

Award No. 5654
Docket No. TE-5677

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE MISSOURI PACIFIC LINES IN TEXAS AND LOUISIANA

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana that:

(a) The carrier violated the terms and provisions of the Agreement between the parties, dated October 15, 1940, when it required or permitted an employe not covered by the scope of the agreement to perform work covered by said Agreement.

(b) The agency at Laureles, Texas, was not actually closed during certain periods of the years 1946, 1947, 1948 and 1949, but the work was transferred and assigned to a person not covered by the Agreement.

(c) The agent, W. G. Howie, who was entitled to the work, shall now be paid for all time lost during the period that the station was improperly closed and the work was transferred to an employe not covered by the Agreement.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing date of October 15, 1940, covering rates of pay and rules of working conditions, and a Memorandum of Understanding on same, dated April 22, 1941, are in effect between the parties to this dispute.

Under the authority of the Railroad Commission of Texas the carrier closed the station at Laureles, Texas, during a certain period of each year approximating from four to six months.

During the period the station was supposed to be closed the carrier did not discontinue its business of handling shipments to and from Laureles.

A position of agent-telegrapher was bulletined each year as a temporary agency and assigned to an employe covered by the Telegraphers' Agreement. This employe occupied the position of agent-telegrapher during the time, designated by the carrier, that Laureles was operated as an open station.

During the time, designated by the carrier, that the station was closed a portion of the work which was formerly performed by the agent-telegrapher was assigned to some one not covered by the Telegraphers' Agreement.

at this station subsequent to that date. Under these circumstances, therefore, the claim as presented in favor of Agent W. G. Howie is in error.

In paragraph (c) of their Statement of Claim the Employees further contend that the station at Laureles "was improperly closed". This is, obviously, an erroneous statement. Hereinabove (Historical Matter) the Carrier has shown that the closing of this station has been in accordance with and on authority received from the Railroad Commission of Texas. (See paragraphs 3 and 7 of Carrier's Statement of Facts). In view of this fact the Employees' Statement that the station at Laureles "was improperly closed" is not understood.

In the foregoing the Carrier has shown that no basis in fact exists, or has existed, for the Employees' contentions as set forth in paragraphs (a), (b) and (c) of their Statement of Claim. Therefore, it is the position of the Carrier that the contentions here presented by the Employees should be dismissed and the accompanying claim accordingly denied.

The substance of matters contained in this submission have been the subject of discussion in conference and/or correspondence between the parties.

OPINION OF BOARD: The Order of Railroad Telegraphers claim Carrier violated its Agreement with them when it permitted someone not covered by the Agreement to perform work at Laureles, Texas, which is covered by the scope thereof. It makes claim for agent W. G. Howie and asks that he be paid for all time lost by reason thereof. The claim covers the years of 1946, 1947, 1948 and 1949. The basis of the claim is that the agency at Laureles, during the periods of time herein involved, was not actually closed but that the work of the position was transferred, assigned to and performed by someone not covered by the Agreement.

As provided by Rule 1 and Rule 37 of the parties' Agreement effective October 15, 1940 the position of Agent-Telegrapher at Laureles is included within the scope thereof.

By Memorandum of Understanding dated April 22, 1941 the parties agreed " * * * that any or all clerical or other work necessary in meeting the service requirements of their positions or in the conduct of their offices by Agents or Assistant Agents, occupying positions covered by the Telegraphers' Agreement, will be considered as coming within the scope and subject to the provisions of the Telegraphers' Agreement."

Just what a Custodian, Caretaker or any other similar employe put in charge of a station may not do when the Agent's position is discontinued is spelled out in Rule 35 of the Agreement. It provides: "Where Caretakers, Custodians or other similar employes are employed at stations in this Agreement or in previous Agreements where Agencies have been or may be abolished, they will not be permitted to sell tickets, check baggage, receipt for or bill freight, take receipt for freight delivered, or keep records incident thereto, nor perform any service of any nature whatsoever covered by Rule 1 hereof. * * *"

Laureles being a one man station these rules make the receipting for or billing of freight there exclusively the Agent-Telegrapher's work and entirely within the scope of the Telegrapher's Agreement.

It is a fundamental rule that work of a class covered by an Agreement belongs to those for whose benefit the Agreement was made. A delegation thereof to others not covered by the Agreement is in violation of the Agreement covering it.

The practice here complained of apparently had its beginning in 1934 when, as of January 23, 1934, the Railroad Commission of Texas authorized

Carrier "to close the station at Laureles, Texas, and operate that point as a non-agency—prepaid station except during the months from December to April, inclusive, each year." This authority was modified by the Commission on November 7, 1936 to except therefrom each year the period from February 15 to June 15.

Under this authority it became the practice of the Carrier, during the periods it was so authorized to close the station at Laureles and did so, to discontinue the position of Agent-Telegrapher and have either an employee designated as a Bill of Lading Agent or a clerk perform the duties of receipting for freight by issuing and signing bills of lading therefor. This practice continued without protest by the Organization until this protest was made on May 20, 1949. Neither the Bill of Lading Agents appointed by the Carrier nor the clerks were employees covered by the Telegraphers' Agreement.

While the order of the Railroad Commission of Texas authorized Carrier to close the station at Laureles and operate it as a non-agency-prepaid station its order did not abrogate nor attempt to abrogate the Carrier's Agreement with the Telegraphers. Neither did it authorize nor attempt to authorize a violation thereof by Carrier. Under this order, whenever Carrier sought to operate thereunder, it was obligated to fulfill its obligations under the Telegraphers' Agreement. This consisted of giving the work of receipting for freight by issuing and signing bills of lading therefor to employees covered thereby.

It is called to our attention that the practice here complained of has been carried on by Carrier for almost fifteen years before complaint was made by the Organization, which was done on May 20, 1949, and in view thereof that the Organization is now estopped from asserting a position contrary thereto. Under the facts as herein disclosed we think the following language taken from Award 3168 of this Division is particularly applicable. Therein we said: "It must be borne in mind, however, that it is the province of the Carrier to interpret the rules of the Agreement in the first instance, and while there is merit in barring stale claims, long acquiesced in by the parties, which arise out of subsequent interpretations, is has the effect of barring such claims only that antedated the claim upon which such Award was based. When the claim asserting a new interpretation is made, the Carrier has received notice of the interpretation contended for and it can no longer rely upon the acquiescence of the Organization to the interpretation theretofore given the rule. The duty then falls upon the Carrier to determine the merits of the claimed interpretation."

And, as stated in Award 4428 of this Division: "The mutual continuance of a practice after the negotiation of an agreement eliminating it, does not have the effect of changing the agreement. The provisions of the agreement supersede the practices incompatible therewith. The acquiescence of the employees in the continuance of the practice after the contract became effective, has the effect of estopping the parties from the collection of retroactive penalties resulting therefrom. It does not estop either party from enforcing the contract and the collection of penalties accruing after demand for compliance has been made."

Here demand for compliance was made on May 20, 1949. While we find Carrier's practice to have been in violation of its Agreement with the Telegraphers we hold that no penalty can be assessed which is based thereon prior to May 20, 1949.

It appears claimant did not occupy the position at Laureles after January 5, 1948 upon which he here bases his right. Consequently his claim for time lost cannot be sustained.

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 Carrier violated the Agreement.

AWARD

Claim (a) sustained.

Claim (b) sustained.

Claim (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of February, 1952.