

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Whitley P. McCoy, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile and Ohio Railroad that:

(a) The Carrier violated and continues to violate the provisions of the Agreement between the parties when on December 15, 1951 and each day thereafter, train service employes not covered by the Agreement, were required or permitted to transmit, by the use of the telephone, a report of the train arrival at Arthurs Spur; and further violated and continues to violate the provisions of the Agreement between the parties when the train service employes are required or permitted to use the telephone to secure a lineup and authority to again use the main line.

(b) The Carrier shall be required to compensate the senior idle employe, preference being given to extra employes, on the basis of eight hours' pay for November 15, 1951, and each day thereafter that the violation occurred.

EMPLOYEES' STATEMENT OF FACTS: An Agreement bearing date of June 16, 1944, and Supplement thereto bearing date of September 1, 1949 as to rules and working conditions, is in effect between the parties.

Daily, except Sunday, a train known as the "Vandalia Turn" leaves Mexico about 2:00 P. M. for Vandalia, arriving at that point about 5:00 P. M.; leaves Vandalia about 6:00 P. M. and returns to Mexico, arriving about 10:00 P. M.

On the outbound or eastward trip the train stops at Arthurs Spur, arriving about 2:20 P. M. Upon arrival at this point, one of the train service employes calls the operator at Francis on the telephone and reports that the train has arrived at Arthurs Spur and has cleared the main line. This report amounts to what is commonly known as "OS".

When the train has finished work at Arthurs Spur and is ready to again continue on its run, a train service employe calls the operator at Francis and receives a lineup and authority to enter the main line. This amounts to obtaining a clearance or train order. In event the office at Francis is closed, the train service employe calls the operator at Mexico.

The train service employes who perform the communication work at Arthurs Spur are not covered by the Telegraphers' Agreement.

As the record in this case shows, the Telegraphers' Organization having failed to get the Carrier to agree to a change in the contract to provide payments under circumstances such as we have in this case, here we have an attempt to have such a strained construction placed on the Agreement between the parties as to require the Carrier to establish, obviously unnecessary positions or penalize the Carrier by paying an unidentified employee eight hours pay or approximately \$20 each day because some other employee talked on the telephone. Such requests have been made on the Carrier in the form of proposed changes in the contract between the parties to provide such payments. The requested change in the contract has been declined. We think the reason for declining to change the contract to provide such payments is obvious. Being unsuccessful in obtaining a change of the contract to provide such payments, the Organization is attempting through this proceeding to have the rejected contract change put into the Agreement by way of an interpretation. This Board has consistently held that such is not its function.

The Agreement between the parties effective June 16, 1944 has been superseded by a new Agreement effective June 1, 1953. This new Agreement contains the identical language as that contained in Rule 1 (b) of the June 16, 1944 Agreement (quoted on page 8) except that the word "schedule" has been changed to "agreement". The June 1, 1953 Agreement provides:

"RULE 15

Train Orders

"No employes other than covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in emergency, in which case the telegrapher will be paid for the call."

The June 1, 1953 Agreement, like the June 16, 1944 Agreement, does not show a Telegrapher position at Arthur. Certainly, had the Carrier had any idea that, in carrying forward the identical language from the old agreement under which an accepted practice had existed for over twenty years, it was incurring an obligation to pay a Telegrapher eight hours pay each day a member of a train crew used the telephone at Arthur, such a requirement would have been clearly shown in the Agreement.

The Organization had proposed that the contract be changed to provide payments such as are asked here but the Agreement does not contain the proposed change.

For the reasons herein set forth, the Carrier respectfully requests that the claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: At the same time that Mexico Refractories Company was constructed at Arthur, Missouri, in 1930, the Carrier constructed a spur track to serve the industry. The spur runs from a siding at Arthur to the Plant, which is some little distance north of the main track at Arthur. Arthur is one mile east of Francis, Missouri, and three miles east of Mexico, Missouri.

A freight switcher known as the "Vandalia Turn" switches the Mexico Refractories Company. It leaves Mexico in the late afternoon, daily except Sundays, proceeds east about 23.5 miles to Vandalia, and after performing certain switching turns around and switches the Mexico Refractories Company at Arthur on the return trip early in the morning. This switching takes an hour and a half to two hours.

At the same time that the track known as Arthur's Spur was constructed, in 1930, a telephone was installed near the main track switch so that members of the train crew could talk to the Telegraph Operator at Francis or Mexico from Arthur. Verbal information only is given and received over this phone—*information from the train that it has cleared the main track, and information from the Operator at Francis or Mexico that it may again occupy the main track.* At the time of the installation in 1930, bulletin notice was issued to employes as to the installation and its purpose. No operator is, or has ever been, located at Arthur.

This practice of giving and receiving information by phone, in lieu of having a flagman walk the mile to Francis, has been in effect ever since 1930. By this claim, filed in 1951, the Organization protests it as a violation of the Scope Rule of the Agreement.

The Agreement was entered into in 1944, about fourteen years after the institution of the practice. The Scope Rule of that Agreement is general in nature, *merely listing the positions covered without specifying the work or jurisdiction.* By our uniform decisions the meaning of the Scope Rule must therefore be found in tradition, practice and custom.

The practice complained of had been in effect for twenty-one years before this claim was filed. It must be presumed that when the Parties executed the Agreement fourteen years after the institution of the practice, and failed to list Arthur as one of the locations covered, they did not intend the Scope Rule to prohibit the practice. It must further be presumed that when the Parties permitted the practice to continue for seven more years under the Agreement before this claim was filed, the Organization did not consider the continuation of the practice as a violation of the Scope Rule.

The organization argues that repeated violations do not, merely by reason of their repetition, cease to be violations. That is true, but it is a principle applicable only where there are violations. Where the Agreement is ambiguous, and practice must be looked to for its meaning in order to determine whether the acts complained of are in fact violations, entirely different principles govern.

It is also argued for the Organization that it is general practice, not local practice on the particular Carrier, that must be looked to. This argument finds support in a number of the earlier cases decided by this Board, but the more recent decisions hold otherwise. We have considered and rejected this argument in our decision in Award 8207 adopted today.

We do not desire to be understood as deciding any broader question than the very narrow one presented by the facts of this case. One telephone is involved here, at a point one mile from the nearest telegraph office, and verbal information is exchanged over that telephone in lieu of having a flagman act as a messenger. No communications of record are copied down. And the practice had been in effect for nearly twenty-one years before this claim was filed. That is the narrow state of facts before us.

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 there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 10th day of January, 1958.