

Award No. 8658

Docket No. TE-7746

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI PACIFIC LINES (In Texas and Louisiana)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Lines in Texas and Louisiana, that:

(a) The Carrier is violating the scope rule of the Telegraphers' Agreement by permitting or requiring the Car Distributor at Kingsville, Texas, an employe not under the Telegraphers' Agreement, to regularly transmit and receive messages and reports of records by telephone; and

(b) That the performance of such work at Kingsville shall be assigned to and performed only by employes under the Telegraphers' Agreement.

EMPLOYES' STATEMENT OF FACTS: This is a resubmission of the dispute that reached your Board on May 24, 1951, covered by Docket TE-5643. On the 8th day of February, 1952, in Award 5644, the following Opinion and Findings were issued:

"OPINION OF BOARD: The Order of Railroad Telegraphers claims that the Carrier is violating the scope rule of their Agreement by permitting or requiring an employe not covered by the Agreement to transmit and receive messages and reports of record by telephone at Kingsville, Texas. No claim for money payment is made.

The record shows that the Carrier has entered into another collective bargaining Agreement with the Brotherhood of Railway and Steamship Clerks and has assigned the work at Kingsville to employes under that Agreement who have been performing it for the past 25 years. The Brotherhood of Railway and Steamship Clerks has not been served with notice pursuant to Section 3 (j) of the Railway Labor Act.

Substantially the same situation complained about here seems to exist at De Quincy, Louisiana. And until 1943 at Palestine substantially the same work was not specifically assigned to either Clerks or

Telegraphers. In 1942 the Brotherhood of Railway and Steamship Clerks filed a claim with this Board (Docket No. CL-1864) contending that the position at Palestine should be assigned to Clerks like the positions at Kingsville and De Quincy. It does not appear that The Order of Railroad Telegraphers was served with notice pursuant to Section 3 (j) of the Railway Labor Act in Docket No. CL-1864. An award was made (No. 1991) denying the Clerks' claim, whereupon the Carrier assigned the work of the position at Palestine to the Telegraphers.

There is color in a claim that the scope rules of both Agreements cover the work at Kingsville; and the Clerks' long established incumbency of the position at Kingsville present questions that were not determined by Award 1991.

As indicated by the minutes of this Board dated July 25, 1951 the Carrier Members insisted that hearing of this case be postponed and that others interested be advised of the date set and be afforded an opportunity to appear at such hearing to protect any interest they may have. The Labor Members would not agree to any such proposal and the hearing was held without any such notice given.

Upon the authority of Awards 5432, 5599 and 5627, the claim must be dismissed without prejudice.

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 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 has jurisdiction over the dispute involved herein; and

That the claim should be dismissed without prejudice for the reasons above found.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 8th day of February, 1952."

This dispute remains unadjusted and it is now respectfully resubmitted herewith for adjudication on the merits of the claim as originally made.

An agreement bearing date October 15, 1940, as to rates of pay, rules and working conditions, is in effect between the parties to this dispute.

All matters contained in this submission have been the subject of discussion in conference and/or correspondence between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim involved in this docket has been before the Division on two prior occasions. It was first here as Docket TE 5643 on which Award 5644 was made on February 8, 1952. In that award the Division dismissed the claim without prejudice because notice pursuant to the requirements of Section 3, First (j) of the Railway Labor Act had not been given to the Clerks' Organization. The record shows that notice was not given pursuant to that Award. However, under date of September 7, 1955 the claim was resubmitted to the Division as Docket TE 7746. In due course the docket was handled by the Division. On October 23, 1957 the Division, with the present Referee sitting as a member thereof, made Award 8107. In this Award the Division held that the decision of the Division in Award 5644 was *res adjudicata* insofar as the third party notice question is concerned. Therefore, Award 8107 deferred decision on the merits of the claim pending the giving of notice to the Clerks' organization.

The record shows that following the issuance of Award 8107 notice was given and an opportunity to be heard was afforded. Therefore, the procedural defects having been corrected, the claim now comes before the Division for decision on the merits.

The Docket involves a claim that the scope Rule of the Telegraphers' was and is being violated by respondent carrier when it permits or requires the car Distributor at Kingsville, Texas to regularly transmit and receive messages and reports of record by telephone. The record shows that the car Distributor in question is not under the Telegraphers' agreement.

It appears that there are three car Distributor positions on this property. One is located at Palestine, Texas; one at DeQuincy, Louisiana and the instant one at Kingsville, Texas. Presently the positions at Kingsville and DeQuincy are presumably covered by the Clerks' Agreement, and have been since about 1926. The position at Palestine is under the Telegraphers' Agreement. (Third Division Award 1991). Award 1991 distinguished the position at Palestine from those occupied by Car Distributors at Kingsville and DeQuincy in terms of telegraphers' duties involved. After a thorough review of the whole record in the instant case we find that the Car Distributor at Kingsville is not involved in the performance of duties to which the telegraphers' have an exclusive claim. Therefore, we find that the scope Rule of the Telegraphers' Agreement has not been violated.

It appears from the record that the work at issue has been handled in the same manner since about 1926. To sustain this claim we would have to have a positive showing that the Scope Rule has been clearly violated in view of this long practice. We have no such showing in this record.

It has been argued to the Referee that this claim is barred by the doctrine of laches. The record does reveal long and unexplained delays in the handling of this claim. However, since we have found that the claim is without merit, it is unnecessary to decide whether it is proper to invoke the doctrine of laches.

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 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 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 12th day of January, 1959.