

Award No. 1552

Docket No. TE-1385

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

E. L. McHaney, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY CO.**

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Cleveland, Cincinnati, Chicago & St. Louis Railway, that the Carrier violated the Telegraphers' Agreement by requiring or permitting employes attached to Extra Gang 233, who were not under said agreement, to regularly receive and transmit communications of record daily by the use of a portable telephone while the gang was engaged in removing or relaying rails with a 'Burro Crane,' which crane blocked the main track when working and which was, by the use of portable telephone, kept practically in touch with the train dispatcher while working; and that the senior extra telegrapher, idle and available on each day this arrangement was in effect, be paid a day of eight hours at the minimum telegrapher's rate for the division (66 cents per hour) as the telegrapher who should have been used to perform this service."

EMPLOYEES' STATEMENT OF FACTS: "An agreement bearing date April 1, 1938, as to rates of pay and rules of working conditions is in effect between the parties to this dispute.

"On October 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, 30, and 31; and November 1, 2, 3, 4, 6, and 7, 1939, the Carrier maintained a portable telephone on a self-propelling Burro Crane operating on the main track between Worthington, Indiana, and Petersburg, Indiana, on said dates, which portable telephone was used daily on said dates by employes of Extra Gang 233 to receive and transmit communications of record such as line-ups, distribution of labor reports, progress of trains, messages, etc."

POSITION OF EMPLOYEES: "The Scope rule of the prevailing Telegraphers' Agreement between the parties to this dispute, provides:

'Article 1.

"(a) Employes in all positions specified in this schedule, held by telegraphers, telephone operators (except switchboard operators), agents, agent-telegraphers, agent-telephoners, levermen, towermen, tower and train directors, block operators, staffmen, ticket agents, car distributors, chief operators, wire chiefs, copy operators, or copyists, relief or extra agents, and operators of mechanical telegraph machines used for receiving and transmitting messages, will be considered "Telegraphers" within the meaning of these articles, irrespective of title by which designated or the character of service per-

"According to the Foreman's recollections, after getting the morning line-up he obtained further information only once from the dispatcher from October 6th to 14th, namely on the 10th. He did not have a portable telephone for the first three or four days the gang operated, and it was not used October 30th and 31st, or November 1st. On others days it would be used not more than 3 or 4 times, if at all.

"The record shows that the agent-operator at Elnora worked a call at 5:30 A. M. October 19th (for other reasons), and worked overtime 4:30 P. M. to 5:15 P. M. on October 17th (due to a work train), and 4:30 P. M. to 5:00 P. M. on October 24th because of a work train and to pay off the extra rail gang, while the gang worked in his neighborhood October 6th to 24th, inclusive.

"At Newberry the agent-operator worked overtime:

Oct.	26	4:00 P. M.—5:00 P. M.	Extra	Rail	Gang	Reports
"	30	4:00 P. M.—4:45 P. M.	"	"	"	"
"	31	4:00 P. M.—4:30 P. M.	"	"	"	"
Nov.	1	4:00 P. M.—5:00 P. M.	"	"	"	"
"	2	4:00 P. M.—4:30 P. M.	"	"	"	"
"	3	4:00 P. M.—4:15 P. M.	"	"	"	"
"	4	4:00 P. M.—4:45 P. M.	"	"	"	"

"It should be apparent from this record that the Carrier spared no reasonable overtime that appeared to be necessary.

"There was in fact no thought that any improprieties under the schedule were being practiced.

"The use of the Burro Crane has no bearing upon the dispute whatever, and the same necessities exactly would have prevailed had the crane not been used.

"The main track was cut each side of where the gang worked from day to day, and it was only upon such dead track, protected by flag in each direction, that the Burro operated.

"The Burro is a portable affair that can be quickly placed upon and removed from the tracks, just as motor cars and other equipment is handled. Rails or planking are set alongside the track and the machine runs out upon them. Tests some time ago showed the device put on the track in as short a time as one minute twenty seconds, and removed in one minute forty seconds.

"When not in use, the Burro Crane was placed in the clear in a side track or spur part of the time, and set off alongside of the track in other cases, whichever was most convenient.

"The Extra Gang was not a work train outfit, but merely a track gang working on the ground.

"The Carrier requests that the claim be denied for lack of merit, and because its allowance would be equivalent to the issuance of a rule requiring a unique method of operation, not in keeping with any recognized practice and not based upon necessity or any good reason.

"The Carrier takes exception in principle to the wording of the 'Statement of Claim' as submitted by the employees because it is not reasonably specific."

OPINION OF BOARD: From October 6 to November 7, 1939, both inclusive, Sundays excepted, the Carrier used a portable telephone in connection with the operation of a self-propelling Burro Crane on the main track between Worthington and Petersburg, Indiana, to receive and transmit

communications of record, such as train line-ups, distribution of labor reports, progress of trains, etc., directly with the dispatcher, which telephone was used by the foreman and other employees of Extra Gang 233.

It is the contention of the Employees that such use of said telephone by the foreman and others, who are not under the Telegraphers' Agreement, is work covered by and coming within the scope of said Agreement; that such telephone so used in communications service constituted a telephone office within the meaning of said Agreement, and that the senior extra telegrapher who was idle during such period should have been assigned to perform the service and paid for the time denied him.

The Carrier denies that the portable telephone was "installed" on the crane, that it was used daily and that messages and reports of record were handled in its use. It admits that it was on the job (between stations) "for conversational purposes but there is no exact record of its usage." It is, therefore, its position that the Agreement was not violated.

In our opinion it is established that the foreman and others of the Extra Gang did use the portable telephone for the purpose of sending and receiving information of record, such as line-ups of trains, distribution of labor reports, progress of trains, etc., all of which work is of the class that comes within the scope of the Telegraphers' Agreement, and that the senior idle telegrapher should have been assigned to perform this service. See Awards 604, 1220, 1224, 1303, and 1535.

The record does not show the exact number of days this portable telephone was used in the work stated and we cannot make any money award for this reason.

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 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 claim will be allowed for every day the Agreement was so violated and will be remanded to the parties to determine the exact number of days and the amount due the senior idle telegrapher at the correct rates of pay.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 13th day of August, 1941.

Dissent to Award No. 1552, Docket No. TE-1385

That part of the Opinion holding that the use of the portable telephone was work in the class that comes within the scope of the telegraphers' agreement, is a conclusion in conflict with more reasonable practical Opinions of prior awards of this Division which held that:

The source of right to the exclusive performance of work is not to be found in the scope or seniority rules of the agreement.

The scope rule specifies the class of employees subject to the agreement; it does not specify the kind of work which may properly be assigned or required of employees.

It is well known that the telephone is and has been used for many purposes independently of its use by telegraphers.

There is no rule in the existing telegraphers' schedule restricting the right of the carrier to have employees other than employees covered by that schedule handle messages and reports of record over the telephone or by messengers as shown by the record in this case, and there is consequently no violation of the current agreement between the parties.

The telephone conversations between the extra gang foreman and the dispatcher involved information for the foreman's own use in the conduct of his work; these conversations were incident to and a part of his customary duties as a M. of W. foreman.

For the past 22 years portable telephones have been used by extra gangs and in the absence of showing by acts or conduct of the parties that such use of the telephone placed it under the scope of the telegraphers' agreement, such all inclusiveness as is here ascribed to the scope rule of that agreement should not have been summarily adopted as a basis for decision in the face of the counter holdings of this Division.

The right to the exclusive performance of all telephone work is not to be found in the scope rule of the telegraphers' agreement and we necessarily register disagreement with the award in this case.

/s/ R. H. ALLISON
/s/ C. P. DUGAN
/s/ R. F. RAY
/s/ A. H. JONES
/s/ C. C. COOK