Award No. 1671

Docket No. TE-1565

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Wilson McCarthy and Henry Swan, Trustees)

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Denver and Rio Grande Western Railroad, that Telegrapher F. A. Thornbrugh, Marshall Pass, Colorado, be paid four calls under the Call Rule of the Telegraphers' Agreement for messages of record copied at his station March 21, 22, 23 and 25, 1940, by an employe not covered by said Agreement, and which communications Mr. Thornbrugh should have been used to handle."

EMPLOYES' STATEMENT OF FACTS: "The Order of Railroad Telegraphers and the Denver and Rio Grande Western Railroad Company have an agreement dated January 1, 1928, Re-issue December 1, 1939, covering wages and working conditions of the employes thereon. Marshall Pass, Colorado, a first telegrapher position is listed in the wage scale on page 20 of this agreement, and the hours of duty of the first telegrapher March 21, 22, 23 and 25 were from 8:00 A. M. to 5:00 P. M. with one hour out for lunch. On the dates named immediately above, the section foreman located at Marshall Pass copied a line-up of trains over the dispatcher's telephone located in the section house a short distance from the depot, at approximately 6:55 A. M."

POSITION OF EMPLOYES: "In error, our thirty-day advance notice of intention to file this dispute, mentions in the Statement of Claim, that Mr. Thornbrugh is Agent-Telegrapher at Marshall Pass. We wish to correct the claim to list him as Telegrapher only. The General Committee of the Telegraphers claim that the handling of the communication of record by an employe not covered by the Telegraphers' Agreement, as narrated in the Employes' Statement of Facts, is a violation of the Telegraphers' Scope Rule No. 1, also of overtime and call rules Nos. 5 and 6 of that Agreement, because an employe who is not protected by the Agreement was required or permitted to perform the work of telegraphers contrary to and in violation of a written agreement assigning such duties and work to those employes protected thereby.

"Under date of September 5, 1939, the following letter was directed to the management in an effort to prevail upon them to discontinue the practice of turning our work over to employes of another craft:

and it might also be added that such a requirement is not only not to be found in the Scope Rule of the agreement, but may be found only in a specific agreement of the same type as that deemed necessary by the Organization when they requested and secured a new rule, in the Mediation Agreement of May 13, 1940 (Case No. A-757), relating to the handling of train orders, etc., by train and enginemen.

"The Carrier submits that a consideration of all the evidence, the previous conduct of the parties, and the practical and economic considerations bearing upon the meaning of the agreement and its application to the facts, fully sustains the Carrier's position, and respectfully requests that the claim be denied."

OPINION OF BOARD: This case presents the question whether it is proper for a section foreman to copy line-ups of trains over the telephone direct from a dispatcher, as a regular practice at a time when the telegrapher is not on duty.

The same question was answered in the negative in Award 604 of this Division. That Award has been applied and followed in upwards of a dozen decisions by this Division in which a number of different referees have participated; and we think that these precedents are so substantial that sound policy requires us to follow them, unless the present case can be distinguished on the facts.

In order to determine whether or not the present case can be so distinguished, we must ask first of all whether the line of authority represented by Award 604 embodies a general principle that it is contrary to the scope rule for non-telegraphers regularly to copy line-ups direct from dispatchers over the telephone; or whether the line of authority hinges upon particular facts showing an intentional evasion by the carrier of the call and overtime rules. The facts in the present case are such as to absolve the carrier of any such intentional evasion.

The opinion in Award 604 did not, perhaps, make sufficiently clear the basis upon which the case was decided. The opinion, for example, pointed out that the carrier could have assigned the work to telegraphers by a relatively slight change of hours or of overtime payments, and the carrier's failure to do this was stamped as an evasion of the overtime and call rules. This part of the opinion was adverted to on behalf of the carrier in Award 1261, the first of several cases involving the regular copying of line-ups by sectionmen direct from dispatchers at stations where no telegraphic service existed. It was contended (see the dissenting opinion) that there could be no "evasion" of the sort mentioned in Award 604, since there were no telegraphers who could be called. The Board, however, held that the work belonged to telegraphers under the scope rule and could not be regularly assigned to others.

Award 604 seems really to have rested on this ground, despite the reference to "evasion," because at 4 of the 13 stations in question there was no telegraphic service, and the conclusion of the opinion stated that many prior decisions of the Board had held "that work of a class covered by the agreement belongs to the employes upon whose behalf it was made and cannot be delegated to others without violating the agreement. It is considered that the instant case directly conflicts with that principle."

In Awards 1268, 1281, 1282, 1284, and 1303, as well as in 1261 (and, to the extent indicated, in 604), no telegraphic service existed at the points in question, and yet the impropriety of section-men regularly copying line-ups direct from dispatchers was affirmed. We may, therefore, take it as settled by these precedents that the principle announced by them rests upon the requirements of the scope rule and not upon a finding of intentional evasion by the carrier.

The next question is whether the present case may be distinguished from the others by the fact of the long-existing practice shown here to have existed, without opposition or question by the representatives of the employes during revisions of the agreement or at any other time until the advent of the decisions beginning with Award 604. Since, as we have seen, those decisions defined the rights of the employes under the scope rule, the real question is whether the practice in this case amounted to an agreed upon abandonment of those rights. It may doubtless be inferred from the facts that the employes either did not think about, or were ignorant of the existence of, those rights until the advent of the decisions in question, and that what they are doing now is to capitalize upon those decisions by asserting the rights declared therein to belong to them. Upon the whole record we do not think that they are legally barred from doing so.

This case is not one of interpreting a doubtful phrase in a contract, with respect to which the practice of the parties may furnish a guide to the intended meaning. For in the type of situation here presented it has been repeatedly held, in decisions referred to above whose soundness we do not feel can be questioned at this late stage, that the meaning of the scope rule is clear and confers upon the employes the rights which they have now chosen to assert. In a number of these very same decisions (e. g.: Award 604 itself, and Awards 919, 941, 1261, 1268, 1281, 1282, 1284) allegations regarding established practices were advanced by the carriers, and were evidently considered by the Board as not barring the employes from insisting that, whatever may have happened in the past, the scope rule should thenceforth be complied with.

We do not wish to be taken as suggesting that past practice may not be a guide to the meaning of the scope rule in doubtful situations, as, for example, in Awards 1396 and 1397 where certain usages of the telephone by non-telegraphers in yard work were held not to be within the rule. All we are holding is that, in precedents so substantial that we feel bound to follow them, the scope rule has been declared, despite contrary prior practices, to confer the rights now asserted.

There remains to be considered the possible effect on this case of Award 1320, involving the same parties as those now before us, and the same question except that there the section foreman obtained the line-ups through a telegrapher instead of directly from the dispatcher. It was held that this was permissible, following Award 1145 which dealt with a similar situation. Award 1283 had in effect over-ruled Award 1145, by holding that there was no distinction between obtaining line-ups from a telegrapher as intermediary and obtaining them directly from the dispatcher; that, therefore, it was necessary to choose between following Award 1145 or Award 604, and that Award 604 should be followed because of the number of cases which had already followed it. Award 1320, we take it, in turn over-ruled Award 1283 by holding that the two situations were in fact distinct and that Award 1145 was sound and applicable. This same view was taken in the most recent case sustaining the propriety of obtaining line-ups from telegraphers as intermediaries (Award 1553).

While there are certain passages in Award 1320 which might have been construed as questioning the authority of Award 604 and of the decisions following it, our conclusion is that Award 1320 merely went back to Award 1145 and restored it; that neither Award 1320 nor 1145 purported to overrule Award 604, but simply distinguished the facts from those in Award 604; that this distinction could soundly be made; and that Award 1553, the latest case to uphold the distinction, clearly also supports the principle of Award 604.

Award 604 has also been reaffirmed, since Award 1320, by Awards 1535 and 1552; and its authority seems to us unshaken.

On the other hand, in view of some of the phraseology of Award 1320, plus the fact that in Award 1535 the opinion of the Board apparently (and if so, erroneously) cites Award 1320 as if it were contra to Award 604, we

think it possible that the carrier in this case might have been misled as to the exact status of the doctrine and of what this Board might rule in its particular case. Accordingly we deem it equitable to sustain the employe's claim without reparation for the past.

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 shows a violation of the scope rule.

AWARD

Claim sustained; but without reparation, for the reasons stated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of January, 1942.

Dissent to Award 1671 (Docket TE-1565)

We dissent from this Award which discards the unquestioned practice of the parties for more than twenty years as reflecting the understood meaning and application of the scope rule and instead assumes the existence of a latent meaning in the rule based upon principle said to be found in other Awards.

/S/ R. F. Ray
/S/ C. P. Dugan
/S/ A. H. Jones
/S/ R. H. Allison
/S/ C. C. Cook.