

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

PANHANDLE AND SANTA FE RAILWAY COMPANY

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

1. The Carrier violated the Agreement between the parties when, on May 27, 1955, it required or permitted an employe at Pampa, Texas, who is not covered by the Telegraphers Agreement to perform work covered thereby; and

2. The Carrier shall be required to compensate the occupant of the position of second shift telegrapher-clerk at Pampa, Texas, on May 27, 1955, the equivalent of three hours' pay at the established rate of said position.

EMPLOYERS' STATEMENT OF FACTS: An agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

At 1:40 P. M. on May 27, 1955, a utility clerk at Pampa, Texas, an employe not subject to the terms of the Telegraphers' Agreement telephoned the following message to an employe in the Division Freight & Passenger Agent's office at Amarillo, Texas:

"Trace CABX 145 which was out of Akron on May 25, 1955 and advise arrival time at Pampa on Car CABX 163."

The Carrier employs a monthly rated agent and three shifts of telegrapher-clerks in around the clock service at Pampa. These employes and the positions they occupy, are covered by the Telegraphers' Agreement. The monthly rated agent and the first shift telegrapher-clerk were on duty when the incident in dispute occurred.

The Employes filed claim requesting a "call" payment in behalf of the second shift telegrapher-clerk at Pampa who was not on duty when the incident occurred. The claim subsequently appealed to the highest officer designated by the Carrier to handle such disputes and was denied.

(4) The Employees' claim is a clear attempt to obtain, by an award of this Board, a rule prohibiting the use of the telephone by other than telegraph service employees, which they did not obtain in negotiation on the property.

(5) Prior Awards of the Board support the handling complained of and clearly justify a denial of the Employees' claim.

The Carrier is uninformed as to the arguments the Organization will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and arguments as it may conclude are necessary in reply to the Organization's ex parte submission or any subsequent oral arguments or briefs presented by the Organization in this dispute.

All that is contained herein is either known or available to the Employees or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue in this case is whether a certain telephone call made by an employe not covered by the Telegrapher's Agreement was a message of record and therefore in violation of the Agreement.

The basic facts are not in dispute. On May 27, 1955 a representative of a patron of the railroad telephoned the Freight Office at Pampa, Texas to inquire about the location of one freight car and the probable arrival time of another. This inquiry was received by a utility clerk. In order to answer this inquiry, the clerk used the Carrier's telephone system to call the office of Division Freight and Passenger Agent at Amarillo, Texas.

The utility clerk was not covered by the Telegrapher's Agreement, but two employes covered by that Agreement, the Agent and a Telegrapher-clerk, were on duty at Pampa during the time of the telephone calls in issue.

The claim is for a call payment in favor of the second trick telegrapher at Pampa, who was not on duty at the time.

The Employees contend that the telephone call involved was a "car tracer" message; that this was a message of record; and that under the Scope Rule and understanding of the parties this communication should have been handled by a telegrapher in the first place or should have been confirmed by the filing of a telegram which would have been handled by a telegrapher.

The Carrier contends that this telephone call was not a car tracer; that it was merely "conversation;" that the use of the telephone is not reserved exclusively to telegraphers; and, therefore, that the Agreement was not violated.

Each party concedes that no specific rule applies. Each acknowledges an "understanding" that in cases where quick action is necessary an outsider is permitted to use the telephone to transmit and receive telegraphic communications which previously were handled exclusively by telegraph service employees. In such case, however, a confirming telegram is required to be filed and handled by employees covered by the Agreement.

Many awards, precedents and principles have been cited by the parties in support of their respective contentions. Most of them are irrelevant.

The only point of substantive difference between the parties is whether or not the telephone call was a "message of record." This must be determined by examining the circumstances surrounding the telephone call and the applicable agreements, understandings or practices of the parties on the property.

The circumstances surrounding the telephohne call show that it was a message of record within the understanding of the parties. The most persuasive evidence of this is the letter from the Division Superintendent to the Organization on June 21, 1955 stating in relevant part:

"My investigation of this claim indicates that the Cabot Carbon Company were urgently in need of this car, and in order to get the information as quickly as possible, the utility clerk called the Division Freight Office at Amarillo for their assistance. The utility clerk intended to confirm the telephone conversation by telegram, however, his attention was directed to other duties, and he overlooked filing the telegram."

After noting that action had been taken to prevent further similar complaints, the Superintendent stated he was declining the claim because a telegrapher was on duty at the time.

It is clear by this letter that the utility clerk and the Superintendent thought that a message of record had been communicated within the understanding of the parties. The Carrier contends, however, that it is not bound by the Superintendent's statements and argues that the telephone call "was entirely a conversation and no messages were transmitted, copied or filed."

The Carrier is correct that it is not limited to the reasons for denial of the claim given in the first instance. The Carrier cannot erase, however, the importance of the Superintendent's letter as to the facts or practice. The Superintendent's "investigation" showed that the customer was "urgently in need of this car". Also, the intention of the clerk to confirm the call by telegram is strong evidence of existing practice with respect to communications of this sort.

Although intending to establish that the telephone call was only a conversation, the Assistant General Manager, acting on appeal from the Superintendent's denial of the claim, referred to the call as one intended to "trace" a certain car. This is further evidence that the subject of the conversation was to trace the cars involved in the accepted car-tracer fashion.

The Carrier seeks to apply the "control of transportation" test to this communication in support of its contention that it was a mere inquiry. Special Board of Adjustment No. 117, Award 58 (L. Smith) is persuasive authority for Carrier's contention. This award should not be controlling, however, because the message in issue was a "tracer" or follow-up to determine if the instructions of a previous message of record had been executed. Accordingly, that case is distinguishable from the claim here since a car-tracer message is involved and not a tracer or inquiry to obtain information about the message of record.

Carrier's argument that the cars were not lost and that they would have arrived where they did when they did is besides the point. The customer's urgent need for the car and the Carrier's efforts to satisfy this need are sufficient to establish that the communication was a car tracer — and,

accordingly, a message of record — **within the understanding and practice of the parties on this property.**

The “understanding” of the parties has been referred to a number of times as being important to help determine the rights of the parties with respect to specific communications. It is also important for a broader reason. It bears on the argument by the Carrier that there is no justification for the compensation claimed by the Organization since no loss was suffered by any telegrapher.

From the full record in this case, it is clear that the Organization has filed this and other claims so that the Employees will not be found to have “slept on their rights” — as they phrase it. By this they mean that they do not intend to have work historically reserved to telegraphers taken from them by employees outside their agreement who now may use the telephone. The Employees argue that since the Scope Rule does not define work or who is to do the work, it is important that practice not be changed since it might be considered that they have acquiesced in such changes. The result of this might be loss of whatever historical rights they had to the work involved. They consider that they can preserve these rights by making claim for violation of their agreement in appropriate cases. They are openly militant about this.

“To satisfy complaints of the Telegraphers’ Organization that the amount of work available to employees of their craft was being reduced,” the Carrier has agreed, informally, to certain practices which prohibit clerks from using the Company telephones to handle matters of record. An exception to this is where speed or handling is of prime importance, in which case it is the practice to confirm the telephone conversation by telegraph.

Therein lies the “understanding” of the parties. It is thin support for labor peace but that is on what it rests in these matters.

It is apparent that the Employees’ interest in this understanding is preservation of work considered by them to fall within the scope of their employment. Payment of a call for a violation of the agreement is incidental at best.

Since the telegraphers on duty at the time of the telephone call by the utility clerk suffered no loss in compensation as a result of that call, no penalty should be assessed against the Carrier as to them. The same is true of the telegrapher on the second trick on whose behalf this claim has been filed. It is enough that we find that the Carrier violated the Agreement, as charged. It should not be construed from this finding, however, that we hold that a penalty could not be assessed against the Carrier. In these circumstances we believe simply that a finding that the Carrier violated the agreement will “adjust” the dispute. Other circumstances might require other adjustments. See Award 10730 in which we held that:

“Our judgment is that this Board may make any award within the limits of the claim that it thinks is equitable. This is based on the view that Congress did not intend to, and did not, limit the powers of the Board to “adjust” the differences of the parties with respect to the subjects over which it has jurisdiction.”

Accordingly, the claim is sustained in its first part and denied in its second part.

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 claim is sustained in its first part and denied in its second part.

AWARD

Item 1 of the claim is sustained; Item 2 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1962.

DISSENT TO AWARD NUMBER 10767, DOCKET NUMBER TE-8952

We dissent to the Findings under Item 1 of this award.

/s/ **T. F. Strunck**

/s/ **P. C. Carter**

/s/ **R. A. Carroll**

/s/ **W. H. Castle**

/s/ **D. S. Dugan**