

Award No. 2086
Docket No. TE-1932

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY**

(Wilson McCarthy and Henry Swan, Trustees)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Denver and Rio Grande Western Railroad, that the work of handling mail, baggage and express shipments to and from train No. 19 and the station warehouse at Palisade, Colorado, is work covered by the Telegraphers' Agreement; that the Carrier has violated, and continues to violate, the terms of the Telegraphers' Agreement, beginning March 9, 1941, by permitting or requiring employes not under said agreement to perform this work at Palisade at a time when the telegrapher at Palisade, whose assigned hours are 9:00 P. M. to 5:00 A. M., is not on duty; and that the telegrapher at Palisade, whose tour of duty ends at 5 A. M., shall be paid for a call on each day beginning March 9, 1941, on which such employes not under the Telegraphers' Agreement have been permitted or required to perform this work formerly performed by employes under the agreement.

JOINT STATEMENT OF FACTS: An agreement bearing effective date of January 1, 1928, Re-issue December 1, 1939, is in effect between the parties to this dispute. A copy thereof is on file with the National Railroad Adjustment Board.

The wage scale of the telegraphers' agreement shows:

Palisade	Agent	68¢ per hour.
	1st Telegrapher-Cashier	75¢ per hour.
	2nd Telegrapher	69¢ per hour.
	3rd Telegrapher	69¢ per hour.

The assigned hours of the claimant March 9, 10, and 11 were from 9:00 P. M. to 5:00 A. M., and train No. 19 was scheduled to arrive at Palisade at 6:05 A. M. on these dates.

At Palisade, Colorado, outside of the assigned hours of the agent and the operator, express messengers, train No. 19, are required to unload from their trains and place in the depot, mail, baggage and/or express consigned thereto. Likewise, mail, baggage and/or express due to leave this station is secured from the depot and placed in the train by express messengers. Express messengers are provided with facilities for entering the depot warehouse.

Springs, Grand Junction, and others is handled between the station and the train by employees coming within the scope of the Clerks' Agreement.

2. All such station work at numerous stations on the property of this Carrier, where a telegrapher is not employed, is handled between the station and the train by employees coming within the scope of the train service organizations' agreements.

3. Rule 21, reading as follows:

"RULE 21—EXCEPTIONS

"(A) Employees will assist in station work except that such work will not interfere with telegraphic duties.

"(B) Employees will not be required to care for local batteries, except at offices where twelve cells or less are used.

"(C) Employees required to operate gasoline pumps will receive \$10.00 per month for such service."

Rule 21 of the Agreement, as quoted above, demonstrates completely that telegraphers can be required only to **assist** in such station work and only under certain conditions. It follows that it is the prerogative of the Carrier to require them to **assist** in such station work to the extent deemed necessary by the Carrier, providing only that assisting in such station work does not interfere with telegraphic duties.

Summarizing—the Carrier asserts:

1. The instant claim is, in effect, a request by the Organization for a new rule and consequently your Board must decline to accept jurisdiction.

2. That such station work as the handling of mail, baggage and express between the station and the train does not belong exclusively to employees under the Telegraphers' Agreement by reason of the Scope Rule or any other rule of the Agreement.

3. That Paragraph (A), Rule 21, of the Agreement in itself denies the instant claim.

The Carrier submits that a consideration of all the evidence, previous conduct of the parties under the Agreement, the practical and economical consideration bearing upon the meaning of the agreement and its application to the facts, fully sustains the Carrier's position and respectfully requests that the claim be denied.

OPINION OF BOARD: This is a joint submission. The facts stated briefly are that the claimant's tour of duty at Palisade, Colorado, is from 9:00 P. M. to 5:00 A. M., and that train No. 19 is scheduled to arrive at this station at 6:05 A. M. Express messengers and train employees of this train on the dates in question unloaded from this train and placed in the depot mail, baggage, and/or express consigned thereto. Likewise, mail, baggage and/or express due to leave this station was obtained from the depot and placed by these employees, who were not covered by the agreement, on this train.

Prior to November 27, 1940, train No. 19 arrived at this station at 5:15 A. M. and the claimant stayed on duty and worked this train. He was paid overtime for this work.

It has been repeatedly held by this Board that work embraced by the Scope Rule of an agreement may not be removed from such agreement and assigned to employes not subject to its terms. The fact that this claimant previously did this work shows it is embraced within the Scope Rule.

In principle, there is no difference between the facts in this claim than those in Awards Nos. 602, 1273, 1274, 1275 as the Scope Rule in those awards are very similar to the one in this agreement. This claim should be governed by those awards unless Rule 21-A makes a distinction.

Rule 21-A reads:

"Employes will assist in station work except that such work will not interfere with telegraphic duties."

This Referee interprets the rule to mean that telegraphers when on duty are required to assist in station work when there are more than one employe at such station. The Scope Rule excludes agents at certain stations. For instance, it would be the duty of the telegrapher at those excluded stations to assist the agent, when not prevented from doing so on account of his telegraphic work.

This Rule does not exclude work covered by the Scope Rule, but may require the telegrapher to do more work at a particular station than is contemplated by the Scope Rule.

The Board holds the claimant is entitled to be paid for a call under Rule 6 of the 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 agreement.

AWARD

Claim sustained in conformity with this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of March, 1943.

DISSENT TO AWARD NO. 2086, DOCKET TE-1932

This Award holds: "In principle, there is no difference between the facts in this claim than those in Awards Nos. 602, 1273, 1274, and 1275 * * *." By reference to Awards 1273, 1274, and 1275, it will be noted that they were predicated upon an assumption that in principle there was no difference in facts from those in Award 602. The failure to distinguish

between the facts basic for decision in those cases has been noted in Dissent to Award No. 1273. That Dissent is hereby made a part of the Dissent to the instant Award.

Further, the instant Award has misapplied holdings which it alleges to have found repeatedly given by this Board (3d par. of Opinion), and without authority has by dictum attempted an extension of meaning of the rule cited in the Opinion of Board (6th par.):

First, note that the Award states: "The fact that this claimant previously did this work shows it is embraced within the Scope Rule." It must be evident that the fact of performance of certain work by a claimant cannot, of itself, establish exclusive right to the performance of that particular item of work. Various employes, covered by separate Agreements, by custom and practice have always been required to perform this particular type of service when occasion demanded. That irrefutable fact as established by the uncontested assertion of such performance at numerous stations on this property by other than employes covered by the Telegraphers' Agreement, should have dissuaded from the improper decision here reached.

Secondly, the unwarranted assumption on the part of this Division to extend the meaning of Rule 21 (A), which is without ambiguity, is self-condemnatory.

When such fundamental principles of contract construction are thus transgressed, the result can be none other than an unsound Award as here was rendered.

/s/ C. P. DUGAN
/s/ R. F. RAY
/s/ C. C. COOK
/s/ A. H. JONES
/s/ R. H. ALLISON