Award No. 10385

Docket No. TE-8487

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Frank J. Dugan, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS & PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Texas and Pacific Railway that:

1. The Carrier violated Rule 1 (Scope Rule) and other rules of the Telegraphers' Agreement when on January 1, 1954, it required or permitted a clerk or clerks, or other employes, not subject to the Telegraphers' Agreement at Hollywood Yard (Shreveport, Louisiana) to take or copy train consist of Train No. 54 (or connection), and continues to violate said Agreement by continuing to require or permit these employes to perform this communication service; and

2. The senior telegrapher, extra in preference, on the seniority district on the date of the original violation (January 1, 1954) and on all subsequent dates on which the violations occurred or will occur be compensated an amount equivalent to eight (8) hours' pay at the hourly rate that would now apply to telegraphers at Hollywood Yard ("JN" office) had this office not been discontinued, each continuous eight-hour period in which said violations occur to be considered as one day in making payments in accord with this claim.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement in effect between the parties with an effective date of May 15, 1950. On January 1, 1954 the following train consist of Train No. 54 (or connection) was sent from Mineola Yard and received by a clerk (an employe not covered by the Agreement) at Hollywood Yard, Shreveport, Louisiana, at 1:15 A. M.

"ALL CONCERNED — Hollywood Yard (Shreveport)

No. 54 engine 1569 out at 12:10 A. M. has: 98-22-6196 all Louisiana —

FROM CABOOSE —

GATX 69590 XT B-326 IC	Sou 13025 XB B-O	GMO 8857 XB B-O
Sou 260992 XB B-O	L&N 65858 same	GMO 8410 same
TNO 61032 flour B-O	T&P 30367 salt B-326 IC.	
ACL 18847 XB B-326	NRC 18712 XR B-326	ACL 24221 XB B-326

Petitioner can not deny that this practice existed long before the above Article VIII became effective, and they cannot deny that it was in effect at the very time, the very moment, said article was adopted. Much more could be said, but what more need be said?

The Carrier respectfully urges that the claim should be dismissed for the reasons set forth in items 1, 2, 3 and 4 above. In the alternative, it must be denied for the reasons set forth in items 5, 6, 7 and 8 above.

It is affirmed that all data submitted herein in support of the Carrier's position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

OPINION OF BOARD: The basic issue here is whether the Carrier violates their Agreement with the telegraphers when it permits clerks to handle consists (or as the Carrier maintains switching lists) at points where no telegrapher is assigned.

While the decisions of the Board on this question are not in harmony the later decisions of the Board hold that where there are Agreement rules such as we have involved here past practice is the deciding factor. As this Board held in Award No. 8207 (McCoy):

> "The Scope Rule merely lists the positions covered, and names among others telegraphers and telephone operators. Under such a general rule the decisions of the Board are unanimous that the question whether exclusive jurisdiction is conferred depends upon tradition, historical practice and custom."

See also Awards 6959, 7955, 9502 and 9343.

Exhibits attached to Carrier's initial Ex Parte Submission received by this Board on March 5, 1956 show that it has been the practice since 1941 for the clerks at Mineola Yards to call consists of trains over the message telephone to the clerks at the Hollywood Yard. The Organization, however, contends that these exhibits cannot be considered because they were not part of the record made in handling the dispute on the property and are, therefore, in violation of Circular No. 1, Rules of Procedure of this Division.

This Board has had occasion to deal with this problem before. In Award No. 9552 this Board held:

> "The same exhibits, which were presented for the first time at the oral argument, although bearing dates prior to the original submission, do not meet the requirements of Circular No. 1 for ex parte submissions that carrier set forth 'all relevant, argumentative facts, including all documentary evidence . . .' The exhibits were submitted in support of a contention made earlier, i. e. in the Carrier's Ex Parte presentation. **They should have been presented then.** Their later offering was untimely."

See also Awards Nos. 8705, 10132.

Under these holdings documentary evidence attached to the original submission can be considered by the Board. While there are decisions of the Board to the contrary the decisions cited seemed based on better reasoning inasmuch

as there are usually no formal hearings with a right of cross examination on the property and no formal records except, of course in disciplinary cases. Furthermore, the Organization did not raise this issue in subsequent submissions to the Board. It was first raised at panel argument. Under these circumstances the Organization cannot claim surprise and, in any event, has waived this point.

The procedural points raised by the Carrier are deemed to be without merit.

In view of past practice and custom the claim is denied.

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 not violated.

AWARD

The Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1962.