

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific (Pacific Lines), that:

1. The Carrier violated the Agreement between the parties hereto at Bakersfield, California, when on November 13, 1959, and on November 18, 1959, it permitted or required an employe not covered by the Telegraphers' Agreement to transmit diversion messages over the telephone to the Agent-Telegrapher at Edison, California.

2. The Carrier shall, because of the violation set forth in Item 1 of this statement of claim, compensate:

(a) D. F. Meyer, Relief-Wire Chief Telegrapher, Bakersfield, California., for one special call for November 13, 1959.

(b) N. Cabellero, 2nd Wire Chief-Telegrapher, Bakersfield, Calif., for one special call for November 18, 1959.

EMPLOYES' STATEMENT OF FACTS: *There is in evidence an Agreement by and between the parties to this dispute, effective December 1, 1944, reprinted March 1, 1951, and as otherwise amended.*

At page 62 of said Agreement are listed the positions existing at Bakersfield, California on the effective date of said Agreement. The listing reads:

"Bakersfield (Freight)	*Agent — Monthly Rate \$369.97	\$2.1849
Bakersfield (Freight)	Printer Machine Operator-Clerk	1.74
Bakersfield 'K'	Manager-1st Wire Chief	1.92
Bakersfield 'K'	2nd Wire Chief Telegrapher	1.86

Rule 17 provides for the establishment and termination of seniority. It obviously does not support the claim.

In connection with the various rules referred to above, it will be noted they are all general rules and none deal in any particular with the subject in dispute. It will further be noted that there is no evidence of any kind that the Carrier has ever agreed in any way to utilize telegraphers in connection with work forming basis of this claim, and conclusive evidence that it has not will be found in Carrier's Exhibits E through L.

The facts in this claim readily establish that the telephone conversations at Bakersfield conveying information to Southern Pacific-Santa Fe agent-telegrapher at Edison in connection with diversions by an employe of Pacific Fruit Express Company in no way involved the provisions of the current agreement.

This claim is obviously invalid in its entirety; but even if it were a proper claim, the penalty allowable would be at straight time rate and not at the overtime rate claimed—see Awards 7094, 7222, 7239, 7242, and 7316, to cite but a few.

CONCLUSION

Carrier has conclusively shown herein the claim is totally lacking in merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: An employe of the Pacific Fruit Express at Bakersfield, California, telephoned the following message to the Agent-Telegrapher at Edison, California:

“PFE 6456 seed spuds origin Tule Lake November 5, 1959, now consigned Giumarra Brothers, Edison, California, route Southern Pacific divert to Robert Newman & Sons care Kern Ice and Coal Storage, Bakersfield, for storage in transit shipper authorized back haul charges.

Diversion received PFE office Bakersfield November 12, 1959.”

This telephone conversation took place on November 13, 1959. A similar conversation was had on November 18, 1959. That message was:

“PFE 63482 spuds origin COPIC November 15 now consigned Henry E. Hoffman, Edison, Divert to change consignee to Sam Shafer Car OH Edison no file.”

Pacific Fruit Express is jointly owned by this Carrier and the Union Pacific. It is operated as an independent entity; it has its own officers and employes; some of the employes are represented by various labor organizations that have agreements with the Pacific Fruit Express. That company employs no telegraphers and has no Agreement with The Order of Railroad Telegraphers.

Shippers, owners and consignees frequently call Pacific Fruit Express to divert cars in transit. For that purpose the company employs "diversion clerks" to handle the necessary work. Depending upon the circumstances in each case, these clerks communicate the requested diversion by regular mail, air mail, mailgram, airgram, railroad line wire, Western Union, telephone or messenger service.

Carrier maintains around-the-clock telegrapher positions at Bakersfield, California. This is found in the Agreement and in the record.

A diversion message either changes the destination of the car or changes the consignee. A copy of the message is kept at the point of origin, a record is made by the receiving agent, and the confirmation or the accomplishment of this information is sent to the party originally filing the diversion.

Such diversion messages are communications of record since they involve the movement of trains. As such, the transmitting of such messages is work which belongs to employees covered in the Telegraphers' Agreement. This having been established, we need to determine if the employees of Pacific Fruit Express are Agents of this Carrier or if such messages had in the past been sent by Carrier's telegraphers at Bakersfield.

Carrier contends that the messages in question were handled by employees of Pacific Fruit Express and not by Carrier's employees. In a letter dated April 11, 1960, Carrier's Superintendent wrote to Petitioner's General Chairman, in part, as follows:

"As stated to you in conference, no provision of the current Telegraphers' Agreement reserves or allocates work here involved to employees represented thereby. On the contrary, the handling of Pacific Fruit Express business does not in any manner involve employees represented by your Organization except to the extent that such business is turned over to them for handling."

Petitioner's General Chairman replied under date of April 18, 1960, in part, as follows:

"We cannot agree that the Pacific Fruit Express Company has the right to have its employees transmit communications of record such as those quoted in my letter of February 18, 1960, since it has been the past practice over many years for the telegraphers and wire chiefs of the Southern Pacific Company to handle communication work for the Pacific Fruit Express Company."

Pacific Fruit Express is a distinct entity. It is a separate company with its own officers and employees. The mere fact that it is jointly owned by this Carrier and the Union Pacific does not alter its identity as a distinct and separate company. It is not per se the agent of the Carrier, nor is there any probative evidence in the record to establish such an agency relationship.

The Pacific Fruit Express is not a new company. It was in existence for many years prior to the dates when the instant claims arose. The record shows that Petitioner was aware of the relationship between the Carrier and the Pacific Fruit Express as far back as 1939.

None of the messages were transmitted by employees of the Carrier. In the absence of any showing of agency, the only remaining issue is that of alleged past practice as set out in Petitioner's letter of April 18, 1960. The burden of proving the existence of such past practice is upon Petitioner. It has failed to meet such proof. There is no probative evidence in the record to show that by history, custom and tradition all such messages were sent exclusively by telegraphers employed by the Carrier and none by employees of the Pacific Fruit Express. On the contrary, the record shows, without contradiction, that employees of the Pacific Fruit Express have sent diversion messages for many years prior to the dates of the incidents which gave rise to the existing claims.

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 Carrier did not violate the Agreement.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of June 1964.

STATEMENT OF CARRIER MEMBERS, AWARD 12617, DOCKET TE-12584 (Referee Dolnick)

This claim is invalid for two obvious reasons. In the first place, the involved telephoning concerned the business and affairs of Pacific Fruit Express, was performed by the employees of that company and was therefore not work which Carrier could have offered to any of its employees; hence under our consistent decisions Carrier's employees had no right thereto, irrespective of past practices—Awards 12303-12179 (Kane), 11398 (Moore), 11002 (Boyd), 10932 (Miller), 10922 (Hall), 9580 (Johnson).

The claim is invalid for the additional reason that this record contains no proof indicating that handling of diversion messages is work reserved exclusively to Telegraphers. There is no basis for the statement in the award that such diversion messages are "communications of record" and that the transmission thereof is work which belongs to Telegraphers. The correct rule was stated by Referee Dolnick in Award 11707, where the Board ruled:

"The issue here is whether telegraphers have the exclusive right to telephone information pertaining to reconsignments or diversions of freight traffic.

Like many other agreements between Labor Organizations and Carriers, the Scope Rule in the Agreement here involved does not describe the work or duties of the covered positions. Under these circumstances we need to ascertain the traditional, historical and customary past practice on the property.

* * * * *

There are several Awards of this Division involving the same parties, the same Agreement, the interpretation of the Scope Rule in that Agreement and similar issues. In Award 11343 (Miller) we denied the claim because:

- '1. The language of the Agreement does not (standing alone) dictate a sustaining Award.
2. The Organization failed to present sufficient proof of an established past practice on the property in regard to the issues involved herein.'

The same principles apply to this claim. Also see Awards 11331 (Coburn), 10237 (Carey), 8207 (McCoy) and 5256 (Boyd)."

G. L. Naylor
R. E. Black
R. A. DeRossett
W. F. Euker
W. M. Roberts