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Award No. 15488
Docket No. TE-13191

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

DETROIT, TOLEDO AND IRONTON RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Detroit, Toledo & Ironton Railroad, that:

The Carrier violated the Agreement between the parties hereto when it permitted or required train service employes not covered thereby to transmit (OS) messages of record governing the movement of their trains directly with the dispatcher on his telephone line, as outlined hereinafter.

CLAIM NO. 1

1(a) At Waverly, Ohio, on November 7, 1960, Conductor Mounts reported arrival and tie-up of his train.

(b) Carrier shall be required to pay P. W. Lowery, Agent at Waverly, Ohio, a call, amounting to three hours.

CLAIM NO. 2

1(a) At Washington Court House, Ohio, reports on arrivals, deliveries to connections, and departures of trains were transmitted by conductors on the following dates: November 22nd (two occasions), 23rd, 24th (two occasions), 25th, and 26th (two occasions), 1960.

(b) Carrier shall be required to pay in each above instance eight hours at straight time rate to the senior idle employe, or if no extra employes were available, eight hours at time and one-half rate to the senior regularly assigned employes on their rest days.

(c) Carrier be required to permit a joint check of its records to establish names of proper claimants.

2(a) At Waverly, Ohio, reports on arrivals and tie-ups of trains were transmitted by conductors on the following dates: November 14th, 15th, 21st, 22nd and 28th, 1960.

(b) Carrier shall be required to pay P. W. Lowery, Agent at Waverly, Ohio, a call, amounting to three hours on each date specified in (a).

3(a), (b), (c) and (d) is withdrawn.

4(a) At Greggs, Ohio, reports on arrivals, departures, and handle of trains were transmitted by conductors on the following dates: November 22nd, 24th (two occasions), and 26th, 1960.

(b) Carrier shall be required to pay a call, amounting to three hours, to P. W. Lowery for November 22nd and 24th (two instances), 1960, and to V. H. Browder for November 26th, 1960.

CLAIM NO. 3

1(a) At Carleton, Michigan, reports on train arrivals were transmitted by conductors on the following dates: November 22nd (three occasions), 23rd (three occasions), 24th, 25th, and 26th (two occasions), 1960.

(b) Carrier shall be required to pay A. Anderson, Agent at Carleton, Michigan, a call, amounting to three hours, in each above instance.

(c) Carrier shall pay a call to A. Anderson, or his successor, for each violation subsequent to November 26, 1960.

CLAIM NO. 4

1(a) At Bainbridge, Ohio, reports on train arrivals and tie-ups were transmitted by conductors on the following dates: January 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th, 30th, February 6th, 7th, 8th, 9th and 10th, 1961.

(b) Carrier shall be required to pay D. R. Murray a call, amounting to three hours' pay, in each above instance.

(c) Carrier shall pay a call to D. R. Murray, or his successor, for each violation subsequent to February 10, 1961.

EMPLOYES' STATEMENT OF FACTS: The incidents which occasioned the charge of Agreement violation are somewhat similar in all claims here in appeal. The issue in complaint developed when trainmen, on the specified dates, handled communications of record, which the Employes contend is work accruable to them.

The correspondence exchanged between the parties in the case handling of the subject matter of this appeal is reproduced below. Said correspondence is shown in respect to the particular claim involved and is prefaced with comment as to the date, sender and addressee.

OPINION OF BOARD: This dispute involves several claims alleging violations of the Telegraphers' Agreement when Carrier permitted or required train service employes not covered by the Agreement to transmit messages of record governing the movement of trains by telephone.

Primarily, the Organization contends that Carrier violated the Scope Rule of the Agreement, covering communications service.

The Scope Rule, effective May 1, 1946, provides:

> "RULE 1. SCOPE
>
> This agreement shall govern the hours of service, working conditions and rates of pay of
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> > Agents (freight and ticket), Assistant Agents, Relief Agents, Agent-Telegraphers, Agent Telephoners, Telephone Operators (except switchboard operators), Telegrapher Clerks, Telephoner Clerks, Towermen, Levermen, Operator Levermen, Tower Directors, Train Directors, Block Operators and Teletype Operators,
>
> and who shall hereafter be referred to as employes coming within the scope of this agreement."

Both parties are in accord that such rule, general in nature, requires an examination into the history, tradition and practice to determine the work falling within the confines of the rule. It is unnecessary to cite authority for the proposition.

In 1907 the parties hereto entered into an agreement which included a Scope Rule reading as follows:

> "Effective April 18, 1907, the services of Telegraph Operators, and of employes whose duties include those of telegraph operating, will be governed by the regulations, and paid at the rate for the offices specified herein. When new positions are created, the wages will be fixed to conform to positions of similar class."

During the ensuing years there were several revisions, and in the March 1, 1920 Agreement, the Scope Rule read as follows:

> "ARTICLE 1.
>
> (a) The following rules and rates of pay shall apply to all telegraphers, telephone operators (except switchboard operators), agents, agent-telegraphers, agent-telephoners, towermen, levermen, tower and train directors, block operators and staffmen, who shall hereinafter be referred to as employes coming within the meaning of this agreement."

The Scope Rule of 1920 is substantially the same as that of 1946 (and revised in September, 1949). It should be noted, however, that the March, 1920 Agreement was entered into between the U.S. Railroad Administration and the Organization. Carrier was not signatory to the Agreement.

From December, 1917 to March, 1920, the federal government, through the Director General of Railroads, assumed the control and operation of the nation's railroads. During this period the Director General of Railroads entered into agreements (known as National Agreements) with employe organizations which included, among other things, the classes and work of employes.

In 1920, the federal government terminated its control of the railroads and the control reverted to the private carriers. The National Agreements terminated with the federal control, and pursuant to Decision 119 of the U.S. Railroad Labor Board, Carrier abrogated the Agreement with the employes in July, 1921.

From 1921 to 1946 the employes of Carrier were not covered by any Agreement. In 1946, an Agreement was entered into between the parties, and, as indicated, the Agreement included a Scope Rule similar to that of the Scope Rule of the 1920 National Agreement.

The Organization asserts that: (1) Prior to 1921, the Scope Rule then in effect (and similar to the Scope Rule of the 1946 Agreement) reserved the exclusive right of all communications, including telephones, to those covered; and (2) What transpired during the intervening years between 1921 to 1946 are of "no importance or significance" because there was no agreement during that period.

Carrier contends: (1) All agreements prior to 1920 (1907, 1914 and 1916) were abrogated; (2) The Agreement of 1920 was entered into between the Organization and the U. S. Railroad Administration, and Carrier was not a party to it; (3) From 1921 to 1945, the telephone by reason of practice and Carrier's instruction was to allow various classes of employes other than telegraphers to use the telephone in transmitting information (excluding train orders); (4) From 1946 to the time of the present claims, such practice had been continued without objection by the Organization (with the exception of some claims filed in 1954, which were dropped); and, (5) Further evidence of such past practice was an attempted change in 1959 by the Organization to confine communication service and train order handling to those employes classified under the Scope Rule.

On the basis of the record, it is unnecessary for the Board to determine the effect of 25 years (from 1921-1946) of practice without an agreement, or the effect of an agreement entered into in 1920 between the Organization and the U.S. Railroad Administration to which Carrier was not a party. An examination of what transpired on the property subsequent to the Agreement of 1946 is sufficient to be dispositive of the issues raised in this dispute.

The record shows that from 1946 to the time of the present claims, Carrier required and permitted employes other than those covered under the Scope Rule to use the telephone to transmit communications. With the exception of some claims in 1954 (which were dropped), such activity was carried on without formal protest from the Organization. Moreover, in 1959 the Organization attempted, without success, to change the rule to confine communication service to those employes coming under the Scope Rule. The effect that may be given such an attempt was stated in Award 19372 (First Division):

"The Division has often stated that to ask for a rule change is one of the best ways to indicate in the party's own estimation

that it is needed to supply the authority to do what the proposed language covers."

Even in the absence of the evidence set forth above, the record fails to show that the Organization has met its burden of proving the exclusive right to the work by reason of custom, practice and tradition, on the property as is required by numerous awards of this Board. See Awards 11592, 13242, 13442, 13972, 14166.

Our attention is directed to Award 4516 (Carter) which has had considerable following, particularly by Referees in earlier awards. Award 4516 held, in effect, that in certain instances telephone work is, ipso facto, reserved exclusively to telegraphers, stating:

"It was thereupon determined that employes whose duties require the transmitting or receiving of messages, orders, or reports of record by telephone in lieu of telegraph constitutes the telephone work reserved exclusively to telegraphers."

That conclusion is based on the premise that the work of the Morse code operator, formerly performed by telegraph and now performed by telephone, was the exclusive preserve of those coming under the Scope Rule of the Telegraphers' Agreement; and its historical and traditional implications industry wide required no examination of the practice on the property.

We are more persuaded by the large body of awards by this Board which rejects historical assumptions given industry wide effect, and, instead, requires an examination of the past practices of the parties on the property with the burden on the Organization to prove exclusivity. Awards 10425, 10918, 11592, 11812, 12356, 12706.

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

The Claims are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1967.

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