Award No. 13334
Docket No. TE-12214

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, 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 Railroad, that:

CLAIM No. 1

1. The Carrier violates the parties' agreement at 'FA' (Erie Yard Office) Elmira, N. Y., when commencing September 1, 1959, and continuing thereafter, it requires or permits employes not covered by the Telegraphers' Agreement to perform telephone communication work formerly performed by Telegraph-operator-levermen in 'FS' Tower, Elmira, N. Y.

2. The Carrier shall, because of the violation set out in Item 1 above, compensate H. L. Wilson, R. R. Elliott, and J. E. Murphy, regular occupants of the first, second, and third shift Telegraph-operator-levermen positions in 'FS' Tower, in the order named and J. F. Illardi, regular occupant of Rest Day Relief position assigned 'FS' Tower, Elmira, N. Y., a day's pay (8 hours) at the applicable rate of the position occupied, for such days, for each eight (8) hour shift around-the-clock that the violations continue, pursuant to the provisions of Article V, paragraphs 1, 3 and 4 of the August 21, 1954 Agreement, in addition to any pay received by the claimants from the Carrier for services performed on such days.

CLAIM No. 2

1. The Carrier violates the parties' agreement at 'FA' (Erie Yard Office) Elmira, New York, when commencing September 1, 1959, and continuing thereafter, it requires or permits employes not covered by the Telegraphers' agreement to perform radio-telephone communication work formerly performed by Telegraph-operator-levermen in 'HO' (Horseheads) Tower, Horseheads, N. Y.

2. The Carrier shall, because of the violation set out in Item 1 above, compensate F. J. Jackson, N. L. Woodmansee, E. D. Kellogg regular occupants of the first, second, and third shift Telegraph-

operator-levermen positions in 'HO' Tower, in the order named, R. E. Mathews and D. J. Welch, regular occupants of Rest Day Relief positions assigned 'HO' Tower, a day's pay (8 hours) at the applicable rate of the position occupied on such days for each eight (8) hour shift around-the-clock that the violations continue, pursuant to the provisions of Article V, paragraphs 1, 3 and 4 of the August 21, 1954 Agreement, in addition to any pay received by the claimants from the Carrier for services performed on such days.

EMPLOYES' STATEMENT OF FACTS:

GENERAL

There is in evidence an agreement by and between the parties to this dispute, effective March 1, 1957, and as amended.

At page 43 of said agreement is listed the positions existing at the locations involved in this dispute. They are: "FS" Elmira Tower and "HO" Horseheads Tower on the effective date of said agreement. The listings read:

SUSQUEHANNA DIVISION

Location	Office	Position	No. Positions	Rate
Elmira	"RA"	OC	2	$2.170
Elmira Tower	"FS"	OL	3	2.146
Horseheads Tower	"HO"	OL	3	2.146

Elmira, New York, is located as indicated above on the Susquehanna Division main line of the Erie 17 miles west of Waverly, New York, and 18 miles east of Corning (Gibson), New York.

Pursuant to the terms of a coordination agreement between the Delaware, Lackawanna and Western Railroad and the Erie Railroad (ICC Finance Docket No. 19989) the Lackawanna-Erie acquired trackage rights as hereinafter set forth:

"1. Acquisition of trackage rights (a) by the Delaware, Lackawanna & Western Railroad Company over the line of railroad and certain connecting tracks of the Erie Railroad Company between Binghampton and Gibson, New York; and (b) by the latter over lines of railroad and connecting tracks of the former at or near Binghamton, Vestal, and Nichols, New York, and South Waverly, Pennsylvania, conditions prescribed.

2. Certificate issued (a) authorizing construction jointly by the Delaware, Lackawanna & Western Railroad Company and the Erie Railroad Company of tracks connecting lines of the applicants at or near Binghamton, Big Flats, and Gibson, New York, and (b) permitting abandonment by the former of certain portions of its lines of railroad between Vestal and Nichols, between South Waverly (Pa.) and Gibson, and at Binghamton; all in Broome, Tioga, Chenung, and Steuben Counties, New York, and Bradford County, Pa. conditions prescribed.

* * * * *."

IV. Conclusion.

Carrier has heretofore shown that the rules agreement does not support Petitioner's claims to exclusive right to this work. Carrier has also heretofore shown that Petitioner has asked for but did not receive a rule that would give it the exclusive rights here claimed. It is therefore axiomatic that if this Board were to issue a favorable decision in this dispute it would be writing a new rule in the agreement and granting unto Petitioner an exclusive right it has never heretofore enjoyed. Carrier reiterates that this right the Board admittedly does not have. Awards 6341, 6625, 7153, 7861, 7953, 8538, 8564, and 8676.

With Petitioner unable to show exclusive right to this work by way of the rules agreement, Carrier has then shown consistent with principles enunciated by this Board, that Petitioner also cannot claim exclusive right to this work by way of past practice and custom on the property. The foregoing facts being as they are, Carrier reiterates that based upon authorities of this Board a denial decision is in order in both of these cases. Awards 6788, 7076, 7826, 7954, 7970, 8208 and 9343.

Carrier again submits that, notwithstanding the foregoing, the claim submitted by Petitioner for the operators at "FS" Tower has not been handled consistent with the provisions of the Railway Labor Act, as amended, or this Board's Circular No. 1. A dismissal decision if not a denial decision is therefore in order.

Still further, Carrier has shown where none of the claimants were damaged which in itself would negate any legitimate claim, of which there are none, that they might have. See Awards 1498, 1802, 4828, 6221, and 8049.

Based upon the foregoing facts and authorities cited, Carrier submits that these claims are totally without merit and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The merit of each of the two claims presented rests on interpretation and application of the Scope Rule of the Agreement which is general in nature. Therefore, the following established principle applies: Telegraphers have the burden of proving that the work involved has been performed, traditionally and customarily by employes covered by the Agreement.

The work involved is transmitting messages. We are concerned only with the substance of the messages; not with their form or medium of transmission.

CLAIM No. 1

In this claim Telegraphers allege that on and after September 1, 1959, Carrier permitted non-telegraphers at the "FA" Yard Office to telephone communications formerly transmitted by telegraphers in "FS" Tower. Telegraphers, in the handling of the dispute on the property, adduced no evidence as to the substance of the communications; this, notwithstanding that it informed Carrier that Telegraphers had such evidence in its possession.

Inasmuch as the record is lacking in evidence as to the substance of the communications, Telegraphers have failed to satisfy its burden of proof. We will dismiss Claim No. 1.

CLAIM No. 2

In 1949, Carrier installed radio-telephone equipment in "HO" Tower and in engines and cabooses. From that time until August 31, 1959, telegraphers at "HO" Tower used the equipment to communicate instructions to over the road trains.

In August 1959, Carrier installed radio-telephone equipment in "FA" Yard Office, in which no telegraphers were employed. Starting September 1, 1959, the employes in the "FA" Yard Office transmitted the instructions to the over the road trains, which during the preceding ten years had been performed by the telegraphers at "HO" Tower.

The foregoing facts are not controverted.

Carrier says it is not enough for Telegraphers to show that employes at "HO" Tower, covered by the Agreement, had transmitted the instructions for ten years — to satisfy the burden of proof, Telegraphers must prove that such instructions had been transmitted, exclusively, by telegraphers over the whole of Carrier's system. Carrier cites Award No. 12356 as supporting this contention.

Carrier asserts that such instructions, prior to September 1, 1959, had been transmitted at other locations on the system by employes not covered by the Telegraphers' Agreement. It failed to adduce evidence to support the assertion. The bare assertion has no probative value.

We said in Award No. 12356:

> "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 . . ."

The employes at a specific location of an extensive system cannot be held chargeable with knowledge of practice throughout the system. This is knowledge peculiarly within the ken of Carrier. When the Carrier avers that the local practice, of which the employes have knowledge, is not system wide, it is an affirmative defense and the burden of proof is Carrier's.

Here, Telegraphers have proven that telegraphers at "HO" Tower had, at that location on the system, exclusively performed the work involved for ten years. This made a **prima facie** case which shifted the burden of going forward with the evidence to Carrier and the burden to prove its alleged affirmative defense.

Carrier's affirmative defense fails for lack of proof. We will sustain paragraph 1 of Claim No. 2.

Since the Agreement contains no provision for liquidated damages or imposition of penalties; and, the record contains no evidence of damages, if any, suffered by Claimants because of the violation of the Agreement, we will award each Claimant nominal damages in the amount of ten dollars ($10). To any further extent paragraph 2 of Claim No. 2 is denied. **Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railrod Company.** – F2d – (C.A.10, decided November 19, 1964.)

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 Employes involved in this dispute are respectively Carrier and Employes 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 Claim No. 1 must be dismissed for lack of proof.

That Carrier violated the Agreement as alleged in paragraph 1 of Claim No. 2.

AWARD

1. Claim No. 1 is dismissed.

2. Paragraph 1 of Claim No. 2 is sustained.

3. Paragraph 2 of Claim No. 2 is denied except to the extent of nominal damages as prescribed in the Opinion, above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1965.

CARRIER MEMBERS' DISSENT TO AWARD No. 13334,
DOCKET No. TE-12214

In sustaining the claim in Award 13334, involving the interpretation of a general type Scope Rule, the majority states, in part:

> "The employes at a specific location of an extensive system cannot be held chargeable with knowledge of practice throughout the system. This is knowledge peculiarly within the ken of Carrier. When the Carrier avers that the local practice, of which the employes have knowledge, is not system wide, it is an affirmative defense and the burden of proof is Carrier's."

The dispute was submitted to this Board by the Order of Railroad Telegraphers, an industry-wide organization. It was handled on the property by the General Chairman of the Organization, who is a system-wide representative. The Agreement between the parties is system-wide in its scope and application. The only thing "local" concerning the dispute is that it originated at one location — a not unusual situation. The situation that existed in this dispute is not unlike many other disputes submitted to this Board.

In denying the claim in Award 11506, involving the interpretation of a general type Scope Rule, in a situation comparable to that which existed

in the dispute in Award 13334, the majority, with the same Referee participating, stated, in part:

> "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 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 employes holding positions with the job titles listed in the Scope Provision. Cf. Award No. 10954."

In denying the claim in Award 12356, involving the interpretation of a general type Scope Rule, in a situation similar to that prevailing in the disputes in Awards 13334 and 11506, the majority, with the same Referee participating, affirmed what was said in Award 11506, stating, in part:

> "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.
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> * * * * *
>
> "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. * * *"

In Awards 11506 and 12356 the majority properly found that since the work in question was not reserved to employes covered by the Agreement by specific reference thereto in the Scope Rule that the burden rested with Petitioner to prove by a preponderance of material and relevant evidence that the work on the system of the Carrier involved had been by history, tradition and custom exclusively performed by employes holding positions embraced within the Agreement. However, in Award 13334 the majority rejected the principles that had been properly applied in Awards 11506 and 12356, and many others, and in order to sustain the claim held that the Petitioner did not need to prove a system-wide practice, but that such burden rested with the Carrier.

It is axiomatic that refusal to follow well established principles that are not in palpable error can only lead to the creation of additional disputes rather than disposing of them. Award 13334 is palpably wrong and we therefore dissent.

G. C. White
D. S. Dugan
P. C. Carter
R. E. Black
T. F. Strunck

SPECIAL CONCURRING OPINION, AWARD 13334, DOCKET TE-12214

I am in substantial agreement with the manner in which the Referee dealt with each of the two claims. The clarity with which he states the obligation of the respondent when the petitioner sustains his burden of making out a prima facie case is commendable.

It is unfortunate that the General Chairman did not present the items of evidence which he felt supported his position in Claim No. 1. This defect in handling, understandable though it may be, might well serve as an object lesson to both sides in a dispute such as this to put all their cards on the table. I cannot quarrel with the dismissal of this part of the claim. Such dismissal has no bearing of course on the merit — or lack of merit — of any similar claim that might arise in the future.

But I am not in agreement with the last paragraph of the Opinion of Board. It seems to me that the Referee is assuming that this Board must proceed as a court when there is no authority for such an assumption in the Railway Labor Act. I am not a lawyer, but I have no doubt that the theory represented by the last paragraph of the Opinion would be valid if we were operating as a court of law.

We do not operate in such a capacity. Our duty, as clearly provided by the Railway Labor Act, is merely to interpret and apply the terms of disputant parties' agreements to the factual situations which they present.

I do not believe we are given any discretionary powers to go beyond the dispute presented to us. In this case there was no dispute concerning the measure of damages. The Carrier simply argued that no violation occurred, therefore, the claim lacked merit. When we found this argument to be unsupported and decided that the Employes had made out a case in one of their claims and not in the other, our duty was fulfilled. Or so it seems to me. When we went on to apply a court principle of "nominal damages" we went beyond the dispute and beyond our authority.

In a recent award of the First Division, Award 20455, there appears a profound commentary on the proper criteria to be applied to our functioning which I believe is in point and worthy of repetition here:

> "The courts have long established a fundamental rule to be observed in the application and interpretation of a labor agreement, namely, that such an agreement as a safeguard of industrial and social peace, should be construed broadly and liberally so as to accomplish its evident aim — disregarding, as far as feasible, unwarranted formalism and legal technicalities which would tend to deprive the agreement of its effectiveness. See Yazoo & M.V.R. Co. v. Webb, 64 F. 2d 902, 903 (CA-5, 1933); Rentschler v. Missouri Pacific Railroad Co., 253 N.W. 694 (Nebraska, 1934); Local Lodge No. 804, I.A.M. v. Stillpass Transit Co., 171 N.E. 2d 372, 374; 36 LA. 63, 64 (Court of App., Ohio, 1960). In construing the grievance procedure incorporated in a labor agreement, flexibility as well as a broad and liberal interpretation are essential in order fairly to meet a wide variety of situations in the light of the practices, customs, and realities of industrial life. See: United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597; 80 S. Ct. 1358,

1361 (1960). Undue formalism or a purely technical construction can defeat the basic aims of the grievance procedure and, thereby, deprive it of its validity."

It seems to me that in applying the technical formalism of a court doctrine of "nominal damages" when no such question was put to us we were violating the fundamental rule so ably stated in the above quotation.

Regardless of my views, when I found the Referee had proposed an award which would sustain the Employes' basic position but would reduce the reparation claimed I reviewed the court action referred to, that is, Brotherhood of Railroad Trainmen v. The Denver and Rio Grande Western Railroad Company, 338 F. 2d 407 (1964). The decision affirmed the judgment of the District Court that the Adjustment Board, in the case there under consideration, had correctly determined that the railroad had breached its bargaining agreement but had incorrectly determined the amount of the allowable award, the cause having been submitted to the District Court upon stipulated facts to the effect that the aggrieved employes had suffered no actual monetary loss or hardship from the contract violation. The Court said:

". . . Judgment in the District Court was entered in favor of the individual claimants for nominal damages of one dollar per day for each claim . . .".

Thus it became clear that the proposed award here meant that each individual claimant is to be awarded ten dollars per day for the period of violation. Since this amounted to a reduction of approximtely one-half in the reparation claimed but still represents a considerable outlay of cash and an acceptable deterrent to further violation of the agreement by the Carrier I considered it my duty to make a motion for adoption and to vote for the proposed award reserving, however, the right to file this special concurring opinion.

/s/ J. W. Whitehouse
Labor Member

CARRIER MEMBERS' REPLY TO LABOR MEMBER'S SPECIAL CONCURRING OPINION, AWARD 13334, DOCKET TE-12214

The attempt of the Labor Member to construe Award 13334 to mean that it provides for the payment of $10.00 per day to each individual claimant for the period of the violation is frivolous as well as ridiculous. The award unequivocally states:

"* * * we will award each Claimant nominal damages in the amount of ten dollars ($10). To any further extent paragraph 2 of Claim No. 2 is denied. * * *"

The award does not contain any language to the effect that the amount of $10.00 is to be paid to each individual claimant for each day in the period covered by the claim nor does it state for each day that the majority found the Agreement to have been violated during said period. It simply and concisely states that each individual claimant is awarded nominal damages in the amount of ten dollars ($10). It then buttresses such holding by the further statement that:

"To any further extent paragraph 2 of Claim No. 2 is denied."

While the award is entirely clear as to the amount of nominal damages awarded if any question remains one only need look at the definition of "Nominal damages" to ascertain that any award in the amount of $10.00 per day would be greatly in excess of "nominal damages". Black's Law Dictionary describes "nominal damages" as follows:

> "Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights or a breach of the defendant's duty, or in cases where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount."

An award of $10.00 per day to each individual claimant could not in any way be considered as a "trifling sum". As stated by the Labor Member in his Special Concurring Opinion such amount would represent approximately one-half of the reparation claimed and would involve a considerable outlay of cash. The reparation claimed was one day's pay for each day of violation and any award in the amount of approximately 50 per cent of the reparation claimed could not possibly be considered to be a "trifling sum".

G. C. White
D. S. Dugan
R. E. Black
P. C. Carter
T. F. Strunck