NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

John P. Devaney, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM.—

"Claim of employes that the assignment of clerical work, hereinafter stipulated, to an employe not covered by the Clerks' Agreement, namely, Train Foreman, Central Belt District, is a violation of Articles I, II, III, and XI of the current Clerks' Agreement, and further claim of employes that such clerical duties should now be assigned to and performed by Yard Clerks in the Merchants West Side Seniority District in accordance with the rules of the Clerks' Agreement and that the senior furloughed Yard Clerk shall be compensated at the established and agreed upon rate of pay for such duties retroactive to August 12, 1936."

STATEMENT OF FACTS.—The clerical work for which the basis of this claim is made is described and stipulated to be as: (1) Checking and recording of cars moving in and out of Central Belt Switching District; (2) checking and recording cars moving into and out of industrial plants including recording of cars on hand each day at each industrial plant; (3) checking and recording of interchange car movement with the St. Louis-San Francisco Railway and the Missouri Pacific Railroad which interchanges are made during night hours; (4) stamping and receipting for all bills of lading handled by train switching crew (5) inspection of damaged freight.

Such clerical duties as described is work incident to and a necessary part of the rendition of reports and accounts covering: (1) demurrage charges; (2) switching charges; (3) carding cars and freight shipments; (4) manifesting cars and freight shipments; and (5) yard operations.

The Central Belt District extends from Easton Avenue in the Northwest part of the City of St. Louis, through St. Louis County and adjacent suburbs to the Big Bend Road Yards in Lindenwood, which is the Frisco connection with the T. R. R. A. The actual track mileage is 9.93 miles.

There is also a spur extending from a point west of Walton Road to what is known as Evans-Howard Mine No. 6, located one-fourth of a mile north of St. Charles Rock Road. This spur is approximately four miles long.

A yard clerk was formerly stationed at Easton Avenue to take care of the industries in that territory. His hours of service were from 8:00 a. m. to 4:00 p. m., rate $5.63 per day. He was allowed two hours' overtime daily in order to assist in checking the north half of the Central Belt District. He was also allowed streetcar tokens daily on account of the distance he had to go from his Easton Avenue office in order to perform this extra duty. He checked fourteen industries and team tracks.

The Easton Avenue yard clerk position, before it was abolished in 1933, had assigned hours 8:00 a. m. to 4:00 p. m., rate $5.42 per day. This position was in effect before we had a contract with the carrier, and with the exception of two short periods, remained as a regular job until September or October 1932. The clerk who worked this position used his automobile in order to cover the industries, as they were widely separated. The carrier did not allow him any compensation for the use of his auto, and he had the alternative of either walking or using his machine. He checked seventeen industries, and in addi-

shall be performed by the clerical employes for whose benefit the agreement was made and subject and pursuant to its provisions.

The subject matter of the agreement between the parties is the performance of clerical and related work. There is nothing in the agreement limiting its provisions to only a portion of the clerical work, except as provided for in Rule 2. To hold that the agreement covers only a part of the clerical work would leave it indefinite as to what, if any, portion of the clerical work was covered. It cannot reasonably be contended that the carrier has the right to merely say that certain work is not covered by the agreement and thereby remove it from the scope thereof. Such a construction would make the agreement a mere wish of the carrier, or no agreement at all.

The wage agreement of April 1, 1927, between the parties established the rate of pay to be applied for the performance of clerical duties at Easton Avenue and on the Central Belt District, at which time the carrier maintained two clerical positions. This wage agreement has not been abrogated or modified in any way as to specific classification and rates. This wage agreement, when considered in conjunction with the rules of the working agreement, obligates the carrier to maintain positions so established, classified, and rated, so long as clerical duties remain in existence and do not disappear. The carrier cannot, either piece-meal or wholesale, remove clerical duties so established, classified, and rated, out from under the clerks' agreement, without due notice, process, and agreement.

We contend that inasmuch as the action of the carrier was in violation of the agreements, the senior furloughed yard clerk in the Merchants West Side Seniority District should be compensated for all loss sustained since April 12, 1936, upon which date, oral and written notice was served upon the carrier, requesting it to assign such employe to the position of yard clerk on the Central Belt District.

POSITION OF CARRIER.—It has never been the practice to maintain a yard clerk on the Central Belt continuously, the assignment being dependent upon the amount of clerical and accounting work, and the necessity for handling it on the line to avoid delays and complaint. In other words, when it was more practical to take care of the clerical, accounting, etc., work on the Central Belt than in the General Yard Office at Carrie Avenue, we add a man. We are the judge of the clerical work required, the number of employes needed to perform it, and the location at which they will be stationed, and it will be our purpose, as in the past, to assign a yard clerk on the line whenever the business justifies it.

While some of the work performed by the Central Belt foreman during periods when the yard clerk is not on duty can be construed as being of a clerical nature, nevertheless it is not wholly guaranteed to clerical forces as it has always been customary to require train forces to keep certain records incident to the handling of their trains, such as wheel reports, etc. The Central Belt foreman is in practically the same category as a trunk line local freight conductor, who signs his own bills of lading, prepares wheel reports, takes record of car seals, makes blind-siding reports and prepares train switch lists. There is such a run in the St. Louis territory, the line being located in St. Louis County. It is the Creve Couer line of the Missouri Pacific Railroad, extending from Lake Junction to Benbush, a distance of 19.5 miles. There is not a yard clerk located on the line and the conductor of the crew prepares all the data aforementioned and turns it in to the Agent at the conclusion of his run. The Agent's forces then prepare all data incident to the handling of the cars.

In assigning the work in question to the foreman of the Central Belt crew during periods of light business, we do not believe we are infringing on the rights of the Clerks or violating any of the provisions of their agreement. Incidentally, the yard clerk was taken off the last time on December 1, 1931, but we did not receive a complaint from the Clerk's Organization until July 16, 1936, during all of which time the current agreement of February 1, 1922, was in effect. Furthermore, that document does not define an employe as a clerk unless he regularly devotes four hours or more per day to clerical work. See Rule 4 of Article 2.

OPINION OF BOARD.—Rule 1 is the scope rule of the agreement. It covers many classes of employes who would not ordinarily be called clerks. Among those employes are messenger boys, train announcers, gatemen, and laborers employed in and around the station.

Rule 4, which is known as the "qualification" or "classification" rule, applies to clerks, and by its terms does not apply to other employes within the purview

of the clerks' agreement. This rule classifies and defines clerks; it in no way limits the effect of the scope rule nor the effect of other provisions of the agreement.

The question before this Board, stated in simple terms, is whether work which is properly the subject of the clerks' agreement can be removed from that agreement and assigned to an employe not covered by the same.

It is settled by action of this Board that carriers have a right to abolish positions included in agreements when there is no longer work to be performed on those positions. In Award No. 236, Referee Garrison, sitting with the Board said:

> "This decision, which calls for the restoration of the position of Claim Clerk at Carroll Street, does not of course prevent the abolition of that position under proper circumstances, nor does it prevent the absorption of the work by employes of the same classification and rate of pay, or of a higher classification and rate of pay. Nor does it amount to saying that when work dwindles to less than half a man's time who is paid on a monthly basis, it cannot be absorbed by lower rated employes."

This decision makes it clear that clerical work can be transferred to others covered by the terms of the agreement under certain conditions.

When clerical work is reduced to less than four hours, it seems clear that the carrier can abolish a position. But it seems equally clear that the carrier cannot assign such clerical work, even where it falls to less than four hours, to employes without the terms of the clerks' agreement. An early decision of this Board, Award No. 18 (without referee), appears to argue otherwise, but this decision did not settle the precise question which was, however, disposed of by subsequent decision of this Board. Thus, in Award No. 385, Referee Sharfman, sitting with this Board said:

> "It is well established under collective agreements of the character here involved that while the carrier is free to abolish positions, such work as remains in connection with these positions must be performed by the class of employes to which the agreement applies."

This was followed by Award No. 886, couched in similar language. Award No. 236, above quoted, sustains this view.

To summarize, we conclude:

First, That many employes not doing clerical work come within the purview of the clerks' agreement.

Second, That the classification or four-hour rule applies only to clerks or those doing strictly clerical work, and not to others covered by the clerks' agreement and that this rule in no way limits the scope rule.

Third, That the carrier may abolish a clerical position when the work thereof is reduced to less than four hours.

Fourth, That in abolishing a clerical position, such work as remains in connection with the abolished position must be performed by employes within the agreement.

We, therefore, conclude that the carrier could not abolish the position here in question without distributing the work to other employes within the agreement. We feel that the equities of the situation will be fully met if the parties determine through negotiation the actual extent of the violation, and restore the work to the proper employes under the terms of this award.

FINDINGS.—The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the 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 facts of record disclose a violation by the carrier of the operative agreement between the employes and the carrier.

AWARD

The parties are directed to determine through negotiation the actual extent of the violation of the agreement, and thereafter to restore to an employe, or

employes, within the clerks' agreement all work properly coming within the terms of the same. Compensation is not to be awarded unless it appears that the extent of the work to which employes coming within the terms of the clerks' agreement have been deprived during the period of violation was such as to make necessary the employment of an additional clerk at regular hours.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 11th day of June, 1937.

DISSENT ON DOCKET CL-458

The Referee in setting forth the Statement of Facts has used practically verbatim the statement as submitted by the employes and ignored the Statement of Facts as submitted by the carrier. The statement of clerical duties listed as being performed by the train foreman is distorted and exaggerated in comparison with the statement of facts given by the carrier and was unsupported by evidence, notwithstanding which it was accepted for purposes of this award. As an instance, the Referee in his conclusion has referred to position in question as having been abolished. The facts of record show that no position was abolished in connection with this particular dispute as yard clerk on Central Belt district had only been put on seasonally, and such position has not existed since December 1931. To accept the employes' statement of facts that the position was abolished in 1933 or to assume its abolishment in 1936 when the employes first made any claim, completely ignores facts rather than it gives recognition to them.

In his opinion and award the Referee totally disregards the clear intent and purpose of the agreement and the practices and customs of long standing under said agreement.

From the earliest history of the transportation industry, employes of various classifications other than those coming within the purview of the classes of employes enumerated in the clerical agreement have performed clerical work, and this practice was well known and understood by the parties when entering into agreements. As each succeeding agreement was written and took the place of the former agreement, the parties knew of the recognized practices under the preceding agreement, and brought forward the same or similar rules in the succeeding agreement. At each schedule negotiation the parties knew and understood the practices which had prevailed under the former agreements, and knew that those practices would continue under the new agreement unless specifically changed by other rules or agreement.

It cannot be said, with reason, logic, or justice, that it was the intention of the parties in entering into the agreement of February 1, 1922, to change a practice which had been in effect for many years. The proof that no change or addition of rule then was intended to change the practice or that any subsequent agreement was had to that effect is the fact in evidence in this case that there had been no change in practice in 1922 when the new agreement came into effect, and none since that time under the terms of that agreement—not even a protest thereupon—until the initiation of this claim in July 1936.

Those practices and the acts and conduct of the parties constituted an interpretation of the agreements, and the interpretation thus placed upon the contracts and rules by the parties to the agreements by their acts and conduct thereunder is evidence of the greatest probative value as to what the parties mutually intended the contracts to mean.

Williston on Contracts, Volume 2, Page 1206, states:

> "The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts but the declarations of the parties may be considered."

The above principle is accepted by the courts; to cite only one instance, the Kentucky Court of Appeals, in a case involving the meaning of a certain rule in an agreement which had been in effect for many years and had been applied while in prior agreements by the acts and conduct of both the organization and the management, held that the practical interpretation as made by the parties

themselves was controlling; the court used the following language (92 S. W. (2nd) 749):

> "* * * It must not be overlooked that railroad men speak a language of their own, and that the terms which they employ in their agreements with the carrier are not always intelligible to the uninitiated, but have a technical meaning which those charged with the duty of construction must seek and ascertain by putting themselves in the place of the men. Because of this ambiguity and uncertainty in meaning, the rule of practical construction by the parties is peculiarly applicable to such agreements * * *."

The "Fourth" conclusion by the Referee appears to construe the agreement applying to clerical employes as constituting a guarantee that all clerical work once attached to a clerical position is guaranteed exclusively to clerks. Such a conclusion cannot be justified under any logical, fair, and unbiased construction of the agreement, nor even under an immediately preceding award (No. 450) by this same Referee, who therein declared, "we do not assume to state that no incidental clerical work could be done by other than clerical employes." It thoroughly ignores the fact that others than clerks have, for many years, prior to the carrier's entering into any agreement with the clerical employes and continuing throughout the existence of such agreement, performed clerical work, and, when the carrier entered into the agreement with the clerical employes, this was as well known to the clerical employes as it was to the carrier.

It cannot be said with reason, logic, or justice that it was the intention of the parties in entering into the agreement of February 1, 1922, to change a practice that had been in effect for many years. Had this been the intention of the parties they would have written a rule providing that all clerical work would be performed exclusively by clerks. Neither has the practice under the agreement since that time been in any iota changed nor even heretofore protested.

An agreement is merely an expression of the intent of parties and the very best evidence of the intent is their conduct under the agreement. The opinion and award totally disregard the rules, practices, and customs in effect on this property and are nothing less than the writing of a new rule, a power which this Board does not possess under the law.

A. H. JONES.
J. G. TORIAN.
R. H. ALLISON.
GEO. H. DUGAN.
C. C. COOK.