

Award No. 2418

Docket No. TE-2010

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers, Atchison, Topeka & Santa Fe Railway, that when the Carrier, without conference or agreement, removed from employes covered by the current Telegraphers' Agreement at Blackwell, Farley, Felt, Clayton, Glazier, Etter, Follett, Darrouzett, Spearman, Dumas, Ropes, Meadow, Caddoa, Coolidge, Granada, Holly, Bristol, Hartman, Elida, Dexter, Hagerman, Lake Arthur, Springer, Perryton, Booker, Englewood, Ashland, Protection, Coldwater, Avard, San Antonio, Danville, Deercreek, Sawyer, Medford, Isabel, Wakita, Nashville, Manchester, Zenda, Sitka, Norwich, Wilmore, Milton, Belvidere, Byron, Coast, Yewed, Carmen, Aline, Mayfield, Lone Wolf, Dill City, Oakwood, Longdale and Canton, the duties of loading and unloading mail, baggage, express, etc., between the station building and trains which arrive at said stations outside the assigned hours of the station employe, a part of whose duties it had been to load and unload this mail, baggage, express, etc., and assigned these duties to members of train crews at such times and places, work which these men we represent had contracted to perform and had previously performed was improperly transferred to employes not covered by said Telegraphers' Agreement; that the work here involved be restored to station employes performing it previous to its improper transfer, and that the agents at the stations mentioned above be compensated under the Call and Overtime rules of the Telegraphers' Agreement for each occasion on which these employes not covered by the Telegraphers' Agreement have performed the aforementioned work.

EMPLOYES' STATEMENT OF FACTS: An Agreement bearing effective date of December 1, 1938 is in effect between the parties to this dispute, copies thereof are on file with the National Railroad Adjustment Board.

At the stations or locations listed in the Statement of Claim, outside of the assigned hours of the agents, train crews (at Clayton, an engine watchman) are required to unload from their train and place in the depot mail, baggage, express, etc., consigned thereto. Likewise, mail, baggage, express, etc., due to leave said stations or locations outside of the agents' assigned hours is secured from the depot and placed in the train by train crews. Train crews are provided with facilities for entering the station buildings. Outbound express and/or baggage shipments received at said stations, outside of the agents' assignments and not billed by them, are billed by train crews, express messengers, or train baggagemen.

was only five months before the effective date of the present Rules Agreement. We cannot overlook the fact that the Carrier and the Committee, with a full knowledge of all the facts before them and the pending controversy undoubtedly fresh in their minds, failed to mention in their Agreement the position of 'weighmaster' as belonging to the employees covered by the Agreement or that the work of weighing cars was the exclusive province of those covered by its terms. We must hold that the Agreement was entered into with full knowledge of the long established practice at Beaumont."

The foregoing is directly in accord with the facts in the instant dispute. Here as in the case covered by Award 1689, the Organization was fully informed with respect to the practice now complained of; they had filed claims in September, 1938, against that practice as it existed at Viola and Rago (See Docket TE-1143, Award 1274); and with that knowledge of the practice before them during the 1938 negotiations which resulted in the current agreement effective December 1, 1938, raised no objections thereto and made no contention that the handling of mail, baggage and express was the exclusive right of employees covered by the Schedule.

In order to sustain this claim, The Order of Railroad Telegraphers must prove:

- (1) That the practice complained of has not been in existence since before the date of the first Telegraphers' Schedule.
- (2) That it ever protested that practice prior to the filing of protests at Viola and Rago in September, 1938.
- (3) That it ever theretofore contended that the handling of mail, baggage and express by other than telegraph service employees was prohibited by the Telegraphers' Schedule.

CONCLUSION

In conclusion, the Carrier maintains that the instant claim should be dismissed or denied for the reasons herein presented and which are summed up as follows:

- (1) The Schedule rules cited by the Organization do not support the claim.
- (2) The handling complained of is in accord with the long and well established practice on the property.
- (3) The handling has had the tacit approval of the Organization and its representatives.
- (4) The restrictive handling now sought by the Organization has never been the subject of negotiation between the parties.
- (5) The Third Division cannot extend or alter the provisions of the Agreement between the parties.

OPINION OF BOARD: This is a companion case to Award 2155, Docket TE-2012, and involves the same Carrier, Organization, contract provisions and facts. The issue is also the same, namely, whether during hours in which the station employe is off regular duty, the Carrier may assign to train crews the work of loading and unloading mail, baggage, express, etc., between trains and station buildings.

In that award the claim was sustained, subject to the limitations of Article V, Section (i) of the Agreement, on the authority of Awards 602, 1082, 1083, 1084, 1273, 1274 and 1275, which held that the employment by the Carrier of persons not subject to the agreement to perform duties in the handling of mail, baggage, and express at the one-man stations involved, outside of agent's assigned hours, which were regularly assigned to and performed by the agents at those points during their assigned hours, constituted a violation of the agreement.

The Carrier attempts to distinguish Awards 602, 1082, 1083 and 1084, which were relied upon as authorities in Awards Nos. 1273, 1274, 1275 and 2155, and argues that the latter four awards were therefore erroneous and should be over-ruled; however, all seven of those awards hold that it is a violation of the Agreement for the Carrier to employ "persons not subject to the Agreement," without regard to what the status of those persons may otherwise be.

There can be no doubt that the Agreement covers the duties in question if performed during regular assigned working hours; and Article III, Section (c) of the Agreement, providing for service after regular working hours, clearly indicates that the same duties outside of regular hours are equally within the scope of the agreement, at least to the extent that the employes covered are available for that service.

While the present Agreement has been in force only since Dec. 1, 1938, the parties agree that the scope rule has remained substantially unchanged since Nov. 1, 1919. However, the Carrier contends that the use of train crews under these circumstances is shown to have existed at one station since 1925, at two since 1926, at eleven since 1931, and at gradually increasing numbers of stations to a total of thirty-four up to the effective date of the present agreement, and at some twenty-two additional stations since that date.

It is obvious that the facts stated are insufficient to show—(1) a practice existing when the scope rule was adopted in 1919 so wide-spread and generally known as to constitute a recognized limitation of that rule, or (2) a practice so wide-spread, long existing and generally known as to constitute a subsequent interpretation thereof, or (3) a novation or modification of the Agreement. At most it indicates a practice at only one station in 1925, six years after the original adoption of the scope rule, and spreading to other stations very gradually until about the time this and like claims were filed.

We find no adequate grounds for over-ruling the determination of this Board in the above awards or for finding them inapplicable to the facts of this claim.

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.

AWARD

Claim sustained subject to the limitations of Article V, Section (i) of the Agreement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1943.

Dissent to

Award 2418, Docket TE-2010

Award 2419, Docket TE-2011

Award 2420, Docket TE-2013

What has been said in our dissent to Award 1273, Docket TE-1140 and affirmed in our dissents to Awards 1274, 1275 and 2155, applies with equal force to these Awards.

R. F. Ray

C. C. Cook

A. H. Jones

C. P. Dugan

R. H. Allison