Award Number 17580
Docket Number TE-16735

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Southern Pacific (Pacific Lines), that:

1. Carrier violated and continues to violate the terms of an agreement between the parties hereto, commencing March 3, 1965, it requires or permitted an employee, not covered by the parties' Agreement, at Red Bluff, California to perform work covered by said Agreement.

2. Carrier shall, because of the violation set forth above, compensate J. W. Wells, or his successor, one special call at the applicable rate March 3, 1965, and for each date thereafter so long as the violation herein complained of continues.

3. Carrier shall permit a joint check of its records to ascertain compensation due J. W. Wells or his successor.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the Southern Pacific Company (Pacific Lines), hereinafter referred to as Carrier, and its employees in the classes named therein, represented by the Transportation-Communication Employees Union (formerly The Order of Railroad Telegraphers), hereinafter referred to as Employees and/or Union, effective December 1, 1944, as reprinted October 15, 1963, and as amended and supplemented, is available to your Board, and is, by this reference made a part hereof.

At page 51 of said reprinted Agreement in the Wage Scale are listed the positions existing at Red Bluff, California, on the effective date of said Agreement. For ready reference, the listing reads:

"Red Bluff ..... Agent-Telegrapher $2.8978
"Red Bluff ..... 2nd Telegrapher-Clerk ..... 2.6528"

At page 40 of the Agreement effective December 1, 1944 (which was the Agreement prior to its reprinting), are listed the positions existing at Red Bluff, California, as of the effective date of that Agreement. This listing of positions reads:

"Red Bluff ..... Agent-Telegrapher $1.1475
Red Bluff ..... 1st Telegrapher-Clerk ..... .975
Red Bluff ..... 2nd Telegrapher-Clerk ..... .975
Red Bluff ..... 3rd Telegrapher-Clerk ..... .975"

the number of calls alleged to be due claimant; and that Carrier violated Rules 1, 2, 3, 4, 7, 12, 16 and 29 of the current agreement when on March 3, 1965, it permitted, caused and required an employe not covered by the current agreement to perform the service of a telegrapher at Red Bluff.

6. By letter dated April 16, 1965 (Carrier's Exhibit "C"), Carrier's Division Superintendent denied the claim and the request.

7. By letter dated June 10, 1965 (Carrier's Exhibit "D"), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel, who denied same by letter dated January 12, 1966 (Carrier's Exhibit "E").

(Exhibits not reproduced)

OPINION OF BOARD: The Organization contends that Carrier violated the Agreement by permitting or requiring the conductor on local freight No. 301 to daily use the telephone at Red Bluff, California, to communicate with the train dispatcher, information in connection with the movement of his train, and in turn, to receive from said dispatcher form Y orders, track and time limits. The Organization bases its claim on violation by Carrier of Rules 1 (Scope), 16, 17, and 29. It alleges that the information given to the train dispatcher by the conductor over the telephone in this instance was recorded by the train dispatcher and thus were "communication of record" and belong exclusively to telegraphers;

The information involved herein was given by Conductor Davis by telephone to the dispatcher at Red Bluff, California on March 3, 1965 and is as follows(

"(Conductor) Red, Bluff, dispatcher

(Dispatcher) Yes; Red Bluff

(Conductor) This is Davis, with Engineer Schnezburger, we have 5638 unit, on duty at Red Bluff at 2:00 p.m.

(Dispatcher) Train Order No. Form Y is in effect MP 216.6 and MP 217.9 between Gerber and Red Bluff, 7:45 a.m. until 3:01 p.m. conditional stop signs at MP 216.4 for Eastward trains and MP 218.1 for Westward trains."

Petitioner alleges that Conductor Davis repeated back the train order, gave the dispatcher a lineup of the work he had to do, and received working time for such work.

Carrier, in its ex parte submission to this Board, states that Order No. 640 of March 3, 1965 was a Form Y order addressed to Gerber to Eastward trains, Dunsmuir to Westward trains, and read as follows:

"Do not exceed restricted speed between MP 216.6 and MP 217.9 between Gerber and Red Bluff from 7:45 a.m. until 3:01 p.m. March 3rd, and be prepared to stop short of unattended red conditional stop sign displayed in vicinity of MP 216.4 for Eastward trains and MP 218.1 for Westward trains unless orally authorized to proceed beyond the stop sign by foreman in charge of work or a proceed signal with green flag or light is received. Restricted speed must not be exceeded unless foreman orally authorizes a

different speed. Yellow proceed prepared to stop signs are displayed one and one-half miles in advance of red conditional stop signs."

Carrier objects to the claim involving unspecified dates and times and thus the claim stating ". . . for each date thereafter so long as the violation herein complained of continues" is invalid and should be dismissed for lack of specificity; that Carrier is not required to make a joint check with petitioner to ascertain possible dates of alleged violations.

Concerning the merits of the claim, Carrier argues that telephone calls between train dispatchers and members of train crews, and others, of the nature involved herein in CTC territory have always been accomplished without intervention of a telegrapher, not only at Red Bluff but throughout Carrier's Pacific Lines; that the conversation herein did not constutute the handling of train orders; nor was it work in lieu of any work formerly done by telegraphers in what is now CTC territory; that the information between the conductor and the train dispatcher herein has been given over a period of some 35 years without the Organization contending that it amounted to train orders or were "communications of record"; that the Organization has failed to prove by competent evidence that by tradition, custom and practice that telegraphers have performed the work here in question to the exclusion of all others.

Carrier, in the handling on the property, contended in Carrier's Ass't. Manager of Personnel, P. K. Larson's letter of January 12, 1966 to the General Chairman, D. W. Ward that the flow of information between members of train crew and the dispatcher as herein is a system practice dating back some 35 years under CTC operation. This assertion, without corroborating proof, is of no probative value. Further, Carrier contends that the Organization did not dispute this assertion and therefore it must be true and thus controlling in deciding this dispute. However, examination of General Chairman Ward's letter of February 3, 1966, which was in reply to Mr. Larson's said letter of January 12, 1966, shows that the Organization did dispute said assertion by Carrier of past practice, and therefore Carrier's contention in regard to said past practice is without merit and must be denied.

As was said in Special Board of Adjustment No. 553, Award No. 21, involving these same parties to this dispute:

> "In Award 12 of this Board we stated that work belongs to telegraphers if it falls within one of the following catagories: (1) relates to the control of movement of trains (2) is a communication of record as that therm has been used in the decisions or (3) by tradition, custom and practice on the property has been performed by telegraphers to the exclusion of other employees. We reiterate these criteria and our intention to adhere to them in future decisions of the Board. If a communication falls within one of the first two catagories it is not necessary for the Union to show that it has been performed exclusively by telegraphers on the particular property. The transmission of messages relating to the control and movement of trains has been historically recognized as work of telegraphers. In order to affect train movements a communication need not be in the form of a formal train order. Special Board of Adjustment No. 553, Award 20, Claim 1."

It is our conclusion that the communication involved herein related to the control or movement of trains and therefore Carrier violated the

Agreement. Claimant is entitled to one call for 3 hours pay for March 3, 1965 only.

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 in accordance with Opinion.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17580, DOCKET TE-16735
(REFEREE DUGAN)

The claim involves telephoning of information which the Employes allege constituted communications of record. What actually constitutes a communication of record is a subject on which the awards affecting these particular parties make many refinements. See Awards 10, 21, 23, 25, 35 of Special Board of Adjustment No. 553, Awards 10492, 10493 (F. J. Dugan), and many others.

Award 21 of SBA 553 is cited with approval, and therefore it is significant that in Award 23 of that same board which involved CTC operations, as does the instant case, Special Board of Adjustment 553 ruled:

> "As to all the other conversations we hold that if the employees covered by the Union's Agreement ever had any right to the work involved, which we seriously doubt, it has been lost through acquiescence in the long practice of the Carrier to have the direct communications made between the dispatcher and person outside the Union's Agreement. The Carrier's evidence of a consistent practice on the property since the installation of CTC (more than 35 years) is convincing and in fact undisputed. . ."

It is the foregoing ruling that is applicable here and the claim should have been denied on the basis thereof. The only excuse offered for failing to follow that decision in the instant case is the erroneous ruling that in this case the Employes disputed the existence of the practice of telephoning the specific type of communications involved herein, and Carrier failed to produce evidence of the practice. Of course, Carrier was under no obligation to support its allegations of practice unless they were denied by

the Employes when made on the property (Awards 9261-Hornbeck and 11398-Moore); and in this case we do not believe the Employes denied the assertions of past practice made by Carrier on the property.

On this point the award contains the following ruling:

> ". . . Carrier contends that the Organization did not dispute this assertion and therefore it must be true and thus controlling in deciding this dispute. However, examination of General Chairman Ward's letter of January 12, 1966, shows that the Organization did dispute said assertion by Carrier of past practice, and therefore Carrier's contention in regard to said past practice is without merit and must be denied."

We believe this ruling is contrary to the facts. The General Chairman's response to Carrier's allegation of past practice reads:

> "As to your allegation of a system practice of 35 years standing, it has been pointed out to this Carrier many, many times before that a practice which violates an Agreement, no matter how long such practice may have continued, does not invalidate that Agreement, in the absence of clear proof of intent by both Parties to invalidate it. You have not shown and you cannot show any intent on our part to invalidate the requirements of our Agreement with respect to the type of communication of record involved in this claim. On the contrary, there is abundant proof that we have repeatedly sought to halt such violations. In this connection, you are referred to Special Board of Adjustment No. 553 Awards Nos. 10, 12, 20, 21 and 25, as examples."

We see in this statement nothing more than an admission that the practice had existed, as contended by Carrier, plus an admission that recently the Petitioner has prosecuted certain claims which were disposed of by the enumerated recent awards of SBA 553. None of these awards involve the particular communications and facts involved in the instant case. To us there is no basis for construing the above statement as a denial of the specific practice alleged by Carrier on the property; and if our reading of the record is correct, the claim obviously should have been denied on the basis of undenied past practice and the failure of the Employes to prove a violation of their agreement.

/s/ G. L. NAYLOR

/s/ R. E. BLACK

/s/ P. C. CARTER

/s/ W. B. JONES

/s/ G. C. WHITE

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