

Award No. 8314
Docket No. TE-7620

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORTHWESTERN PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Northwestern Pacific Railroad Company, that:

1. Carrier violated the terms of the Agreement between the parties when it required or permitted a Section Foreman, an employe not covered by said Agreement, to copy and handle train line-ups by telephone at Tiburon, California, a location where an employe covered by the scope of the agreement is employed but was not on duty at the time the violation occurred.

2. (a) Agent-telegrapher C. A. McGuire, Tiburon, Calif., regularly assigned, shall be compensated for a call on May 3, 10, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, June 1, 2, 3, 7, 8, 9, 11, 16, 17, 18, 21, 22, 23, 28, 29, 30, July 2, 6, 7, 8, 12, 14, 19, 20, 21, 22, 23, 28, 29, 30, August 23, 1954, March 1, 2, 3, 4 and 7, 1955; and

(b) R. W. Chambers, temporarily assigned Agent-telegrapher, Tiburon, California, shall be compensated for a call on February 21, 23, 24, 25 and 28, 1955.

(c) On each date and occasion subsequent to March 7, 1955 that the violation occurs at Tiburon, the Carrier shall compensate the occupant of the Agent-telegrapher position as provided under the Call Rule 6(a).

Note: The actual number of days involved subsequent to March 7, 1955, and the compensation due to be determined by a joint check of Carrier's records.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing effective date of August 1, 1945 (Reprinted September 1, 1951, including Revisions) with supplements thereto covering rates of pay and working conditions is in effect between the parties to this dispute.

Prior to May 1, 1954 and for many years previous to that date there were three shifts of telegraphers working around the clock seven days a week at Tiburon.

letter from Senior Asst. Bridge and Building Supervisor Arthur Hefte, dated December 30, 1954 (Exhibit "E"); letter from Bridge and Building Foreman F. G. Williams, dated December 22, 1954 (Exhibit "F"); letter from Extra Gang Foreman Dale B. Herren, dated December 6, 1954 (Exhibit "G") and letter from Assistant Bridge and Building Supervisor H. F. Clouette, Jr., dated December 16, 1954 (Exhibit "H").

The Telegraphers' Agreement was rewritten August 1, 1945 and reprinted with revisions on September 1, 1951, but no exception was taken to the outstanding instructions and to the practice of handling lineups on carrier's property. Obviously, if any change were desired by the petitioner, the matter was one which should have been handled through the medium of negotiations. The fact that no rule of the agreement supports the claim now made and the further fact that the practice has been in effect for at least thirteen years during which time there were two changes in the agreement, most certainly evidences petitioner's acquiescence in that practice.

CONCLUSION

In view of what has been shown supra, carrier asserts that the claim for a call on March 1, 2, 3, 4, and 7, 1955, in behalf of Agent-telegrapher C. A. McGuire, as listed in Section 2(a), Employees' Statement of Claim, and claim as presented in Section 2(c) of Employees' Statement of Claim, are not properly before this Board as they were not handled on carrier's property in accordance with the Railway Labor Act and Rules of the National Railroad Adjustment Board and, therefore, this portion of the claim should be dismissed.

The carrier asserts that the other portions of the claims in this docket are entirely lacking in either merit or agreement support, and therefore requests that said claims be denied.

All data herein submitted have been presented to the duly authorized representative of the employees and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts giving rise to this claim are not in dispute and may be summarized as follows. Prior to May 1, 1954, and since the establishment of Tiburon as an agency station, three shifts of telegraphers were maintained constituting around-the-clock service at this point. The employees occupying these positions performed all the telegraphic communication service originating at or destined to Tiburon including the handling of train orders, lineup orders for track motor cars operating out of this station, messages and reports.

The third trick telegrapher position, 11:59 P.M. to 7:59 A.M., was abolished on the above date, was re-established on October 2, and again abolished on October 30, 1954. During the period when this position was abolished there was no telegraph service at this station during those hours. Tiburon is the headquarters of a section gang which goes on duty at 7 A.M. On the dates covered in the claim the Section Foreman copied and handled a lineup order obtained, by the use of a telephone located at Tiburon, from the telegrapher at San Rafael, 10.5 miles to the north and the nearest open office, prior to the time that the first shift agent-telegrapher was assigned to begin his tour of duty. No attempt was made by the Carrier or the Section Foreman to call the claimants or any occupant of the Agent-telegrapher position at Tiburon.

The pertinent sections of the rules of the controlling agreement, effective August 1, 1945 (reprinted September 1, 1951, including revisions) are set forth below:

"Rule 1

SCOPE

(a) This agreement will govern the employment and compensation of the following:

Agents, assistant agents, agent-telegraphers, agent-telephoners, telegraphers, telephoners, car distributors (if required to telegraph in performance of their duties), towermen, drawbridge-tenders (levermen) and telephone operators (except telephone switchboard operators); and occupants of any other positions listed in the wage schedule.

(b) As used in this agreement, the word 'employee' shall include all classifications coming within the scope of this agreement unless specific classifications of employees are set forth; and the word 'station' refers to locations at which employees perform service."

"Rule 2

BASIS OF COMPENSATION

CLAIMS AND PAY ROLL DEDUCTIONS

(c) Where existing pay roll classification does not conform to Rule 1, employees performing service in the classes specified therein shall be classified in accordance therewith."

"Rule 6

CALL RULE

(a) An employee notified or called to perform work not continuous with the regular work period will be allowed a minimum of two (2) hours at overtime rate for two (2) hours work or less, and if held on duty in excess of two (2) hours, overtime will be allowed on the minute basis. Each call to duty after being released will be a separate call.

(b) An employee who has completed his regular tour of duty and been released, and who is required to return for further service within less than one (1) hour following such release, may be compensated as if on continuous duty.

(c) An employee required to report for duty before assigned starting time and continues to work through his regular shift, shall be paid two (2) hours at overtime rate for two (2) hours work or less, and at the overtime rate thereafter on the minute basis for the time required to work in advance of his regular starting time."

The Organization also invokes Rule 30 as amended, Handling Train Orders. This rule has no application here for we find as a fact that the alleged violation concerns the handling of a "lineup of trains", not a "train order."

The question herein is whether the Telegraphers' Agreement was violated when employees not covered by said Agreement copy lineups at a station where a Telegrapher was assigned, but when he was not on duty, from telegraphers at another point.

As is true in regards to numerous other issues that have been considered by this Board, the Board's precedents evidence a diversity of results on the general issue stated above. None of the numerous awards submitted involved this Carrier and the petitioner organization, and for that reason the present Referee feels free to follow any precedent or line of precedents that appears correct to him.

Under Scope rules of the general character involved herein certain awards have placed special emphasis, in deciding cases involving the same issue that

is before us, upon past practice on the same property leading up to the time when the effective Agreement was entered into. Award 6788 utilizes this approach and the reasoning of that award is particularly persuasive upon the present Referee. Also see Awards 7970 and 8141.

The Carrier has submitted evidence that as early as July 25, 1942, Circular No. 128 (Carrier's Exhibit A), setting forth instructions in connection with the operation of track cars, was in effect. They were reissued May 4, 1944, August 2, 1944, November 25, 1946, January 14, 1948, and October 26, 1950. Also, these instructions have been listed in each issue of Resume of Circular Notices and Instructions, the last issue being September 1, 1953. Specific reference is made here to Rule 1 thereof:

"1. Lineups must be obtained from the Train Dispatcher through the operator, if no operator on duty call nearest open office."

In addition, petitioners' ex parte submission sets forth a typical track motor car order Form C. S. 2639, in effect since 1947, on which appears the following instruction:

"New line up must be obtained from train dispatcher through nearest train-order operator at the end of the period covered by this line up, if track car is to continue to use main track."

We are cognizant of the fact that neither the Carrier nor the petitioner can take solace from past practice at the station in question for there was none. The past practice relevant in this case is that with respect to obtaining lineups outside the assigned hours of the telegrapher.

This record contains no evidence submitted by the petitioner to refute the Carrier's contention regarding past practice either prior to August 1, 1945 or September 1, 1951 the date of reprinting with revisions of the 1945 Agreement. In short, the petitioner has failed to establish that the functions performed by the Section Foremen, under the factual situation here present, was treated as work belonging to the telegraphers at the time the effective Agreement was executed.

In view of the above considerations it must be concluded that the claim is without merit and will be denied.

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

That the parties waived hearing on this dispute; and

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

That the Carrier did not violate 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 28th day of April, 1958.