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

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM.—

"Claim for restoration of position of Assistant Chief Yard Clerk, Interbay, Washington, and claim for payment of wage losses retroactive to July 31st, 1935, suffered by employes affected by discontinuance of said position in violation of agreement rules."

STATEMENT OF FACTS.—At Interbay, Washington, the carrier maintains a yard office. Prior to July 31, 1935, three clerical positions were maintained in that yard office, one of which was classified as Assistant Chief Yard Clerk, rate of pay $5.64 with assigned hours from 8:00 a. m. to 4 p. m.

Said position of Assistant Chief Yard Clerk was covered by the rules of the current Clerks' Agreement and the rate of pay of said position was fixed by agreement between the carrier and the Brotherhood. Effective as of July 31, 1935, the carrier nominally abolished the position while the duties of said position still remained in effect.

Concurrently with the nominal abolishment of this position the carrier assigned substantially all of the clerical duties theretofore performed by the regular incumbent of the position to a telegraph operator, whose position had been created also concurrently with the nominal abolishment of the clerical position.

A check of the performance of the clerical duties assigned to the position of Assistant Chief Yard Clerk prior to July 31, shows that after July 31st, approximately seven hours and thirty minutes' time was consumed daily by the telegraph operator in the performance of such clerical duties and approximately thirty minutes' time was consumed daily by the cashier in the agent's office in the performance of clerical duties theretofore performed by the Assistant Chief Yard Clerk.

There is in evidence an agreement between the parties bearing effective date of August 15, 1922, and the following rules thereof have been cited:

"SCOPE—EMPLOYES AFFECTED—RULE 1. These rules shall govern the hours of service and working conditions of the following employes, subject to the exceptions noted below:

"(1) Clerks—

"(a) Clerical workers;

"(b) Machine operators.

"(2) Other office and station employes—such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employes, train and engine crew callers, operators of certain office or station appliances and devices, telephone switchboard operators, elevator operators, office, station, and warehouse watchmen and janitors.

"(3) Laborers employed in and around stations, storehouses, and warehouses.

"* * *."

"QUALIFICATIONS—RULE 2. (a) Clerical workers—Employes who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, rendition of bills, reports, and statements, handling of correspondence, and similar work.

The action of the carrier in this instance was not upon an actual or proper abolition of a position, but was, in fact, an act of transferring clerical duties from under the Clerks' Agreement, in violation of the rules thereof and seniority rights of all employes in the seniority district where the position was located.

In Award No. 231, Docket TE-152, the Third Division, National Railroad Adjustment Board, promulgated a principle which is applicable to and should be considered as governing in the instant case. In this award the Third Division held:

> "whenever a particular position is negotiated into agreement and specifically placed there by the parties, it means only one thing and that is that so long as the work is to be done it will be done by an employe filling that position under the agreement at rate fixed in the agreement. The position can be abolished if the work is not there, but it cannot be handed over to an employe not covered by the agreement."

The relevant facts and circumstances connected with the dispute covered by Award No. 231 are in all respects similar to the facts and circumstances connected with the instant case.

Employes contend that the carrier should be required to restore the position of Assistant Chief Clerk and reimburse the incumbent of the position for all wage losses suffered by reason of violation of Clerks' Agreement, as well as all other employes who suffered wage losses as a result of the action of the carrier in abolishing this position.

POSITION OF CARRIER.—The issue in this case is whether it is proper to have a position covered by the telegraphers' schedule perform clerical work. It has been the practice of this Railway for many years to do the very thing that was done at Interbay. Clerical positions have been discontinued and work on these positions has been taken over by employes covered by the telegraphers' agreement. This has been done at a number of places, such as Brainerd, Staples, Little Falls, Jamestown, Dickinson, Forsyth, and Chehalis. In addition to these specific cases, it has been the general practice at stations on the Northern Pacific to have telegraphers perform clerical work and where business has fallen off, clerical positions have been discontinued and the work which they performed has been handled by telegraphers. On the other hand, where conditions have changed, some of the work formerly performed by telegraphers has been turned over to clerks, but where all or any portion of the work performed by a position includes telegraph duties, such positions have been filled by employes covered by the telegraphers' schedule.

The scope rule of the Telegraphers' agreement has been in effect since October 1, 1918, and under that rule there has been an unvarying practice to recognize that employes who performed telegraph duties would come within the scope of the telegraphers' schedule. The present case is the first instance wherein the clerical employes have contended that a telegrapher's position which performs clerical work is in any way in contravention of the provisions of the Clerks' Schedule. It is also the first case where the employes have contended there has been a violation of the Clerks' Schedule by the employment of a bona fide telegrapher's position which has taken over the duties of a clerical position that was formerly in existence. This position handles train orders, clears trains, gives line-ups, and handles messages. All of this work is done by the use of telegraph instruments.

OPINION OF BOARD.—It is the opinion of this Board that the Carrier has violated the Clerks' Agreement in abolishing the position of Assistant Chief Yard Clerk and assigning substantially all of the clerical duties of that position to a telegraph operator whose position had been created concurrently with the abolition of the position of Assistant Chief Yard Clerk.

The position of Assistant Chief Yard Clerk was clearly a clerical position within the meaning of rules one and two of the Clerks' Agreement. It appears uncontroverted in the record that the telegrapher in question now consumes more than seven hours per day in the performance of strictly clerical duties.

Rule two defines a Clerical Worker as one who devotes regularly not less than four hours per day to the performance of clerical work. The clerical work here performed by the telegrapher clearly exceeds four hours per day. Therefore, there is no question that there has been assigned to one outside of the Clerks' Agreement the duties of a clerical position.

Rule 88 of the Clerks' Agreement has been violated in that an established position has been discontinued and a new one created, covering the same class of work for the purpose of evading the application of rules of the agreement.

The Carrier's argument to the effect that long practice permits this action is not sound. Continued violation of existing rules does not change or diminish the binding effect of such rules. If change in the agreement is desired, that result must be attained in the prescribed manner and through the proper channels.

We have not overlooked the problem created by conflict between the various agreements the Carrier has with different Brotherhoods. In this case, the alleged conflict between the effective Telegraphers' Agreement and the Clerks' Agreement is similar to the one presented in docket Number CL–377, Award 423, and the language contained therein in the Opinion of the Board is applicable here. It is unnecessary to restate it.

The claim of the employes must be sustained.

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 violated the agreement between the parties.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

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

DISSENT ON DOCKET CL–444

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 peculiarly applicable to such agreements * * *."

The record is clear that the carrier put on a position of telegrapher-clerk, this being in accordance with their practice and custom of years' standing, and this telegrapher-clerk clearly comes under the provisions of the Telegraphers' Agreement. There can be no question of the right of the carrier to establish 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 certain 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 provisions of the Clerks' Agreement been indicated through an award by any tribunal during all of those years.

The referee states in effect that an established position has been discontinued and a new one created in violation of Rule 88, and that the argument of the carrier in relying upon the long practice under the rule of use of telegraphers to do clerical work was argument relying upon a violation of existing rule which did not change or diminish the binding effect of such rule. Such circumferential reasoning to place burden of error upon the one party to a contract in whom reposed the responsibility for conduct of its work and assignment of its forces according to the agreements in effect and the practices accepted thereunder is sophistry of elemental character. It ignores not only the meaning of the rule, but all reasonable and actual interpretation previously given by any constituted tribunal, and by the parties themselves during the existence of any contracts up to the time of institution of this claim.

It cannot be said, with reason, logic, or justice, that it was the intention of the parties in entering into the agreement of August 15, 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, which regularly required more than four hours per day, would be performed by clerks exclusively.

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