NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20513
THIRD DIVISION Docket Number CL-20330

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (CL-7324) that:

1. Carrier violated the Telegraphers' Agreement (TCU) and in particular, Paragraph 2 of the May 20, 1970 Memorandum Agreement, when, beginning June 2, 1972, it arbitrarily transferred the copying of train orders, clearing of and delivering of train orders for Missouri Pacific trains, Sargent Yard, Memphis, Tennessee, to employes of the Arkansas - Memphis Bridge and Terminal Company who are not covered by the Agreement. (Carrier's File 380-3009) (Employes' File 8056-1-TC)

2. Carrier shall now be required to compensate claimants as outlined in Employes' Exhibit No. 4, three hours at pro rata rate, as required by the May 20, 1970 Memorandum Agreement.

OPINION OF BOARD: Starting on June 2, 1972 a series of train orders ware copied, issued and delivered to Missouri Pacific train crews by employes of the Arkansas-Memphis Railway Bridge and Terminal Company at its Kentucky Street office. When Carrier refused to pay Claimants a minimum call Petitioner alleged that Carrier was in violation of the Memorandum of Agreement dated May 20, 1970. That Agreement provides in part:

> "2. When train orders, or communication which serve the purpose of train orders, are handled by persons other than covered by this agreement and train dispatchers at locations where no employe covered by the T-C Div., BRAC Agreement is employed, other than under the exceptions set forth in Rule l(b)(a) (Missouri Pacific); Rule 2(c) (Texas and Louisiana); and Rule 2(d)(4) (Missouri-Illinois), a telegrapher designated by the district chairman will be allowed a call - three hours at the minimum telegrapher pro rata rate applicable on the seniority district."

Carrier alleges that the above Agreement was not applicable to Memphis prior to March 1, 1973, when the various clerks and telegraphers agreements were consolidated. Some historical perspective is essential in order to resolve this dispute.

The Union Railway Company of Memphis was a wholly owned subsidiary of the Missouri Pacific Railroad Company and encompassed the Memphis Terminal (Sargeant Yard) and the telegraphers employed at that location, who were represented by the Order of Railroad Telegraphers. By an Agreement entered into on August 31, 1949 between the Union Railway Company of Memphis and ORT, the parties agreed, inter alia, as follows:

> "It is further agreed that any wage adjustments, whether an increase or decrease in wages or any change in the rules or working conditions as adopted herein, affecting the employees of the Missouri Pacific Railroad Company represented by The Order of Railroad Telegraphers arrived at through channels provided therefor by the Railway Labor Act, amended, the National Vacation Agreement signed at Chicago, Illinois on December 17, 1941, supplements thereto and interpretations thereof, and the Chicago Agreement of March 19, 1949, as adopted by the Missouri Pacific Railroad Company and its employees represented by The Order of Railroad Telegraphers shall also apply to employees of the Union Railway Company covered by this agreement."

In 1966, pursuant to an ICC Order, the Union Railway Company was dissolved as a legal entity, and Carrier assumed total operating control. On March 1, 1973 the Clerks and Telegraphers Agreements were consolidated and the Telegraphers' agreements were eliminated throughout Carrier's property.

Carrier contends that, by practice, agreements applicable to Memphis were, prior to March 1, 1973, necessarily adopted by the parties; this was not the case with the May 20, 1970 Agreement. Further Carrier states that the dissolution of Union Railway did not automatically make the Carrier's memorandum agreements applicable at Memphis. Carrier also argues that Claimants did not have exclusive rights to handle train orders for Carrier's trains and that Bridge Company employes, by long established practice, may handle such orders. Carrier argues additionally that Claimants suffered no loss of earnings and that their claims constituted a penalty request.

The Organization states that the May 1970 Memorandum Agreement was entered into by the parties after almost nine years of negotiations and it provides clearly that at any location where no employe covered by the basic agreement is working or employed, the Carrier may have its train orders handled by any other person on the condition that it must pay a call to a designated telegrapher. Petitioner argues that the only exception provided for is in the event of an emergency and such is not the case in any of the Claims herein.

The key issue to be resolved in this dispute is whether or not the May 20, 1970 Agreement is applicable. Carrier cited Award 17629 in support of its position, involving the same parties. It is noted, however, that the incident in that dispute took place long before the May 1970 Agreement was executed, hence we do not find that Award to be controlling. On the contrary there have been several Awards (20126, 20127 and 20173) which have dealt with the 1970 Agreement on this Carrier and one of its subsidiaries and have all held that the calls were payable under circumstances similar to those herein.

The major thrust of Carrier's position is that the May 1970 Agreement is not applicable since it was not adopted by the parties. Carrier has not submitted any convincing evidence to support its contention; there must have been many changes in the rules in the period from 1949 to 1973 but we do not find copies of adoption agreements covering any of those modifications. Further, and more significantly the 1949 Agreement quoted in part above is abundently clear and unambiguous.

The quoted language "It is further agreed that....any change in rules....affecting employees of the Missouri Pacific Railroad Company ....shall also apply to employees of the Union Railway Company covered by this agreement." is specific and unequivocal. Under that language we do not believe it is possible to ignore the impact of subsequent agreements such as the May 1970 Memorandum Agreement. To further buttress this language, it is difficult to know how an adoption agreement could have been entered into in 1970 when the Union Railway Company ceased to exist in 1966. We also must reject Carrier's arguments with respect to exclusivity; such contentions are not relevant if the 1970 Agreement is applicable since any person can handle a train order under that Agreement when Telegraphers are not employed at that point.

Our conclusion is inescapable: the May 20, 1970 Agreement is applicable to Carrier's telegraph service employes working at Memphis, Tennessee. Further there was no emergency alleged in this dispute. Carrier's contentions with respect to the penalty nature of the Claim are similarly without merit: the payment of a call provided for in an agreement cannot be termed a penalty. If Carrier feels that the payments called for are unrealistic, the place to seek a change is at the bargaining table, not before this Board.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 8th day of November 1974.

LABOR MEMBER'S RESPONSE TO CARRIER MEMBERS' DISSENT TO
TO AWARD 20513--DOCKET CL-20330

Carrier Members' dissent to Award 20513 suggests that the Board was presented with two defenses. They then proceed to argue one of the two defenses-one they glossed over in their submission and oral presentation before the Board. The main thrust of their written and oral arguments was directed toward their argument that the May 20, 1970 Memorandum of Agreement was not applicable to its operations at Memphis, due to the fact that the Memorandum of Agreement was not adopted by the parties to apply at Memphis. This argument was found to be wanting and was correctly answered by the Board in its Opinion.

Now Carrier Member dissenters attempt to inject a Scope issue that Carrier ". . . presumed the Employes were contending the 'Scope' of the Agreement had been violated."

Such statement is completely ill-founded and not well taken, and borders on the brink of the ridiculous.

Carrier was well aware of the nature of this dispute, which was a result of Carrier's violation of the Agreement, "in particular, paragraph 2 of the May 20, 1970 Memorandum Agreement."

Carrier's dissenters understandably attempted to completely ignore the clear and unambiguous language of paragraph 2 of the May 20, 1970 Memorandum Agreement, which was adopted by the parties after almost nine years of conferences and negotiations. However, Carrier should not attempt through a discourse of language to change the intent and meaning of

that Memorandum Agreement, by an interpretation of the Board, contrary to the Railway Labor Act.

The Dissent also makes absurd conclusions, such as:

"Furthermore, the 1970 Agreement, by its own terms, does not apply at locations where telegraphers are employed, as here."

Telegraphers of the Eridge Company are not employes of the Missouri Pacific Railroad Company, and they are not covered by the May 20, 1970 Memorandum Agreement. The Telegrapher employes of the Bridge Company are covered by en entirely different working Agreement.

The dissenters further state that:

"The majority rejected Award 17629 that was squarely in point . . .."

The majority rightly so rejected Award 17629, for that Award was not squarely in point with the instant case, as the facts and circumstances clearly reveal. In addition, there was no Memorandum Agreement involved in Award 17629, as involved in Award 20513.

Award 20513 followed the principles of Awards Nos. 20126 and 20127 on this property, which properly interpreted the meaning and intent of the May 20, 1970 Memorandum Agreement, and also followed the principles of Award No. 20173, which also properly interpreted the meaning and intent of a Memorandum Agreement dated June 3, 1966 on the Texas & Pacific Railway Company (a subsidiary of the Missouri Pacific), and that Memorandum Agreement contained the same basic language as the May 20, 1970 Memorandum Agreement involved in Award 20513.

For some reason known only to Carrier Member dissenters, they simply do not wish to accept proper interpretation of the May 20, 1970 Memorandum

Agreement and/or a similar Memorandum Agreement, even though both contain clear, concise and unambiguous language.

Therefore, regardless of Carrier Member dissenters' statements, Award 20513 is correct in every respect,

J. C. Fletcher
December 30, 1974