

Award No. 13731

Docket No. TE-13824

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly THE ORDER OF RAILROAD TELEGRAPHERS)**

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
— EASTERN LINES —**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka and Santa Fe Railway, that:

1. The Carrier violated the Agreement between the parties when on October 14, 1960, it required or permitted an employe at Newkirk, Oklahoma, not covered by said Agreement, to perform telegraphic communications work covered thereby; and

2. The Carrier shall now be required to pay W. L. Humphreys the equivalent of a "call" payment at the established rate of his regularly assigned position.

EMPLOYEES' STATEMENT OF FACTS: Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

The Carrier maintains an Agency station at Newkirk, Oklahoma, and employs an Agent-Telegrapher on first shift.

At 7:55 P. M., October 14, 1960, the Carrier required or permitted Clerk John Wyant, an employe not covered by the Telegraphers' Agreement, while at Newkirk, Oklahoma, to communicate with the PBX Operator at Arkansas City, Kansas, who is likewise not covered by the Telegraphers' Agreement, and telephone the following message addressed to the Trainmaster:

"Extra 165 West went through Newkirk without headlight burning, and was going about 60 MPH and it should be stopped."

The Employees filed claim, in behalf of an employe covered by the Telegraphers' Agreement, which was subsequently appealed to the highest officer designated by the Carrier to handle such disputes and was denied.

A denying award in the instant dispute is obviously in order on the basis of the conclusions expressed in Awards Nos. 5564 and 8538, which were incidentally reaffirmed by Awards Nos. 9005, 9006, 9454, 10516, 10683, 10776, 10817 and others.

In conclusion, the Carrier respectfully reasserts that the claim of the Employees in the instant dispute is entirely without merit or support under the governing Telegraphers' Agreement and should, for the reasons heretofore stated, be denied in its entirety.

OPINION OF BOARD: Petitioner contends that Carrier violated the Agreement on October 14, 1960, at Newkirk, Oklahoma, when it permitted a clerk, an employe not covered by the Telegraphers' Agreement to use the company telephone at Newkirk, to call the P.B.X. operator at Arkansas City, to report and transmit the following message:

"Extra 165 West went through Newkirk without headlights burning, and was going about 60 MPH and it should be stopped."

It is agreed by the parties that the basic issue in TE-13824 is the same as in TE-13820 and TE-12789.

The submissions and arguments advanced by the parties have been carefully evaluated due to the unusual fact situation presented in the instant dispute.

Certainly the matter that precipitated this dispute involved a condition that demanded immediate attention. It was a matter which directly controlled the movement of Extra 165 West and immediately affected the movement of other trains on the division. Conversely, the condition that existed was one of an emergency which involved the safety of employes, property, and the public.

When this unusual condition was detected by the clerk, the clerk or any other employe, would certainly be required to do whatever he could, under the immediate circumstances, to correct the unsafe condition.

We find that this was an unusual condition which necessitated the call for the safe operation of trains on the railroad, and find no flagrant violation of the Agreement to justify a "call" payment.

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 the Agreement was not violated.

It will also be obvious from the foregoing factual discussion that the petitioning Order of Railroad Telegraphers is attempting to obtain by means of an award of the Board in the instant dispute an exclusive right to the use of telephones which they have not only never enjoyed under the past and present Telegraphers' Agreements but were also unable to obtain in the negotiations leading up to the adoption of the current Telegraphers' Agreement and are again attempting to obtain by negotiation through the medium of the proposals they submitted in their requests of December 15 and 16, 1959 for a general revision of the current Telegraphers' Agreement, which have not been disposed of and are still pending.

It is needless to say that the Third Division has consistently recognized and held that it is without authority to either amend existing agreement rules or grant that which a petitioner has either been unable to obtain or is attempting to obtain by negotiation under the amended Railway Labor Act. In denying the claim of the petitioning Order of Railroad Telegraphers covered thereby, the majority in Third Division Award No. 5564 had the following to say with regard to the significance of the Petitioner's attempts to obtain by negotiation that which it was attempting to obtain by an award of the Third Division:

"It is also significant that despite the long list of awards which are relied upon by the Organization, going back to 1937, enforcing the Scope Rule under similar circumstances, the Organization has not heretofore sought to secure any relief from this Board. Neither can we disregard the numerous attempts by the Organization to secure by negotiation the result which it seeks from this Board, especially its pending request of the Carrier to adopt a train order rule in the language as set forth above." (Emphasis ours.)

See also Third Division Award No. 8538 which denied a claim of The Order of Railroad Telegraphers that arose on the respondent Carrier's property and in which the petitioning Order of Railroad Telegraphers was requesting the Board to grant employees subject to the Telegraphers' Agreement an exclusive right to certain work which the Petitioner had previously been unsuccessful in obtaining by means of negotiation in a proposed revision of the Scope of the Telegraphers' Agreement. The "Opinion of Board" in Award No. 8538 read in part as follows:

"Third, the record shows that Petitioner has sought unsuccessfully to revise this Scope Rule to insure an exclusive right to the operation of teletype machines, whether located within or without established telegraph offices.

When a collective bargaining agreement is consummated and existing practices are not abrogated or changed by its terms, those existing practices are just as valid and enforceable as if authorized by the agreement itself, (Awards 1257, 1568, 3461, 41054); and particularly when, as here, an existing practice is sought to be changed.

Claimants here have not conclusively established their right to perform the work in question to the exclusion of others similarly employed, either through custom and practice on this property or under the terms of the contract. Thus, in effect, this Board is being asked to grant something the agreement does not provide. The rule that we are without authority so to do is too well established to require further comment." (Emphasis ours.)

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July, 1965.