Award No. 5834
Docket No. CL-6006

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT AND TERMINAL RAILWAY COMPANY

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

(a) The Carrier violated the Clerks' Agreement on July 16, 17, 18, 19, 20, 23 and 24, 1951, when it required or permitted Mr. Gentry, Ticket Agent, to suspend work on his regularly assigned position in order to work position of Accountant. Also

(b) Claim that Mr. Gentry be paid an additional day's pay, at his own rate, for each of the days involved.

EMPLOYES' STATEMENT OF FACTS: Mr. Gentry is regularly assigned to the position of Ticket Agent at Union Station, Houston, Texas, with rate of $19.28 per day.

Mr. O'Kelly is regularly assigned to position of Accountant in the Ticket Office, rate $15.92 per day.

Mr. O'Kelly was on vacation July 16 through July 27, 1951.

On July 16, 17, 18, 19, 20, 23 and 24, 1951, Mr. Gentry suspended work on his own position and worked the Accountant's position.

POSITION OF EMPLOYES: The fundamental facts in this case are not subject to dispute.

Mr. Gentry is regularly assigned to the position of Ticket Agent at Union Station, Houston, Texas. He has held that position since 1942, having secured the position under the provisions of the Clerks' Agreement.

Mr. O'Kelly is regularly assigned to the position of Accountant in the Ticket Office, and has held that position for several years.

When Mr. O'Kelly went on his vacation the Carrier had no extra or furloughed employes available to relieve him and, as the accounting work had to be performed daily the Carrier, in order to avoid paying other employes overtime to perform the accounting work had to either require or permit Mr. Gentry to suspend work on his own position and assume the duties of Accountant.

years, during which time no protest thereto was made by the Organization representative, although, admittedly, the practice was well known and recognized by the parties concerned. Certainly their silence over this long period of time can be interpreted as no less than an acquiescence in the practice and understanding of this practice of more than ten years. (See the General Chairman's letter to the Superintendent November 19, 1941, supra.)

In the light of the facts and circumstances here involved, together with the previous rulings of your Board in analogous situations, it is the position of the Carrier that the contention and claim of the Organization in the instant case is without basis, merit or justification and should therefore be denied.

The matters contained herein have been the subject of correspondence and/or conference between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: The first issue to be decided in this case is whether Rule 44 of the agreement of July 1, 1950, between the Organization and the Carrier or Articles 6 and 12(a) of the general Vacation Agreement of December 17, 1941, apply to the dispute arising from the employment of depot ticket agent Gentry as relief for accountant O'Kelly on July 16, 17, 18, 19, 20, 23, and 24, 1951, when O'Kelly was on vacation.

We think that Rule 44 of the parties' agreement must be controlling here. To date the Vacation Agreement has not been incorporated into the parties' agreement. And numerous previous awards by this Board (for example, 2340, 3795, 4690 and 5717) have held that under such circumstances the applicable provisions of the parties, agreement take precedence.

The next issue, basic to a determination of the dispute, is whether the fact of Gentry's taking over O'Kelly's duties constituted a violation of Rule 44 of the agreement.

The Carrier contends that the Rule was not violated because (1) Gentry himself wished no claim to be filed in his behalf by his General Chairman; (2) Gentry had relieved O'Kelly on numerous earlier occasions under similar circumstances and all those concerned had acquiesced without protest in the arrangement; (3) while performing O'Kelly's work, Gentry continued to carry on the supervisory duties of his own regular position; and (4) the Carrier's intent was not to evade the Rule's operation.

The Organization holds that (1) the attitude of Gentry in this case and the lack of protest by any one over previous similar events do not weaken the validity of the Organization's position and do not bar a sustaining award in the instant case; (2) Gentry actually suspended the conduct of his own duties while performing O'Kelly's work; (3) this kind of situation differs significantly from the occasional assistance given by Gentry to O'Kelly while the latter was on the job; and (4) whatever the subjective intent of the Carrier and Gentry, the objective effect was to avoid giving and paying for overtime work by existing accounting or clerical employes, no furloughed, extra, or relief men being available.

We think that we must hold with the Organization's position in this case. It is well established by previous awards (for example, 3416 and 5793) and by the United States Supreme Court decision of October, 1943, that an individual employe subject to a collective bargaining agreement cannot properly disregard or negate the agreement's provisions by his own agreements with his employer. Similarly, when the meaning and intent of a provision of a collective bargaining agreement is clear and unambiguous, past practices and unprotested violations of the agreement by either or both parties are not controlling and must not be permitted to vitiate the force or interpretation of the agreement (for example, see Awards 1492, 1518,

4501, and 5386) we agree also with previous awards for example, 139, 3301, and 3396) that the intent of the Carrier's action can and must be inferred from the observed effects of such action. There can be little reasonable doubt that, given the Carrier's decision to permit O'Kelly to take his vacation, Gentry's relief of O'Kelly operated to avoid the necessity for using other employes on overtime work at premium rates of pay. This being so and in view of the relevant applicability of Rule 44 of the agreement, the question of whether or to what extent Gentry continued to perform also his supervisory duties is immaterial.

It may be argued that Gentry, as supvercisor, assigned himself to O'Kelly's work, as he said, because he wished to avoid having his accounts thrown "out of balance by inexperienced help." Such flexibility may well be needed for the proper exercise of managerial functions. This problem, however, is not one for resolution by this Board. It must be handled by direct bargaining between the parties. The Carrier must, if it wishes, attempt to achieve such flexibility by asking the Organization to cooperate in appropriately modifying the agreement.

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

That both parties to this dispute waived hearing thereon;

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 Rule 44 of the parties' agreement was violated.

AWARD

Claim (a and b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.)A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of June, 1952.