

Award No. 11221

Docket No. TE-9746

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Phillip G. Sheridan, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO GREAT WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago Great Western Railroad, that:

1. Carrier violated and continues to violate the agreement between the parties when, at Council Bluffs, Iowa, it requires and permits employees not covered by the agreement to handle messages.
2. Carrier be required to compensate C. J. Colles, Telegrapher-Clerk at Council Bluffs, or his successor, the equivalent of a two hour call payment on each day the violation occurs commencing December 4, 1955 and continuing thereafter until the violation is corrected.

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

Council Bluffs, Iowa is a station on the Minnesota Division of the Carrier, just across the Missouri River from Omaha, Nebraska, and is the western freight terminal of the railroad. In the depot building at this station the Carrier maintains the Agent's office and the Yardmaster's office in which several clerks are employed; also there is a telegraph office with one position of Telegrapher-Clerk under the Telegraphers' Agreement with assigned hours 8:30 P. M. to 5:30 A. M., (one hour meal period). The assigned rest days are Friday and Saturday, relieved on rest days by a regular relief position. At the time cause for this claim arose C. J. Colles was the regular assigned incumbent of the Telegrapher-Clerk position and T. M. Martin the regularly assigned incumbent of the relief assignment performing the rest day relief on Fridays and Saturdays. Martin performs rest day relief at another location on two days per week and in order to fill out the five day relief assignment works at Council Bluffs as Telegrapher-Clerk 12:30 P. M. to 8:30 P. M. on Thursdays. Prior to 1949 Carrier maintained continuous telegraph service at Council Bluffs 24 hours per day seven days per week; in 1949 one position

agreement. Due to the fact that the right to perform the work in question is not contained in the contractual agreement, the Employees have endeavored from time to time to secure such a rule by the process of negotiation pursuant to formal notice served on the Carrier under terms of Section 6 of the amended Railway Labor Act, and by invocation of the services of the National Mediation Board under Section 5, First, of the aforementioned Act. As previously indicated herein, the Employees by their actions have recognized that the right to perform the work in dispute is a negotiable matter which is simply another way of saying that the work is not included within the Telegraphers' Agreement.

In Third Division Award 5331 it was said:

"Except insofar as it has restricted itself by the Collective Bargaining Agreement or it may be limited by law, the assignment of work for its operation lies within the Carrier's discretion."

We have previously shown that neither the Telegraphers' Agreement nor the Clerks' Agreement contains any reference whatsoever to teletype or printer machines and up to the present time the Carrier has been unable to negotiate an agreement with the O.R.T. and B.R.C. covering such work. In the absence of any restriction or prohibition in either of these agreements the Carrier has assigned the work of operating teletype machines, which it has the right to do, according to the exigencies of the service. At Council Bluffs, clerks, while the operator is off duty, are required to observe from time to time such incoming messages as may appear on the teletype machine (the number of such messages is small) so they may, if necessary, call train and engine service employees which is part of their regular duties regardless of whether or not a telegrapher is on duty. Clerks at Council Bluffs are not obliged to remove messages from teletype machines and it is the practice for the telegrapher to remove such messages, which practice was followed in the instant case.

Claim clearly is not based upon any supporting rule of the contractual agreement but rather upon the unsupported theory that certain work "historically, traditionally and customarily" flows to employees under the Telegraphers' Agreement. In the handling of the case on the property the Employees failed to produce any evidence in support of their theory. Damages are not awarded on theory alone and there must be compelling proof, supplied by the Employees, in support of that theory. This Division has held:

"The burden of establishing facts to require or permit the allowance of a claim is upon him who seeks its allowance." (Award 4011—Also, see Awards 6829, 6828, 6824, 4758, 3523, 3477, 2577 and others).

Under the Railway Labor Act this Division is required to give effect to the collective agreement and adjudicate this dispute in accordance therewith. On the basis of that Agreement and the awards of this Division in similar cases, claim should be denied.

The Carrier affirms that all data in support of its position has been presented to the other party and made a part of the particular question in dispute.

OPINION OF BOARD: This dispute arises over Carrier sending messages by teletype originating from a telegrapher on duty at Clarion to a teletype

machine at Council Bluffs. These messages were sent between 8:00 A. M. and 4:00 P. M. The Council Bluffs telegrapher did not begin his tour of duty until 8:30 P. M.

These messages related to the assignments of train and Engine service Employes, and the Organization asserts that the persons responsible for notifying the train crews takes the message physically or takes note of it and acts pursuant to the contents of the message.

We think the matter herein constitutes a jurisdictional dispute.

On Page 7 of the Organization's First Submission as follows:

"There is a dispute between the parties concerning the use of teletypes and printing machines, jurisdiction of the dispute was taken by the Mediation Board and the case designated as Case A-4077 is still pending; action has been deferred for the time being which leaves the situation in 'status quo' as of the beginning of the dispute."

We cannot agree with the Organization's quotation as illustrated above. The record reveals that the matter in dispute has been submitted to the National Mediation Board, both by the Organization and the Brotherhood of Railway Clerks without being resolved. This has been in dispute for a period of ten years or more prior to being submitted to this Board.

This Board has on repeated occasions held when a jurisdictional dispute exists between two Organizations, it is not equipped nor empowered to decide.

We must therefore remand the claim before us for further negotiations between the parties. If negotiation fails, their proper forum is the National Mediation Board.

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 no jurisdiction over the dispute involved herein.

AWARD

Case remanded in accordance with opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March, 1963.