

Award No. 5792
Docket No. TE-5779

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

STATEMENT OF CLAIM: Claim of The Order of Railroad Telegraphers on the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, that:

(1) The Carrier violated Rule 1 (d) of the applicable agreement in effect between the parties when and because it failed and refused to pay to Telegrapher-Clerk J. T. Follis, Jr., in addition to his regular rate of pay for December 20, 1950, the minimum rate per day for Telegraphers as set forth in the agreement as a result of Section Foreman Shiflet transmitting a message to the train dispatcher on December 20, 1950, at a time the telegraph office at Gainesville, Texas was closed; and that

(2) The Carrier shall compensate J. T. Follis, Jr., for the difference between the amount which he was paid and the amount to which he was and is entitled under the provisions of Rule 1 (d) of the applicable agreement as a result of the Carrier's violative act on December 20, 1950.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of September 1, 1947 is in effect between the parties to this dispute, Rule 1 (d) of which reads as follows:

"(d) Station or other employees at closed offices or non-telegraph offices shall not be required to handle train orders, block or report trains, receive or forward messages, by telegraph, telephone or mechanical telegraph machines, but if they are used in emergency to perform any of the above service, the pay for the Agent or Telegrapher at that office for the day on which such service is rendered shall be the minimum rate per day for Telegraphers as set forth in this agreement plus regular rate. Such employee will be permitted to secure train sights for purpose of making bulletin boards only.

NOTE: (It is understood that 'closed offices' also means an office where other employees may be working not covered by this agreement, or an office which is kept open a part of the day or night."

At Gainesville, Texas, two positions are covered by the terms of the agreement, namely (1) Telegrapher-Clerk position, with assigned hours of

7. Section 13 of Memorandum of Agreement, executed September 15, 1930, covering creation of Telegraphers' Adjustment Board on M-K-T Lines, Carrier's Exhibit "G", attached, provides as follows:

"13. All decisions of the Board shall be approved by a majority vote of all members of the Board, decisions of the Board to be final and binding upon both parties to the dispute and to be rendered within thirty (30) days from the close of the hearings. Hearings shall not be considered closed until the Board has obtained all information which it may consider necessary."

8. Claim non-telegraph Agent, Stark, Kansas, September 29, 1936, under Rule 1, Section (d), account Trainmaster copying train order while Agent on duty and present. Claim allowed. Carrier's Exhibit "H", attached.

9. Claims of Agent-Telegraphers, Fayetteville, Texas, February 20, 1948, account dispatcher requesting and securing OS report on Extra 892 North from Mail Carrier; LaGrange, Texas, February 23 and March 5, 1948, account dispatcher requesting and securing information from member of train crew for use in issuing train order and OS report from Helper on freight train going north; New Ulm, Texas, February 26 and 27, 1948, account Conductor copying train orders, under Rule 1 Section (d). Claims allowed on basis of call under Rule 1, Section (e). Carrier's Exhibit "I", attached.

10. Claim Agent-Telegrapher, Trenton, Texas, December 7, 1948, account Conductor securing instructions from train dispatcher, under Rule 1, Section (d). Claim allowed on basis of call under Rule 1, Section (e). Carrier's Exhibit "J", attached.

11. Claim of Telegrapher at North McAlester, Oklahoma, under Rule 1, Section (d), account Conductor securing instructions from dispatcher December 28, 1948. Claim allowed on basis of call under Rule 1, Section (e). Carrier's Exhibit "K", attached.

Many other similar claims have been made and allowed over the years since these rules have been in effect under either Section (d) or (e) of Rule 1, without question or controversy, on basis of these settlements and Decision Case No. 4 of Telegraphers' Adjustment Board, conclusively and affirmatively supporting the position of the Carrier that it was and has consistently been the intent, purpose, understanding and practice that Section (d) of Rule 1 applies to part-time and non-telegraph agencies when used to handle train orders, block or report trains, receive or forward messages, by telegraph, telephone or mechanical telegraph machines, and that Section (e) of Rule 1 applies to telegraph or telephone offices where a telegrapher is employed and is available or can be promptly located. Gainesville, Texas being a telegraph office where two shifts of telegraphers are employed, Section (e) and not Section (d) of Rule 1 applies.

The Carrier respectfully requests that the Board deny the claim.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of Petitioner's claim, original submission and any and all subsequent pleadings.

All data submitted in support of Carrier's position as herein set forth have been heretofore submitted to the employees of their duly authorized representatives.

(Exhibits not reproduced).

OPINION OF BOARD: At Gainesville, Texas on December 20, 1950 there was a Telegrapher-Clerk and a Telegrapher-Cashier position. The combined

hours of the two positions were from 12:01 A.M. to 4:00 P.M. The office was closed from 4:00 P.M. to 12:01 A.M. At 5:00 P.M. on December 20, 1950 after the office was closed for that day, a section foreman, using the facilities of the office, transmitted a message, omitting the heading and conclusion, as follows to the train dispatcher at Denison: "Issue order look out for rail and material between Old Pass and main track M.P., G-701 Gainesville."

The claim here is for a day's pay in favor of J. T. Follis, Jr., the Telegrapher-Clerk at Gainesville for a call which was an emergency call within the meaning of Rule 1 (d) of the controlling Agreement and thus under the penalty provision of the rule he became entitled to a day's pay in addition to the regular pay of his position.

The Carrier does not deny that Follis is entitled to penalty pay for the call but it contends that he is entitled to penalty pay in accordance with Rule 1 (e) which would be for a call as defined by Rule 9 (e) of the Agreement.

Rule 1 (d) is as follows:

"(d) Station or other employees at closed offices or non-telegraph offices shall not be required to handle train orders, block or report trains, receive or forward messages, by telegraph, telephone or mechanical telegraph machines, but if they are used in emergency to perform any of the above service, the pay for the Agent or Telegrapher at that office for the day on which such service is rendered shall be the minimum rate per day for Telegraphers as set forth in this agreement plus regular rate. Such employee will be permitted to secure train sights for purpose of marking bulletin boards only."

There is a note to the rule as follows: "Note: (It is understood that 'closed offices' also means an office where other employees may be working not covered by this agreement or an office which is kept open a part of the day or night.)"

Rule 1 (e) is as follows:

"(e) No employee other than covered by this Agreement and Train Dispatchers will be permitted to handle train orders at Telegraph or Telephone offices where a Telegrapher is employed and is available or can be promptly located except in an emergency in which case the telegrapher will be paid for the call (and the dispatcher will notify the Superintendent so proper record and allowance will be made)."

Rule 1 (d), except as the note, has been in the Agreement without change since 1924. The note appears to have been added in 1947. Rule 1 (e) has been in the Agreement since 1922.

It is to be observed that Rule 1 (e) by its terms applies solely and alone to the handling of train orders by employees not covered by the Agreement at offices where a Telegrapher is employed and available or can be promptly located. It permits the use of employees not covered by the Agreement in an emergency where the telegrapher is not available and cannot be promptly located. When a non-covered employee is so used in an emergency the telegrapher is entitled to be paid for a call.

Under the language of the rule and this interpretation of it in order to sustain the position of the Carrier it would be necessary to find (1) that the non-covered employee had handled a train order, (2) that at this office a telegrapher was not available and could not be promptly located, and (3) that there was an emergency.

The parties have treated the occurrence as an emergency. No point is made as to availability of the telegrapher or the ability to promptly locate

him, so it may be assumed from the fact that the office was closed that he was not available and not subject to prompt location. The Carrier apparently does not contend that this was a train order within the accepted meaning of that term.

Therefore on the basis of the facts and the literal content of Rule 1 (e) it cannot be said that the claim comes within the purview of the rule.

The Carrier urges however that by precedent established through settlement of numerous other similar claims on the property there has become an agreed to interpretation which classifies this as a matter compensable under Rule 1 (e). Attention has been directed to a considerable number of settlements.

This contention may not be sustained. In most if not all instances cited by the Carrier covering a period of years the claims in order were presented on the basis of Rule 1 (d). Even though they were settled on the basis of provision of Rule 1 (e) a reasonable inference from the manner of presentation is that instead of agreeing that the claims were compensable under Rule 1 (e) they were steadfastly insisting that they were subject to the provisions of Rule 1 (d).

Further, it has long been the position of this Division that mere settlements of claims by compromise are not admissible as proof of agreed to interpretations of Rules provisions.

In Award 1657 a claim as this was considered under Rule 1 (d), without the note, and decided unfavorably to the Carrier. The note has no significance insofar as the question here is concerned. In the Opinion it was declared: "In view of the particular facts set out in the record showing prior settlements covering similar claims under this Agreement, the contention of the Carrier cannot be sustained."

On the basis of this statement the Carrier substantially urges that the award was grounded on past practice rather than literal interpretation and application of the rule. Without question the indication of the words used is that the decision was influenced by evidence of past practice. It does not follow though that the wording of the rule itself was not the true basis of the determination. In the very nature of the issue presented the wording was the basis.

If this were not true, provided the rule and the past practice were inconsistent, the decision based on past practice would amount to a substitution and enforcement of past practice on the property for the rule contained in the Agreement. This of course is not proper.

It is believed that Award 1657 correctly interprets and applies Rule 1 (d) of the Agreement and that it as a precedent should be adhered to herein.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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

The claim should be sustained.

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AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of May, 1952.