

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Kansas City Terminal Railway:

(1) That Carrier violated the Agreement between the parties hereto when commencing January 1, 1936, it caused and permitted an employe not covered by the Telegraphers' Agreement, to perform work as a Telegrapher at its "US" telegraph office in Kansas City, Missouri, continuing daily Monday through Saturday of each week, including holidays, to and including April 15, 1950;

(2) That Carrier shall be required to compensate senior idle extra man or senior idle telegrapher, if no extra man available, at the pro rata rate for each regular day and time and one half regular pay for each holiday, for each and every day of such violation as set out above.

EMPLOYEES' STATEMENT OF FACTS: There is in full force and effect, an agreement, between the parties, dated August 1, 1924, which covers hours of service and conditions of employment for employes of Carrier represented by The Order of Railroad Telegraphers. The Agreement has, of course, been supplemented by agreements for vacations, six-day week (Mediation Case A-2070), and the Forty Hour Week, which are not involved in the instant matter.

Carrier provides terminal facilities to the twelve operating railroads going into Kansas City. The number of employes covered in the Telegraphers' Agreement are few. The principal telegraph office is located in the Union Station, Kansas City and is known locally by its call letters "US" office. No work is carried on in such office except in connection with the handling of communications and train orders.

Prior to January 1, 1936, the office Manager was C. E. Marsh, who had the designated title of Superintendent of Telegraph. Mr. Marsh performed no work as a telegrapher, confining himself solely to supervisory duties in handling the office administrative function. He died in December, 1935.

Upon the death of Mr. Marsh, effective January 1, 1936, G. A. Parr, who was then Senior Chief Operator in the office, was appointed Manager—with a title of working manager. Mr. Parr however continued to devote a major portion of his time to routine duties as telegraph operator, the same

the parties as evidenced by their actions with reference thereto, offers a safe-guide in determining what the parties themselves had in mind when the contract was made.' True past violations of an agreement do not revise the agreement. But this rule has no application unless the agreement is susceptible to only one meaning, and is clear and explicit. The rule announced in Award 1397 is applicable here, 'The long delay in asserting this claim does not bar the employes from complaining of a violation of the contract by continuing course of conduct or otherwise. But, under the controlling and distinguishing facts of the case, such delay is cogent evidence that there has been no violation.' "

In Award 5278, with Referee Hubert Wyckoff sitting with the division stated in his opinion as follows:

"An intention to change a prior practice becomes plain, When the parties deal directly with the subject of the practice and adopt an amendment which is contrary to, or incompatible with it. In such a case, no matter how long standing the practice may be, it falls in the face of clear and unambiguous terms in the amendment."

Then sets out a number of cases with varying terms of years, over which the practice prevailed.

In the present case there is no rule setting out who or who shall not work. In fact the Chief Operator's positions are not set out in the Scope of the Agreement and the Agreement is silent on just what duties are encompassed. The case then reverts back to the work that has been done over a long period of years by mutual consent or interpretation. The Carrier avers that no rules of the agreement have been violated in any manner and requests that your Honorable Board so hold.

All of the above has been handled within conferences or in writing with the organization.

(Exhibits not reproduced).

OPINION OF BOARD: This claim is based on the contention that on and after January 1, 1936, and up until April 15, 1950, Carrier permitted an employe not covered by the Telegraphers' Agreement to perform work of a telegrapher in its "US" telegraph office, Kansas City, Missouri.

The telegraphers are entitled to perform all the work encompassed by the scope rule of their agreement as work of the class covered thereby belongs to those for whose benefit the agreement was made. A delegation of this work to others not covered by the agreement is in violation thereof.

The Telegraphers' Agreement provides: "These rules shall cover the hours of service and working conditions of telegraphers, telephone operators handling train orders, towermen, levermen, and tower and train directors."

This scope rule does not purport to specify or describe the work encompassed within it. It sets forth the class of positions to which it is applicable. The traditional and customary work of these positions, generally speaking, constitutes the work falling within the Agreement. See Award 4516 of this Division.

The Carrier's principal office, known as "US" office, is located in the Union Station at Kansas City, Missouri. This office handles only communications and train orders.

Prior to January 1, 1936, C. E. Marsh, designated Superintendent of Telegraph, was in charge of this office. He performed no duties of a telegrapher but confined his duties entirely to handling administrative functions.

He died in December of 1935. Just what Carrier did following Marsh's death is fully set out in its statement of facts in Docket TE-433 on which Award 435 of this Division is based. It is therein stated: "Subsequent to the death of the Superintendent of Telegraph early in December, 1935, the responsibility for the operation of the department was placed directly with the working Manager and Chief Operators, for the reason that the position of Superintendent of Telegraph was not filled. This meant that the Manager, who had previously been Chief Operator on the first trick, was in complete charge of the operation of the department, and the Chief Operator on the other two tricks were his personal representatives as well as representatives of the Management in his absence."

Under the foregoing situation it was held in Award 435 that the position of second trick operator, whose major duties continued to consist of telegraphing, should be included in the schedules governing employees in telegraph service.

Parr, after January 1, 1936, continued to devote a major portion of his time to the performance of the duties of a telegraph operator. He did so up until the date of his retirement April 15, 1950. Admittedly, if Parr's position was covered by the scope of the Telegraphers' Agreement then the work he was performing was not a violation thereof. We think what was said in Award 435 of the position held by Mr. Lunsford is equally applicable to the position then held by Parr and which he continued to hold until he retired.

It is true that Carrier insists that Parr's position was that of an official and, therefore, not covered by the scope of the Agreement. But this conclusion on its part does not necessarily make it so if the factual situation will not support it. We find the position which Parr filled, in view of the work he performed and our holding in Award 435, was within and covered by the Telegraphers' 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 Carrier and Employee involved in this dispute are respectively Carrier and Employee 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 has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 30th day of January, 1953.