

Award No. 18299

Docket No. TE-18497

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

**NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Norfolk and Western Railroad (Lake Region), that:

1. Carrier violated the Agreement between the parties when, on dates shown below, it required and/or permitted employees not covered thereby to transmit messages of record at Continental, Ohio.

2. Carrier shall, as a result, compensate the following employees a day's pay (8 hours) for each of the dates of occurrence as herein set forth.

R. N. McCullough - November 13, 20, 27, 29, 30; December 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22 and 26, 1967.

C. R. Young - November 14, 15, 21 and December 2, 1967.

W. W. Anspach - November 15, 16 and 17, 1967.

CARRIER DOCKETS: 30-240674 - BU-13651-18
30-24-675
30-24-691
30-24-692

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties effective January 1, 1959, as amended and supplemented, is on file with your Board and by this reference is made a part hereof.

Originally entered into by the New York, Chicago and St. Louis Railroad and its employees represented by The Order of Railroad Telegraphers on the Nickel Plate, Lake Erie and Western and Clover Leaf Districts, the Carrier merged with the Norfolk and Western Railway and the Organization merged with the Brotherhood of Railway and Airline Clerks.

CARRIER'S EXHIBIT E-1 - June 7, 1968 - Denial - Manager-Labor Relations to General Chairman - C. R. Young claims.

CARRIER'S EXHIBIT F-1 - November 21, 1968 - Letter - General Chairman to Manager-Labor Relations relative to C. R. Young claims.

CARRIER'S EXHIBIT A-2 - February 16, 1968 - Appeal - General Chairman to Superintendent claims of W. W. Anspach.

CARRIER'S EXHIBIT B-2 - March 19, 1968 - Denial - Superintendent to General Chairman claims of W. W. Anspach.

CARRIER'S EXHIBIT C-2 - March 29, 1968 - Appeal - General Chairman to Manager-Labor Relations - claims of W. W. Anspach.

CARRIER'S EXHIBIT D-2 - April 3, 1968 - Acknowledgment of appeal Manager-Labor Relations to General Chairman claims of W. W. Anspach.

CARRIER'S EXHIBIT E-2 - June 7, 1968 - Denial - Manager-Labor Relations to General Chairman claims of W. W. Anspach.

CARRIER'S EXHIBIT F-2 - November 2, 1968 - Letter - General Chairman to Manager-Labor Relations - claims of W. W. Anspach.

CARRIER'S EXHIBIT G - December 11, 1968 - Letter - Manager-Labor Relations to General Chairman setting up conference to discuss the instant claims.

CARRIER'S EXHIBIT H - March 26, 1969 - Letter - Manager-Labor Relations to General Chairman affirming previous denials.

CARRIER'S EXHIBIT I - May 13, 1969 - Letter - General Chairman to Manager-Labor Relations.

The time limit for handling these claims was extended by each party to the other by mutual understanding.

(Exhibits not reproduced.)

OPINION OF BOARD: Maintenance of Way employes telephoned progress or tamping reports to the Division Engineer on all of the dates in the claims except on November 14, 15 and 21, 1967. The claim of C. R. Young for alleged blocking work performed on the latter dates has been withdrawn by the Petitioner.

In Award No. 12118, involving a similar dispute on another district in this Carrier's property, this Board held that the Petitioner failed to show by a preponderance of evidence that progress reports were reserved to Telegraphers by history, tradition, custom and practice. The claim was, accordingly, denied. Petitioner now argues that in the instant case the "Employes have met their burden of proof and have established a valid basis for the claim by presenting details of both past practices and Carrier's reaction to these claims." Thus, the burden of proof has shifted to the Carrier which was not met.

After a careful examination of the relevant evidence in the record, we are obliged to conclude that the Petitioner has not met the burden of proof. There is no convincing evidence that such telephone communications are reserved exclusively to Telegraphers by history, custom, practice and tradition on this property.

Petitioner merely says that "the clearest evidence as to what the practice on this property has been with regard to handling such types of messages, may be found in the Carrier's failure to come forth with statements from these employes as it did with its officers, and signal maintainers (3), and two chief clerks unrelated to the issues, as contained in the twelve statements relied upon. We further submit such statements are absent for the reason they would lend damage to the Carrier's defense regarding such practice." A preponderance of evidence of an alleged fact is not proved by an omission of evidence from the opposing party. The Petitioner alone must prove by a preponderance of relevant evidence that by history, custom, tradition and practice communications of progress or tamping reports are reserved exclusively to Telegraphers. The mere omission of statements from the Maintenance of Way employes involved in this dispute is not affirmative evidence of proof for the Petitioner. Likewise, putting Carrier on notice of telephone conversations allegedly in violation of contract rules does not establish a prima facie case for the Petitioner. The same is true with settlements of disputes on the property. They are not precedents unless they firmly and unequivocally establish a practice on the property that has consistently continued for a reasonable period of time. Otherwise, they may be compromises which do not reflect the merits of the case. The settlements referred to by the Petitioner do not establish such an unequivocal past practice.

Further, the reports are not messages of record. "They do not affect the operation of trains or do they affect the safety of persons on and off property." (Award No. 18069.) They are not communications the transmission of which are exclusively reserved to telegraphers.

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 DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of November, 1970.

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