



**Award No. 19100**

**Docket No. TE-14164**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Claude S. Woody, Jr., Referee**

**PARTIES TO DISPUTE:**

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

**BOSTON AND MAINE RAILROAD**

**STATEMENT OF CLAIM:** Claim of the General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad, that:

1. Carrier is in violation of the Agreement between the parties commencing May 17, 1961 in requiring or permitting employes not covered by the Agreement to operate the Drawbridge at Manchester, Massachusetts.

2. Carrier shall return the work of operating the Drawbridge at Manchester to the Agreement.

3. Effective May 16, 1961, and for each day thereafter that the violation outlined in (1) above occurred or may occur in the future, Carrier shall compensate the following employes for all compensation lost as a result of such violation:

H. L. Krueger, Jr.  
R. C. Edwards

*Any spare employe adversely affected  
(such claimants to be determined by  
joint check of the Carrier's records.*

**EMPLOYEES' STATEMENT OF FACTS:** The Agreement between the parties, effective August 1, 1950, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

Carrier operates a drawbridge at Manchester, Massachusetts. Up to the time Carrier abolished the position of agent at Manchester, that employe was assigned to operate the drawbridge. Nearly as the Employes can ascertain from their records, this work was assigned to the agent at Manchester starting about the year 1916. The agent at Manchester continued to be assigned this work until the abolishment of the agency position, at which time the Agent-Telegrapher and Assistant Ticket Agent and Operator (both covered by the Telegraphers' Agreement) at Gloucester, Massachusetts, were assigned all the work (including operation of the drawbridge) of the Manchester position. Gloucester is six miles from Manchester. Thus, the two employes at Gloucester

operated the drawbridge at Manchester during their regularly assigned hours, except when it became necessary to open the bridge when neither were on duty. When work occurred at times they were not on duty, one of them was called to perform the work and paid on a call basis. At time of claim the assignments at Gloucester were as follows:

Agent-Telegrapher — hours of assignment, 10:30 A.M. to 6:30 P.M.,  
Monday through Friday, rest days, Saturday  
and Sunday.

Assistant Ticket Agent — hours of assignment, 5:30 A.M. to 1:30 P.M.,  
and Operator Monday through Friday, rest days, Saturday  
and Sunday.

Neither position was assigned to work on Saturday and Sunday.

The incumbent of the Agent-Telegrapher position was H. L. Krueger, Jr., and the incumbent of the Assistant Ticket Agent and Operator position was R. C. Edwards.

This dispute arose when Carrier announced its intentions to, and later did, assign an employe not covered by the Agreement to operate the drawbridge at Manchester. It became necessary to, instead of operating the drawbridge on a part-time basis, assign an employe on a full-time basis. This arrangement was put into effect May 17, 1961, and continued to September 7, 1961, when the work was again returned to the Telegrapher class of employes at Gloucester, to be performed as was in effect prior to May 17, 1961.

It is noteworthy that on September 12 and November 6, 1960, Carrier required full-time service at the Manchester drawbridge. In each of these instances employes covered by the Telegraphers' Agreement were assigned to perform the work.

The facts and circumstances surrounding this case, together with the position of the Employes, were fully set forth in the handling on the property, and such are shown in ORT Exhibits 1 through 21, attached hereto and made a part hereof. It is noted that when the General Chairman learned of the Carrier's plans to assign employes not covered by the Agreement to handle the drawbridge at Manchester, he corresponded quite extensively with the Vice President-Personnel before a formal claim was presented to the Superintendent. The claim involved was filed and handled in the usual manner up to and including the highest officer of the Carrier and has been denied.

(Exhibits not reproduced.)

**CARRIER'S STATEMENT OF FACTS:** Manchester, Massachusetts, is a suburban town on the Rockport peninsula north of Boston. It is served by a branch line operated by Respondent. A bascule drawbridge on this line spans the entrance to a bay about one-half square mile in area which is a part of Manchester Harbor. The bay is located west of the bridge as shown on Exhibit "A" attached.

Prior to the date of claim, the bridge was not opened with great frequency, its principal use being in the spring and fall by small water craft. Until November, 1951, the method of operation was that the proprietor of the craft requiring operation of the bridge advised the Chief Train Dispatcher of the Terminal Division at Boston to that effect. Operation of the bridge was

performed by a crossingtender located at the Bridge Street crossing west of the Manchester station. The dispatcher at Boston notified the agent at Manchester, who in turn directed the crossingtender to proceed to the drawbridge (200 yards distant) as required.

In the spring of 1951, automatic crossing gates were installed at Bridge Street crossing, which resulted in discontinuance of the crossingtender assignment. The crossingtender at Bridge Street displaced to the crossing at Sea Street, and subsequently continued to perform the drawbridge work along with his crossing work. In November, 1951, the Sea Street crossing was converted to automatic gates, leaving no crossingtender nearby to handle the drawbridge.

Thereupon, Respondent directed the agent at Manchester station to do the work as and when required upon direction of the train dispatcher at Boston. On November 13, 1958, the agency at Manchester was abolished. Effective that date, the necessary drawtending work was assigned to the Gloucester agency located six miles distant. This part-time arrangement continued until May 14, 1961, after which a full-time drawtender, on a daily basis, was employed seasonally from April 1 through November 1.

The reason for the creation of the full-time drawtender was to comply with an order of the Division Engineer, United States Army Corps of Engineers, as a result of a complaint from a new marina, known as Marine Enterprises, Inc., which was located west of the drawbridge, in Manchester Bay on the inland side of the draw. This required that a drawtender be on duty daily at the bridge from April 1 to November 1 inclusive from 9:00 A. M. to 1:00 P. M., and from 2:00 P. M. to 6:00 P. M.

This full-time position was advertised to employees rostered under the agreement with the Brotherhood of Maintenance of Way Employees and assigned to the senior qualified applicant. The applicable agreement with this organization reprinted February 1, 1951, is on file with the Third Division and by reference is made part of the record.

The instant claim followed. It has been progressed under the agreement with Petitioner effective August 1, 1950, including supplements, which are on file and are also by reference made part of the record.

Prior to the institution of formal claim, discussions were had with both the Petitioner and representatives of the Brotherhood of Maintenance of Way Employees in an effort to resolve the conflicting issues of jurisdiction. No solution suggested by the carrier was acceptable to both of the organizations. Accordingly, the carrier had no alternative but to assign the work in conformity with its understanding of the intent and meaning of the agreements, precedents and practices on the property; and the claim here involved was denied on that basis. (Exhibits not reproduced.)

**OPINION OF BOARD:** This dispute involves operation of a drawbridge located near the station of Manchester, Massachusetts, on a branch line of the respondent, the Boston and Maine Railroad. The drawbridge spans the entrance to a bay which lies west of the tracks at this point, and was required to be raised only occasionally prior to 1961.

Early in 1961 a new marina, located west of the drawbridge, was opened requiring frequent operation of the bridge during the season from April 1st to November 1st. A full time position was established to perform the neces-

sary work. This position was advertised to employees covered by the Carrier's Agreement with its Maintenance of Way Employees, and was filled by the senior qualified applicant subject to that Agreement.

The instant claim, by the Carrier's telegraph service employees, followed. The Telegraphers contended that the work of operating this drawbridge was reserved by their Agreement to employees subject thereto, hence its assignment to a Maintenance of Way Employee was in violation of the Telegraphers' Agreement. A day's pay for a spare employee on each day the alleged violation continued was claimed as reparation.

This claim was handled in the usual manner without a settlement being reached. This appeal to the Board by the Telegraphers then followed.

Carrier, in its submission to the Third Division, contended that the employees represented by the Brotherhood of Maintenance of Way Employees were an interested third party and were entitled to notice and an opportunity to be heard. The Division's record of the case shows that this contention was acted upon by its giving such notice to the Brotherhood of Maintenance of Way Employees under date of December 14, 1966. That union responded, disclaiming involvement and stating that if its Agreement were at any time violated, appropriate steps would be taken for correction. This was the usual procedure being followed at that time.

However, on December 5, 1966 the United States Supreme Court rendered its decision in **Transportation-Communication Employees Union v. Union Pacific Railroad Company** (385 U.S. 157), holding that in such cases the Adjustment Board has a duty to resolve the " \* \* \* entire dispute upon consideration not only of the contract between the railroad and the Telegraphers but 'in light of \* \* \* [contracts] between the railroad' and any other union 'involved' in the over all dispute, and upon consideration of 'evidence as to usage, practice and custom' pertinent to all these agreements. \* \* \*"

Whereupon, after delays in arriving at procedures to be used in carrying out the Court's mandate, the Board gave another notice to the Brotherhood of Maintenance of Way Employees, and a hearing was held on September 14, 1971, at which time the Maintenance of Way Employees filed a submission, which was made a part of the record in this case. The Petitioner and Respondent were then afforded an opportunity to supplement their original submissions "to embody the involvement of the Brotherhood of Maintenance of Way Employees in this dispute." The Petitioner did file a supplemental submission which was also made a part of the record. The Carrier (respondent) did not file a supplement submission.

It thus appears that the Board has fully complied with the requirements concerning notice and opportunity for the "involved" parties to be heard, as laid down by the Supreme Court. The Board has now given consideration to all submissions, evidence, and both the Telegraphers' Agreement and the Maintenance of Way Agreement, as well as the "usage, practice, and custom", as discussed by the parties in their various submissions. In light of all these data, the Board is now in a position to "resolve the entire dispute" in accordance with the requirements as set forth in the Supreme Court decision, *supra*, and does so as follows.

We look first to the two Agreements. If either or both of them reserve, in unambiguous terms, the work of operating drawbridges to the employees

covered we need look no farther to determine the Carrier's obligation to one or both crafts. The Petitioner's (Telegraphers) Agreement contains a scope rule of the type generally found in such agreements. It lists the classification of positions to which the Agreement applies. Among these classifications is one shown as:

**"Draw Tender — Levermen"**

In Appendix A, the Wage Scale appended to the Agreement, there are listed two locations, "Draw 8" and "Draw 7", where such positions are shown. These two locations are also referred to by the parties in their submissions.

The Maintenance of Way Agreement (Operating Department) contains a scope rule of similar type which lists a classification of:

**"Drawbridge Tenders"**

This Agreement does not contain a wage scale comparable to that of Appendix A in the Telegraphers' Agreement.

Thus neither Agreement specifically refers to a particular job at the location here involved, that is, the drawbridge at Manchester Bay. But both Agreements refer specifically to the activity involved, that is, operation of a drawbridge.

The Telegraphers' scope rule classification of "Draw Tender—Levermen" quite clearly shows an intent to limit its application to those positions where the duties assigned include both the operation of a draw bridge and the work of a "Leverman", the operation of switches and/or signals by means of levers from a central point, unless "usage, practice and custom" clearly requires a different conclusion.

The classification of "Drawbridge Tenders" in the Maintenance of Way Agreement just as clearly shows the intent to be that all drawbridge tending is reserved to the employees covered, unless a recognized exception can properly be inferred from "usage, practice and custom." No specific exception is stated in the Agreement itself.

The record shows that for many years there was a position of Agent-Telegrapher at Manchester which was subject to the Telegraphers' Agreement. There were also two positions under the Maintenance of Way Agreement, whose occupants were primarily engaged in the work described by the scope rule classification of "Crossing Tenders". First, one of these latter positions then the second, and finally the Agent-Telegrapher position were abolished.

The Telegraphers contend that during the entire time the Agent-Telegrapher position existed, its occupant had the duty and responsibility of operating the drawbridge in question, and that the "Crossing Tenders", first one and then the other, assisted him in performing this duty. Then, when both of the Maintenance of Way positions were abolished, he performed this service alone until his own position was abolished.

Carrier and the Maintenance of Way Employees content that the crossing tenders operated the drawbridge during the entire time their positions existed, and that the Agent-Telegrapher merely supervised their work.

All parties are agreed that after the last Crossing Tender position was abolished, the Agent-Telegrapher, under direction of the Carrier, operated the drawbridge when necessary, and that after his position was abolished, the work was assigned by the Carrier to the Agent-Telegrapher at Gloucester, six miles away.

The record contains statements from a former occupant of the Agent-Telegrapher position and a former occupant of one of the Crossing Tender positions, which support the foregoing recitation of facts. These statements, however, do not reach the question of whether the method of operation became an exception to or modification of the scope rules.

The record also contains evidence that on one occasion an Agreement was reached among all three parties that operation of a drawbridge at Newburyport, Massachusetts, was to be transferred from Maintenance of Way Employees to the Telegraphers. It appears that this position included "Levermen" duties, and thus came within the composite classification of "Draw Tender — Levermen" in the Telegraphers' Agreement. The General Chairman of the Maintenance of Way Employees agreed with that conclusion.

In the light of the foregoing, as well as a careful study of the record as a whole, we must conclude that, with the exception to be noted, the inclusion of the classification "Drawbridge Tenders" in the Maintenance of Way Agreement, without modification of any kind being stated therein, manifests an intent to reserve such work to employees covered by that Agreement.

The undisputed fact that on sporadic occasions the Agent-Telegraphers at Manchester and Gloucester have been required to operate the drawbridge in question, does not rise to the dignity of a recognized exception to the intent of the parties as expressed by the clear and unambiguous language of the classification "Drawbridge Tenders." Rather, it can only be considered as violation of that intent. And it is well settled that even repeated violations of an Agreement do not serve to amend or modify it. For a typical example of the multitude of Awards on this point, see Award 11007, where this Division said:

"\* \* \* We have many times resorted to the use of past practice to put meat on and meaning to the bare bones of the scope provisions of a contract. But past practice cannot be used to place the stamp of validity on what is in fact a violation of the Agreement \* \* \*"

The one exception, clearly recognized by the parties, is that where positions consist of the duties of a drawbridge tender, combined with those of a Leverman, requiring the composite classification of "Draw Tender - Leverman," such positions and work properly belong to employees under the Telegraphers' Agreement.

Therefore, addressing ourselves to the specific claim before us, and to the position of the parties, we must deny the claim of the Petitioner. This does not mean, however, that the position of the Carrier is sustained. The Carrier's position, in essence, is that because the work has been performed by both crafts, the Carrier has no obligation to either. Our discussion, above, clearly indicates such a position is erroneous. The Carrier is obligated to both precisely as it has bound itself to both in the scope rules of the two Agreements. The various rulings in this case are based on the peculiar history of the applicable scope rules and the understandings and practices of the parties thereunder; and cannot properly be used as a precedent in any case where other facts and/or agreements may be involved.

Thus, we decide and dispose of "the entire dispute" as the Supreme Court decision dictates.

**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 as to the Petitioner:

That the position of the Carrier is sustained to the extent indicated in the Opinion; and

That the position of the Brotherhood of Maintenance of Way Employees is sustained to the extent indicated in the Opinion.

#### AWARD

Claim denied in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: E. A. Killeen  
Executive Secretary

Dated at Chicago, Illinois this 24th day of March 1972.

