

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM:

1. Claim of the General Committee of the Order of Railroad Telegraphers on the St. Louis-San Francisco Railway that the Carrier violated the Telegraphers' Agreement when:

(a) At 10:16 A.M., September 11, 1958, it permitted or required Conductor Titus of Train No. 140, at Prescott, Kansas, to receive by telephone the following message from the train dispatcher at Fort Scott, Kansas:

"Cut out work of unloading company ties and set car of ties out at Prescott. Get in clear there for No. 107."

(b) For such violation the Carrier shall now be required to compensate Agent R. F. Teubner, Prescott, the difference between the minimum telegraph rate of \$2.192 per hour for the entire month of September 1958, and the rate paid him as non-telegraph agent.

2. Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis-San Francisco Railway that the Carrier violated the Telegraphers' Agreement when:

(a) At 10:02 A.M., October 23, 1958, it permitted or required Conductor Edwards of Train No. 140, an employe not covered by the Agreement, to perform the work of a telegrapher at Prescott, Kansas, where a non-telegraph agent is employed.

(b) As a result of such violations, Carrier shall now compensate Mr. R. F. Teubner, non-telegraph agent at Prescott, Kansas during the month of October 1958, the difference between the minimum telegraph rate of \$2.192 per hour for the month of October 1958, and the compensation actually allowed him as non-telegraph agent.

3. Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis-San Francisco Railway that the Carrier violated the Telegraphers' Agreement when:

(a-1) At 11:05 A.M., and again at 11:07 A.M., October 8, 1958, it caused, required or permitted Roadmaster Marsh, an employe not covered by the Agreement, to perform the work of a telegrapher at Boicourt, Kansas.

(a-2) At 11:11 A.M., October 8, 1958, it caused, required or permitted Conductor Napper, an employe not covered by the Agreement, to perform the work of a telegrapher at Boicourt, Kansas.

(a-3) Again, at 11:27 A.M., at the same place and on the same date, Carrier further violated the effective Agreement when it caused, required or permitted Road Foreman Doane, an employe not covered by the Agreement, to perform the work of a telegrapher.

(b) As a result of such violations, Carrier shall not compensate Mr. R. G. Billiard, the senior idle extra telegrapher on the Division on October 8, 1958, an amount equivalent to one day's pay at the minimum telegraph rate, eight hours at \$2.192 per hour, a total of \$17.54.

EMPLOYEES' STATEMENT OF FACTS: The Agreement currently effective between the parties contains the following scope rule:

"ARTICLE I

(1) Employees, except train dispatchers, who are required by direction of officer in charge to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines, (defined as telegraphers, telephone operators, block operators, operators of mechanical telegraph machines, agent-telegraphers, agent telephoners), agents, assistant agents, ticket agents, assistant ticket agents and car distributors, listed in appended wage scale, also tower and train directors, towermen, levermen, staffmen, are covered by this Agreement and are hereinafter collectively referred to as employees, and when so referred to all are included."

Article I also provides that:

"(2) Station employes at closed offices shall not be required to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines, but if they are used to perform any of the above service, the pay at that office for the month in which such service is rendered shall be at the minimum hourly rate for telegraphers as set forth in Article XII of this Schedule. This paragraph applies where either railroad or commercial telephone is used by station or other employes, except in cases of emergency, defined as: train accidents, fires, washouts, personal injuries, main line obstructions or engine failures.

NOTE: Interpretation dated July 25, 1942 appended."

The Organization is, no doubt, relying heavily upon sustaining Award 8183 (Smith) in support of the instant claim. The facts there were dissimilar to the facts in the instant dispute. The facts surrounding the dispute which resulted in Award 8183 concerned the receipt of information regarding train movements at points between stations by operators of motor cars, through the use of either emergency or portable telephones. The operator of the motor cars contacted the train dispatcher who in turn requested a telegrapher on duty at some intermediate station to furnish the requested "line-ups". There it was said:

"The record indicates that such information is made of record by the dispatcher and/or telegrapher issuing same as well as the recipient thereof."

Attached hereto as Carrier's Exhibits A-1 through A-6 are signed statements from those whom the Organization has involved in this dispute that no record was made of the disputed conversations.

The term—"written messages"—as used in the Agreement, can mean only one thing and that is—transmitted intelligence must be reduced to writing so that the meaning thereof may be ascertained from the message itself. The word—"written" is a key word in the Agreement, and when examined in light of the facts of this dispute the claim of the Employees is completely nullified.

It is clearly evident that Paragraph (1) of the Agreement was not violated and, therefore, the Memorandum of Agreement of July 25, 1942 is inapplicable and the Board is requested to give it no further consideration.

The claim here presented should be denied or dismissed for the reasons herein stated and this Division is requested to so find.

OPINION OF BOARD: This claim involves several separate communications, placed into three different categories or claims. We will discuss each communication and claim separately for clarification.

Claim Number 1 involves an alleged telephone communication between the Conductor of train No. 140 at Prescott, Kansas and the train dispatcher at Fort Scott, Kansas. The communication is alleged to have been as follows:

"Cut out work of unloading company ties and set car of ties out at Prescott. Get in clear there for No. 107."

The Organization contends that such a communication violates the scope rule and the interpretation placed thereon by Agreement. Such rule and agreement reads as follows:

"(1) Employees, except train dispatchers, who are required by direction of officer in charge to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines, (defined as telegraphers, telephone operators, block operators, operators of mechanical telegraph machines, agent-telegraphers, agent telephoners), agents, assistant agents, ticket agents, assistant ticket agents and car distributors, listed in appended wage scale, also tower and train directors, tower-men, levermen, staffmen, are covered by this Agreement and are

hereinafter collectively referred to as employees, and when so referred to all are included."

Article I also provides that:

"(2) Station employees at closed offices shall not be required to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines, but if they are used to perform any of the above service, the pay at that office for the month in which such service is rendered shall be at the minimum hourly rate for telegraphers as set forth in Article XII of this Schedule. This paragraph applies where either railroad or commercial telephone is used by station or other employees, except in cases of emergency, defined as: train accidents, fires, washouts, personal injuries, main line obstructions or engine failures.

NOTE: Interpretation dated July 25, 1942 appended."

The following Memorandum of Agreement is likewise in effect:

"MEMORANDUM OF AGREEMENT

As to Application of
Paragraph 2 of Article I, also Article XIII,
Telegraphers' Schedule Agreement
Dated May 16, 1928, as Amended,
With Respect to Emergency Telephones.

* * * * *

1. The term 'emergency telephone' is construed for the purpose of this agreement to mean a telephone ordinarily kept under lock and key at fixed locations for use in emergencies, and commercial telephones when used in lieu of an emergency telephone.

2. The term 'emergency' is construed to mean train accidents, fires, washouts, floods, personal injuries, main line obstructions, engine failure, train equipment failures, broken rails and failures of block signals or other fixed signals, which could not have been anticipated by dispatcher when train was at previous telegraph office and which would result in serious delay to trains.

3. If emergency telephones are used contrary to provisions of Paragraphs 1 and/or 2 of Article I of Telegraphers' Schedule Agreement, except in case of emergency as defined in Paragraph two (2) of this Agreement, employees covered by Telegraphers' Schedule Agreement shall be paid as follows, provided claims are submitted within thirty (30) days of date of occurrence:

(a) At stations or locations between stations where there is no occupied position covered by Telegraphers' Schedule Agreement, one day's pay to senior idle extra telegrapher of that date.

(b) At stations where agent-telegrapher or telegraphers are employed and not on duty, a call as defined in Article II, Paragraph Seven, to agent-telegrapher or telegrapher whose hours of service converge nearest with the time violation occurred.

(c) At stations where no telegraph service is maintained but there is a non-telegraph agent, or there are non-telegraph towermen employed, non-telegraph agent shall receive telegrapher's rate applicable at such station for the month in which such violation occurs, or towermen whose hours of service converge nearest with the time violation occurs shall receive telegrapher's rate applicable at such tower for the month in which such violation occurs.

4. It is agreed following usage of emergency telephones shall not be considered a violation of this agreement or Telegraphers' Schedule Agreement.

(a) Installation of emergency telephones at any place in absolute permissive block territory or in centralized traffic control territory and their use by trainmen or enginemen to obtain verbal authority to pass automatic block or interlocking signals in a restrictive position.

(b) Use of emergency telephones by trainmen or enginemen at junction points to report arrival or departure or request permission to occupy main track.

Dated at St. Louis, Missouri, this 25th day of July, 1942."

It is the contention of the Organization that such a communication is a train order or train report or written message encompassed by the above quoted scope rule and that the handling by the non-telegrapher conductor in a non-emergency situation violates the agreement, thereby imposing upon the Carrier the obligation of the agreement dated July 25, 1942.

The Carrier points out that any communication between the conductor and dispatcher on the date in question was not on record and was not a written communication. It contends that the organization has offered no proof that the communication which they rely upon actually occurred in the form and content alleged. We agree with this contention. Although the Organization asserted that an individual overheard and recorded the "message", they offer no statement of such individual, nor other proof that such message was sent. The Carrier asserts that any communication between the parties in question was mere conversation, which was not recorded. In the absence of any proof by the organization as to the nature of the communication, we are unable to ascertain whether or not it is of the type of communication which might be classified as a train report, train order or a written message. We must therefore deny the claim.

Claim Number 2 involves a communication between Conductor Edwards on train No. 140 and the train dispatcher at Fort Scott, Kansas on October 23, 1958, as follows:

"Dispatcher: How much work you got north of Prescott?

Edwards: We got quite a bit of work and want main line at Pleasanton, got to work the house.

Dispatcher: Are you going to eat at Lacygne?

Edwards: Yes, we will eat at Lacygne.

Dispatcher: Can you back up to south end Prescott and head in Prescott for No. 107?

Edwards: Yes, we can do it.

Dispatcher: Then go ahead and do it; have got No. 107 lined up at Pleasanton."

In this case, the Carrier does not deny that the above communication transpired although it denies that it was a written message or that it is otherwise encompassed by the scope rule quoted earlier.

The Organization contends that such communication constitutes the handling of train orders within the intent and meaning of the scope rule and is work reserved exclusively to the telegraphers. We agree with this contention. The fact that the communication was not issued in its usual form does not alter the fact that it was a train order. We therefore hold that such communication by non-telegraphers in a non-emergency situation violates the agreement. In such case, paragraph 3 (c) of the Memorandum Agreement dated July 25, 1942 would appear to fix damages as claimed by the Organization in Claim Number 2. Such claim should be sustained.

Claim Number 3 involves alleged use of the emergency telephone at Boicourt, Kansas in non-emergency situations. The Organization contends that Roadmaster Marsh did communicate, via emergency phone, with the dispatcher, instructing the dispatcher with regard to two cars of chat and then again later requesting a train lineup. It further asserts Conductor Napper and Roadmaster Doane requested a train lineup on the same date. The Carrier denies that any communication of this nature occurred and that no record was made of such communication. A search of the record fails to show us that the Organization has met its burden of proving that the communications involved were of a nature encompassed in the scope rule. For this reason, claim number three (3) must be denied.

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 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 the Agreement has been violated.

AWARD

Claims 1 and 3 denied. Claim 2 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1964.

AWARD 12640, DOCKET TE-11476
CARRIER MEMBERS' DISSENT TO THAT PORTION
OF THE AWARD SUSTAINING CLAIM 2
(Referee West)

With reference to Claim 2, the award is gravely in error, both in its findings of fact and in its application of the rules to the purported facts found.

It is elementary that the employes have the burden of proving the facts which are essential to their claim; yet in reference to Claim 2 the Referee has assumed the facts to be exactly as alleged by the employes, even though the employes' allegations were stoutly denied by Carrier on the property and were not supported by any evidence.

The award finds, with reference to Claim 2, that the alleged conversation between the dispatcher and Conductor Edwards was precisely as represented by the employes, and from that finding it is concluded that this telephoning "constitutes the handling of train orders." In denying the claim on the property, Carrier stated that:

". . . The movement of Conductor Edwards' train within the CTC territory was governed by signals controlled by the train dispatcher and it was not necessary for either the train dispatcher or Conductor Edwards to make any record of the conversation which they had over the telephone. . ." (Emphasis ours.)

In the same letter Carrier refused to admit that the conversation had taken place by referring thereto as an "alleged conversation".

At a later point in handling, Carrier advised the Organization that the train dispatcher had been contacted concerning the matter, and the dispatcher had advised that he did not recall the circumstances in connection with such conversation with Conductor Edwards, and that no written record was made. The conductor also advised that no written record had been made. At the conclusion of handling on the property, in the final letter of Carrier's highest officer to the General Chairman, Carrier again emphasized the fact that the alleged telephone conversation did not affect in any way the operation of either of the trains involved, and challenged the employes to submit proof of their contrary contentions. Carrier said:

"'. . . The telephone conversation which the conductor on train 140 had with the train dispatcher did not in any manner affect the operation of either of the trains involved, and the burden of proving otherwise rests upon your Organization if it is your contention, as you have previously indicated, that the telephone conversation did affect the movement of either of these trains.'"

The employes did not meet the challenge to come forward with evidence. They have brought the case to us without a scintilla of evidence; yet the Referee has found that the disputed allegations of the employes are true and that the alleged telephoning constituted a train order. On the point that the Claimant must prove all essential elements of his claim with competent evidence, and mere allegations and argument of his representatives are not evidence, see Awards 5040 (Carter), 6828 (Messmore), 9261 (Hornbeck), 10007 (McMahon), 10390 (Dugan), 11149 (Rose), 11236 (Sheridan), 11865 (Seff).

In this case, the employes were not even positive as to the alleged facts. Their own letters on the property indicate that they were merely guessing and supposing. In the General Chairman's letter of March 11 he states that "Train 140 had apparently passed the point where the dispatcher could use his remote control signals to put him in the siding at Prescott and advance train 107 to that point." There is no proof in the record that train 140 had actually passed the point where the dispatcher could use his remote control signal to put it in the siding, and in spite of Carrier's challenge to the employes to come forward with proof, they have submitted nothing. There was a clear and obvious failure of proof as to the essential facts upon which the employes based their claim, and the claim should have been denied on that basis.

The award is also gravely in error in holding that the alleged conversation between the dispatcher and the conductor constituted "handling of train orders." The employes frankly admit that this claim is "not based on the issuance of a formal train order as prescribed by the Transportation Department book of rules." There is nothing in evidence in this record to warrant the inference that the term "train order" is used by the parties in their Scope Rule in any sense that is different from the meaning attached to it in Carrier's operating rules. The employes submit no evidence to support their contention that this telephone conversation, which certainly does not resemble anything that has been defined as a train order on Carrier's property, should be regarded as "issuing verbal train orders", and that this constitutes "handling of train orders", as the latter term is used in the Scope Rule.

The employes repeatedly tell us that:

"'. . . The sum and substance of our entire argument on this claim is incorporated in one sentence found in the second paragraph of our original submission. I quote, "The carrier is here attempting to supplement its CTC operation by issuing verbal train orders to members of the train crew, directing train movements that it cannot accomplish through its remote control signal system" . . .'"

The same argument was advanced by the petitioning Organization in Award 11720 (Hall) and was there rejected by the Board. Award 11720, and the authorities cited therein, all recognize that a telephone conversation between the dispatcher and the conductor as a means of facilitating the work in CTC territory does not infringe upon the rights of Telegraphers. In view of that ruling, there is certainly no basis for an arbitrary ruling in this case to the effect that the alleged telephone conversation in Claim 2 constituted the handling of train orders.

Even if the employes had proved that the alleged telephone conversation actually took place, the claim would nevertheless have been invalid because that alleged conversation does not involve the handling of a train order.

We dissent.

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