

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood:

"(a) That the carrier has violated and continues to violate the rules of the Clerks' agreement by the payment of less than eight (8) hours pay per day for the performance of regular daily assigned duties of Gatemen (assignments as shown in employees exhibit A), Passenger Department, Union Station, Kansas City, Missouri; and, claim that employees affected by such violation shall be paid a minimum day's pay of eight (8) hours per day at Gateman rate of pay, \$5.17 per day, for such days worked and paid less than eight (8) hours, effective January 6, 1938;

"(b) That T. Y. Payton and M. A. Thompson shall be paid a minimum day's pay of eight (8) hours per day at rate of Gateman, \$5.17 per day for such days worked and paid less than eight (8) hours and pay at the daily rate, \$5.17 for such other days not worked to provide six (6) days' pay each week, effective January 6, 1938."

EMPLOYES' STATEMENT OF FACTS: "There is an agreement covering hours of service and working conditions between the parties bearing effective date of February 17, 1936, the scope of which includes the classifications of work and employees of 'Usher Captains' and 'Gatemen,' Passenger Department, Union Station, Kansas City, Mo.

"The carrier employs force of approximately 100 Ushers (Red Caps) at the Union Station. These employees are not covered by agreement with any organization.

"The force of Usher Captains and Gatemen assigned to 8 hours work, 6 days each week, at the present time is as follows: Three (3) Usher Captains, four (4) Gatemen and one (1) relief man.

"Duties of the Usher Captains are principally the supervision and assignment of the Usher force. They are used in some instances regularly and in others temporarily to perform the work of Gateman. The duties of the Gatemen are the checking of passengers through the gates to outbound trains and through inbound doors, which requires the calling or announcing of trains, examination of tickets, posting of train signs, furnishing of information to the traveling public and other duties incidental thereto.

"At various times daily and regularly during the 24 hour period Ushers are and have been assigned to work as Gatemen for periods of less than

There is in evidence an agreement between the parties bearing effective date of February 17, 1936, and the hereinbefore quoted rules are a part thereof.

OPINION OF BOARD: Were it not for the practices engaged in of assigning ushers to part-time work as gatemen, with pay only for time worked, such assignments would be improper under Rules 1, 28 and 46. The sole issue is whether or not the past practice has been such as to create exceptions as a matter of mutual understanding.

The record shows that the practice referred to has existed continuously for some 25 years, beginning with the opening of the station about ten years before the first agreement between the parties was made. In their reply brief the employees state that "with some exceptions" the ushers from 1920 to 1933 were not used as gatemen on a regular schedule, such as has been put into effect since 1933, and that the ushers were assigned "in most instances" when extra trains and late through trains created uncontrolled variables in train service that could not be handled by the full-time gatemen. The carrier lays a different emphasis upon the nature of the work. Thus the carrier's letter to the representative of the employees dated September 15, 1938 refers to the performance of gatemen's work by ushers, "particularly that peak period work which for many years has been well recognized as assignable to ushers."

Both of these statements indicate that the practice had been to assign ushers to part-time gate service both during peak periods and to take care of variables, the difference being that the employees minimize the former and stress the latter while the carrier minimizes the latter and stresses the former. It seems clear that there was a mixture of both types of assignments, in proportions which cannot clearly be ascertained from the record.

It is admitted that the practice was known to the employees and it appears to have been acquiesced in. No objections to the practice were made when the first agreement between the parties was entered into in 1924.

In 1934 the employees sought but failed to obtain a rule assigning the ushers to part-time gatemen's work during specified peak periods at an hourly rate of \$1.00 with a minimum assignment of 30 minutes.

In 1936 the present agreement between the parties was negotiated, and the first protest against the use of the ushers on gatemen's work was made in 1938.

Considering all the circumstances—the fact that the practice had been established for many years before the first agreement was made, instead of being introduced afterwards; the fact that a rule was later sought by the employees permitting that practice but with pay rates unacceptable to the carrier; the fact that subsequently another agreement between the parties was made without reference to the practice one way or the other; and the fact that the first protest was not made until 1938; we think that while the case is a very close one the evidence is sufficient to establish a definite acquiescence, amounting to an understanding that ushers might be used for part-time gate service in accordance with the long-standing practice.

We do not propose to discuss here the Nicholson case which arose in 1934, because both sides claim that it strengthens their position and it seems wholly inconclusive to us one way or the other.

Clearly the carrier is not at liberty to go beyond the established practice and infringe upon the rules while using the ushers in a way not previously sanctioned. The employees contend that a departure from the previous practice took place beginning in 1933 and has been taking place since. The carrier contends that the only difference since 1933 is that there has been a substantial decrease of train service, which accounts for the fewer number of full-time gatemen. The record is not sufficiently clear, especially in view

of the negotiation of the 1936 agreement, to warrant a finding that what has taken place since 1933 has differed in substance from what took place before. The employees are not estopped by this award from re-submitting the case if it can be shown that in the guise of relying upon the understanding created by practice and acquiescence the carrier has in fact materially departed therefrom and has destroyed full-time gatemen's positions by the assignment of ushers for purposes and to an extent not previously sanctioned. Under the circumstances a joint check should be had, if requested.

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

That the carrier and the employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the evidence does not warrant a finding that the rules have been violated.

AWARD

Claim (a) denied, without prejudice as stated in the opinion, and with the privilege of a joint check if requested. Claim (b) dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1939.