Award No. 13456
Docket No. TE-12280

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NEW YORK CENTRAL RAILROAD
(Northern District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central System, Michigan Central District, that:

CASE 1

1. Carrier violated the Agreement, when on the 3rd day of January, 1960, it caused, required and permitted Mr. LaPointe and Mr. Hartley on Extra 1682 West, train service employes, not covered by the Telegraphers' Agreement, to handle (receive, copy and deliver) train orders Nos. 113 and 114 at Willow Run, Michigan.

2. Carrier shall compensate Mr. V. T. Wilson, senior idle and available employe on January 3, 1960, for one day (8) eight hours at the straight time rate of $2.398 per hour. Total $19.184.

CASE 2

1. Carrier violated the Agreement, when on the 16th day of January, 1960, it caused, required and permitted Mr. L. H. Jolly, Assistant Trainmaster, an employe not covered by the Telegraphers' Agreement, to handle (receive, copy and deliver) train order No. 102 at Willow Run, Michigan.

2. Carrier shall compensate Mr. C. C. Ettinger, senior idle available employe on January 16, 1960, for one day (8) eight hours at straight time rate of $2.386 per hour. Total $19.088.

EMPLOYES' STATEMENT OF FACTS: The portion of the railroad involved in these two claims is called the Main Line between Jackson, Michigan and Detroit, Michigan. It is automatic block signal territory and under the control of train dispatchers located at Jackson, Michigan. The train dispatchers' territory extends from Porter, Indiana to Town Line, Detroit.

denials are supported by Awards of this Division. Therefore, it is the Carrier's position that for the reasons stated above the instant claims are without merit and this Board is respectfully requested to sustain this position and deny the instant claims.

(Exhibits not reproduced.)

OPINION OF BOARD: Both cases involved in this claim arise because employes not covered by the Telegraphers' Agreement handled train orders at Willow Run, Michigan, a location where no telegrapher is employed. The essential facts are not in dispute. On the property the dispute was primarily over whether, as claimed by the Telegraphers, Claimants were entitled to 8 hours on the basis that the Scope Rule was violated and the involved occurrences were not covered by the special provisions of Rule 23, or, as argued by the Carrier, that because an emergency gave rise to the events the Claimants should be paid 2 hours under the provisions of Rule 23. At the highest level on the property, Carrier took the position that no rule violation at all had taken place. There are no precisely precedent Awards between these parties on the Northern District.

Carrier suggests "a special rule applicable to a certain situation takes precedence over a rule having general application." While this may be so, Rule 23 in this case cannot by its explicit terms be considered applicable to the events in this case; it is a rule which by its explicit terms covers the handling of train orders at locations where operators are employed and available. In order for us to consider its special applicability to be in conflict with the general applicability of the Scope Rule, we would have to read into it specific permission for train orders to be handled by persons not covered by the Agreement at places where no operator is employed without any payment to an operator at all. This we might do if we find that the involved work is not to be reserved to the Telegraphers by the Agreement. Rule 23 is not in conflict with the Scope Rule and does not, as suggested by Carrier, take precedence over application of the Scope Rule in this case.

Carrier argues that the involved work is not reserved exclusively to the Telegraphers by the explicit terms of the Agreement, and that Telegraphers have failed to prove by evidence of tradition, custom or practice that the Agreement intends so to reserve the involved work. Carrier also argues that, in any case, the actions complained of were the result of an emergency, as defined in Rule 23, and justified Carrier's action even in the face of reservation of the work by the Agreement. The emergency exception to the normal rule is written as an exception to Rule 23 which involves restrictions on handling of train orders or locations where an operator is employed; the exception cannot be found to apply in cases such as this without some evidence of past application or other evidence that such was the intention of the parties. Evidence to prove this contention is not in this record. This case then turns on whether Telegraphers have present adequate evidence, not successfully rebutted or countered, that the Scope Rule was intended to reserve the involved work to the Telegraphers under circumstances such as exist in this case. Since we have found that Rule 23 does not apply in these claims, if they have succeeded in establishing that the work belonged to the Telegraphers, the Claimants should be paid under Rule 2.

On the property in their letter of February 4, 1960 to the Division Superintendent clarifying the basis of the claims (ORT Exhibit No. 4), Telegraphers wrote:

". . . it (Telegrapher's position in the case) is supported by this Carrier's practice of many years standing in paying such claims, a few of such paid claims are here quoted for your reference."

(parenthetical explanation inserted by Referee);

the letter then listed identification of six claims paid over a six month period about a year before the herein involved events. The record shows that Carrier recognized that this presentation in the letter was a presentation of evidence of practice purporting to prove the Agreement's intent.

Neither on the property nor in its Ex Parte Submission did the Carrier introduce any evidence to oppose evidence of practice recited above, nor did Carrier at any time until its Rebuttal even argue that said evidence was invalid for any reason, or that it was inadequate to prove that practice supported Telegrapher's position. In the Rebuttal Carrier merely asserts that the actual practice for many years had been counter to that set forth by Telegraphers on the property. Carrier's Rebuttal argues that its Manager, Labor Relations, first became aware of the six claims used by Telegraphers as examples of "a practice of many years standing" when he received General Chairman's letter dated March 15, 1960. But, although he had time and the case was still on the property, neither in his reply letter of March 23, 1960, nor in his final letter of denial, dated April 4, 1960, after a conference with the General Chairman regarding these claims, did the Manager make the arguments and assertions about the Telegrapher's evidence of practice which Carrier makes in the Rebuttal. We give the matter regarding practice presented in the Rebuttal no weight: it was not presented in time to permit Telegraphers to offer additional evidence or arguments further to elucidate the situation.

On the basis of the foregoing we find that Telegraphers did present on the property adequate uncontroverted evidence to support their assertion that in many years of practice the parties have applied the Scope Rule to reserve the involved work to the Telegraphers under circumstances such as existed in the instant cases.

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 the Agreement was violated.

AWARD

Claim allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of April 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13456, DOCKET TE-12280

The issue involved herein, i.e., given a general scope rule and a standard train order rule may other than telegraphers handle train orders at points where no member of that craft are employed, is neither novel nor a matter of first impression with this Board. While earlier awards differ to some degree, there now has been remarkable unanimity for many years among scores of referees as to the proper conclusions to be reached in these circumstances.

Succinctly stated, given factual situations perfectly analogous and contractual provisions identicaly worded to those present herein, this Board has held that the work involved is not reserved to employes covered by the Telegraphers' Agreement by specific reference in the Agreement. Whether the work has become reserved to employes covered by the Agreement to the exclusion of all others through practice, custom and tradition is a question of fact (**Award 11592** – Stark). The burden of proving that fact with competent supporting evidence is upon the Petitioner (**Awards 12462** – Coburn, **12106** – Seff, **11988** – Rinehart, **11854** – Dolnick, among numerous others). It is not enough for the Petitioner to merely show that employes covered by the Agreement have performed such work. Rather, the Petitioner must prove that employes have performed the work to the exclusion of all others (**Awards 12897, 11907** – Hall, **12787** – Ives, **12381** – O'Gallagher, **12340** – Stack, and **12109, 11864** – Seff, among others) throughout Carrier's property as the Agreement is system-wide in scope and application (**Awards 10615** – Sheridan, **11239, 11242** – Moore, **11331, 11605** – Coburn, **11526, 12257** – Dolnick, **11506, 11758, 12356** – Dorsey, **11880, 11963** – Christian, **11988** – Rinehart, **12381** – O'Gallagher, **12774** – Hamilton, **12787** – Ives, **12897** – Hall, **12932** – McGovern, **13048** – Wolf, **13094** – West). Failure to establish this proof is fatal to the Petitioner's case (**Awards 12356** – Dorsey, **11882, 11812** – Christian, **11592, 11510** – Stark, **11343** – Miller, and **11128** – Boyd). Needless to say, mere unsupported (or insufficiently supported) allegations do not constitute proof and are not sufficient to establish that the Agreement was violated (**Awards 12790** – Ives, **12421, 12415** – Coburn, **12405** – Dolnick, and **12298, 12953** – Wolf, among numerous others.)

In applying these tests the Majority finds "that Telegraphers did present on the property adequate uncontroverted evidence to support their assertion that in many years of practice the parties have applied the Scope Rule to reserve the involved work to the Telegraphers under the circumstances such as existed in the instant case." A careful reading of the record and the Majority award reveals that the so-called "adequate uncontroverted evidence" consists of the following from ORT Exhibit No. 4:

> ". . . it (Telegrapher's position in the case) is supported by this Carrier's practice of many years standing in paying such claims, a few of such paid claims are here quoted for your reference."
>
> (parenthetical explanation inserted by Referee);

and the "identification of six claims paid over a six month period about a year before the herein involved events."

We think the Majority has erred in concluding that this simple assertion and the scintilla of evidence advanced in suppport thereof adequately establish that Telegraphers have performed this work customarily and traditionally over the entire district to the total exclusion of all others.

It has been argued that the Carrier did not effectively rebut this evidence. Accepting, **arguendo,** this to be a fact, the further and more important point of law remains that the evidence submitted by the moving party (whether rebutted or not) must be sufficient to establish a **prima facie** case. The evidence herein is far from sufficient to meet this test and a finding to the contrary casts serious doubts on the validity of the conclusion reached by the Majority.

It may well be that the Carrier's failure to rebut certain contentions justified payment of this claim for technical reasons — it hardly permits a conclusion that an assertion supported by six claims paid over a six month period establishes "many years of practice."

For these reasons, among others, we dissent.

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