Award No. 11329
Docket No. TE-9611

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Elgin, Joliet and Eastern Railway, that:

1. Carrier violated the Agreement when commencing with first half pay period March 1956, and continuing each pay period thereafter it failed and refused to compensate H. W. Watkins, Rock Island Tower, Joliet, Illinois, in accordance with provisions of Agreement.

2. Carrier will be required to compensate H. W. Watkins for seven hours at pro rata rate, Rock Island Tower (first shift), for first half pay period March 1956, and nine hours pro rata rate Rock Island Tower (first shift) for second half pay period March 1956. Further, Carrier will be required to compensate H. W. Watkins for all amounts due in April (1956) and succeeding months in accordance with time sheets duly filed with authorized officers.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining Agreement entered into by and between Elgin, Joliet & Eastern Railway Company, hereinafter referred to as Carrier or Management and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The Agreement was effective September 1, 1949 and is on file with this Division. The Agreement and all amendments thereto is by reference made a part of this submission as though set out herein word for word.

The dispute submitted herein was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes, and failed of adjustment. The dispute involves interpretation of the collective bargaining Agreement and is under the provision of the Railway Labor Act as amended, proper to be submitted to this Board for award.

The dispute is on rather narrow grounds. The particular rule involved reads as follows (page 23, Rules Agreement):

"THAT PART OF MEMORANDUM OF AGREEMENT dated June 2, 1941, reading, 'Should train or engine service employes copy

provisions of the applicable agreement, he is permitted to seek its correction, and, in some cases, to recover compensation for the violation involved. The converse should be true of the employer; it must be permitted to adjust its mistakes to the same extent even though to do so is to its own benefit rather than to that of its employes. Any other disposition of such a situation would be manifestly unjust.

Therefore, the Carrier submits the Organization should not be allowed to base its claim on the past practice in this case, but should be required to demonstrate conclusively that the agreement supports its position, as a basis for settlement of the claim in its favor. Its failure to do so should result in the rendering of a denial award.

IV. CONCLUSION.

The existing Memorandum of Understanding effective Sept. 1, 1949, originally negotiated and dated June 2, 1941, completely supports the Carrier's position in this claim.

The words "at other stations" should be given a literal interpretation necessitating payment of the arbitrary only when train or engine service employes copy train orders or secure clearance cards at one station, where there is no operator, from an operator at a second station.

In the present claim, since the Rock Island Tower and the phone at Rowell Avenue are both within East Joliet Yard limits and, in fact, are only sixty or seventy car lengths apart, the Memorandum does not apply.

Past practice of the Carrier paying an arbitrary of one (1) hour to the operator at Rock Island Tower when train or engine service employes copy train orders or secure clearance cards has no effect on this claim since the Board has consistently held that past practice does not alter or change a rule of the agreement that is clear and unambiguous.

In view of the foregoing, the Carrier asks that the claim be dismissed in its entirety.

The material data included herein have been discussed with the Organization either in correspondence or in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue confronting the Board in this case is one of contractual interpretation. We are called on to interpret and apply the following language of an Agreement between these parties:

> "THAT PART OF MEMORANDUM OF AGREEMENT dated June 2, 1941, reading, 'Should train or engine service employes copy train orders or secure clearance cards through operator at other stations, the telegraph operator on duty at the time this work is performed will be allowed one (1) hour extra time per day at pro rata rate regardless of the number of train orders copied or clearance cards secured through such operator while he is on duty. It is understood train or engine service employes will not secure train orders or clearance cards direct from dispatcher except in case of emergency', shall remain in effect. The continuance of this paragraph is without prejudice to the position of the Organization with respect to its notice of

desire to eliminate this paragraph, served on the Carrier April 2, 1949, and handling of this matter may be progressed without further notice."

The essential facts are that on July 13, 1948, the Carrier abolished all telegrapher positions at its "GF" office and transferred the work formerly done there to re-classified positions at "RI" Tower. Included in the work so transferred was that of telephoning clearance and train orders to crews at Rowell Avenue where a telephone was available for that purpose. The telegrapher on duty at "GF" office (and subsequently at "RI" Tower) was paid an arbitrary for performing this service under Item 4 of the then effective Agreement.

The current Agreement (September 1, 1949), under which the dispute arose contains the language quoted above which is identical with that of Item 4 of the former Agreement, with the addition of a sentence not relevant here. Under this rule, the telegrapher on duty at "RI" Tower continued to receive the arbitrary for clearance and train order telephone calls to crews at Rowell Avenue, until March, 1956, when the Carrier discontinued payment.

Essentially this is a dispute over the meaning of the rule language "at other stations". The Carrier takes the position that the rule requires payments of the arbitrary only when the telegrapher on duty telephones the clearance and orders from a "station" (as that word is defined in the operating rules) other than that at which the train crews are located and that Rowell Avenue is not such a "station" within the meaning and intent of both the rule of the Agreement and the operating rules.

The Organization's case rests on past practice. It demonstrates that since 1941, when the original memorandum was entered into, Rowell Avenue had been treated by the parties as another "station"; that the language of the rule had remained unchanged throughout subsequent revisions of the Agreement following negotiations on the property; that for some 16 years the Carrier had paid the arbitrary allowance without protest. It urges, therefore, the conclusion that Rowell Avenue was intended to be included within the purview of the rule as another "station" by reason of the consistent interpretation and application of the rule by the parties themselves over a long period of time.

The Board is not unaware of those principles of contract construction relied on by lawyers and judges in cases similar to this one. It has often been said that when the language of a contract is "clear and unambiguous", or has a "plain meaning", or is "express", past practice or the conduct of the parties thereunder should not be permitted to modify, abrogate or vitiate this "clear" language. (Awards 7914, 7294, 6308, are typical). This time-honored concept has its origins in and was widely used under the old common law to provide a bar to the admission of parol evidence seeking to change the terms of a written instrument.

The rigid application of legalistic principles of contract construction to agreements collectively bargained by management and labor to meet the realities of modern industrial life is, in our opinion, open to question as a consistent, unvarying practice. This is especially true of labor-management agreements in the railroad industry where the language used and the technical idiom employed are not always susceptible of either easy or quick understanding. Resort to custom, usage and practice in this business more often than not is necessary to gain an understanding of what the parties intended to accomplish.

Here the rule language employed, standing alone, would tend to support the Carrier's contention that Rowell Avenue may not be considered another "station" for purposes of payment of the arbitrary. But for over 16 years the parties themselves obviously treated it as such. Mutual acquiescence in a past practice over such a long period of time not only establishes binding conduct on both parties under the doctrine of equitable estoppel — it also leads logically to the conclusion that the practice reflects what the parties intended or had in mind when the Agreement was made (Award 2436).

Limiting our decision here to the facts of this particular case, the Board finds that evidence of past practice establishes it was the consistent intent of these parties to include Rowell Avenue as another station within the meaning of the applicable rule, and that, therefore, the Claimant should have been paid the arbitrary allowance.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.