

Award No. 12356
Docket No. TE-9859

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware and Hudson Railroad, that:

1. Carrier violated agreement between the parties when, on October 8-9-10-11 and 12, 1956 and continuing thereafter, Monday through Friday of each week, it caused, required or permitted Section Foreman R. Greco, an employe not covered by the Telegraphers' Agreement, to perform work of receiving, copying and delivering train lineups at Castleton and relaying such lineups by telephone to others at Granville and Cambridge, which work is by the Agreement solely and exclusively reserved to employes covered by the Telegraphers' Agreement.

2. Carrier shall compensate Charles E. Corey, Agent-Telegrapher, Castleton, Vermont, for one call in accordance with Article 3(d) for October 8-9-10-11 and 12, 1956, and to permit a joint check of records to determine violations on subsequent dates thereafter and the amount and names of employes entitled to such compensation.

3. Carrier violated agreement between the parties thereto when, on October 1-2-3-4-8-9-10-11-12-15 and 16, 1956 and continuing thereafter, Monday through Friday of each week, it caused, required or permitted Section Foreman McKnight, an employe not covered by the Telegraphers' Agreement, to perform work of receiving and copying train lineups at Corinth, which work is by the Agreement solely and exclusively reserved to employes covered thereby.

4. Carrier shall compensate Herbert B. Austin, Agent, Corinth, N. Y., for one call in accordance with Article 3(d) for violations on October 1-2-3-4-8-9-10-11-12-15 and 16, 1956, and to permit a joint check of its records for the purpose of determining violations on subsequent dates and the names and amounts due employes for such violations.

5. Carrier violated agreement between the parties thereto when, on October 1-3-4-8-9 and 10, 1956 and continuing thereafter, Monday through Friday of each week, it caused, required or permitted Sec-

tion Foremen Harrington and Birch, employes not covered by the Telegraphers' Agreement, to perform work of receiving and copying train lineups at North Creek, which work is by the Agreement solely and exclusively reserved to employes covered thereby.

6. Carrier shall compensate James M. Parkis, Agent-Telegrapher, North Creek, N. Y., for one call, in accordance with Article 3(d), for October 1-3-4-8-9 and 10, 1956, and to permit a joint check of its records to determine violations on subsequent dates and the names and amounts due employes for such violations.

EMPLOYEES' STATEMENT OF FACTS: This claim is based on collective bargaining agreement in effect at all times hereinafter mentioned. The agreement is on file with this Division and is, by reference, made a part of this submission as though set out herein word for word.

The petitioner will be referred to as Employees or Telegraphers and the respondent as Carrier or Management.

The three separate claims, submitted herein, were handled on the property in the usual manner, through the highest officer designated by carrier to handle such disputes, and failed of adjustment. The disputes involve interpretation of the collective bargaining agreement and under the provisions of the Railway Labor Act, as amended, this Division has jurisdiction of the parties and subject matter.

These disputes involve the question as to whether the collective bargaining agreement was violated when Management required Section Foremen to perform service as telephone operator at stations where Telegraphers are employed. The claim also involves compensation for regular incumbents of the positions (Agent-telegraphers) who were not called but were available to perform the service. The Management, however, did not question the correctness of the amount of compensation claimed, but denied the claims solely on the ground that the Rules did not support the claims.

On November 9, 1956, Local Chairman Griffin filed claim with Superintendent Young (Paragraphs 1 and 2—Statement of Claim). The claim was as follows:

"November 9, 1956

Mr. P. W. Young, Superintendent
Delaware and Hudson Railroad
Albany 1, New York

Dear Sir:

Claim is hereby made account the following violation:

STATEMENT OF CLAIM: Carrier violated Article No. 1 of the Telegraphers' Agreement when on October 8, 9, 10, 11 and 12, 1956, and continuing thereafter, Monday through Friday of each week, it caused, required or permitted Section Foreman R. Greco, an employe not covered by the Telegraphers' Agreement, to perform work of receiving, copying and delivering train line-ups at Castleton and relaying such line-ups by phone to others at Granville and Cambridge, which work is by agreement, solely and exclusively reserved to employes covered by the Telegraphers' Agreement.

this approach and the reasoning of that award is persuasive upon the present Referee. Other awards which place special emphasis on the past practice element in deciding this same issue, include Awards 1145, 5582, 6032 and 6607. Also see Awards 4265 and 4506."

The Board's attention is also directed to Awards 1145, 4265, 4266, 4267, 5582, 5583, 5584, 5585, 6032, 6607, 6608 and 6788, which involved claims similar to the instant claim.

Without prejudice to carrier's position as outlined above, except for the specific dates set out in statement of claim, the claim is both indefinite and vague, and carrier is under no obligation to conduct a joint investigation against itself. In Award 4305, Referee Elkouri, it was held:

"The only claims properly before the Board for its consideration are those of named parties for specified dates and locations."

and in First Division Award 7206, Referee Wolfe, it was held:

"The Carrier is not bound to develop the claim for the employees."

Also see Third Division Award 5965, Referee Douglass; and First Division Awards 11642, Referee Scott; 12312, Referee Boyd; 13296, Referee O'Malley; 14124, Referee Weeks; and 15214, Referee Kelliher.

The line-ups involved in this dispute had no connection with train movements, but were sought and obtained by maintenance men in order to enable them to plan and carry on their work with the least possible interference. The Telegraphers' Agreement does not give telegraphers the exclusive right to perform the work here claimed. By practice, this work has been performed by others prior to the November 1, 1937 Agreement and during the life of both the November 1, 1937 Agreement and the July 1, 1944 Agreement which was effective on the dates involved in this claim. Under these circumstances, a sustaining award would have the effect of writing a new rule which is not within the province of the Adjustment Board.

It is the carrier's position that the claim is not supported by existing rules and practices and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: In each of the alleged violations of the Agreement set forth in paragraphs 1, 3 and 5 of the claim, a Section Foreman, at places where telegraphers were employed, but not on duty at the time, used the telephone to secure line-ups of train movements in direct communication with the train dispatcher. In one of the cases, paragraph 1 of the claim, the section foreman, after receiving the line-ups from the dispatcher, used another telephone to transmit them to two other foremen at separate stations on a branch line.

The question presented is whether the handling of train line-ups is by its very nature work of a type reserved to the telegrapher class or craft of employees.

PERTINENT PROVISION OF AGREEMENT

The pertinent provision of the Agreement is its Scope Rule. Insofar as here material, it reads:

"ARTICLE No. 1**Scope**

(a) The following rules of service and rates of pay will apply to Telegraphers, Telegrapher-Clerks, Telephone Operators (except Switchboard Operators), Agents, Ticket-Agents, Agent-Telegraphers, Agent-Telephoners, Assistant to Agents, Towermen, Levermen, Tower and Train Directors, Block Operators, Staff Men, CTC Machine Operators (employees whose duties require the operation of CTC machines where the issuance of train orders is not a part of the assignment), and Operators of mechanical telegraph machines, as shown in the wage scale and such other positions in these classifications as may be added thereto; all of whom are hereinafter referred to as employees."

INTERPRETATION OF SCOPE RULE AND BURDEN OF PROOF

In Award No. 11506 in which we interpreted and applied a Scope Rule, which in substance was the same as the one now before us, we held:

"Where the Agreement, as in the instant case, does not define the work reserved exclusively to Telegraphers, but merely lists job titles, the established rule to which this Board adheres is: When Telegraphers claim that a certain type of communication by telephone is within the Scope Provision of the Agreement, it must prove, by a *preponderance of the evidence*, that the work on the system of the Carrier involved has been by history, tradition and custom exclusively performed by employees holding positions with the job titles listed in the Scope Provision. Cf. Award No. 10954."

FAILURE OF PETITIONER TO SATISFY BURDEN OF PROOF

Whether the handling of train line-ups, on Carrier's property, has been historically, usually and customarily performed by telegraphers is a question of fact. For Petitioner to prevail, it must prove the fact, in the record, by a preponderance of material and relevant evidence. Petitioner has adduced no evidence to establish the fact.

Instead of offering evidence of the practice on Carrier's property, system-wide, Petitioner argues that the handling of communicating train line-ups is by its very nature work of a type reserved to telegraphers. In support, it cites 32 Awards of this Division in which it was held, in each case on a distinct case basis, that such work was reserved to telegraphers; plus, General Order 27 and various supplements thereto. The essence of the argument is that communicating of train line-ups is reserved to telegraphers industry-wide.

Carrier, on the other hand, has cited a number of Awards of this Division in which it was held that work of the type here involved was not, in each of those particular cases, reserved to telegraphers.

We have studied the Awards cited by the parties. It is significant that in each of those Awards the issue presented was decided upon the evidence of record in the particular case. Those Awards, being pro and con, do not

support the proposition — indeed, they destroy it — that there is any industry-wide reservation of the work to telegraphers; nor does General Order 27 support the proposition.

It is beyond question that this Board's jurisdiction is confined to deciding each case before it on evidence of record in that case introduced on the property. Findings and holdings in stranger cases are not evidence.

CONCLUSION

We find that: (1) Petitioner had the burden of proving that the work involved had been historically, usually and customarily performed by telegraphers on Carrier's system; (2) the record is barren of any evidence proving or tending to prove past practice on the property; and (3) Petitioner failed to satisfy its burden of proof. We will, therefore, dismiss the claim for lack of evidence.

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 Employee involved in this dispute are respectively Carrier and Employee 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 must be dismissed for lack of evidence.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1964.