division is on record in a previous case, Award No. 80, Docket CL–113, in denial of a claim for pay by a class of employes whose positions had been abolished account decrease in business, and the small amount of work remaining was handled by other employe in the same class and even by employes not coming under the agreement with that class which had previously held the work when there was a sufficient amount to justify a separate position to handle it. The carrier therein took the position that it had the right to abolish positions when there was not sufficient work to justify the retention of the position in the case then in point. The award of the Third Division, adopted without necessity of calling in a neutral, other than quoting the facts and referring to the rules involved carried a sole and pertinent finding showing the limited amount of work required on the abolished position, which was justification for denial of the claim. In the absence of rule of specific limitation the same rule of reason in application of the terms of the agreement between the parties in the instant dispute should apply.

The weight of the evidence in the record is such as to indicate it not to have been the intention of the parties in negotiating the wording of Article 21, to require employment of operators at locations where their services are not needed. The continued decreasing needs at Byers Junction since the office was first closed at that point, makes it further evident that operators are not required at that point and that the reasonable action of the carrier in refraining from their restoration under such circumstances, is a proper compliance with the restrictive, but non-absolute limitations of Article 21.

(s) C. C. Cook.

The undersigned concur in the above dissent:

R. H. Allison.
Geo. H. Dugan.
A. H. Jones.
L. O. Murdock.