Award No. 6840
Docket No. TE-6698

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Western Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway System, that:

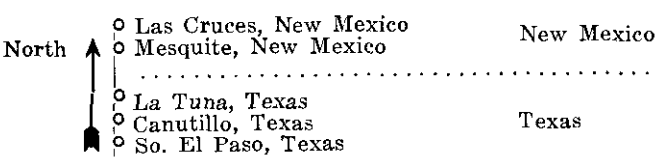
1. The Carrier violated the Agreement between the parties when, beginning January 4, 1951, without conference or agreement, it removed the work of handling mail, baggage and express at the *one-man stations of Mesquite, New Mexico, La Tuna, Texas and* Canutillo, Texas and assigned this work, outside the assigned hours of the agent-telegraphers at these stations, to persons not covered by the Telegraphers' Agreement; that

2. The Carrier shall restore the work involved to employes covered by the Telegraphers' Agreement, and that

3. The Carrier shall now compensate incumbent agent-telegraphers of the aforesaid stations in accordance with the call and overtime rules of the Agreement for each violation beginning with January 4, 1951.

EMPLOYES' STATEMENT OF FACTS: Agreements bearing effective dates of December 1, 1938, Mediation Agreement Case A-2070, and June 1, 1951 between the parties to this dispute are in evidence.

The approximate locations of the stations involved in this dispute is shown in the rough diagram below:



The distance from Las Cruces to Mesquite, New Mexico, is 11 miles La Tuna, Texas, 24 miles, and Canutillo, Texas, 30 miles.

OPINION OF BOARD: The record discloses that for a number of years the Carrier has maintained at Mesquite, New Mexico, La Tuna, and Canutillo, Texas, one-man stations on the Carrier's line between Albuquerque, New Mexico, and El Paso, Texas, in charge of agent-telegraphers. On January 4, 1951, the United States Postal Service entered into a contract with the Santa Fe Trail Transportation Company, hereafter referred to as SFTT Co., by virtue of which United States mail for delivery to the above mentioned stations would be unloaded from the Carrier's passenger trains at Las Cruces, New Mexico, and transported to such stations by trucks. On the same date the Carrier contracted with the SFTT Co. to transport baggage and express in like manner. Upon arrival at the stations here involved, the driver of the truck for the SFTT Co., who was furnished with a key to the stations, unloaded the mail, baggage, and express, placed the same inside the doorway of the station and picked up outgoing shipments of the same type which had been left inside the doorway of the station by the agent, and then proceeded on his route. The truck arrived and departed from the above mentioned stations outside of the agent's assigned hours of duty. The service by the SFTT Co. was performed Mondays through Fridays. On Sundays, the agent was given a call to meet the train and handle this type of business, and paid in accordance with the contract between the Telegraphers and the Carrier.

The right of the Carrier to utilize any means of transportation it deems advisable is not questioned.

The Employes contend that the Carrier violated the Telegraphers' Agreement by removing the work of handling mail, baggage, and express at the above mentioned stations when it turned the work over to the SFTT Co., which is not covered by the Agreement and holds no rights thereunder.

The Carrier contends that the work in question is not within the contemplation of the Scope Rule of the Telegraphers' Agreement; that such work is by contract with the SFTT Co., under its direction and control, and belongs to the employes of the SFTT Co.

The Carrier also contends that past practice creates an estoppel and bars consideration of the Employes' claim.

This Division has decided many times that station work in a one-man station belongs to the agent—a position under the Telegraphers' Agreement. It has been decided that station work outside the assigned hours of the agent at a one-man station is work which belongs to the agent. See Award 4392. There are a number of awards decided by this Division to the same effect. See Awards 217, 529, 535, and 564.

The parties in the instant case have, on numerous occasions, presented to this Board issues of the same kind and character as are involved in the present dispute which involved the Scope Rule of the Telegraphers' Agreement. It would serve no useful purpose to set forth and analyze each of these awards. However, we deem it advisable to set forth the principle determined therein by referring to Award 602. In this award, speaking about the Scope Rule of the Agreement, it was stated, in substance, "This schedule will govern the employment and compensation of * * * agent-telegraphers, * * *."

It was also said in Award 602 that the Agreement by its terms clearly contemplates that work of the character covered by the Scope Rule of the Agreement shall be performed by employes coming under the Agreement. The handling of mail, baggage, and express at points by others than employes covered by the Telegraphers' Schedule and outside of assigned hours of the agent-telegrapher was held to be a violation of the Telegraphers' Schedule. Awards adhering to this principle are 1082, 1273, 1274, 1566, 2155, 2418, 2419, and 2420, many of which involved the same Carrier, the same Organization, the same Agreement, as in the instant case, and the same issues

as are primarily presented in this case. There are many other awards of like character, too numerous to cite.

The Carrier makes some contention that Award 6066 supports its position in the instant case. We are not in accord with the Carrier in this respect. The important question presented in the cited award was stated as follows: "Was the checking and handling of these LCL freight shipments at Price, done in the facilities of the Rio Grande Motorway, Inc., by employes not covered by the Clerks' Agreement, in violation of the Scope thereof?" Here the Carrier contracted with the Rio Grande Motorway, Inc., to haul its LCL freight shipments from Salt Lake to Price for consignees at Price and points adjacent thereto. This it had a right to do. Awards were cited from the First Division to support the statement. The checking and handling of the LCL freight at Price, done in order to deliver it to consignees or their agents, completed the hauling of this freight by the Rio Grande Motorway, Inc., and an incident thereof. After the LCL freight shipments were turned over to the trucking company at Salt Lake the work in connection therewith no longer existed with the Carrier in the prosecution of its business. It was no longer a railroad operation. As distinquished from the instant case, by the turning over of the shipments to the trucking concern, the Carrier no longer handled the items. In the instant case the in-bound and out-bound station work still existed in a railroad facility, namely the station. The station was under the control, direction, and responsibility of the agent assigned thereto. Therefore, the contention of the employes in the instant case, as previously mentioned, is that when the items were placed inside of the station and taken outside by other than the employe charged with responsibility of the station, it constitutes a violation of the Telegraphers' Agreement.

It might be mentioned that Award 6066 did not depart from the general principle announced by previous awards cited in this Opinion. It was said that any work necessary in performing the functions of a common carrier belongs to the classes of employes that have secured it by their collective agreements with it. So long as the work exists in the prosecution of the Carriers business it is its under the Agreement and cannot be removed therefrom and assigned to employes not subject thereto.

While Award 1647 is relied upon by the Carrier, we have no quarrel with the decision in that award. However, there is appropriate language therein that applies to the facts in the instant case, wherein it was stated: "The checking, handling and trucking of freight into and out of the warehouse is clearly within the scope of the agreement as defined in Rule 1. The Carrier has no right to remove such work from under the agreement either by farming it out by contract or by permitting others not within the protection of the agreement to perform it. The Carrier must assign such work to employes who, under the terms of the agreement, are entitled to perform it." Citing awards to sustain such proposition.

It was also stated in Award 1647: "The broad issue presented in this phase of the claim is: where may the Railway Express Agency and other 'outsiders' pick-up and deliver freight without infringing the rights of the Organization under the scope rule? To our minds there is only one practical answer to the question, i.e., upon the platform of the warehouse. In so holding we do not in any way broaden the scope rule nor do we go beyond the necessary implication of its express terms. Of course if there were no platform then pick-ups and deliveries could be made by 'outsiders' on the floor, at the door, of the warehouse."

We have examined other awards cited by the Carrier, but find the same not to be in point with the facts and circumstances as here presented, and we deem discussion of the same unnecessary.

The Carrier next asserts that past practice on the property between the parties creates an estoppel and bars the Employes' claim in the instant case.

In this connection we deem the following to be pertinent. Acquiescence of employes as to the interpretation placed upon a provision of a contract for a period of time and their understanding as to the manner the same applies, can operate only to defeat reparations for past violations. It does not change the collective agreement or deprive the Organization of the right to insist upon compliance with the rules from the time the violation is called to the attention of the Carrier. See Award 5979.

Past practices under a rule on a specific subject that is clear and unambiguous does not change the rule itself, and either Carrier can enforce or Employes can require Carrier to enforce it according to its terms. See Award 5166.

Acquiescence in the violation of an agreement does not prohibit enforcement of its terms. It does preclude retroactive application of reparation for a period prior to the time the claimed interpretation was first asserted. See Awards 5430, 5872.

From an analysis of the record, and for the reasons given herein, we conclude that the Carrier violated the Agreement as contended for by the Employes.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1955.

DISSENT TO AWARD 6840, DOCKET TE-6698, and AWARD 6841, DOCKET TE-6699

Awards 6840 and 6841 are wrong for misconception of the principles and the work functions involved although a correct recitation of the facts is made in the first paragraph of the Opinion of Board, viz: "Upon arrival at the stations here involved, the driver of the truck for the SFTT Co., who was furnished with a key to the stations, unloaded the mail, baggage, and express, placed the same inside the doorway of the station and picked up outgoing shipments of the same type which had been left inside the doorway of the station by the agent, and then proceeded on his route."

The foregoing quotation is a disclosure contained in the record and adopted as factual matter by the referee; therefore, all that is involved is the simple pick-up or delivery of baggage or express from just inside the warehouse door.

As to the furnishing of a key to the driver of the truck: We have soundly said in **Award 6525** that "We do not think that the act of furnishing a key to the truck driver is in violation of the Agreement." And in **Award 4463**, we *said again that it is not a violation for the Carrier to furnish the trucking company* with a key to the freight house.

There was no performance of any work by the truck driver within the rail carrier's station or warehouse. This is the settled line of demarcation. In Award 6525, **supra**, where the claim was denied, we said: "There is no showing that freight handler's equipment was used in moving freight within the freight warehouse." In **Award 5526**, where the claim was sustained, it was on the basis that "Checking and trucking freight **inside** the warehouse was within the scope" of the Agreement, but even there we held that "Pick-ups and deliveries by outsiders should be on the platform or on the floor at the door of the warehouse."

It is, therefore, not only erroneous but most unsettling for the subject awards to recognize the fact that truck drivers placed shipments inside the doorway of the station and picked up outgoing shipments which had been left inside the doorway by the agent and then sustain the within claims in the face of directly opposed holdings in previous awards based upon a consideration of identical facts.

The awards are also in error on the ground of dismissing past practice as being effective "only to defeat reparations for past violations" and as not changing "a rule on a specific subject that is clear and unambiguous." The trouble with this holding is that the terms of the rule are so sparse as to be completely devoid of any work description whatsoever. Certainly, with our past awards, some mentioned in this dissent, recognizing the complete propriety of truck drivers' picking up and delivering from and to a point inside the warehouse door, this scope rule cannot be considered as being so "clear and unambiguous" as to require that a truck driver be met at the door or any place else by the agent, in person. The practice referred to and attempted to be subordinated by the majority opinion goes back to 1927 on the Eastern Lines of this Carrier and 1936 on its Western Lines. The practice embraces nearly 200 stations and goes uninterruptedly back to a time commencing, in the one case, seven years before this Board was created and in the other case, two years after this Board was created. We cannot dispose of that with a wave of the hand, therefore, we dissent.

(s) **E. T. Horsley**
(s) **R. M. Butler**
(s) **W. H. Castle**
(s) **C. P. Dugan**
(s) **J. E. Kemp**