

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 Kansas, Oklahoma & Gulf Railway, that the Carrier is requiring or permitting the agent at Allen, Oklahoma, a position not covered by the Telegraphers' agreement, to perform telegraph and telephone service during that portion of each day while telegraph operators are not on duty; that the performance of such service automatically brings the position of agent at Allen within the scope of the telegraphers' agreement and shall be incorporated into the Telegraphers' Agreement.

EMPLOYES 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 Allen, Okla., is not covered by said agreement. Prior to on or about May 1, 1929, a first trick telegrapher position was maintained at this station for many years. Since on or about May 1, 1929, no first trick telegrapher has been maintained at this station. A second trick telegrapher position and a third trick telegrapher position is and has been maintained at this station for many years, with assigned hours 3:00 P. M. to 12:00 o'clock midnight and 12:00 o'clock midnight to 8:00 A. M. respectively.

Subsequent to the discontinuance of the first trick telegrapher position at this station, on or about May 1, 1929, the Carrier is requiring or permitting the agent, not covered by the telegraphers' agreement to perform telegraph service during that portion of each day while there is no telegraph operator on duty.

POSITION OF EMPLOYES: The scope rule of the telegraphers' agreement, reading as follows, is 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."

Under the terms of the scope rule, the agreement applies automatically to all positions the incumbents of which perform telegraph or telephone service. The language of the scope rule which stipulates that "This schedule will govern

the telephone for such conversation or verbal instructions as it may deem necessary or desirable to handle the company's business" has been specifically recognized by the employees in the supplemental agreement. It should only be necessary to consider the provisions of the agreement in order to determine that the claim is wholly without merit and should be denied.

Carrier's Exhibits A and B are submitted.

Since this is an ex parte case, this submission has been prepared without seeing the employees' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contentions of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission.

OPINION OF BOARD: At Carrier's Allen, Oklahoma, station three positions are maintained, an exclusive Agent, a second trick telegrapher and a third trick telegrapher. The claim before us concerns only the Agent who works the first trick when no telegrapher is on duty.

The Organization contends that during this period Carrier is requiring and permitting the Agent to perform telegraph and telephone service having to do with the movement of trains which automatically classifies such position as one of Agent-telegrapher and brings it within the scope of the Agreement.

The facts are not disputed. They show that almost daily over the periods mentioned there were telephone communications, either directly or indirectly, between the Dispatcher and the Agent. It seems clear to us that these communications, with only a few exceptions, were more than mere conversations as Carrier characterizes them, but were for the purpose of transmitting messages and other matters necessary to regulating train movements which are within the scope of the Agreement.

Furthermore, the facts indicate a continuing persistent practice on the part of the Carrier to use the Agent in such work. On the facts the claim must be sustained unless, as the Carrier contends, it has the right to use this particular Agent for these services under the Agreement; or unless, as Carrier alternatively contends, this Board has no jurisdiction to grant the relief asked for.

While denying the communications are of such a character as come within the scope of the Agreement, Carrier asserts it is free to use the Agent at Allen for telegrapher's work because that position is expressly excluded from the terms of the Agreement by Article XXXI thereof. Further, that a similar exclusion provision in the Agreement with the Midland Valley Railroad was interpreted by an arbitration award of the United States Mediation Board, Case GC-1068, to permit such service from an agent designated in the exclusion provision and that such award is controlling in this case. While the Carrier in this case appears to have been at one time involved in the arbitration proceedings leading up to that award it withdrew before the award was made. Carrier was not a party to the award so the award cannot be binding upon it. The facts that Carrier and the Midland Valley are operated by the same management and the employees of both roads are represented by one committee and one General Chairman do not of themselves make the award binding upon Carrier. Carrier and the Midland Valley were, and still are, operating under separate agreements so that an arbitration award upon an agreement to which Carrier was not a party in a proceeding in which Carrier's rights and obligations were not considered or determined could under no circumstances be binding upon Carrier.

Nor is the arbitration award of persuasive authority in this case because of the difference in the facts on which the award was based. The award was the subject of a decision of this Division in Docket No. TE-885, Award 940, in which the Organization and the Midland Valley were the parties. In that case the claim was similar to the one here. There, as here, the Organization was seeking to bring within the scope of the Agreement an agency expressly excluded from the Agreement to which telegrapher's duties had been added. In its opposition to the claim Carrier relied on the arbitration award. The arbitration award found as facts that when the Agreement excluding the agency, which was the subject of consideration in the case before this Board,

was adopted that very agency was then performing telegraph work. Also that at another agency likewise excluded it was understood by the parties that such agency was to perform telegraph work in the future. "Thus it appears," stated the arbitration award, "that the employees by their acts, have placed an interpretation upon the agreement which may not be avoided." This Division held the finding of such facts was final and conclusive upon the parties and was controlling upon this Board with respect to the claim presented. But such facts are not present in this case. There is nothing in the record to show, nor is any contention made, that the Agent at Allen ever performed, or was expected to perform, telegraph duties. Award 1562 merely follows Award 940.

Carrier next contends the telephone communications with the Agent at Allen were authorized by a supplemental agreement of March 1, 1933, amending the original agreement of May 1, 1929. The supplemental agreement revised some positions and rates of pay and changed five stations to non-telegraph agencies, expressly naming the five stations so changed. No change was made affecting the station at Allen. The supplemental agreement next set out several rules applicable only to the non-telegraph stations and then provided:

"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."

Even if the above provision applies by its terms to the station at Allen, a question which we need not here decide, it is clear from the reading of it that it does not authorize Carrier to add telegrapher's duties to such position without bringing it within the scope of the Agreement.

Finally Carrier argues that this Board has no jurisdiction to reclassify the position of Agent at Allen and order it included under the Agreement, but that such may be done only by negotiation by the parties to the Agreement. In answer to this we point out that Carrier by imposing and permitting the performance of telegrapher's duties by the Agent has created a new position at Allen which automatically comes under the Agreement by its terms. Such was the effect of the ruling in Award 564. We so rule in this case. Compensation for such new position should be fixed as required under Rule IX(b) of the Agreement relating to new positions.

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 the service required of the Agent at Allen created a new position within the scope of the Agreement.

AWARD

Claim sustained.

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.