Award No. 11835
Docket No. TE-10540

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Burlington and Quincy Railroad that:

1. Carrier violated the Agreement between the parties when it required or permitted employes not covered by the Agreement to perform the work of the agents at Emerson, Iowa, Malvern, Iowa and Hastings, Iowa on holidays.

2. Carrier shall compensate the incumbent agents in the amount of a holiday call payment on each date the violation occurred: B. Read at Emerson on May 30 and July 4, 1957; T. C. Adkins at Malvern on May 30 and July 4, 1957; and H. E. Miller at Hastings on July 4, 1957.

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

The stations named in the Statement of Claim are on the Ottumwa-Creston Division of this Carrier; each is a one-man station with a position of Agent under the Telegraphers' Agreement; each position is a five-day position with a work week beginning on Mondays of each week with assigned rest days of Saturdays and Sundays, position not represented on rest days.

The assigned hours of each of the positions involved are 7:15 A. M. to 4:15 P. M. (one hour meal period). The dispute concerns the handling of the head-end work on Train No. 7 which is due at the stations during the assigned hours of the agent (between 12 o'clock noon and 1:00 P. M.). This work is performed regularly on each work day by the agent at the respective stations and prior to May 30, 1957 was performed on a call basis on holidays. At each station the Carrier utilizes a person classified as a "custodian" which is not covered by the Telegraphers' Agreement to meet Train No. 14 (between 7 and 8:00 P. M.) each day and Trains Nos. 7 and 14 on Saturdays and Sundays. The custodian works about one hour each day Mondays through Fridays and two hours on Saturdays and Sundays.

On the holidays mentioned in this claim, the agents were notified not to report on the usual holiday call to handle the head-end work from Train

terpret the Regulations as they are written in the Agreement, and we have no authority to modify or amend the provisions in any way. This must be done only by negotiation between the parties."

In Award 7577, the Third Division stated:

"It would be exceeding our statutory function to allow compensation where the Agreement itself does not authorize it. We do not believe it to be the prerogative of this Board to attempt to do so by reading into the rules something that is not there. We feel that the employe's recourse is to negotiate with the Carrier under Section 6 of the Railway Labor Act."

In Third Division Award 6022, the Board, with Referee Parker, stated:

"There are two principles, so well established there is no occasion for citing awards supporting them, that must be given consideration in determining the rights of parties under the confronting facts as we have construed them. The first is that except insofar as it has restricted itself by the Agreement the assignment of work necessary for its operations lies within the Carrier's discretion. * * * "

Petitioner proposed a rule, quoted above, that would, if it had been adopted, restrict the Carrier from assigning the work of meeting trains and handling mail, baggage and express to other than telegraphers. Carrier, however, declined the proposal, and it was never adopted. Consequently, Carried did not restrict itself by the Agreement with respect to handling mail, baggage and express between trains and station buildings, and it therefore follows that the assignment of such work lies within the discretion of the Carrier.

In conclusion, Carrier respectfully submits that:

(1) The handling of mail, baggage and express between trains and station buildings has been performed by custodians and others for more than forty years on this property. Such work has never been considered as belonging exclusively to any class or craft.

(2) Petitioner recognized this fact by withdrawing the claim in Award 1866.

(3) Petitioner recognized this fact by attempting to negotiate a rule which would provide what is here claimed. The proposed rule was never adopted.

(4) Awards cited in this submission support Carrier's position that the work made the basis of this dispute does not belong exclusively to any craft.

With these facts before it, the Board has no alternative but to deny the claim in its entirety.

The Carrier affirmatively asserts that all evidence herein and herewith submitted has previously been submitted to the Petitioner.

OPINION OF BOARD: Petitioners allege that Carrier violated the Telegraphers' Agreement when it assigned custodians not covered by this agreement to handle "head end" work, mail, baggage, and express transfer between Train No. 7 and the station building on holidays that fell on weekdays. They rely on the practice in connection with Train No. 7 to sustain their claim.

Carrier denies the claim on the grounds that the Scope Rule does not

reserve the work in dispute exclusively to agents. It argues "that the mere listing of a job classification such as 'agents' in a scope rule does not by itself grant the exclusive right to perform all work that is normally associated with such positions." Furthermore, it asserts that since custodians perform "head end" work on nights and Saturdays and Sundays, the rest days of the agents, there is no reason why they should be denied this work on workdays on which holidays fall. Carrier also emphasizes that the practice of using custodians for this work prevailed throughout the system. It takes the position that neither time nor a limited geographic area is a factor in determining whether work accrues to a particular craft as a matter of contractual rights.

We agree with Carrier that the Scope Rule does not confer exclusive rights upon agents to perform "head end" work. We also note that Organization does not make this claim.

Since the Scope merely sets forth classes of positions, but does not delineate the work for these classifications, we must look to the practice to determine to whom the work belongs. In connection with Train No. 7, agents were the only employes who performed "head end" work on holidays that fell on weekdays and were paid holiday rates until Carrier abruptly changed this practice on May 30, 1957. Moreover, the practice continued for three years after adoption of the August 21, 1954 Agreement in which agents became eligible for holiday compensation under the provisions of Article II. Although the record shows that since 1949 both agents and custodians performed "head end" work in the system, we give recognition to the practice in the particular location or station rather than to the practice in general. The predominant number of awards in "head end" disputes sustain our position. In the assignment of agents to the work of mail, baggage, and express transfer for Train No. 7 on holidays that fall on workdays with holiday pay, and in the failure to write into the agreement prohibition of this policy, Carrier gave its approval to the practice. Carrier moreover permitted it to be for a long period from 1949 to 1957. When this party without reason assigned this work to custodians, it interrupted a consistent practice which has the force of agreement.

We find that Carrier violated the agreement of the parties and allowed the claim of Petitioners for compensation for the dates the violation occurred.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of November, 1963.

DISSENT TO AWARD NUMBER 11835, DOCKET NUMBER TE-10540

The holding of this award is erroneous because of its misconception and misapplication of the practice principle.

Carrier has the traditional right to manage its affairs restricted only by law or the collective bargaining Agreement. The award properly notes that there has been no reservation of this work to this craft in the contract. Yet, it finds a reservation at a particular station by practice.

Practice standing alone cannot serve as a source of work rights. In fact, practice alone has little significance. It cannot possibly be elevated to the status of a binding Agreement provision so as to prevent Carrier from changing a work activity admittedly not a subject of agreement. Practice is only important when an ambiguous rule is under interpretation. But lacking at the minimum an ambiguous rule, practice does not enter the picture and Carrier is free in the area.

Furthermore, even if such a provision existed, the actual practice in this case does not support the award's result. The fact of record is that employes other than agents have been consistently doing this work on this railroad for decades. For example, hundreds of custodians do this work at many stations, including the one involved in the claim. Since this is a system-wide contract, the practice over the system should control. **Awards 7031** (Carter), **9610** (Rose), **10615** (Sheridan), **11067** (McMillen), **11239 (Moore), 11331** (Coburn), **11526** (Dolnick), and **11758** (Dorsey).

/s/ T. F. Strunck

/s /D. S. Dugan

/s/ P. C. Carter

/s/ W. H. Castle

/s/ G. C. White