

Award No. 1657
Docket No. TE-1511

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
MISSOURI-KANSAS-TEXAS LINES**

STATEMENT OF CLAIM: "Claim of the General Committee of the Order of Railroad Telegraphers on Missouri-Kansas-Texas Lines, that the transmitting and receiving of messages and reports of record by means of the telegraph or telephone is work covered by the Telegraphers' Agreement and shall be performed by employes under said Agreement; that the Carrier violated the terms of the Telegraphers' Agreement by requiring or permitting an employe not under the Agreement at Tulsa, Oklahoma, to transmit a message of record on December 18, 1939, by means of the telephone to the Baden Yard telegraph office at St. Louis, Mo.; and that the first trick telegrapher at Tulsa shall be paid an extra day's pay at the minimum telegrapher rate under the provisions of Article 1-(d) of the Telegraphers' Agreement for the day on which this violation occurred."

EMPLOYES' STATEMENT OF FACTS: "An agreement bearing date August 28, 1928, as to rates of pay and working conditions, and interpretation thereto dated November 25, 1933, is in effect between the parties to this dispute.

"Two positions of telegrapher are maintained at Tulsa, Oklahoma, and are covered by said agreement with assigned hours 8:00 A. M. to 4:00 P. M. on the first trick, and 7:30 P. M. to 3:30 A. M. on the second trick.

"On December 18, 1939, at 4:07 P. M., the Carrier required or permitted an employe at Tulsa not under the Telegraphers' Agreement, to transmit by telephone the following message of record to the Baden Yard telegraph office at St. Louis, Mo.:

"Tulsa, Okla., Dec. 18, 1939.

R. D. Kelly, Baden:

NATX 5478 Chicago Heights MKT East St. Louis C&EI protect.
File RC-861-39. Joint JHL-RDK.

/s/ T. L. Peeler. 4:07 P. M.'

"This message was transmitted by telephone seven minutes after the first trick telegrapher at Tulsa had been excused from duty for the day."

POSITION OF EMPLOYES: "The prevailing Telegraphers' Agreement contains in particular, the following articles which we invoke in this dispute:

'Article 1

'Employes Included

'(a) These rules and working conditions will apply to Agents, Freight Agents, or Ticket Agents, Agent-Telegraphers, Agent-Tele-

'(d) For continuous service after regular working hours, employees will be paid time and one-half on the actual minute basis. Employees shall not be required to work more than two (2) hours without being permitted to go to meals. Time taken for meals will not terminate the continuous service period and will be paid for up to thirty (30) minutes.'

'(e) Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.'

and recognized by the petitioner in his letter of December 27, 1939, quoted on page 10 herein, in which he states:

'Of course if this wasn't a habit with the clerks and others the message could have been sent by the telegrapher before he left off duty, or could have held him a while.'

(Emphasis supplied.)

"The Carrier denies each and every, all and singular the allegations contained in the employees submissions and asks that strict proof be required of each and every, all and singular, the allegations contained in petitioner's submissions.

"The Carrier respectfully requests that inasmuch as the claim is for a penalty, and penalties are not recoverable for breach of contract, the claim be denied.

"For the foregoing reasons the Carrier respectfully requests that the Board deny the claim."

OPINION OF BOARD: The parties are in dispute over the material facts in the case. There is in effect an agreement bearing date of August 1, 1938 as to rates of pay and working conditions, and an interpretation thereof dated November 25, 1933. When the prevailing agreement became effective the Carrier maintained continuous service during the twenty-four hours of the day at Tulsa, Oklahoma, telegraph office. On or about January 21, 1933 the Carrier abolished one of the three trick telegraph positions in that office and rearranged the assigned hours of the two remaining positions so that the office was thereafter closed during the periods 4:00 P. M. to 7:30 P. M. and from 3:30 A. M. to 8:00 A. M. It is the contention of the Employees that on December 13, 1939 at 4:07 P. M. the Carrier required or permitted an employee at Tulsa not under the Telegraphers' Agreement to transmit by telephone the following message of record to the Baden telegraph office at St. Louis, Mo.:

"Tulsa, Okla., Dec. 18, 1933

"R. D. Kelly, Baden:

"NATX 5478 Chicago Heights MKT East St. Louis C&EI protect.

"File RC-861-39. JOINT JHL-RDK.

(s) T. L. Peeler. 4:07 P. M."

The Carrier contends that it has no record that the quoted message was sent but admits that about 4:00 P. M., December 18, 1939, the Bell Oil and Gas Company telephoned diversion order on NATX 5478 to the Division Freight Agent's office at Tulsa; that that office contacted Muskogee yard office by company telephone and was informed this car passed Muskogee on train 72, December 17, 1939. The Carrier then called Baden yard office at St. Louis, Mo. on the company telephone and informed them of the diversion order and that car would arrive at Baden on train 72 that evening and that they would send Baden yard a telegram covering the diversion.

This record shows that on January 23, 1940 Mr. Schaller, one of the Operating officials of the Carrier, wrote a letter to the General Chairman answering a letter written to him by the General Chairman on December

27, 1939. In that letter this official of the Carrier sets out in detail the facts as contended for at that time by the Carrier. This letter shows that an investigation had been made by the official in regard to this telegram. Nowhere in this letter of January 23, written better than five weeks after the telegram was claimed to have been sent, does this official deny that the telegram was sent. On May 27, 1940 Mr. F. W. Grace, an official of the Carrier, wrote to the General Chairman in reference to this claim and in that letter we find the following:

"I find Mr. Schaller's letter of January 23, to you set forth what appears to be a frank and correct statement of the circumstances involved in this case."

Nowhere in the letter of Mr. Grace, written some five months after the telegram was claimed to have been sent, does he deny that the telegram was sent. The Board is of the opinion that in view of the two letters of the officials of the Carrier, both written after investigation had been made, the last one after the elapse of five months, neither denying that the message was sent, and, in view of the fact that there were diversion instructions covering the car in question, the contention of the Carrier that there was no such message cannot be sustained.

It is the contention of the Employees that the action of the Carrier in this case constituted a violation of the prevailing agreement, particularly Article I, paragraph (d) of the agreement, which we quote:

"(d) Station employes at closed offices or non-telegraph offices shall not be required to handle train orders, block or report trains, receive or forward messages, by telegraph, telephone or mechanical telegraph machines, but if they are used in emergency to perform any of the above service, the pay for the agent or telegrapher at that office for the day on which such service is rendered shall be the minimum rate per day for telegraphers, as set forth in this agreement, plus regular rate. Such employes will be permitted to secure train sights for the purpose of marking bulletin boards only."

It is the contention of the Carrier that the above article covers only "station employes" at closed offices or non-telegraph offices; that the office at Tulsa at the time of alleged violation was neither a closed office nor a non-telegraph office; that there is a provision in the current agreement which defines a non-telegraph agency as an agency at which no telegraph service is performed and the Carrier also maintains that a proper definition of a closed office is an office at which no telegraph service is performed. With the Carrier's construction of Article I, paragraph (d) we cannot agree because the parties in their current agreement provided for a penalty rule and unless there was a telegrapher working at the office, there would be no one to pay the claim to under the rule.

The Board is of the opinion that a fair reading of the agreement contemplates that there is an agent or telegrapher employed at that office for the rule states that if the telegraph or telephone is used to perform such service the agent or telegrapher at that office shall be paid the minimum rate per day for telegraphers. If the station were a closed station, such as the Carrier contends, there would not be a telegrapher employed at that office to receive the compensation set forth in the rule. The agreement simply states "closed offices" and does not designate any minimum period of time in which the office shall be closed before the rule shall apply. In the absence of such restriction the rule is applicable no matter for what period of time the office is closed.

It is conceded by the Employees that the Carrier has a right to use the telephone for ordinary conversational purposes but they question the right of the Carrier to require or permit employes not under the Telegraphers'

Agreement to use the telephone for sending or receiving messages, reports of record, or the handling of train orders, all in connection with the Carrier's business. In Award 603 this Board said:

"With no disposition to trench on the long line of decisions sustaining these principles the Board deems them inapplicable in the instant case. It is not always easy to distinguish situations arising under the Telegraphers' Agreement involving the use of telephone for the reason that it is well known that the telephone is and has been used for many purposes independently of its use by the telegraphers. It is, of course, not even claimed that all telephone communication is subject to the Telegraphers' Agreement."

Carrier also contends that the article covers only "station employes" and that the employes in the Division Freight office are not "station employes" within the meaning of the agreement. This record shows that this Carrier paid claims where employes, holding no rights under the Telegraphers' Agreement, used the telephone for the purpose of handling communications of record. In one of these cases it was an employe of the signal department who used the telephone. In another it was an employe classified as a foreman. Neither of them would come under the classification of "station employes."

In view of the particular facts set out in this record showing prior settlements covering similar claims under this very agreement, the contention of the Carrier cannot be sustained. Finally, the Carrier contends that claimant here is no more entitled to the penalty than the other telegraphers employed at Tulsa. This we do not think is important for the other telegrapher is making no claim, and if he should, the Carrier would not be required to pay twice. See Awards 1248 and 1605. Under this record as it was presented to the Board we hold that there was a violation of the Telegraphers' Agreement and that the first trick telegrapher at Tulsa is entitled to the minimum rate for the day on which this violation occurred.

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 there was a violation of the Telegraphers' Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of December, 1941.