Award Number 451
Docket Number CL–412

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

GULF COAST LINES

STATEMENT OF CLAIM.—

"Claim that the Carrier violated the Clerks' Agreement in December 1935 by assigning clerical work to employees not covered by said agreement and failing and refusing to assign such clerical work to employees holding seniority rights thereto under the rules of the Clerks' Agreement; also claim of employees for all wage losses sustained as a result of such agreement violation, at Weslaco, Texas."

STATEMENT OF FACTS.—Weslaco is located in the lower Rio Grande Valley of Texas. The business of the carrier at this point is seasonal due to the movement of fruit and vegetables. This movement begins in the early fall and continues until about the middle of June each year. The force of station employes at this station varies with the volume of business available.

In 1929 there were three clerical positions existing at Weslaco, during the fruit and vegetable season and the carrier put on one additional telegrapher and one to three additional clerks.

In 1930 two of the clerical positions were abolished leaving only one.

In 1935 the normal season force at Weslaco consisted of two telegraphers and one cashier.

When it became necessary to increase the force due to the regular fruit and vegetable movement the carrier put on two additional telegraphers but did not put on any additional clerks. Therefore there were four telegrapher positions and only one clerk position, one of the telegrapher's positions being that of agent-telegrapher as in the other similar cases.

The telegraphers' hours were overlapped so that two of the positions overlapped for a period of three and one-half hours and the other two for a period of six hours. There is in evidence an agreement between the parties bearing effective date December 1, 1926.

POSITION OF EMPLOYES.—When the additional telegraphers were put on at Weslaco the organization protested the assignment of clerical work to them as being in violation of the rules of our agreement, and called the carrier's special attention to the "over-lapping" of the hours of assignment, during which time one telegrapher spent his entire time performing clerical work and the other telegrapher a majority of his time performing like work. The Superintendent stated that it was necessary to "overlap" the hours so that a telegrapher would be available for telegraph service while the other telegrapher was outside checking cars, making switch lists and sealing cars, which work is strictly clerical.

The organization requested the Superintendent to join in making a check of the duties of the positions in dispute to determine what the exact duties and requirements were. The Superintendent refused to join in the check.

The organization then made a detailed check of the work performed on a minute basis for a period of twenty-four (24) hours, beginning at 8:10 A. M., February 17, 1936, and ending at 8:10 A. M., February 18, 1936. This check showed that the Agent-Telegrapher spent 37 minutes telegraphing during his tour of duty. The next telegrapher spent 1 hour and 52 minutes telegraphing,

1931 the first trick telegraphers' position was abolished and the telegraphing assigned to the Agent. When this was done the Agent's position was placed under the Telegraphers' agreement and the Agent has, since that time, been working under that agreement.

The wage agreement of July 1, 1929, has not been abrogated or modified by agreement as to specific classifications and rates. Such wage agreement when considered in conjunction with the rules of the working agreement, cited in this submission, 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.

The organization contends that inasmuch as the action of the carrier was in violation of the agreement, the clerical employes who were affected should be compensated for all loss sustained, and request your Honorable Board to sustain our claim.

POSITION OF CARRIER.—The assignment of the employes at the above named station by the officials of the Carrier is necessary to meet the requirements of the service and was made in line with the agreements which we have with the different organizations affected. In making the assignment, same was done without violation of any of the agreements in effect on the property.

The management reserves the right to determine what force is necessary to carry on the business of the Company and does not recognize the right of any organization to dictate to it in such matters.

The three Telegrapher-Clerks assigned at the above mentioned point are properly classified as coming under the Telegraphers' Agreement and employes listed as coming under the purview of the Telegraphers' Agreement were assigned. We have an agreement with the Order of Railroad Telegraphers that Telegraphers may be required, in addition to their telegraphic duties, to perform clerical service.

It is the contention of the Carrier that the assignment of the force at the above station is proper and that the Agreement with the Brotherhood of Railway Clerks is in no way involved and that their claim in respect to the assignment of force at that point should be denied.

OPINION OF BOARD.—The material facts in this case are not in dispute. They apparently are substantially as contended by the employes.

It is the opinion of the Board that the carrier is violating the Agreement by refusing to assign clerical work to employes covered by the Clerks' Agreement.

The subject matter of the Agreement between the Brotherhood and the carrier is the performance of clerical work. This is so clear as to require no extended discussion. It is unnecessary to detail the various Rules which might be considered particularly applicable. It is sufficient to state that the Agreement itself covers work of this kind.

We do not assume to state that no incidental clerical work could be done by other than clerical employes, but on the facts in this case there is no question but that the amount of clerical work involved is clearly within the Clerks' Agreement. It appears to be uncontroverted that the clerical duties performed by the so-called Telegraphers requires in each case the major portion of the day while the telegraph work done requires a very small portion of the time. Therefore, there is no question involving Rule 2 of the Agreement, which defines clerks as employes who devote not less than four hours per day to keeping records, accounts, etc.

We do not overlook the hardship that may be imposed upon the carrier because of the effect of the Agreement with another Brotherhood such as the Order of Railroad Telegraphers. There is no doubt that in many cases requirements of Agreements with different Brotherhoods impose upon a carrier certain hardships in particular instances where there is not enough work to employ full time men under each Agreement. However, this is a matter that cannot be solved by violating one agreement in order to abide by another. The solution lies rather in proper conferences and agreements with the respective brotherhoods. Such conferences should be held with a view of reaching an amicable and reasonable result which would impose no hardship upon either side. It is, however, not within the province of this Board to uphold one such agreement and at the same time strike down the other. When such Agreements are fairly made this Board can but construe them. We cannot excuse the violation of the terms of one agreement by invoking the terms of another.

Such agreements are analogous to separate contracts and the parties themselves must adjust the hardships resulting from overlapping.

We have no alternative but to sustain claim of the employes.

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 carrier is violating the current Clerks' Agreement by assigning clerical work to employes not covered by said Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 1st day of June, 1937.

DISSENT ON DOCKET CL-412

The Referee, in his opinion and award, totally disregards the clear intent and purpose of the agreements in effect, and the practices and customs of long standing under said agreements.

From the earliest history of the transportation industry, telegrapher-clerks and other employes covered by the Telegraphers' 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.

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 SW (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 particularly applicable to such agreements * * *"

The record is clear that no positions coming under the Clerks' Agreement were abolished when the carrier put on two positions of telegrapher-clerk. When business increased, requiring additional telegraph service, the carrier put on

two telegrapher-clerks, this being in accordance with their practice and custom of years' standing, and these telegrapher-clerks clearly came under the provisions of the Telegraphers' Agreement. There can be no question of the right of the carrier to augment its force in this manner, as is clearly indicated by not only the practice on this property, but also by innumerable precedents which were presented to the Referee.

The rule in the Clerks' Agreement giving "Definition of Clerk" as devoting "not less than four hours per day" to work requiring clerical ability was for the purpose of distinguishing such employes coming under the Clerks' Agreement from other employes referred to by that rule and listed in the agreement whose work did not require clerical ability. This is an undeniable fact as is evident from the history of negotiations of the respective agreements with the telegraphers and with the clerks, the former antedating the latter by many years. The telegraphers, prior to the time of existence of any agreements and continuing throughout the years of their existence, until a current decision by the referee acting in the instant case, have devoted to clerical work any number of hours in excess of four hours or otherwise, which could be made available outside of their actual telegraphic work without violation of the provisions of the Clerks' Agreement or other agreement. Nor has any violation or infringement of the four-hour rule or other provision of the Clerks' Agreement been indicated through an award by any tribunal during all of those years.

The Referee seeks to construe the agreement applying to clerical employes as constituting a guarantee that all positions requiring four or more hours of clerical work during the majority of the working days of the month as being guaranteed to exclusive clerks. Such a conclusion cannot be justified under any logical, fair, and unbiased construction of the agreement. It thoroughly ignores the fact that telegrapher-clerks have, for many years prior to the carrier entering into any agreement with the clerical employes, performed clerical work in addition to telegraph duties, and when the carrier entered into the agreement with the clerical employes this was as well known to the clerical employees 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 December 1, 1926, 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, which regularly required more than four hours per day, would be performed by exclusive clerks.

An agreement is merely an expression of the intent of the parties, and the very best evidence of their 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.
R. H. ALLISON.
GEO. H. DUGAN.
J. G. TOBIAN.
C. C. COOK.