Award No. 5079
Docket No. TE-5099

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE & OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake & Ohio Railway Company,

(1) That the carrier violated the terms of the current Telegraphers' Agreement when, on April 14, 1948, it permitted and/or required a trainmaster accompanying work extra 1143 to copy a train order at Mile Post 13 on the Greenbrier Subdivision, a point where no telegrapher is employed; and

(2) That D. G. Adkins, an extra telegrapher idle on April 14, 1948, shall be compensated on the basis of a day's pay of 8 hours at the minimum rate for telegraphers on the district due to the carrier's violation of the agreement.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date October 16, 1947, as to rates of pay and rules of working conditions is in effect between the parties to this dispute.

On April 14, 1948, a landslide occurred at Mile Post 13 on the Greenbrier Division of the carrier, blocking the single main track at that point. A work train with a mud scoop was dispatched to the scene to clear the track. An assistant trainmaster, not under the Telegraphers' Agreement, accompanied the work train. No telegrapher is employed at Mile Post 13. At 6:49 P.M., the assistant trainmaster received and copied train order No. 38 by telephone at Mile Post 13 direct from the train dispatcher to give the work train additional time over train No. 143, and delivered said train order to the conductor and engineer of the work train.

Extra operator D. G. Adkins on the district was living at Hinton, W. Virginia and was idle and available on this day but was not called to handle the above mentioned train order.

Claim was promptly filed by the Local Chairman in behalf of extra operator Adkins for a day's pay for this day on which he was deprived of this work. The carrier declined the claim.

POSITION OF EMPLOYES: The scope rule of the prevailing Telegraphers' Agreement which embraces telegraphers and telephone operators and the work performed by them in those classes of employment, is invoked in this dispute.

is embodied in the scope rule, there would clearly have been no purpose in the request for inclusion of the following language:

> "(d) Only employes covered by this agreement shall be required or permitted **to handle train orders** or clearance cards, or to report or block trains or to transmit or **receive by telephone** or telegraph; **train orders**, clearance cards, messages, train lineups, reports of record, or other information at stations where an employe covered by this agreement is employed, except in case of extreme emergency, in which event the employe at such station shall be notified and paid a call.
>
> **If such service** is performed **AT OTHER POINTS by employes not covered by this agreement, the senior idle extra employe shall be notified and paid a minimum of one day's pay for each violation.**" (Emphasis supplied.) See Carrier's Exhibit "A".

Hold that request up against the present case involving copying the train order in emergency at Mile Post 13. Mile Post 13, under the proposed rule, would have been one of the "other points." This claim asks a minimum day for the senior idle extra employe, and fits exactly the provisions which were requested in the rule negotiations.

The carrier submits that its evidence is overwhelmingly to the effect that the current rules intend that Rule 58 govern in the matter of handling train orders, and that Rule 58 (even by admission of the employe representatives) has not been violated in this case. The evidence is equally clear that the employes seek a new rule, something outside the function of your Board under the provisions of the Railway Labor Act. For these reasons this claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: There is in dispute claim on behalf of an extra telegrapher for 8 hours' pay at the minimum rate for telegraphers on the district, growing out of the Carrier's alleged violation of the Agreement when, on April 14, 1948, it permitted and/or required a trainmaster accompanying work extra Train 1143 to copy a train order at Mile Post 13 on the Greenbrier Subdivision, a point where no telegrapher is employed.

Basically, the dispute involves the Carrier's right, under the current Agreement, to permit or require employes not covered by Telegraphers' working rules to copy train orders at points where no operator is regularly assigned.

The Employes rely on the Scope Rule as authority for the claim that the work in question is covered by the Telegraphers' rules and is work belonging to their class and craft. The Carrier denies that the work in question is subject to the Scope Rule and pleads an emergency situation.

The record shows that there was a senior extra operator idle on this day available for call 47 rail miles from Mile Post 13, who could have provided his own transporation if train schedules were inadequate. The record further shows that it was late in the day before additional time over Train 143 was needed to continue work on the main track. The Carrier made no effort to call Claimant.

Mile Post 13 is located in the open country. No telegraph office is located at or near that point. A portable telephone had been set up and communication with the Assistant Trainmaster was established in this way.

The sole question to be resolved is whether the subject work belongs exclusively to employes under the scope rule of the Telegraphers' Agreement. But, the question, as stated, is an over simplification of an involved dispute

which requires an exhaustive review of Board precedent. A reexamination of cases cited, and others, may be said to settle on general rules which answer certain contentions urged and others implied. We shall dispose of the more important of the general propositions before discussing the controlling reasons for the award.

The fact that the copied train order was transmitted over the telephone and not be telegraph does not make the receipt and copying of said order any less the work of telegraphers if, prior to the advent of the telephone, historically and traditionally, the work belonged to telegraphers. Awards 1983, 4249, 4458, 4575.

But the fact a telephone had been installed and was in use at the site of the work is not alone sufficient to bring this case under the rule that such is tantamount to locating a telegraph office at Mile Post 13. If employes other than telegraphers were using telephones occasionally—but not as a regular practice—at outlying points where no telegrapher is available, for the purpose of obtaining instructions and information concerning their work, mere presence and use of the telephone for that purpose is not objectionable as being in violation of the Scope Rule. Award 604. The instant case is factually different from Award 1552 wherein it was found that the Carrier used a telephone between two points on the main track to receive and transmit communications of record, such as train line-ups, distribution of labor reports, progress of trains, etc. Here we are concerned with the express charge which involves the copying of only one train order. In the absence of charges and proof of other alleged violations such may not be implied.

A delegation of work to a class covered by agreement belongs to those for whose benefit the contract was made. A delegation of such work to others not covered by the Agreement is violative of the Agreement. Awards 3901, 3902, 3955. There is an exception to this rule, however, where the work is permissibly incidental, rather than an unwarranted invasion of another organization's field. Award 4259. In an early award (603) adopted March 30, 1938, is was stated in part:

> "It is well known that section foremen and other maintenance employes occasionally use box telephones located at blind sidings and other outlying locations where no operator is available for the purpose of communicating either with the operators or their supervisors and this practice is not regarded as an encroachment on the telegraphers' agreement."

But work covered by an Agreement cannot be taken away arbitrarily from parties represented by the Agreement and given to other parties who are outside the scope of the Agreement. Award 564.

Evidence of a practice, though long established, if clearly repugnant to and incompatible with rights, duties and obligations by contracts will not support a continuing violation of a rule, nor will the Board lend its sanction thereto by invoking the doctrine of estoppel to change or diminish the binding effect of the Agreement because long violated. Award 3521.

On the other hand, long practice amounting to acquiescence, and evidencing a mutual understanding as to the application of the agreement will be carefully weighed with the other facts and circumstances of the case, to determine the intent of the parties, when they bring their dispute to the Board for settlement. Awards 1435, 1609, 3603.

To permit a practice, later urged as objectionable, to continue unchanged through the process of negotiating and settling terms of new agreements is some evidence of mutuality in the continuity of the practice. See Awards 4791, 2436, 3603.

We come now to considerations determinative of the dispute. First, we are unable to agree with the Organization's position that Rule 58 is only a

limitation of more general rights enjoyed under the Scope Rule and must be strictly construed. As said in Award 4720, where only one exception is definitely stated in a rule, the language of the rule militates against an inference of other exceptions, but one may be implied from a well-established practice.

In this case the same tradition, historical practical and custom on which the Organization is compelled to rely to bring work of its craft and class under the scope rule of this Agreement, show that for at least 28 years there has been on this property what amounts to a mutual acceptance of the Carrier's interpretation of the rule to mean that there is no penalty where employes not under the scope of the subject Agreement copy train orders at locations other than at or near established telegraph or telephone offices.

This practice and the rule have continued unchanged through contract negotiations in 1942 and 1947. The rule has its origin in Decision No. 757 of the United States Railroad Labor Board, effective March 3, 1922, and was first incorporated in this contract in 1927. Over these many years and in fact as early as 1917, these parties have been dealing with the problem of train and engine service employes securing train orders. So it cannot be said that the Organization has been sleeping on its rights or has been careless or negligent in the enforcement of its Agreement.

That the Organization was cognizant of the implications of Rule 58 is evidenced by the fact that in negotiations leading up to adoption of the current Agreement, effective October 16, 1947, the Organization undertook to amend the Scope Rule.

This Board has consistently held by a long line of awards that the function of this Board is limited to the interpretation and application of agreements as agreed to between the parties. Award 1589. We are without authority to add to, take form, or write rules for the parties. Awards 871, 1230, 2612, 3407, 4763.

As said by the Board in Award 2622:

> "Far better for all concerned is a course of procedure which adheres to the elemental rule, leaving it up to the parties by negotiation or other proper procedures to make certain that which has been uncertain."

Thus, we are led to the inescapable conclusion that Rule 58 on this property, by reason of the record here before us, and the issue as framed, implies a reasonable intent that at points such as here in question, and under the peculiar facts and circumstances of the case, train orders could be copied by others than telegraphers without penalty. See Awards 1145, 4516, 4259. We find these awards especially well reasoned and quite persuasive.

The Organization, in the very able presentation of its case, cites several awards supporting its position. We have carefully examined these precedents and find them distinguishable factually and on the rules at issue. No good purpose could be served by laboring the points of distinction. Instead, reference is made to Award 4772 to show in a general way, the manner in which the Board distinguishes its Awards. There proof of violation was established on claim of an assigned operator off duty and available for call. That a contrary conclusion is proper under the facts of the instant case is shown by the observation, "that the obtaining of a line-up by such employe at a place where no operator is assigned, is an extension of the use of a telephone beyond the range of former telegraphic service, and is not a violation 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 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 facts of record show that the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1950.