

Award No. 12935
Docket No. TE-10586

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Railway that:

1. Carrier violated Rule 1 and Rule 31 of the Telegraphers' Agreement when on Saturday, May 4, 1957, it caused, required or permitted Conductor E. S. Brown, an employe not covered by the Telegraphers' Agreement, to transmit communications of record by telephone and/or to handle (receive, record and deliver) train order No. 22 at Gainesville, Georgia.

2. Carrier shall compensate Clerk Telegrapher W. J. Gibby, regular assigned employe, first trick clerk-telegrapher position, Gainesville, Georgia, assigned hours from 5:30 A.M. to 1:30 P.M., Mondays through Fridays, rest days Saturday and Sunday, one day's pay, eight hours at pro rata rate of pay of his assigned position (\$2.115 per hour) for the herein described incident; and, further, that for each subsequent similar incident occurring on this Seniority District, Charlotte Division, the senior employe idle and otherwise entitled to the work on dates of such occurrence, shall be paid the equivalent of one day's pay at the prevailing rate of pay for the Division.

EMPLOYEES' STATEMENT OF FACTS: At Gainesville, Georgia, W. J. Gibby is the regular assigned first shift clerk-telegrapher. His assigned hours are 5:30 A.M. to 1:30 P.M., Monday through Sunday, with Saturday and Sunday as rest days.

On Saturday, May 4, 1957, about 6:10 A.M., E. S. Brown, the Conductor of Extra 2120 North, which is called the Athens Branch Local— Gainesville Switcher, used a telephone in a booth at or near the station. The conductor was using the dispatcher's phone and requested from the dispatcher the use of main line track No. 2. The trick train dispatcher informed him it would be necessary to have a call on this crew and train before he could issue any orders. Conductor Brown then replied as follows:

"Conductor E. S. Brown, Engineer L. W. Farmer, Engine 2120, on duty at 6:30 A.M. for the Athens branch local."

conditions of employment for such persons — something which the Board does not have authority to grant.

Claim being barred should be dismissed by the Board for want of jurisdiction. If, however, despite this fact, the Board assumes jurisdiction, it cannot do other than make a denial award.

OPINION OF BOARD: The incident from which this claim arises and certain surrounding circumstances are not in dispute. The occurrence on which the claim is based took place on Saturday, May 4th, 1957. Carrier does not refute Petitioner's statement that for some length of time before that date, the Carrier had called clerk-telegrapher at Gainesville on Saturday mornings to handle the reporting and clearing of orders and receiving of messages for local freight and the performance of such other clerical duties about the office as were assigned to him. On May 4th, 1957 and thereafter, this practice was discontinued.

On the same day, at about 6:10 A.M., Conductor E. S. Brown, in charge of Train Extra 2120 North, used a wayside telephone in Centralized Traffic Control (CTC) territory to request permission from the train dispatcher to use Track No. 2 between Red Lane and Gainesville until 7:15 A.M. The train dispatcher gave the conductor permission to use the Track, as requested, and made a notation in his record book accordingly.

Claim is made for compensation of one day's pay, eight hours, at pro rata pay of his assigned position for Clerk Telegrapher Gibby who is the regular assigned employee first trick clerk-telegrapher position, Gainesville, Georgia, assigned hours from 5:30 A.M. to 1:30 P.M., Mondays through Fridays.

Petitioner puts forward the following grounds in support of its claim:

- (1) Reservation of this work to the Claimant under the Scope Rule;
- (2) The express assurance of this work which is given specifically in Rule 31 of the Agreement and the accompanying letter of October 19th, 1929 which appears in the Agreement as further definition of Rule 31. In respect to application of Rule 31 and the letter of October 19, 1929, Petitioner contends that the message in issue was a train order within the definition of the Rule and the accompanying letter.

Petitioner has not successfully supported its claim on either of the two grounds urged. The controlling and determinative factor leading to this conclusion is the question of whether it can be factually and objectively stated that the telephone message was sent from a location "where an operator is employed and is available or can be promptly located . . ." This is the situation under which Rule 31 preserves the handling of train orders for telegrapher employees. It is also the central consideration in applying the Scope Rule, inasmuch as there has been no refutation by Petitioner of Carrier's claim that messages of this kind (whether or not they may properly be regarded as train orders) have been regularly and customarily handled by other than telegraphers at wayside train booths where telegraphers are not employed.

In respect to Claimant's rights under the Scope Rule, it is well established now that under a general rule of this type, there must be a showing of historic allocation of such work to the Claimants as their exclusive functional domain. In the situation here presented, there is a surface appearance of exclusivity of assignment to the telegrapher class by the dramatic fact that the Claimant himself had worked on Saturdays to the very day of this incident, handling messages of the type involved. But it is not contested that the telephone booth at which the conductor received the message was not in fact at the location where the Claimant had been employed on Saturdays and continued to be employed on Mondays through Fridays. The said booth was one of three located respectively six-tenths of a mile from the station milepost, one and one-tenths of a mile from the station milepost, and two and eight-tenths miles from the station milepost. It has not been established by the Petitioner that even if Claimant Gibby had been on duty, he would have handled this call or would have had the right to so do. Furthermore, as pointed out above, Petitioner did not refute Carrier's statement that such calls (at posts removed from the actual telegraph station) have been handled daily all over the system by other than telegraphers.

We note that the Carrier sometimes refers to the location of the way-side telephone booth as "at Gainesville", but we do not believe that we should seize on this casual allusion as having any more significance than a convenient abbreviation for giving the approximate locale of the telephone booth. It should be noted that Petitioner itself in its ex parte submission to this Board states:

" . . . On the Saturday in question the Carrier did not call Mr. Gibby to perform the work but had the work performed at a telephone booth some distance from the station. . . ."

It is thus apparently conceded by the Petitioner that the work was not done at the station where the telegrapher's post was located.

Under these circumstances, we not only find absent a proof of customary and traditional exclusivity necessary to establish a violation of the general Scope Rule, but also the absence of such conditions as would show a failure to adhere to Rule No. 31 of the Agreement. Such circumstances as those present here were recently dealt with by us in 22 decisions involving the same parties, the same Agreement, and similar contentions. (Awards 12150-12171.) We held in all of these claims that the copying of train orders by conductors and others not covered by the Telegraphers' Agreement at locations where telegraphers were not employed, was not in violation of the agreement. Award No. 12168 covered a situation very close to the facts given here. The Board stated (in the controlling Award No. 12150):

"The record reveals that the custom and practice of having train orders copied by other than telegraphers at telephone booths where telegraphers were not stationed was in vogue for a great many years prior to the effective date of the Telegraphers' Agreement, and continued to the date of this claim. In fact, the letter of October 19, 1929, which is referred to by a note appended, to Rule 31, the Train Order Rule, incorporated in the current Agreement confirms this."

On the simple grounds that there was no telegraph or telephone office where an operator is employed at the location at which this message was handled, we reject the Petitioner's claim of a violation of Rule 31. It is

not necessary for us to rule on whether this message was, in fact, a train order, because assuming it was, it was no violation to have handled it through a train conductor, under these circumstances.

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 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 30th day of September 1964.