Award No. 521
Docket No. CL-501

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Arthur M. Millard, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of Employes that the action of the Midland Valley Railroad Company in employing the Western Union Telegraph Company and the Yellow Cab Company for calling of train and engine crews at Muskogee, Oklahoma, is a violation of their Schedule Agreement and particularly Articles 1-III- & XII thereof; also that Mr. Floyd Love, caller, Muskogee Yard and Station, should be compensated for all monetary loss sustained by him as result of this action."

STATEMENT OF FACTS: Prior to June 30, 1930, there were three callers employed at Muskogee Yard and Station, being assigned to hours from 7:00 A. M. to 3:00 P. M., 3:00 to 11:00 P. M., and 11:00 P. M. to 7:00 A. M., rate $3.74 per day.

These employes called all train and engine crews. Effective July 1st, 1930, the third trick caller (11:00 P. M. to 7:00 A. M.) was laid off and all calling of crews on this trick was handled by clerks at the yard office, who were on the same seniority district and roster. Effective November 13th, 1930, first and second trick callers were transferred to the dispatcher's office and dispatchers were required to call crews when no callers were on duty.

Effective March 12, 1932, position of crew caller occupied by Floyd Love was abolished. Calling of crews was then assigned to dispatchers, and they were instructed to use Western Union during the hours the Telegraph Company maintained messenger service and to use the Yellow Cab Company when there were no Western Union messengers on duty. The practice of requiring dispatchers to call crews was protested by the General Chairman, and on September 16, 1932, the calling of crews was returned to the yard office. This action of the carrier was accepted by the General Chairman as a satisfactory adjustment of the protest against assignment of crew calling to the dispatchers.

There is in evidence an agreement between the parties bearing effective date of June 14, 1921, and the following rules thereof are cited:

"ARTICLE 1—SCOPE

RULE 1—EMPLOYES AFFECTED

These rules shall govern the hours of service and working conditions of the following employes, subject to the exceptions noted below:

layed to the employe by messenger service and the amount paid for such service during the period from March, 1931, to December, 1936, inclusive. From this exhibit it will be noted that the average amount paid per month throughout the entire period was $27.15, and the average number of telephone calls requiring messenger service for each twenty-four hour period was less than five, or less than the equivalent of one average crew per day. During the heaviest year the average amount per month was $42.24, and the average calls for each twenty-four hour period numbered 7.8.

"The calling work is being performed by yard clerks, who are within the scope of the clerks' agreement. There is nothing in the agreement which could be construed as requiring that call boys be employed to do work which is now assigned to yard clerks, and which is being done in the same manner as when the call boy Floyd Love, for whom claim is filed, was employed.

"The precise method to be used in calling crews is not within the province of the clerks' agreement, as it is covered by the agreements with the train and engine service employes.

"If we had sufficient calling work to justify employing call boys and assigning the work to them instead of the yard clerks, any call boy so employed would be within the scope of the clerks' agreement, but there is no obligation to substitute call boys for yard clerks in connection with this work.

"Had call boy Floyd Love continued in service after March 12, 1932, it is obvious that he could not have performed this work as it is spread over a twenty-four hour period. Even if it could be compressed within an eight hour period, which of course would be impossible, it clearly could not even then justify his employment."

"The articles of the agreement mentioned in the claim seem to have no bearing on this question. Article 1, the scope rule, covers train and engine crew callers when employed, but it does not require the establishing of positions not needed, and there is obviously no need for the position of call boy claimed on behalf of Floyd Love; furthermore, even if we were to employ Love as a caller, he could do nothing that the yard clerks are not now doing with respect to the calling of crews, which extends over a twenty-four hour period.

"None of the rules quoted undertake to define the method by which the work should be done. When a yard clerk calls a crew of five men, one of them may not have a telephone at his home. The yard clerk uses the telephone to notify four of the employes at their homes, and uses the same telephone to notify the fifth employe through the Western Union or Yellow Cab Company.

"When Floyd Love was cut off March 12, 1932, he was employed in the dispatcher's office and performed other work than calling. His name was dropped from the seniority roster by reason of his failure to file his name and address in accordance with Rule 14."

OPINION OF BOARD: In this claim of the employes that the Carrier violated the rules of the existing agreement between the parties, effective June 14, 1921, by employing the Western Union Telegraph Company and the Yellow Cab Company for the calling of train and engine crews at Muskogee Yard and Station, Muskogee, Oklahoma, the employes cite various rules of the Agreement and particularly Rules 1, 3 and 12 in support of their contention.

The Carrier contends that the National Railroad Adjustment Board is without jurisdiction in this case because—

First: That the employe in whose behalf the claim is made did not perform any service for the Carrier after March 12, 1932, and therefore cannot be considered as an employe within the meaning of the Amended Railway Labor Act as approved June 21, 1934; and

Second: That if the "employe" were in the status of an employe when the claim was first presented to the Carrier (December 19, 1934), the same does not constitute a pending and unadjusted case within the purview of the Railway Labor Act.

Considering the first contention of the Carrier that this Third Division of the National Railroad Adjustment Board is without jurisdiction because the employe in whose behalf the claim is made was no longer an employe of the Carrier after March 12, 1932, the Board submits that the employe in question maintained his standing and seniority rights at least until July, 1934, when, as stated by the Carrier, "his name was dropped from the roster of employes . . . as a result of his own failure to comply with the provisions of the agreement." Outside of that, however, while the definition of the term "employe" as used in the Fifth Section of Title 1 of the Amended Railway Labor Act, includes every person in the service of the Carrier who performs any work, etc., it does not exclude those who have performed work in the service of the Carrier and who have equal rights under the Act with those continued in the service and for whose joint protection the Act was ratified.

Of the second contention of the Carrier that if the individual involved were in the status of an employe when the claim was first presented to the Carrier December 19, 1934, the same does not constitute a pending and unadjusted case within the purview of the Act, the Board submits that this claim does not represent a grievance or unjust treatment in the sense in which the term is used in Rule 24 of Article 5 of the agreement between the parties and as cited by the Carrier nor is Rule 22 of that Article applicable. This claim is made by one of the two parties to an agreement entered into between the employes specified in the agreement and the carrier, and is not a claim presented by an individual of a character coming under the application of Rule 24 of Article 5 of the schedule. Further, this claim is a contention of one of the principals of the agreement with the other over the application or misapplication of rules whose proper application is a matter of mutual or joint responsibility.

However, the Amended Railway Labor Act was and is not limited to cases that were pending and unadjusted on or subsequent to the date of its approval, but applies broadly to "The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions including" and not excluding "cases pending and unadjusted" on the date the Act was approved.

Under these conditions the Board rules that the contentions of the Carrier in this instant case are over-ruled and that the dispute involved is properly before this Third Division of the National Railroad Adjustment Board.

Insofar as the merits of this claim are concerned and the contention of the employes that the Carrier violated the terms of the existing agreement between the parties effective June 14, 1921, the Carrier submits that following the abolishment of the position of caller occupied by Floyd Love, the calling of train and engine crews was assigned to and handled by yard clerks and, where the particular employe to be called did not have a telephone the yard clerks placed a call through the Western Union or the Yellow Cab Company.

From the evidence introduced in this claim there is no doubt but that following the abolishing of the position of caller and the calling by the yard clerks of such members of train and engine crews as maintained telephones in their homes, there were still a number of calls that could not be made in that manner and which were made by the yard clerks through the agencies outlined under the direction of representatives of the Carrier.

The fact, however, that these calls were made upon an outside agency by the yard clerks, who were also covered by the scope rule of the existing

agreement between the parties, does not in any way affect the existing conditions. The fact remains that an outside agency was used without conference or negotiations to perform the work of an employe of a class negotiated into the schedule by conference and agreement, and constituted a violation of the rules of such existing agreement between the parties.

With relation to the monetary claim for loss sustained by Mr. Love, the employe displaced by the action of the Carrier, it is not in the power of this Board, nor has any evidence been introduced to show the amount of loss sustained by the claimant before the date his name was dropped from the seniority roster or whether any loss was sustained by reason of his displacement after such severance had taken place. It is, therefore, the ruling of the Board that the employe be reimbursed to the extent of the loss actually shown to have been sustained by the employe involved by reason of the violation of the rules of the agreement by the Carrier and this to be determined through conference and negotiation between the parties to the existing agreement.

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 Employe involved in this dispute are respectively Carrier and Employe 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 terms of the existing agreement between the parties.

AWARD

Claim sustained. Compensation for loss sustained to be determined by conference and negotiation as outlined in concluding paragraph of the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary.

Dated at Chicago, Illinois, this 29th day of October, 1937.