Award No. 11223
Docket No. TE-10171

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Phillip G. Sheridan, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the San Diego and Arizona Eastern Railway, that:

1. Carrier violated the rules of the current Telegraphers' Agreement, on November 24, 1956, at Clover Flat, when it required or permitted Conductor Keller, a train service employe, not covered by the Telegraphers' Agreement, to handle (receive, copy and deliver) Train Ordr No. 133 direct with the train dispatcher, and

2. Carrier shall compensate the senior idle Extra Telegrapher or if none available, then the senior idle regular assigned Telegrapher W. A. Stewart at Jacumba, California, who was observing a rest day, at the nearest location to Clover Flat, 8 hours' compensation at the minimum Telegrapher's rate of pay, November 24, 1956.

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

Clover Flat, California, is a station on this Carrier's lines where no employe covered by the Agreement is regularly employed. On November 24, 1956, Conductor Keller of Train No. 451, by use of telephone, handled (received, copied and delivered) the following train order at Clover Flat:

"Train Order No. 113 Nov 24 1956
To C&E No. 451
At Clover Flat

No. 452 meet No. 451 at Campo instead of Clover Flat
Order to No. 452 at Campo
SHC
Repeated and Complete Time 1228 PM Keller OPR."

There was no emergency condition existing at the time.

In addition to the rules of the current agreement referred to by petitioner when appealing this claim to carrier (Carrier's Exhibit "A"), certain awards of this Division were also cited and asserted to be "exactly in point and support the claim herein set forth". A review of those awards will readily reveal that they are not exactly in point and in each instance the awards there made involved different rules and circumstances than those here under consideration.

In May of 1955, petitioner brought to this Division a dispute involving telegraphers on this property asserting in part as follows:

> "The Carrier violated and continues to violate the provisions of the agreement between the parties when commencing October 19, 1950 at Campo, California and November 2, 1950 at Jacumba, California, it permitted or required section foremen and other track motor car operators, who are employes not covered by said agreement, to copy train lineups at a time that the agent-telegrapher was not on duty at these stations."

While that claim involved a different issue and facts dissimilar to those forming basis of this claim, it is a point of interest that petitioner relied upon Rules 1, 2 and 17 of the current agreement, among others, to support its position in that case. Significantly, in its Opinion in Award 8141 denying that claim, this Division declined to discuss the rules cited and stated in part:

> "In the present case a great deal of the discussion has concerned the matter of past practice, and here as in Award 7970, past practice on the property governs the disposition of the case."

Award 7970 referred to in that quotation likewise involved facts dissimilar to those obtaining in this case.

CONCLUSION

Carrier requests that this claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced).

OPINION OF BOARD: There is no dispute between the parties relative to the facts which are the source of this claim.

At a blind siding known as Clover Flat, the conductors of Carrier's train by use of the telephone obtained, handled, received, and copied a train order.

The Organization contends that the aforesaid acts of the conductor was work reserved to the Organization and therefore, the Agreement was violated.

Before proceeding with the merits of the present claim, we must dispose of an objection made by the Organization in their second submission and also at panel argument before this referee concerning the admission of Carrier's Exhibit "C".

The Organization contends that a review of this exhibit by this Board would be improper for the reason that it was not made known to them while the matter in issue was being handled on the property.

We believe the objection is well taken and we will not discuss it in arriving at our ultimate decision, except to say at this point that the inference the Carrier wished to express is not destroyed by this exclusion of the aforementioned exhibit. The Carrier has preserved its theory of defense by other means in their record as submitted to this Board.

The Scope Rule upon which the Claimants base their right to the work involved is general in nature, it does not define any work or specific duties that may be required of the persons, the rule merely lists positions.

It is well settled by this Board that where the Agreement lists the positions rather than defining the work, the Organization's assertions that it is work reserved to them must be supported by proof of historical practice and custom. Thus, we are presented with a factual situation.

The record presented herein does not sustain this factual situation. In response to the Organization's assertions under their Scope Rule, the Carrier responded from the inception of this claim and through the negotiations on this matter on the property that the factual situation originating this claim had been the practice for many years standing. In fact since the beginning of operation.

The Organization offered no proof to sustain their position nor did they in any way rebut or deny the Carrier's assertion. The burden of proving this claim rests upon the Claimants.

This Agreement was subject to interpretation in Award 8141 (Elkouri). The factual situation in the former award varies, however the same defense was utilized by the Carrier and the Organization failed to prove its assertions under the same Agreement.

We concur also with Referee Elkouri's opinion as to the type of evidence required in order to assist and support the Organization's position; similar evidence could have been presented herein, but the Organization having made only assertions, and failing to support them by competent evidence, we find the Agreement was not violated.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

Claim denied.

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.