Award No. 2436
Docket No. CL-2215

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

ILLINOIS CENTRAL RAILROAD COMPANY

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

STATEMENT OF CLAIM: That certain illegal, unauthorized and unapproved practices, enumerated below, at South Water Street Freight House, Chicago, Illinois, and East St. Louis, Illinois, be discontinued and the provisions of the Clerks' schedule be applied to the employes concerned to cover its losses retroactive to February 20, 1942.

SOUTH WATER STREET:

1. That the practice whereby two employes take time off without loss of pay to act as pallbearers in the event of the death of an employe or his wife be discontinued.
2. That check clerks be required to perform lower rated work (at no decrease in rate) during periods when their regular work is slack.
3. That the practice of starting the lunch hour five minutes ahead of the designated meal period be discontinued.
4. That the practice of quitting five minutes ahead of the designated quitting time be discontinued.
5. That the following time-off practices be discontinued:
   (a) Piece workers taking four days off per year without loss of pay.
   (b) Certain clerical employes taking one day off per month without loss of pay.
6. That employes work a full eight hours on Saturdays instead of seven and one-half hours for which they receive eight hours' pay.

EAST ST. LOUIS:

1. That the practice of certain clerical employes taking one day off every third week without loss of pay be discontinued.

CARRIER'S STATEMENT OF FACTS: There is no written or oral agreement between the signatory parties to authorize the granting of these gratuities and the employes relinquished none of their rights or privileges in order to secure them. All were granted voluntarily by local supervisors and were without the advice, knowledge or consent of the officers authorized by the carrier to enter into agreements regulating the hours of service and working conditions of the employes.

It is admitted the schedule of rules and working conditions negotiated between representatives of the management and representatives of the employes effective June 23, 1922 and revised September 1, 1927, is silent on these questions, but these working conditions are as a result of agreement between representatives of the management and representatives of the employes and in no way are in conflict with the schedule of rules and working conditions.

These conditions apply to the particular position, and the employes consider them as part of their working conditions, just as much as the basic salary of the position. These working conditions constitute a part of the compensation of the employes. During the life of the agreement covering them, the management and the employes have conducted negotiations and arrived at agreement on wage increases or decreases no less than on seven different occasions, viz., during the years 1922 (Labor Bd. No. 1074), 1923 (Labor Bd. No. 1986), 1927 (Wage Arb.), 1931 (10% deduction), 1937 (40¢ per day 8/1/37), 1938 (Wage deduction request) and in 1941 (80¢ per day increase December 1), yet at no time during these negotiations has the management requested that compensation resulting from this agreement on working conditions be changed or eliminated.

It has been proven by the evidence here submitted by the employes, that there was and is an agreement between the representatives of the management and representatives of the employes covering the conditions set forth in the management's claim, and that what the management is actually doing is asking this Board to take away from the employes, working conditions established over the years by conference and agreement.

The fact that the agreement covering these working conditions is not reduced to writing does not lessen its effectiveness. Stated differently, the management is asking the Board to do for it that which management cannot in good faith do for itself; also a matter which we believe this Board is without authority to do, for the question raised by management involves the changing of working conditions that were arrived at by negotiations and agreement. In view of which, the Employes respectfully request that the claim be denied.

OPINION OF BOARD: The Carrier submits the unadjusted dispute specifically set out in the statement of claim for decision by the Third Division. It is the contention of the Carrier that certain practices in force at South Water Street Freight House, Chicago, Illinois, and East St. Louis, are illegal, unauthorized and unapproved, and asks this Division to hold that the Carrier can terminate such practices without violating its agreements with the Clerks' Organization. The Carrier also asks this Division to hold that it can properly make pay-roll deductions from all employes concerned to cover its losses retroactive to February 20, 1942, the date the Carrier asserted its right to so do.

The Clerks' Organization contends that there is no dispute properly before the Third Division for decision under the provisions of the Railway Labor Act. The right of the Carrier to bring a dispute of this nature to the National Railroad Adjustment Board for decision appears to be a matter of first impression. Carriers have brought two other cases to this Division (Awards 1698, 2140), but in neither of them was the question raised.

That the alleged disputes were handled on the property by the authorized representatives of the Clerks' Organization and the Carrier is not questioned. The Clerks' Organization contends that as the purpose of the Railway Labor Act is to avoid any interruption of commerce or the operation of any carrier engaged therein, it is implied that the dispute must arise at the instance of the employes,—the thought being that otherwise peace and tranquility could be maintained by the carrier by the simple expedient of taking no action at

all. But this is only one of the general purposes of the Railway Labor Act. Among the stated objectives appear the following:

> "(4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;
>
> (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." Railway Labor Act, Sec. 2.

No inferences can properly be drawn from the statement of the general purposes of the Act, as contained in the Act itself, which could be construed in the light advocated by the Clerks' Organization. This position is further fortified by the language used in Sec. 3 (i) of the Act wherein it says that disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or **by either party** to the appropriate division of the Adjustment Board * * *." (Emphasis supplied.)

It appears to us that a proposal by a carrier to put an order in force affecting the interpretation or application of agreements concerning rates of pay, rules, or working conditions, might be as detrimental to the public interest as any similar dispute originated by the employes. By submitting such a proposal to the Adjustment Board before putting it into effect might well tend to subserve the public interest. It might, also, have the effect of preventing the temporary loss of pay or other rights by the employes which could not otherwise be avoided. It might, also, have the further effect of avoiding, if the position of the carrier be not sustained, claims for reparations and penalties that might otherwise be imposed. We think the elimination of these things wherever possible are contemplated by the Act itself.

We are obliged to hold, therefore, that the instant dispute is properly before this Division and that the Division has jurisdiction to hear and determine such dispute upon its merits.

The practices which are the subject of this dispute are listed in the statement of claim and will not be enumerated in this opinion except as necessity may require in dealing with the questions posed for decision.

It is first necessary to determine if the matters sought to be avoided are in fact practices. While it is true that the carrier refers to them as illegal, unauthorized and unapproved practices, its argument is to the effect that they are nothing more than gratuities existing at the sufferance of the carrier. It is agreed that no written agreements are in existence which bind the parties with reference to them. The carrier contends that there never was a recognized understanding concerning the alleged practices. The Clerks' Organization contends that they were the result of negotiations which necessarily implies a meeting of the minds with respect thereto. The evidence in the record as to a definite oral agreement is fragmentary to say the least. The fact remains, however, that all have been in force from 25 to 40 years at the two points mentioned in the statement of claim. The claim of the carrier that these practices originated as mere gratuities is not a controlling fact. We do not doubt that many recognized practices were first considered as favors or gratuities and by long continued usage became such an integral part of railroad transportation as to deserve the name of "practice." A continuous recognition of them for 25 to 40 years, whether or not they had their beginnings as favors or gratuities, or as the result of oral understandings leads us to the conclusion that they are at the present time practices in the sense in which that term is used in the railroad industry.

It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties. It seems to us, therefore,

that the only question remaining is whether these specified practices have been abrogated by the various collective agreements made by the parties to this dispute.

The carrier asserts that the collective agreement entered into by these parties on June 23, 1922, had the effect of nullifying all practices theretofore existing including those involved in the instant case. The pertinent part of that agreement provided:

> "The rules of this schedule shall supersede all previous rules, practices and working conditions and shall remain in effect until revised or abrogated, of which intention 30 days' written notice shall be given." (Rule 65, Agreement of June 23, 1922.)

The record shows that this construction was immediately contested by the Clerks' Organization and on September 1, 1927, the rule was amended to read in part as follows:

> "This agreement shall be effective as of September 1, 1927, and shall continue in effect until it is changed as provided herein or under the provisions of the Transportation Act of 1920." (Rule 64, Agreement of September 1, 1927.)

It will be noted that the amendment eliminated the words "the rules of this schedule shall supersede all previous rules, practices and working conditions." In this connection, it is presumed that an amendment is to have force and effect from the date of the original agreement; in other words, that as amended the contract represents what the original contract was intended to be. Unless a contrary intent is shown, the amended agreement will be considered as if it had been originally drawn in its amended form. The reason for such a construction is clear. An amendment is primarily used to put a contract in the form originally intended by the parties and leaves the legal inference that the matters deleted from or changed in the original contract, never did represent that which the parties intended. We are obliged to say, therefore, that Rule 65 of the June 23, 1922 Agreement, under the circumstances shown, could not have the effect of abrogating or superseding all previous rules, practices and working conditions. The conduct of the parties following an attempt by the carrier in 1922 to apply the construction for which it now contends indicates that the parties intended the very result which the rules of construction apply to it.

The carrier contends that the practices specified in the statement of claim are in conflict with the current schedule and are rendered nugatory by it. The sections relied upon are those providing for (1) the bulletining of new positions and vacancies, including the showing of the hours of service, (Rule 7 (a) current agreement), (2) that eight consecutive hours shall constitute a day's work, (Rule 28, current agreement), and (3) that employes temporarily assigned to lower rated positions shall not have their rates reduced, (Rule 50, current agreement).

We do not think that it can be said that any of these provisions were intended to supersede or nullify the specified practices that had grown up in the railroad industry at the freight houses designated in the present claim. The evidence is that special conditions and circumstances existed at these two points, long recognized by the parties, that brought these practices about. By recognizing the practices, we must assume that the carrier considered the attendance of two employes at funerals of deceased employes or their wives as the equivalent of their regular work, that available lower rated work at these points was such that check clerks should not be required to do it during their slack periods, and that because of local conditions the equivalent of an 8-hour day was worked even with the starting of the lunch hour 5 minutes ahead of the designated meal period and of quitting 10 minutes ahead of the designated quitting time. The same may be said as to the practice of allowing

certain clerical employes to work 7½ hours on Saturday although they are paid on an 8-hour basis. See Awards 2040, 2073, 2268, 1511, 1512, 1524, and 497. As to Specification 5, South Water Street, and Specification 1, East St. Louis, we find nothing in the current agreement which can have the effect of nullifying these practices.

Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforcible to the same extent as the provisions of the contract itself. See Awards Nos. 507, 1257 and 1397.

It may be argued that the carrier never intended any such interpretation to be made, especially since the adoption of the current agreement on September 1, 1927. If such practices had been directly abrogated in the current agreement, this argument could readily be sustained. But the failure of the parties to deal directly with these practices in subsequent agreements and their recognition by the parties for more than fifteen years after the negotiation of the last collective agreement furnishes convincing proof that their abrogation was never intended. See Award 1435. The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made.

We conclude therefore that the specified practices are not superseded by subsequent agreements and that they remain in force until such time as they may be eliminated by negotiation, a field entirely foreign to the powers of this Board.

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 specified practices have not been abrogated by subsequent agreements and are therefore properly in force until changed or nullified by negotiation.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of December, 1943.