

**Award No. 14107
Docket No. TE-13961**

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly 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:

CLAIM NO. 1

1. Carrier violated the Telegraphers' Agreement when on the following dates, December 28 and 29, January 2, 3, 4 and 5, 1962, it caused, required or permitted employes (conductors), not covered by the Telegraphers' Agreement, to perform the work of a telegrapher, telephoner and block operator at "XY" Waverly, New York, and "MJ" Southport, Elmira, New York.

2. Carrier shall compensate the senior idle employe, extra in preference, for a day's pay (8 hours) at the rate of \$2.435 per hour, which is the established rate under Rule 25(e), for each day set forth in (1) of Statement of Claim, and for each location (XY and MJ).

3. Carrier shall permit a joint check of records to determine the employes and the amounts due said employes in (2) of Statement of Claim. (Carrier File 220.9 — Item 240).

CLAIM NO. 2

1. Carrier violated the Agreement, when on the 2nd day of October, 1961, it caused, required or permitted Mr. T. J. Malloy, a train service employe, not covered by the Telegraphers' Agreement, to handle (receive, copy) train orders Nos. 2 and 3 at "KI" cross-over (Hancock, N. Y.).

2. Carrier shall compensate J. F. Hanrahan, Agent-Operator, Deposit, New York, for one day (8 hours) at the rate of \$3.651 per hour, time and one-half for the violation aforesaid. (Carrier File 280 — Item 230).

CLAIM NO. 3

1. Carrier violated the agreement, when on the 3rd day of October, 1961, it caused, required or permitted Mr. W. A. Burke, a train service employe not covered by the Telegraphers' Agreement, to perform telephone communication with train dispatchers in connection with detouring trains.

2. Carrier shall compensate F. M. Tobin, operator, Hancock, New York for one day, eight (8) hours, at the rate of \$3.651 per hour, time and one-half for violation aforesaid. (Carrier File 280 — Item 231)..

CLAIM NO. 4

1. Carrier violated the agreement, when on the 3rd day of October, 1961, it caused, required or permitted Mr. A. E. Kelly, a train service employe not covered by the Telegraphers' Agreement, to perform telephone communication with train dispatchers in connection with detouring trains.

2. Carrier shall compensate H. E. Kingsbury, operator, deposit, for one day, eight (8) hours, at the rate of \$3.651 per hour, time and one-half for violation aforesaid. (Carrier File 280 — Item 233).

EMPLOYES' STATEMENT OF FACTS: The four claims involved in this dispute were, for the most part, handled separately on the property, up to the last letter written by the General Chairman to Carrier's Assistant Vice President, in which letter he combined and dealt with the four claims as a single dispute for the reason that the issue giving rise to the claims was the same in each claim instant, except Claim No. 2 which also entails the handling of train orders by train service employes in addition to train blocking and OSing. The basic issue in these claim cases is that Carrier issued special orders, under which it established single-track train operations within double-track territory, and in connection therewith utilized flagmen and/or conductors (train service employes), instead of telegraphers, at each end of the single-track to block and OS train operations. The single-train operations extended in distance up to 20 miles.

Claims were timely filed, correspondence exchanged, and conferences held, but the parties were unable to effect a settlement. The dispute has been handled in accordance with the requirements of the law and rules of procedure of your Board.

POSITION OF EMPLOYES: The facts relevant to the incidents bringing about these claims, the positions and arguments of both parties, and applicable rules, are fully covered in the extensive correspondence exchanged in the case handling on the property.

The file records are hereinafter reproduced and, being part of this submission, it is therefore unnecessary to reiterate what is shown therein in respect to the Employes' statement of facts, position or arguments. The author of this submission is satisfied that the General Chairman has effectively, efficiently and comprehensively presented, documented, and handled this dispute in a manner which will not require any additional bolstering at this time, and for the sake of brevity we will in this, the Employes' first submission, refrain from further supporting comment and stand on the case made by the General Chairman.

2. When Means of Communication have failed (Manual Block Territory), use the following:

Proceed at restricted speed.

3. When the proper interlocking Signal indication cannot be displayed, use the following:

Proceed through interlocking over route from
..... track to track.

This form does not affect any orders you may have received. Manifold copies will be made for each Conductor, Engineer, and Operator, the latter retaining a copy. When means of Communication have failed, this form must be delivered to the Operator at the next block station in advance, and the engineer must personally obtain from the operator permission to proceed.

When this form is used at an interlocking station, it must be delivered to the engineer before he is given a signal to proceed."

It is extremely significant to note that Clearance Forms "A" and "B" deal with a "block" such as involved in these cases. Yet, it has conclusively been shown by Carrier that operators do not under the parties rules agreement have an exclusive right to handle Clearance Forms "A" and "B" or train orders at locations where no operator is employed, such as, in all four (4) of these cases now before this Board. These being the absolute facts, how then can Petitioner possibly claim that it has the exclusive right to the involved work? The obvious answer is that it cannot legitimately so claim. Common sense and logic dictate that if Petitioner does not have the exclusive right to handle train orders at locations where no operator is employed, which it does not, it also most certainly cannot claim an exclusive right to the involved work where no operator is employed, even if "block operator" work, which can only be that work described in the operating rules, was performed, which it was not. Carrier submits that these facts leave nothing more to be said.

Without detraction from or prejudice to the foregoing, concerning Petitioner's claim for time and one half, this Board is well aware of the fact that it has enunciated in over two hundred different awards that the right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. And, that the one making a claim for time and one half for allegedly been deprived of work, has not done that which makes the higher rate applicable. With this principle being so pronounced by this Board, Carrier does not deem it necessary to say anything further in this respect except to reiterate that all claims are without merit in any event.

III. CONCLUSION

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

(Exhibits not reproduced.)

OPINION OF BOARD: The file in this case has been unnecessarily complicated by both parties having injected a great deal of irrelevant material.

It is undisputed that the rule herein involved is the Scope Rule of the Telegraphers' Agreement, as follows:

"RULE 1 — SCOPE

(a) This agreement shall govern the employment, working conditions and compensation of the following:

* * *

Telegraphers

Telephoners

* * *

Block Operators"

The following facts appear to be undisputed: Claim No. 1 deals with a situation in January, 1962 where for a period of six working days the Carrier had a maintenance crew laying rail on a four mile (approximately) section of the westward main track in the vicinity of Wellsburg, N. Y. During the working hours of the maintenance crew the track on which they were working was closed to traffic and all trains normally using that track were re-routed over the eastward track. The eastward track thus became the equivalent of a single track between the points where westbound trains entered and left it. These points were "XY" Passing Siding at one end and "MJ" Crossover at the other.

Since the operation of trains in both directions on a single track must be made safe, some means of protecting the detoured westward trains from opposing westward trains had to be provided. No telegraph office was located at either end of the single track section, that is, at "XY" or "MJ." To provide the necessary protection the Carrier assigned a train service employee at each of these points under instructions to afford protection as directed by the train dispatcher. These two train service employees were not attached to the crews of any trains, but were used solely to provide protection to the detoured trains using the single track section. They did so in the manner set out in Special instructions identified as Special Order No. 197.

Claims Nos. 3 and 4 relate to October 3, 1961, when the Carrier had a crew installing a culvert under both tracks at Mile Post 168.52 between points identified as "KI" Crossover and "HF" Crossover.

On October 3, the culvert was put under the westward track and westward trains were diverted over the eastward track between "KI" Crossover and "HF" Crossover. Instead of accomplishing the diversion by use of train orders, as on the preceding day, the Carrier stationed train service employees at the two Crossovers. These employees, working under the instructions of the train dispatcher, provided the necessary protection in the same manner as was done in the case covered in Claim No. 1. The Petitioners took the same view of this operation as they did in Claim No. 1, however, instead of filing one claim to cover both ends of the handling, they filed separate claims, Claim No. 3 for the alleged use of a conductor at "KI" Crossover, and Claim No. 4 relating to the use of a trainman at "HF" Crossover.

The Petitioners consider such use of train service employees under the circumstances to be violative of the Scope Rule of the Agreement and in

derogation of their contractual right to perform work of the types assigned to employes of the Telegraphers Craft.

It is the contention of the Petitioners that this has been the exclusive work of employes under the Telegraphers' Agreement historically and traditionally by custom and practice for the past twenty years and repeatedly made this assertion during the progress of these claims on the property. Carrier did not effectually deny this contention of Petitioners on the property.

The facts in this case are practically identical with those contained in Awards 8263, 8264 (McCoy) and Award 11722 (Rinehart). Note the following statement in Award 8263 (McCoy):

"The claim is of course based upon the Scope Rule. Under our uniform decisions, where the Scope Rule merely lists the positions covered without specifying the work reserved, it is to be interpreted as reserving to the employes covered the work which customarily and traditionally has been performed exclusively by those employes. In this case the Scope Rule names among others, telegraphers, telephoners and block operators. Traditionally, these employes have handled all communications by telegraph and telephone controlling the operation and movements of trains. This is what Conductors Olson and Anderson did in this case, over the eight mile block set up here. The Carrier no longer operates by manual block system, but the work which Anderson and Olson did is typical of block operator work. They held trains, and they 'cleared the block,' using the dispatcher's telephone wire to receive instructions and to transmit information and orders. It is true that no permanent records were kept, such as are ordinarily kept by a block operator. If they had been, then of course the matter would be completely free of any possible doubt. But the primary function of the block operator, telegrapher, or telephoner, is communication work in controlling the movement of trains. If in a particular situation the Carrier dispenses with records as unnecessary in that situation, the work constituting the primary function of the job does not thereby cease to be telegrapher work. It is also true, of course, that not every telephone call is telephoner's or telegrapher's work. But telegraph or telephone communication to control the operation of trains unquestionably belongs to this craft. This is not the simple case of the conductor of a train telephoning the nearest station that his train has cleared the main track such as has been the subject of some of our awards."

See also Award 11848 (Rose).

The Carrier not having effectively challenged or denied that the work involved in these claims had been performed exclusively by the employes under the Telegraphers' Agreement for 20 years, the Board must conclude that Claim No. 1, Claims 3 and 4 must be sustained at pro rata pay, no overtime to be allowed.

Claim No. 2 can be distinguished from the other three claims. Therein, it is claimed that the Carrier permitted a train service employe to handle train orders at "K1" Crossover, Hancock, N. Y. in violation of the Telegraphers' Agreement.

This Division has consistently held that the use of the telephone is not reserved exclusively to employes covered by the Telegraphers' Agreement.

The burden is on Petitioners to establish this. It was argued by the Petitioners that the performance of telephoning by the conductor at Crossover at "KI" had the effect of establishing an Operators station or a telephone or telegraph office at "KI" on October 2. A similar claim was made in Award 13972 (House) and was disposed of, as follows:

"Employes argue in addition, that the performance of the involved work by Conductor Felber had the effect of establishing a telephone or telegraph office at MP 11.38, thus clearly bringing the work under the prohibition of Rule 64. We reject this argument: in order even to state the argument for consideration, Employes had to assume that the involved work belongs exclusively to the Employes, and that is the very argument we are seeking to resolve."

Petitioners have failed to establish an exclusive right to this work by practice, tradition or custom. Claim No. 2, therefore must be denied.

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

Claims 1, 3 and 4—the Agreement has been violated.

Claim 2—the Agreement has not been violated.

AWARD

Claims 1, 3 and 4—Claims allowed in accordance with the Opinion.

Claim 2—Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of January, 1966.