

Award No. 12944

Docket No. TE-14043

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Erie-Lackawanna Railroad (Erie District), that:

1. Carrier violated the Telegraphers' Agreement at Addison, N. Y. when on April 5, 1961, it caused, required or permitted Foreman Murray to handle (copy, receive and deliver) a track car line-up of trains.
2. Carrier shall compensate regular assigned Agent-Operator for a day's pay (8 hours) at the pro rata rate of his position (\$2.506) per hour, in addition to his regular pay, beginning with April 5, 1961, and for each and every day that such violation continues.
3. Carrier shall permit a joint check of records to ascertain if there are other days and dates of said violation and the amount of compensation due Mr. Horey.

EMPLOYEES' STATEMENT OF FACTS: Mr. J. A. Horey (Claimant) is the occupant of the Agent-Operator position in Addison, New York. While he was on duty on April 5, 1961, during his regularly assigned work hours (8:15 A.M. to 5:15 P.M.), a track foreman (Mr. Murray) communicated with the train dispatcher on the latter's telephone circuit and requested and received a line-up of trains. The line-up message handled by Foreman Murray is shown in the General Chairman's claim letter dated May 21, 1961; copy of which is attached hereto as ORT Exhibit No. 1.

A similar situation occurred on May 8, 1961, except that a signal maintainer (Mr. Evans) was involved in the communication service in this instance. The line-up of trains and the message received by Mr. Evans is also shown in the General Chairman's letter just referred to.

The claim requested payment of a day's pay (8 hours) for Agent-Operator Horey for each day that outsiders were permitted or required to perform work

As has been shown, the enunciated principles set forth by the Board in Award 4791, 5564 (Erie), 6788, 7970 and 7153 meet the facts and circumstances in the instant dispute head on and, thus, dictate a similar denial decision here.

Still further, Carrier has before shown that Petitioner abandoned two like claims on the property. This in Carrier's judgment clearly expresses the fact that Petitioner actually recognizes that the instant dispute is totally without authoritative foundation.

Finally, even though the monetary claim must necessarily fail because Petitioner cannot show that operators have exclusive right to this work, Carrier has shown that even if operators had exclusive right to this work, which they do not, there is no provision for any such penalty as here asked for by Petitioner. Moreover, the claimant lost nothing—he was on duty and under pay at time the Foreman handled the line up direct with the dispatcher. A denial decision is in order on this count alone.

OPINION OF BOARD: The facts in this case are similar to those in Award No. 12942. Both involve copying a line-up by an employe not subject to the ORT Agreement. Carrier offered to accept the Board's Award in that case as conclusive in this but the offer was not accepted. There are, however, significant differences in the two cases.

In this claim, unlike the other, the alleged violation of the Agreement occurred while an operator was available and on duty. There were other differences which will be pointed out below.

In Award No. 12942 we said, in effect, that since all communications of record including line-ups were first exclusively handled by telegraphers, the burden is upon the Carrier to show that this state of facts had been changed. We do not think Carrier met this obligation.

On the other hand, the Organization alleged that Carrier had issued instructions that "where it was possible to secure 'Track Car Line-Ups' through an Operator, those employes desiring same were to obtain such line-ups in that manner."

Carrier did not deny this but said it did not concede that operators were the only employes who are permitted to obtain motor car line-ups. This amounted to a concession as to the practice while reserving the right. Exclusivity, we said, will be determined by the practice. The reservation of rights does not create rights. One cannot reserve rights that one does not possess. The reservation of rights, moreover, is subjective and unilateral. It was not agreed to by the employes and is of the same stripe as the rights that the Organization claims arise out of the Scope Rule. Both are merely interpretations of language and do not affect the practice, which is objective and bilateral. Both sides have seen and have participated in the way it was handled on this property. Practice is determined by facts. Interpretations by arguments.

Another point of difference is that affidavits submitted too late to be considered in the earlier case were offered by the Carrier in this case as proof of the practice. Again Carrier did not submit such proof on the property as required by Board's Circular No. 1 but submitted them for the first time in its Ex parte Submission. While this was an improvement in point of time in the Board's procedure, the ex parte submission coming before the reply, it is nevertheless not in compliance with Circular No. 1 which requires

that it be submitted on the property. Circular No. 1 is wise because it encourages full disclosure on the property so that all the facts can be known and thereby facilitate the adjustment of disputes. If we accepted such evidence, we would encourage the withholding of such vital information which would be contrary to the spirit of the act.

We conclude that Carrier violated the Agreement. We do not, however, agree that Claimant is entitled to a days pay, or that this was a continuing violation as stated in Claim No. 2. While it is true as argued by Carrier, that Claimant suffered no damages, the failure to make a monetary award would reduce a right which we have sustained to a nullity, because the Carrier could continue to violate the Agreement with impunity. We shall, therefore, award Claimant a call.

There is no basis for Claim No. 3.

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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October, 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12944

DOCKET TE-14043

Our dissent to Award 12942 applies with equal validity to the instant award, based as it is, in part, on Award 12942.

/s/ C. H. Manoogian
/s/ R. A. DeRossett
/s/ W. F. Euker
/s/ G. L. Naylor
/s/ W. M. Roberts