Award No. 13488

Docket No. TE-12621

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY

(Eastern District, Boston & Albany Division)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Boston and Albany Railroad (New York Central Co., Lessee), that:

1. The Carrier violated the terms of the Agreement between the parties hereto when commencing March 17, 1960, it suspended Extra Agent E. P. Mason from his position as agent at Jamesville, Massachusetts,*without a hearing because of his refusal to use his privately owned automobile in the service of the Carrier.

2. The Carrier shall, because of the violation set forth in Item 1 of this Statement of *Claim,* compensate E. P. Mason for a day's pay at the rate of the agent's position at Jamesville, Massachusetts, commencing March 17, 1960, for each day thereafter that the temporary vacancy at Jamesville continued, and

3. The Carrier shall, in addition to the foregoing, compensate E. P. Mason a day's pay at the rate *of* any position to which entitled under the seniority provisions of said Agreement that he would have performed service on, had not the Carrier unilaterally imposed, as a condition of employment, the ownership and use of a privately owned automobile in the service of the Carrier.

OPINION OF BOARD: Following are the undisputed facts in this controversy: The regular occupant of the Age&Telegrapher's position at Jamesvilie. Massachusetts. was F. T. O'Brien who was assigned a vacation period for the calendar year 1960 to commence March 3, 1960—his absence terminated May 1. 1960. it having been prolonged by illness. Prior to the 3rd of March, 1960, the Carrier had ordered that the agent at Jamesville handle the business at seven closed stations within a radius of 36 miles. The regular Agent, O'Brien, had made his own private automobile available for travel in the performance of his duties. On March 3, 1960, Extra Agent E. P. Mason, the Claimant herein, was assigned by the Carrier to work the position at Jamesville during the period the regular occupant of the agency position was

absent. Some time prior to March 16, 1960. complaint was made that Claimant was not carrying out part of his assignment. This was called to Claimant's attention by the Carrier, Claimant then notifying Carrier that he did not elect to use his own automobile to travel 36 miles that he must traverse to perform service at the closed agency stations but that his election not to use hi automobile was not to be construed to mean that he refused to perform service at such stations. Up to this point the parties are in accord as to the facts.

However, Claimant contends that Carrier's Trainmaster called him over the telephone and advised him that the management had made a new ruling that an employe in order to be assigned to an agency position must, as a condition of such employment, own and operate an automobile and be willing to use the said automobile in the service of the Carrier; that the Carrier did on March 17, 1960, suspend the Claimant from his assignment at Jamesville without a hearing and thereafter replaced him with a junior empioye who elected to use his own automobile.

Carrier's contention is, as follows:

> "The facts in this case are that this position requires the use of an automobile in which management requested Mr. Mason to use his *car* and he failed to do so. And, on account of this, Mr. Mason was relieved from his position and a relief man placed thereon.
>
> "I fail to see where there was any violation of your rules as he was placed first to go on any position that did not require the use of a car to perform the duties and he was not disciplined or taken out of service.
>
> "As we maintain that there was no other work that he could cover in this period without the use of *a* car, claims as submitted are declined."

Rather than consider this case strictly as a discipline case it would be much more beneficial to both parties to this controversy if it were to be considered on the merits.

It is the contention of the Claimant that under Section (d) of Rule 29 of the instant Agreement there is nothing requiring the employe to furnish his own private automobile in the pursuit of Carrier's business, that the most that can be inferred is that it gives an employe an election in determining the method of transportation to be-used; that,-in-fact, under the rule Carrier was required to furnish transportation and that because Claimant elected not to furnish his own automobile he was wrongfully removed from his assignment and withheld from service without a hearing and that he should be compensated for the damage he sustained in consequence thereof.

Carrier maintains that Claimant was advised that the position for which he was called necessitated the use of his automobile, as no other form of transportation was available, that Claimant was told when he declined to use his car the Carrier would have to call another extra man to cover the assignment which was done, the extra man called acquiescing by the use of his own car; the Carrier further contends that all that was requested of Claimant was compliance with the understanding and practice which had been in existence on this property for over 26 years.

"RULE 29—TRANSPORTATION.

"(e) When employes, other than relief and extra employes, are authorized to use their private *automobiles* on company business and do so they will be reimbursed for such use at the mileage rates provided for in Section (f-2) (b) below."

Section (f-3) (b) of Rule 29 provides as follows:

"(b) If rail transportation is not available, or if it is not reasonable, the relief employe may elect to use either available and reasonable bus or other transportation, or his private automobile; if the former is used carrier will reimburse the relief employe for the fares so paid; if the latter, the relief employe will be allowed actual necessary highway miles at the mileage rate of 7 cents a mile for the first 300 miles or less, 6 cents a mile for the next 300 miles or less *and 5* cents a mile for each mile over 600 in any calendar months."

We find the following statement commencing on page 9 of the submission in behalf of the Claimant (page 16 of the Record) :

"The facts further show that the Carrier has, during the past *several* years, unilaterally assigned to the agent-telephoner's position at Jamesville the residual work of the closed stations at North Oxford Mills; Rochdale; Spencer; Charlton; East Brookfield; Brookfield and North Brookfield, Massachusetts. In order to perform service at each of these stations, the occupant of the Jamesville position must use his privately owned automobile to travel the circuit between the stations."

Also from page 5 of the rebuttal submission in behalf of Claimant we note the following (page 67 of the Record) :

"We have not asserted that the use of automobiles is not essential to certain Carrier's services, nor is it denied that the practice has not been sanctioned bv the Organization: on the contrary. it was because of these considerations 'that the -Organization b&gained with the Carrier to place in effect a rule whereby and whereunder certain allowances would be paid if and when the employes used their own cars in Carrier's service, as many and perhaps most employes elected to do."

It appears from the Record that Claimant had functioned on many assignments with the use of his automobile prior to the period involved, his seniority dating from the year 1942. The rule requiring Carrier to furnish transportation to its employes was applicable only when such transportation was available.. That it was not available for the assignment at Jamesville has been admitted by the Organization, as hereinbefore quoted.

It has been urged that what we are concerned with in the immediate case in au individual contract with an employe which affects the rate of pay and working conditions of the Claimant and that the ruling in Order of Railroad Telegraphers vs Railway Express Agency, Inc. (321 U.S. 342) should apply. It is our opinion that the arrangement for compensation in return for the use of an employe's automobile in no way affects his rate of pay nor working conditions.

The Organization and the Carrier had, at least tacitly, mutually agreed on exchanging the use of employes' automobiles for the mileage allowance to the employes where train or bus service was not available. There is no denial by the Organization that such a practice had continued for 26 years as alleged by the Carrier. Other than the requirement that the Carrier shall provide rail transportation when available there is no provision in the instant Agreement for the Carrier to furnish an automobile to an employe—in lieu thereof there is a provision for the allowance of mileage to the employe. From a review of the Record and the Agreement in this case we must conclude that this claim is without merit.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DMSION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April, 1966.

DISSENT TO AWARD NO. 13433

DOCKET TE-12621

This award is contrary to law. In addition, incompetent evidence was considered and rules cited are not relevant to the issue. However, this dissent is directed, primarily, to the failure of the learned Referee to apply the provisions of the Railway Labor Act, as interpreted by the United States Supreme Court.

In accordance with provisions of Section 3, Railway Labor Act and Collective Bargaining Agreement (Article V, August 21, 1954 Agreement) the exclusive representative of the class or craft, acting by and through the General Chairman, on April 25, 1960, filed formal grievance with the officer of the Carrier, duly designated to receive same. The claim was as follows:

"Employe's Statement of Facts.

"On March 3rd, 1960, Extra Agent E. P. Mason was assigned by management to work the position of Agent at Jamesville, Mass. during

the period the regular occupant of the agency poeition was absent on vacation, March Srd, 1960 and until further notice.

"On March 16th, 1960. at 4:15 P.M. while claimant E. P. Mason was working at Jamesville, Mass., Trainmaster Mr. Stipek called him on the telephone and informed E. P. Mason that the Management was making a new rule that in order for *an* employe to be assigned *to* any agency position he must own an automobile and using a car was to be a qualification for holding and working an agent's position. Since Mr. Mason did not choose to use an automobile he was being disqualified *and* was removed from the position of Agent at Jamesville commencing the next day, March 17, 1960.

"During the past years, without any agreement with the Organiration, Management has prevailed upon the regular Agent Mr. T. F. O'Brien to *assume* responsibility of other closed agency stations, and in fact Management acting unilaterally has ordered that the Agent at Jamesville handle the business at seven dosed stations. First it was North Oxford Mills, then the Management added Rochdale and Spencer with Charlton, East Brookfield, Brookfield and North Brookfield placed under jurisdiction of Jamesville Agency by Management all within a radius of 36 miles requiring daily travel between certain points. It is apparent regular Agent Mr. O'Brien made his private automobile available, something Extra Agent Mr. Mason did not choose to do.

"Extra Agent Mason did not at anytime refuse to work the Jamesville Agency. He is a qualified agent having considerable experience *on* railroads in this type of work. Be was available and willing to travel between Jamesville station and any other location Management desired him to work. All Management had to do in this case was to arrange for his transportation and make it available.

"The Organization avers that Management erred *in* disqualifying claimant Mason for agency work *because* he did not choose to use his automobile for company service.

Employe's Position:

"The Organization Contends that there is no rule in the effective agreement between the parties that make it mandatory that any employe own an automobile or that he must supply transportation facilities *in* order to perform service for the carrier. Neither is there any rule extant that gives the carrier the right to disqualify an employe and bar him from the right to be assigned to any position because he does not choose to furnish transportation for company convenience and service.

"While the entire agreement is invoked the following rules 1, 3, 5, 9, 29, 36 are stressed at this time in tbis dispute.

Article 1 lists Agents covered by the Agreement.

Article 3 lists basic *day* of eight hours.

Article 6 guarantees employes one days' pay each 24 hours according to location occupied or to which entitled.

Article 9 covers extra employes and their rights to work assignments.

Article 29 covers transportation and the rule *requiring Manage*ment to furnish transportation to its employes.

Article 86 is the discipline *rule.* In the instant dispute the Organization avers that by disqualifying Agent Mason at Jamesville, March 17, 1960 and denying hi work Management disciplined him without a fair and impartial hearing as required by this rule.

Statement of Claim:

"Claim of the General Committee of The Order of Railroad Telegraphers that:

1. Carrier violated the provisions of the Telegraphers Agreement when commencing March 17, 1960 it refused and-denied Agent E. P. Mason the right to work the agency position to which assigned at Jamesville, Massachusetts and other positions on the Boston Division.

2. Carrier shall compensate Mr. Mason at the rate of the position of Agent at Jamesville for each day denied employment to which entitled at that station.

3. Claimant Mason shall be compensated for any other agency position to which entitled and is denied and refused work subsequent to March 17, 1960".

Under date of April 28, 1960, Carrier officer responded:

"Referring to your Item ORT-94 in which you submitted a claim for E. P. Mason who was assigned work at Jamesville.

"The facts in this case are that this position requires the use of an automobile in which management requested Mr. Mason to use his car and he failed to do so. And, on account of this, Mr. Mason was relieved from his position and a relief man placed thereon.

"I fail to see where there was any violation of your rules as he was placed first to go on any position that did not-require the use of a car to perform the duties and he was not disciplined or taken out of service.

"As we maintain that there was no other work that he could cover in this period without the use of a car, claims as submitted are declined."

The General Chairman then appealed to Carrier's highest officer, designated to handle such grievances, on April 30, 1960. The matter was discussed In conference on May 27, 1960, and on June 1, 1960, this officer wrote the General Chairman as follows:

"Yours of April 30th, file ORT-94, appealing decision of C. Oliveri, Asst. Transportation Supt., Labor Relations, in the claim involving Agent E. P. Mason in connection with use of personal automobile while assigned to the agency at Jamesville.

"This was discussed in conference May 27, 1960 and you were advised of the Carrier's position as previously taken in conference with Vice President, R. J. Woodman. Accordingly, the claim is declined."

Article V, August 21, 1954 Agreement, Section l(a) provides, in part:

"Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance".

It must be assumed. since the highest officer of Carrier gave no reasons in writing for disallowance of the c&m, that he adopted the reasons given by Mr. Oliveri. In a dispute involving the same Union and *same Carrier* and the same collective bargaining agreement (Award 12388--Referee Nathan Engelstein-March 31, 1964) it was held that Carrier limited, on appeal to this Board, to the "reasons" given for disallowing the claim. Prior awards of this Division, involving other parties, but the same Agreement, *sustained* this interpretation. See Awards 11939--Referee John H. Dorsey, 11986, 11987 -Referee Jim A. Rinehart.

Also, the Board has consistently held that provisions of the Railway Labor Act and Rules of Procedure (Circular No. 1) do not permit either party, on appeal to the Board, to present issues that have not been raised during the handling of the dispute on the property. Some recent awards holding that *new* issues may not be raised *for* the first time on appeal to the Board are:

AWARD 9578. Howard A. Johnson (1960)
AWARD 10075. Charles W. Webster (1961)
AWARD 19195. Thomas C. Begley (1961)
AWARD 10588. Levi M. Hall (1962)
AWARD 111'78. Roy R. Ray (1963)
AWARD 11027. Levi M. Hal1 (1963)
AWARD 11432. Martin I. Rose (1963)
AWARD 11460. William H. Coburn (1963)
AWARD 11465. Martin I. Rose (1963)
AWARD 11617. William H. Coburn (1963)
AWARD 11665. Nathan Engelstein (19633)
AWARD 11676. Jim A. Rinehart (1963)
AWARD 11731. Jim A. Rinehart (1963)
AWARD 11735. Arthur Stark (1963)
AWARD 11752. Levi M. Hall (1963)
AWARD 11848. Martin I. Rose (1963)
AWARD 11915. Nathan Engelstein (1963)
AWARD 12092. Benjamin H. Wolf (1964)
AWARD 12178. Michael J. Stack (1964)
AWARD 12326. Bernard J. Seff (1964)
AWARD 12354. Louis Yagoda (1964)
AWARD 12646. John J. McGovern (1964)
AWARD 12790. George S. Ives (1964)

AWARD 13060. Nathan Engelstein (1964)
AWARD 13181. Lee R. West (1964)
AWARD 13344. Ross Hutchins (1966)

It is clear that the Carrier did not raise any issue of practice or acquiescence: it did not contend that there was any rule in the collective bargain, which gave it the right to impose a condition of employment, on the position of Agent-telephoner at Jamesville, the furnishing an automobile or that the occupant of the position was required to be a licensed motor vehicle operator. It should be remembered that the General Chairman said, in the original claim,

> "The Organization contends that there is no rule in the effective agreement between the parties that make it mandatory that any employe own an automobile or that he must supply transportation facilities in order to perform service for the carrier. Neither is there any rule extant that gives the carrier the right to disqualify an employe and bar him from the right to be assigned to any position because he does not choose to furnish transportation for company convenience and service."

and, the reply was:

> "The facts in this case are that this position requires the use of an automobile in which management requested Mr. Mason to use his car and he failed to do so. And, on account of this, Mr. Mason was relieved from his position and a relief man placed thereon."

First, let us see when "this position" began to "require the use of an automobile". The answer is to be found in the admissions of the Carrier as shown on Page 2 of its Original Submission to the Board as follows:

> "Prior to March 4, 1960, Carrier employed at Spencer, Mass. an Agent-Telephoner (referred to hereinafter as Agent) to handle railroad freight business at Spencer, Carlton, Brookfield, East Brookfield and North Brookfield, Mass. Carrier petitioned the Massachusetts Department of Public Utilities for permission to discontinue the Agency at its Spencer station and place the carload business handled by Spencer Agency under the jurisdiction of the Agent-Telephoner, (referred to hereinafter as Agent) at its Jamesville Station.
>
> "Jamesville, Mass. freight station is located on the main line of the Carrier's Boston and Albany Division in the City of Worcester, 3½ miles west of the Worcester, Mass. Station and 16 miles east of Spencer, Mass.
>
> "Following consent given by the Massachusetts Department of Public Utilities Carrier arranged the closing of Spencer Agency effective with the close of business 4:30 P. M., Thursday, March 3, 1960.
>
> "The regularly assigned Agent at Jamesville, Mr. F. T. O'Brien, made a special request to be allowed to go on a three weeks vacation etarting March 3, 1960, the date of closing Spencer Agency. Carrier granted the request. Claimant E. P. Mason, an extra employe, was called to cover the vacancy effective March 3, 1960."

Since Mason began service as Agent-telegrapher at Jamesville on March 3, 1960, and the company did not "require" trips to Spencer, etc., until March 4, 1960, then it is obvious that this was a "new" working condition, just as was stated in the original claim of the General Chairman. The distinguished Referee erred then in the finding of fact that Mr. O'Brien, the regular incumbent, had performed this service using his own automobile. This new service; this new condition, was not imposed until after Mr. O'Brien had begun his vacation.

The collective bargaining Agreement between the parties to this dispute was executed and effective August 1, 1948, as amended in Supplement No. 1, executed July 9, 1949. At Page 17 of Supplement No. 1 it is provided:

"WAGE SCALE
Showing positions and rates
in effect
as of

September 1, 1949

STATIONS-BOSTON DISTRICT

Location	No. of Positions	Classification	Hourly Rate
"F" Office; Boston	1	Wire Chief-Teleg.-Printer Opr.	1.972
"F" Office;- Boston	3	Telegrapher-Clerk-Printer Opr.	1.686
		* * *	
Jamesville	1	Agent-Telegrapher	1.606
		* * * "	

In RULE 37. (DURATION OF AGREEMENT) it is provided:.

"(a) This agreement effective August 1, 1943, supersedes, the, agreement effective August 14, 1939, and all supplemental rules and interpretations placed thereon.,

(b) These rates of pay, rules and regulations shall continue in force and effect until they are changed as provided herein or under the provisions of the amended Railway Labor Act. Should either party to this agreement desire to revise or modify any or all of these rules, thirty days written advance notice containing the proposed changes . shall be given, and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

It was not contended that the parties had negotiated any rule changing the work location or the classification of the Jamesville position. It was not: contended that the Carrier had effected any change in the Agreement, as provided in Section 6 of the Railway Labor Act. It was not contended, in the handling on the property, that any rule in the collective bargain provided that an employe must have available and be licensed to operate a motor vehicle, as a condition of occupying the position at Jamesville or any other position. The Carrier merely contended that it had created a condition, which "required" the "use of an automobile". The prime question for decision, then was whether, as a matter of law, the Carrier was obligated to negotiate with the bargaining representative; and, if no agreement be reached, pursue the matter in accordance with the Railway Labor Act.

The dispute involved in this case did not involve the question as to whether the Carrier could unilaterally impose additional job duties on the Position invoked; it did not involve any question of an adjustment in rate of pay. It was not disputed that Claimant was fully qualified to perform all the duties of the position and evinced willingness to do so. He simply did not want to furnish to the company an automobile, suitable for making the daily trips of 35 miles. It was the company that was solely responsible for creating the condition, which it said "required" the use of an automobile. It was the company, that benefited from the abolishment of the position at Spencer and the imposition of the duties upon the incumbent of the position at Jamesville.

The Referee took cognizance of the decision of the Supreme Court in *THE* ORDER OF RAILROAD TELEGRAPHERS v. RAILWAY EXPRESS AGENCY (321 US 342). It is clear that binding effect of the decision was accepted, however, the scope of the Opinion was rejected by the statement:

> "It *is our opinion* that the *arrangement* for *compensation in re*turn for use of an employe's automobile in no way affects his rate of pay nor working conditions."

With due deference to the respected Referee, it must he stated that this statement is illogical, It is simply not relevant to the point. If we assume, for the purpose of discussion, that the reimbursement for the use of an automobile, was reasonable and in proper amount, *it begs* the issue. There is a vast difference in obtaining the use of the auto by voluntary means than by coercion. The Claimant did not choose to voluntarily furnish the automobile; the Carrier then use coercive methods to compel him to *do so.* This is a violation of the law and the Referee should have so held.

In ORT v. REA, the Court said:

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and that the carrier's efforts to modify its terms through individual *agreements are not* effective. The *award, therefore, was in accordance with the law."

The Referee cited certain provisions of Rule 29 as supporting his conclusion. First, it should be noted that the Carrier itself, in the handling of the claim on the property, did not think these rules had any relevance. This is correct they do not. Rule 29 was negotiated for the purpose of providing a methodology of enabling relief and extra employes to get from their headquarters station to the work location. These methods of travel were to be first free train passage; and, if such transportation was not available or not suitable, the use of bus or automobile.

The rules provide the amount of reimbursement to the employe, if free transportation is not available. These rules have nothing to do with the *furnishing* an automobile, for use during the regular assigned working hours. This fact was well known to the Carrier and explains the reason for not mentioning such rule during the progression of the dispute on the property. Paragraph (e) cited by the Referee, specifically excludes "relief and extra employes". Furthermore, it is merely to provide the quantum of reimbursement, "when an employe" uses his car and does not, even remotely, pertain to compulsion in the use.

(*Award 648) (Relative the 1926 provision, the Court said: "The (June 21, 1934) Act contains a similar provision".)

This award denies to the Union and the individual employe involved, the contractual rights granted in the collective bargaining agreement. It denies to them the statutory rights granted in the Railway Labor Act. It therefore follows, the Petitioner and the individual employe were denied due process by this Board.

J. M. Willemin, Labor Member