Award No. 4104
Docket No. TE-3992

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee.

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware, Lackawanna and Western Railroad Company that Agent E. T. Dalberg, regular assigned at Portland, Pennsylvania, with hours 8:00 A. M. to 5:00 P. M., and an allowed meal hour, shall be paid for a call under Rule 5, of the Telegraphers' Agreement, account the conductor on Extra 1231 copying a train order No. 1 at Portland, Pennsylvania, at 1:28 A. M. on August 15, 1946; on Extra 1233 copying order No. 25 at 11:50 P. M. at Portland on August 22, 1946; and on extra 1231 copying train order No. 1 at 12:51 A. M. at Portland on August 24, 1946, at a time of the day when Agent Dalberg was not on duty and was not called or used to perform work that was his, and on subsequent dates when such work has been denied him.

EMPLOYES' STATEMENT OF FACTS: An Agreement by and between the parties, hereinafter referred to as the Telegraphers' Agreement, bearing effective dates of May 1, 1940 and May 22, 1946 as to rules and rates of pay, respectively, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

The Carrier on August 15, 1946, August 22, 1946 and August 24, 1946, required and/or permitted Train Orders Nos. 1, 25 and 1, respectively, to be copied at Portland, Pennsylvania, by train service employes outside of the Agent-Operator's assigned hours, or at 1:28 A. M., 11:50 P. M. and 12:51 A. M.

Agent-Operator Dalberg's assigned hours are 8:00 A. M. to 5:00 P. M. with one hour out for meal. Mr. Dalberg was available and willing to accept "call" service to perform these duties.

The Organization, for Mr. Dalberg, filed claim for these "call" payments in accordance with Rule 5 of the Telegraphers' Agreement. The Carrier denied the claims on the basis they were not "valid".

POSITION OF EMPLOYES: As indicated by the Employes' Statement of Facts, the Carrier required and/or permitted train service employes to copy Train Orders Nos. 1, 25 and 1 on the dates and at the place mentioned, outside of the Agent-Operator's assigned hours. Agent-Operator Dalberg was available and willing to accept "call service" to perform this communication work. The Carrier made no effort to notify or call Mr. Dalberg for this service—instead it has attempted to defend its action by devious methods.

Award 1062—Second Division

Finally, under the circumstances of this case, the acquiescence of the Organization goes far beyond laches and estoppel and amounts to a concurrence in the Carrier's interpretation of the agreement.

In **Award 757** this Board said:

> "It is well settled by many decisions of this and the First Division * * * that as an **abstract principle** a carrier may not let out to others * * * work of a type embraced within one of its collective *agreements with its employes * * * as a basic legal principle* the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exceptions appear in the scope rule. **But the decisions likewise recognize** that there may be other exceptions * * *."
>
> "*In Award 615 of this Division the question was fully discussed* in a controversy as to the right as between clerks and telegraphers to do certain clerical work. Although there was no written limitation *in the Clerks' Agreement it was found that* **in the light of all the circumstances such a limitation existed as a fact** and it was deemed that the Clerks' Agreement **was entered into in the light of such limitation.**"

Award 757—Third Division

> "* * * a practice uncontested over a period of years must justly be regarded by such party as indicating the course of conduct *for it to follow* * * *."

Award 1082—First Division

The case now before the Board is within the principle enunciated by the above language of this Board. This is no "abstract" case, but one in which "in the light of all the circumstances a limitation existed **as a fact.**"

The U. S. Supreme Court has said of such situations that the best test of what the parties agreed to is:

> "an appraisal of their practical construction of the working agreement **by conduct.**"

322 U. S. 723

This Board has voiced the same opinion as the Supreme Court in the following language:

> "Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written."

Award 1435—Third Division

> "Such a delay indicates **concurrence in construction of agreement made by the Carrier.**"

Award 8145—First Division

For reasons heretofore stated, claim should be denied.

Exhibits not reproduced.

OPINION OF BOARD: The claim is set forth and the facts are fully stated in the respective submissions and will not be detailed. However, it should be said that on August 15, 22 and 24, 1946, train orders for Carrier's Bangor and Portland Branch were copied at Portland yard by Conductors not covered by the Telegraphers' Agreement, at times when the Portland Agent was not on duty without calling him to perform such work.

Many reasons for denial of the claim are asserted by the Carrier and no attempt will be made to mention or discuss all of them in this opinion. It will suffice to say they have each been examined and that only one of them, to which we will presently give attention, has been found sufficiently meritorious to compel the sustaining of its position.

Carrier contends the practice of Dispatchers issuing train orders direct to Conductors of trains operating on the Bangor and Portland Branch for merly The Bangor and Portland Railway, was in effect prior to the merger of such railroad and the Carrier in 1909, and continued on such Branch up to the date of the incidents giving rise to the instant claim with the knowledge, consent, acquiesence and approval of the Brotherhood; that in January 1940 the parties negotiated and executed a new contract the terms of which made no mention of, and of a certainty did not abrogate, the practice; that such practice continued long after the execution of the 1940 contract; and that as a result, irrespective and regardless of the force and effect to be given the terms of the scope rule of such Agreements, the practice of issuing train orders direct to conductors of trains operating on the Bangor and Portland Branch instead of to Telegraphers must, by virtue of the construction and interpretation placed upon the contract as evidenced by the acts and conduct of the parties themselves, be regarded as excepted from such scope rule.

Passing the factual phases of the Carrier's contention for the moment let us turn to the rules it seeks to apply to them.

One of these rules, now so well established by Awards of this Division as to almost preclude necessity for their citation, is that when a collective bargaining contract is negotiated and existing practices are not abrogated or changed by its terms such practices are just as enforceable as if they had been expressly authorized by the terms of the instrument itself. See Awards 2436, 1435 and 1397.

Another well recognized principle is that after a contract has been executed the conduct of its signatories is often just as expressive of their intention and the construction they place upon its terms as the written words themselves and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with respect thereto, affords a safe guide in determining what they had in mind when it was executed. See Awards 2436 and 1435.

Turning again to the facts upon which Carrier's position is based, while it is true there is no unanimity between the parties with respect to them, it can be stated without fear of contradiction the record discloses the practice in question existed and was indulged in on the Bangor and Portland Branch up to 1940 without complaint on the part of the Organization during which time two contracts, one in 1919 and one in 1940, were negotiated without abrogation thereof or reference thereto. Likewise added that for approximately six years after the 1940 contract became effective such practice was not actually contested by the Organization and, so far as the record shows, no claim was made against the Carrier for action taken in connection therewith.

Notwithstanding what has been heretofore stated, if that was all on which our decision could be based, we might have some difficulty in concluding the claim must be denied on the single ground to which we have heretofore referred. But it is not. Following the filing of a claim against the Carrier for the three calls herein involved the Organization and the Carrier, entered into a new working Agreement, effective November 1, 1947. Article 3 of such Agreement refers specifically to train orders and provides:

> "No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

"The effective date of this rule on the Bangor and Portland Branches is April 1, 1948." (Emphasis ours).

In our opinion the Article just quoted, particularly the language underlined for purposes of emphasis, definitely indicates that any and all rights the Organization may have had under the 1940 contract with respect to the practice of Conductors copying train orders were merged in the new Agreement. Of a certainty such language clearly evidences the parties themselves did not regard such practice when limited to the Bangor and Portland Branches as being in violation of pre-existing Agreements. In either situation our duty is clear. The claim must be denied.

In conclusion it should perhaps be stated this Award is limited strictly to the facts and the particular properly herein involved and is in no sense to be regarded as impinging upon what was said and held in Award 3114.

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 record discloses no sound basis for an affirmative Award.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.