

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

(James M. Douglas, Referee)

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

KANSAS, OKLAHOMA & GULF RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Kansas, Oklahoma & Gulf Railway, that the agent at Fairland, Oklahoma, shall be paid for a call on each day, except Sundays and holidays, since April 1, 1941, on account of the Carrier requiring or permitting the section foreman not under the Telegraphers' Agreement to secure a line-up from the train dispatcher by means of the telephone at the Fairland Station on each of such days before the agent comes on duty.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing date May 1, 1929, as to rates of pay and rules of working conditions, as amended by Supplement No. 1, effective March 1, 1933, is in effect between the parties to this dispute.

The position of agent at Fairland, Oklahoma, involved in this dispute, is covered by said agreement, with assigned hours 8:00 A.M. to 5:00 P.M. and an allowed meal hour between 11:30 A.M. and 1:30 P.M.

A dispatcher's telephone is installed in the station buildings at Fairland. The train dispatcher located at Muskogee, Oklahoma, broadcasts a line-up of train movements over the dispatcher's telephone at 7:55 A.M. daily, except on Sundays and holidays.

The section foreman located at Fairland, Oklahoma, secures a copy of the broadcasted line-up daily, except on Sundays and holidays, direct from the train dispatcher by means of the dispatcher's telephone at the Fairland Station at 7:55 A.M. before the agent comes on duty.

POSITION OF EMPLOYEES: The following rules of the prevailing telegraphers' agreement are invoked in this dispute:

"Article 1. Scope. This schedule will govern the employment and compensation of telegraphers, telephone operators, (except switchboard operators), agent-telegraphers, agent-telephoners, towermen and levermen, tower and train directors, block operators, staffmen and such agents as may be listed herein, and will supersede all previous schedules, agreements and rulings thereon.

"The word 'employee' as used in these rules, will apply to all the foregoing classes."

"Article V. Call Rule. Employees notified or called to perform work not continuous with the regular work period shall be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

broadcast by the dispatcher, even without the supplemental agreement, he would no more be performing work of a telegrapher than the trainmen on the L&N who obtained instructions from the yardmaster by telephone, which the Third Division, in Award 1396, declared was not a violation of the Telegraphers' Agreement.

It is also of interest to consider the opinion expressed by the Board in Award 1396, which denied a claim that it was a violation of the Telegraphers' Agreement for trainmen to use the telephone for communication with the yardmasters. For example, the following three paragraphs are quoted from the opinion of board in that case:

"The theory of the claim is that, although the three operator-levermen positions were properly abolished, the work is now being done improperly and in violation of the Agreement by trainmen who use the telephone in procuring directions from the yard office.

"The trainmen are not doing the work of the operator-levermen. What is happening is that, for yard movements, trainmen are getting their instructions directly by telephone instead of having their action controlled by operator-levermen. It is impossible to see, in the terms of the rules, any ground for insisting, as the employes do with commendable candor, that telephone operators should be stationed at the telephone instrument which is now placed approximately where North Block used to be.

"If they were there, what would they do? Instead of the trainmen talking directly to the yardmaster, he would give his message to a telephone operator, who would repeat it into the 'phone, get the reply and repeat that to the waiting trainman. Under the facts of this case, such an unneeded and unessential operation is certainly not contemplated by anything in the rules. That aside, the process (as distinguished from the result) is essentially different from the work formerly done by the three operator-levermen in North Block tower."

All of the foregoing is really superfluous since the question of line-ups was previously presented and disposed of. See Paragraphs 12 and 13 of Carrier's Statement of Facts and Carrier's Exhibit B.

The claim should be denied.

OPINION OF BOARD: Every morning at 7:55, except on Sundays and holidays, it was the practice of the dispatcher to announce over the telephone circuit connecting all stations the day's line-up for the benefit of all section foremen. The section foreman at Fairland, Oklahoma, a one-man non-telegraph station, would obtain the line-up from the dispatcher over a telephone located in the freight house.

The Organization's claim that this practice violates the Scope Rule of its Agreement is one which this Division has sustained in many similar instances commencing with Award 604. It is true the awards subsequent to Award 604 have generally carried dissents usually on the ground the decision in 604 was of limited application and pertinent only where the carrier was found to be using such practice for the purpose of evading the agreement. Award 604 was re-examined and subsequent awards relying on it were reviewed in Award 1671 which restated the principle that regularly obtaining line-ups directly from a dispatcher over the telephone was work belonging to the telegraphers under the Scope Rule. It found Award 604 was based on that principle and reaffirmed it.

Award 1671 also considered and discussed at length and with reference to other awards the question whether the right to complain about such practice had been abandoned by long existing knowledge of it by the employes without protest on their part before the advent of Award 604, and during which time agreements had been revised, as here. It held there was no abandonment under

such circumstances. That question was later considered fully in Award 1720 and again it was held that absence of protest over a number of years (25) was no defense to such a claim. While both these awards carried dissents that question seems to have now been firmly settled.

Carrier contends that this case differs from the others in that the practice complained of was authorized by the Agreement. On May 1, 1933, the parties made a supplemental agreement under which Fairland was made a non-telegraph station and which contained the following provision:

"Station employees at closed stations or non-telegraph stations shall not be required to handle train orders, block or report trains, receive or forward messages by telegraph or telephone, but if they are used to perform any of the above service, the pay for the agent or telegrapher at that station for the day on which such service is rendered shall be the minimum rate per day for agent-telegraphers, as set forth in this agreement. Nothing herein contained shall limit the right of the carrier to use the telephone for such conversation or verbal instructions as it may deem necessary or desirable to handle the company's business."

Carrier argues that announcing the line-ups amounts to no more than giving "verbal instructions" over the telephone which right is expressly given it by the above provision. That such announcements constitute verbal instructions as contemplated by such provision is sustained. Carrier contends, by the fact the section foremen are not required to write down the line-ups as they receive them. The same contention that such line-ups were verbal messages and did not need to be copied was advanced without success in Awards 604 and 1752. Furthermore, the effect of Carrier's argument is that the above provision operated to transfer the right to receive line-ups to station employees or section foremen not under the Agreement. No such intention is evident from the above provision or may it be read into it. The record discloses that the adoption of the supplemental Agreement did not change the method of obtaining line-ups as they had long previously been obtained in the same manner. We find the above provision does not support Carrier's position.

While the Organization's claim dates from April 1, 1941, the first notice of it to Carrier is dated January 17, 1942. In view of the existence of such practice for a long period without protest the Organization may not recover a penalty for the period prior to the time the violation was called to the attention of the Carrier. Award 2635. The claim should be sustained but only from January 17, 1942.

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 Employees involved in this dispute are respectively carrier and employees 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 Carrier violated the Agreement.

AWARD

Claim sustained from January 17, 1942 in conformity with opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 26th day of June, 1945.