

Award No. 10967
Docket No. TE-9063

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk and Western Railway, that:

1. The Carrier violated the agreement between the parties when it required or permitted employees not under the agreement to perform work belonging to employees under the agreement.

2. Carrier be required to pay a call, two hours at the time and one-half rate, to V. R. Wilson, Buena Vista, Virginia and to M. T. Ramsey, Waynesboro, Virginia, on August 9, 1955.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties to this dispute are available to your Board and by this reference are made a part hereof.

Waynesboro, Virginia and Buena Vista, Virginia, are stations located on the Shenandoah Division of the Carrier, between Roanoke, Virginia and Hagerstown, Maryland. Buena Vista is about 55 miles north of Roanoke and Waynesboro about 40 miles north of Buena Vista. At Waynesboro there are two telegraphers' positions, Agent Operator, assigned hours 8 A. M. to 4 P. M., work days Monday through Friday with rest days Saturday and Sunday, position not filled on rest days, and Operator assigned hours 11 P. M. to 7 A. M., seven days per week, position relieved on rest days; there is a position of Clerk under the Clerks' agreement assigned 1 P. M. to 10 P. M. At Buena Vista there is one telegraphers' position, Agent-Operator, assigned hours 7 A. M. to 4 P. M. (One hour for meal), six day assignment, rest day on Sunday position not filled; there is a position of Clerk under the Clerks' agreement assigned 1 P. M. to 9 P. M., Monday through Friday.

On Tuesday, August 9, 1955, about 8:45 P. M. the Test Operator in "GM" Telegraph Office at Roanoke, Virginia, discovered, or had reported to him, the Dispatcher's telephone circuit had developed a condition causing a noise which interfered with the Dispatcher's work. This Dispatcher's telephone was designated as circuits Nos. 17 and 18. The

PART III**Employees' Position Cannot Be Sustained By The Agreement, Custom, Tradition Or Historical Practice:**

The position of the Employees in the instant case is untenable and cannot be sustained by the Agreement; neither is it sustained by custom, tradition or historical practice, as clearly demonstrated in Part II of this submission. This case is nothing more than an attempt on the part of the Organization to broaden the Agreement far beyond its intent and purposes by reading into it something not contained therein. As your Board said in Third Division Award 7153:

"It is not for us to read into the language of the Scope Rule something which the parties themselves have quite obviously omitted."

The unilateral appeal of the instant claims by the Employees to your Board cannot serve to change the long established practice as set forth in Part II of this submission. "The mere filing of a claim in conflict with the Agreement is not enough." (First Division Award 9560.)

Denial of the instant claims is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: This case raises the troublesome issue as to whether testing and patching are within the Scope provision of the Telegraphers' Agreement.

The cornerstone case is Award No. 3524. Therein the Board enunciated the following principle applicable to interpretation of the Scope provision:

"... The Carrier contends that testing, patching and balancing do not belong exclusively to the telegraphers. In this respect, we are of the opinion that testing, patching and balancing is work belonging exclusively to the telegraphers when it is incidental to and done in connection with the operation of lines, either telegraph or telephone, in performing work belonging to the telegraphers under their Agreement. On the other hand, such work is not that of the telegrapher when done by Telegraph and Signal Maintainers incidental to and in connection with the maintenance of lines. With these general rules in mind, we will consider the particular facts that brought about this dispute."

Award No. 8018 is in accord. Cf. Awards Nos. 4880, 4899 and 10624. All the cited awards establish that testing and patching are not always, exclusively, within the Scope provision of the Telegraphers' Agreement.

With the above cited Awards as a premise we examine the undisputed facts in this case.

At about 8:30 P. M., Tuesday, August 9, 1955, trouble developed on the dispatcher telephone line between Roanoke, Va. and Waynesboro, Va. The Carrier's Shenandoah Division train dispatchers are located at Roa-

noke, the Division headquarters. Waynesboro is a station on the Shenandoah Division 97 miles north of Roanoke. An employe in the Division headquarters at Roanoke used the telephone to contact a clerk on duty at Waynesboro, who, as directed, inserted a test plug in the test panel in Waynesboro station for the purpose of determining whether or not the trouble was in the Waynesboro office. When the clerk at Waynesboro inserted the test plug as directed, the employe in Division headquarters knew immediately the trouble was not in Waynesboro office but on the line between Roanoke and Waynesboro. The employe at Division headquarters then used the telephone to contact a clerk on duty at Buena Vista, Va., a station 54 miles north of Roanoke and 43 miles south of Waynesboro. When the clerk at Buena Vista inserted plugs in the test panel as directed, the employe at Division headquarters determined that the trouble on the dispatcher line was north of Buena Vista, that is, somewhere between Buena Vista and Waynesboro. The employe at Division headquarters then instructed the clerk at Waynesboro and the clerk at Buena Vista by telephone to insert a plug in the patching facilities provided at each of the stations and this connected the dispatcher telephone line to the message telephone line, which set up an emergency dispatcher circuit over the message line between Buena Vista and Waynesboro, that is, around the trouble on the dispatcher line between those points.

The Claimants herein are an Operator at Waynesboro and an Agent-Operator at Buena Vista. The incident involved occurred at a time not within the regularly scheduled hours of work of Claimants. The Operator at GM Roanoke who directed the clerks in the testing and patching occupied a position within the Scope provision of Telegraphers' Agreement.

Telegraphers contend that: (1) testing and patching are not incidents of the clerk positions; (2) Claimants should have been called to do the testing and patching; and, (3) Carrier's failure to call Claimants violated the Agreement. Telegraphers pray that each Claimant be awarded call pay for two hours at time and one-half.

Carrier argues that for Claimants to prevail Telegraphers must prove from consideration of tradition, historical practice and custom that the work of testing and patching performed by the clerks, in this case, comes "exclusively" within the Scope provision [citing Awards Nos. 6824 and 7076]. Further, Carrier avers "that for many years it has been the general practice on this property for employes not covered by the Telegraphers' Agreement to assist in the testing and patching of telephone lines." The record contains no evidence that either defense was proffered by Carrier on the property.

Telegraphers' Submission was filed with this Board on August 20, 1956; Carrier's Submission on October 24, 1956. Attached to Carrier's Submission as exhibits are 18 affidavits executed by officials or former officials of Carrier on various dates during the month of October 1956—long after final denial of the Claim on the property and after Telegraphers Submission of the Claim to this Board. These affidavits are to the effect that testing and patching have not by tradition, historical practice or custom been performed on the property, exclusively, by those in positions under the Telegraphers' Agreement. Had the Carrier raised the defense on the property these affidavits would be admissible as corroborating evidence. Not having raised the defense on the property, the affidavits are not a part of the record before us and have no probative value.

Carrier's only defense in the record is a bald assertion that the work of testing and patching do not come, exclusively, within the Scope Agreement. It has adduced no evidence in the record to prove it.

As we read Award No. 3524 and related Awards, cited above, there is a presumption that testing and patching comes within the Scope provision. To rebut it Carrier must prove: (1) the work was performed as an incident to a position not under the Telegraphers' Agreement; or, (2) by tradition, historical practice or custom the work was not exclusively performed on the property by employes covered by the Telegraphers' Agreement. In the record Carrier has not proven either of these recognized defenses. We, therefore, must sustain the Claim.

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 the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1962.