# Award No. 1145
# Docket No. TE-1149

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

I. L. Sharfman, Referee

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## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## THE CHESAPEAKE & OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Chesapeake & Ohio Railway that, agent-telegrapher R. H. Murray, Gregg, Ohio, be paid under the call rule of the Telegraphers' Agreement for eighty-one (81) instances in which the operator of motor car at Gregg, during hours Telegrapher Murray was not on duty, copied by telephone from other points, line-ups of record which Telegrapher Murray should have been called on duty to secure."

EMPLOYES' STATEMENT OF FACTS: "An agreement bearing date August 1, 1927 as to rules and August 1, 1937 as to rates of pay is in effect between the parties to this dispute. The position of agent-telegrapher at Gregg, Ohio is covered by said agreeement.

"During the period involved in this dispute the telegraph office at Gregg was operated 10:00 A. M. to 7:00 P. M., except during lunch hour. The nearest telegraph office east of Gregg is at Robbins, a distance of 3.2 miles. The nearest telegraph office west of Gregg is at 'GB' Cabin, a distance of 7.1 miles. The telegraph offices at Robbins and at 'GB' Cabin are operated continuously day and night.

"During the period of the day on the following dates while the telegrapher at Gregg was not on duty, operators of motor cars not under Telegraphers' Agreement secured from the train dispatcher through the medium of the telegraphers at Robbins and/or 'GB' Cabin line-ups of trains, by the use of the block telephone at Gregg for their use in the movement of their motor cars:

"October 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 24, 25, 27, 28, 1938.
"November 1, 2, 3, 4, 7, 9, 10, 11, 14, 17, 30, 1938.
"December 1, 2, 6, 7, 9, 21, 22, 29, 1938.
"January 3, 4, 9, 11, 12, 17, 20, 25, 26, 27, 30, 1939.
"February 7, 9, 10, 13, 14, 16, 17, 20, 21, 22, 23, 24, 27, 28, 1939.
"March 1, 2, 3, 6, 7, 8, 9, 13, 14, 17, 20, 21, 24, 27, 30, 31, 1939.
"April 3, 4, 5, 7, 10, 11, 1939.

a total of eighty-one (81) days on which this work was performed. On fifteen (15) of these days more than one (1) line-up was copied in this manner by different operators of motor cars but within a spread of two (2) hours, excepting on October 4, 1938, when four-line-ups were copied by different operators of motor cars within a spread of two (2) hours and six (6) minutes. A total of ninety-nine (99) line-ups were thus handled during the eighty-one (81) days."

CARRIER'S STATEMENT OF FACTS: "The Agent-Operator at Gregg, Ohio, is assigned 10:00 A. M. to 7:00 P. M. On various dates from

Board has ruled that the handling of messages of record is not restricted to employes covered by the Telegraphers' Agreement.

"2. Rule 58 is the only rule involved in this dispute. It definitely stipulates 'train orders'; and as the conditions now complained of were in effect with the full knowledge of the employes at the time this rule was incorporated in the agreement, it is conclusive they did not consider the work now complained of as coming under the scope of their agreement—otherwise, they would have requested a revision of Rule 58 to cover.

"3. The following Finding of the Board in Award 4173 is sound and should be applied here:

> 'There are many practices as to which the schedules are silent, but which constitute just as much a part of the agreements as though they were incorporated, indeed it would require almost an encyclopedia to specify all such existing practices. Nevertheless, it is an elementary rule of the law of contracts that when parties make an agreement rested on a condition of affairs not even mentioned in the agreement, one party to such contract may not by unilateral action so alter these conditions as adversely to affect performance by the other parties.
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> 'We therefore hold that a practice of this sort may not be changed without agreement.'

"The practice here complained of has been in effect without previous protest for all the years there has been an agreement between the employes and the carrier, the information being given the motor car operator by the telegraph operator either verbally, in writing, or by telephone. This practice may not be ruled out without agreement to that effect.

"4. The request of the employes is for a new rule, which is a matter that should be handled under Section 6 of the Railway Labor Act. Therefore, this complaint should be dismissed.

"All evidence introduced in this submission has been previously discussed in conference or by correspondence with the representative of the employes."

**OPINION OF BOARD:** The claim in this case is based exclusively upon the scope rule of the Agreement, and the sole issue here involved is whether the use of the telephone by motor-car operators in securing line-ups from telegraph operators under the circumstances of this proceeding constitutes a violation of that rule.

It is common knowledge, and not controverted by the employes, that not all telephone communication is subject to the Telegraphers' Agreement. In the instant proceeding the information was obtained by the motor-car operators for their own use from telegraph operators employed under the prevailing schedule of rules. In other words, the work of receiving the line-ups from train dispatchers, as well as the work of transmitting them to the motor-car operators, was performed by employes subject to the agreement. In essence, then, it is the contention of the employes that delivery of the line-ups to the motor-car operators may not properly be made by telephone communication between the motor-car operators and telegraph operators located at points other than those where the motor-car operators are stationed. This contention, which, if upheld, might necessitate the assignment of telegraph operators at all points where line-ups are found to be necessary, is urged by the employes despite the provisions of Rule 58 of the Agreement and the long-established practice of the carrier in this connection.

Rule 58, captioned **Telephones**, which displaced an earlier rule captioned **Using Telephone**, imposes in this regard express restrictions, explicitly stated, upon the carrier, but these restrictions are specifically made applicable only to the handling of train orders. No persuasive consideration has been pre-

sented for assuming, as contended by the employes, that this rule with regard to train orders was designed to restrict the rights of the employes, as established by the scope rule, rather than those of the carrier, by way of express definition of the scope rule in controversial situations, and that therefore the scope rule not only applies to such handling of line-ups as is here involved but is more comprehensive in its restrictions upon the carrier in connection with line-ups than it is in connection with train orders.

In addition, it must be noted as of substantial significance that while the current Agreement dates from 1927, the present form of line-up from 1931, and the precise method of handling here involved at least from 1934, this is the first claim submitted by the employes questioning the propriety of the established practice. Although it must be conceded that the long-continued acquiescence of the employes cannot operate to alter the scope rule of the Agreement, such acquiescence is clearly relevant to a determination of the intent of the parties as to the applicability of the scope rule to the situation here in dispute.

There is ample evidence of record that this claim was submitted as a result of the issuance, in 1938, of Award 604 of this Division. That Award (and, with a single exception, those concerned with like disputes which followed it) involved line-ups secured by telephone directly from train dispatchers, whereby telegraphers were altogether eliminated from the performance of the work of obtaining and communicating this information as to location of trains. Since the scope rule of the Agreement there operative was found to have been violated, the carrier in this proceeding discontinued in due course the practice of direct communication between motor-car operators and train dispatchers. The present claim, however, applies in all instances to the provision of line-ups to motor-car operators by employes subject to the Agreement. No adequate grounds appear for extending the determination of Award 604 to the situation here involved; and the dictum in Award 942, where the claim was denied because of a cut-off rule and the question on the merits received no independent consideration, cannot be held to be controlling in the disposition of this proceeding.

It must be concluded, therefore, that under the circumstances of this case —including the character and development of the relevant rules and the established practice of the carrier in the handling of line-ups—there has been no violation of the Agreement.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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 evidence of record does not disclose any violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of July, 1940.