Award No. 5872
Docket No. TE-5781

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis-San Francisco Railway; St. Louis, San Francisco and Texas Railway, that:

1. The Carrier violated the terms of the agreement between the parties when and because on July 12, 13, 14 and 15th, 1950, it directed Telegrapher H. B. Riggins, Hugo, Oklahoma, to leave train orders and clearance cards pinned to the train register for later delivery to the crews of trains leaving after Riggins had gone off duty; and,

2. The Carrier shall now pay H. B. Riggins an amount equal to forty-five minutes overtime, one hour overtime, one hour overtime, and one "call" respectively, on the dates aforesaid for this violative action which deprived claimant of the work which is rightfully his under the agreement.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of May 16, 1928, is in evidence. At page 40 of the above mentioned agreement, hereinafter referred to as the Telegraphers' Agreement, there are listed the following positions at Hugo:

Telegrapher, first, 87¢ per hour;
Telegrapher, second, 85¢ per hour.

These rates of pay have since increased and at the date of the violations amounted to $1.65 and $1.606 respectively.

On the dates set forth the second telegrapher's position was regularly held by H. B. Riggins whose assigned hours were 6:00 P. M. to 2:00 A. M., Tuesdays through Saturdays, rest days being Sundays and Mondays. The rest days were covered by a rest day relief telegrapher. On July 12, 13, 14 and 15, 1950, the Carrier directed telegrapher Riggins to leave train orders and clearance cards pinned to the train register for later delivery to crews of trains leaving Hugo after Riggins had gone off duty. Copies of train orders and clearances involved are attached as Employes' Exhibits A-1 to 5, inclusive, B-1 to 6, inclusive, C-1 to 5, inclusive and D-1 to 6, inclusive.

The Organization on behalf of Telegrapher Riggins filed claim for payment in accordance with Article 2, Section 7 of the Telegraphers' Agreement on the basis that work covered by the agreement, to which Riggins was entitled, had been denied him. Telegrapher Rigins was available for this service. The Carrier has declined payment of the time claimed.

OPINION OF BOARD: There is no dispute as to the incident which forms the basis for the claim. Hugo, Oklahoma is a two shift telegraph office. On the dates involved the assigned hours of the first shift were from 7:45 A. M. to 3:45 P. M. and the second from 6:00 P. M. to 2:00 A. M. H. B. Riggins in whose behalf the claim is made occupied the second shift. On July 12, 13, 14 train orders and clearances were for trains 737 and/or 736 left on the train register to be picked up by the train crews at times when no telegrapher was on duty. The time of receipt by the train crews was July 12, 2:45 A. M., July 13, 3:00 A. M., July 14, 3:00 A. M. and July 15, 5:00 P. M. The claim for the first three days is for overtime and the fourth is for a "call" in advance of starting time.

The subject here involved has been before the Division on numerous occasions over a long period of time and as to it a number of divergent views have been expressed. Divergent views have even recently been evidenced by awards which have been rendered. However out of them some points have been made clear.

One of these is that the delivery of the orders to the train crew is a component part of the handling of train orders. In all of the late awards it has not been held that failure of manual delivery by a telegrapher was a violation, but in those in which no violation was found to exist the finding was based on other considerations.

In most of the instances where the violation was based upon a delivery other than by a telegrapher the claim was predicated upon a violation of the so-called train order rule which appears in many agreements. Its substance is that, **No employe other than covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph and telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for a call.** Awards involving claims based upon a violation of the train order rule are 1680, 1713, 1719, 2926, 4057 and 5013. No such rule appears in the agreement between the carrier and the organization on this property.

The claim here is based upon a violation of the Scope Rule. In other words it is the contention of the organization that the work of handling train orders belongs to the telegraphers and that failure to allow them to make delivery to a train crew, as in these instances, deprives them of their work in violation of the agreement for which they are entitled to be compensated.

One Award (Award 3670) has been cited wherein the claim was progressed to the Division on a like basis. The claim was sustained. In the Opinion it was said:

> "The 'handling of train orders' rule common to many agreements between the organization and other carriers is not included in the agreement before us. We do not think that is of any material importance in this case. 'As we see it, because the train order rule is not in the present agreement does not mean that the Carrier can, without violating the agreement, delegate work of the character here involved to employes not covered. . . . It has been held in numerous awards of this and other divisions that work of a class covered by the scope rule of an agreement belongs to the employes upon whose behalf it was made and cannot be delegated to others without violating the agreement.' * * *."

The clear indication of these observations is that the Scope Rule in and of itself is a grant of rights to the employes covered by the Agreement which rights are secured to them so long as the Agreement is in force, and any infringement amounts to a violation. This as a general attitude toward the Scope Rule is supported by numerous Awards. It appears to be a correct analysis.

The so-called train order rule is not a grant of work to the employes covered by the Agreement but is a specific restriction and limitation upon the

right of the carrier to allow work covered by the Scope Rule to be performed by those not covered. It simply under named conditions permits work covered to be performed by others.

In this light it must be said that the work which is the basis of the claim herein was work covered by the Agreement.

The carrier urges that because of past practice this kind of handling cannot be regarded as a violation. This Division has often held that past practice in and of itself no matter how long continued will not have the effect of permitting an agreement to be violated. Past practice may be considered in determining what the parties regarded as the true meaning of an ambiguous or uncertain Rule or provision thereof. It may also be considered in instances where it is contended that there has been an agreed to interpretation whereby the parties have become bound. Also there are Awards wherein it has been held that there was a violation of the Agreement but that equitably and reasonably on account of past practice it was improper in the particular instance to assess a penalty. But in instances such as this where the carrier asserts that there was a long continuing well known practice of which complant has not been previously made this Division has quite consistently held that such practice and delay is no bar to the assertion of a proper claim.

The conclusion therefore is that the Agreement has been violated as claimed and that nothing has been shown that would justify its denial on the basis of past practice.

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

The Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 22nd day of July, 1952.