Award No. 1720
Docket No. TE-1603

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Carl B. Stiger, 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 & Rio Grande Western Railroad, that Agent-telegrapher C. E. Maddox, Silt, Colo., be paid for four calls under the Call Rule of the Telegraphers' Agreement because of messages of record copied at his station November 19, 20, 22 and 23, 1940, by an employe not covered by said agreement and which messages Mr. Maddox 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. Silt, Colorado, an Agent-telegrapher position, is listed in the wage scale on page 17 of this agreement, and the hours of duty of the Agent-telegrapher November 19, 20, 22 and 23, 1940 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 Silt copied a line-up of trains over the dispatcher's telephone located in the Depot at Silt at approximately 7:56 A. M.

POSITION OF EMPLOYES: This claim is predicated on our Scope Rule No. 1, also Rule 5, Overtime; and Rule 6, Call Rule, of the current agreement.

It is evident that the management recognized that the copying of the line-ups by the section foreman at Silt was a violation of our Scope Rule as they did, under date of November 25, 1940, change the hours of service of Agent Maddox at 7:30 A. M. to 4:30 P. M. in order that he, instead of the section foreman, could copy the line-up; however, they have steadfastly declined to allow the claims for calls on the dates shown in our above claim.

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 Rule 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's position in this case is similar to its position in a claim presented to the Board ex parte by the Organization under Docket TE-1565.

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: The question is whether the practice prevailing on the Carrier's System of section foremen and other motor car operators of copying line-ups of trains direct from dispatcher over the 'phone when the telegrapher is off duty violates the scope rule of the agreement, effective January 1, 1928, which reads:

"Rule 1—Scope

"This Contract will govern the employment and compensation of Telegraphers, Telephone Operators (except Switchboard Operators), Agent-Telegraphers, Agent-Telephoners * * * and will supersede all previous schedules, agreements and rules thereon."

During the era in which train orders and line-ups were transmitted by Morse code and key, telegraphers under the scope rule of agreements then in force performed the work of receiving line-ups which was one of the duties that constituted the position of telegrapher.

During the years 1916-17 the telephone was quite generally substituted for the Morse code and line-ups were copied by telegraphers direct from the dispatcher over the 'phone.

The practice complained of began during the year 1918 and gradually became a regular practice on the respondent system when the agent-telegrapher was not on duty.

The scope rule includes agent-telephoners.

The change in the method of copying line-ups did not affect the agreement and this usual and ordinary work of telegraphers remained under the scope rule and attached to the position of telegrapher though the line-ups were communicated by telephone rather than by Morse code.

The Board is not in accord with the statement of the Carrier in its rebuttal reply that copying line-ups through conversation between Maintenance of Way employes and the dispatchers is not telegraph work.

The decision in this case is controlled by Awards 604, 851, 919, 941, 1024, 1220, 1224, 1261, 1268, 1281, 1282, 1283, 1284, 1303, 1535, 1552, 1553, 1671 which hold, or support the principle, that the regular practice of section foremen and other motor car operators of copying line-ups over the telephone direct from the dispatcher when the telegrapher is not on duty violates the scope rule of this and identical agreements.

The transfer of this work, which was covered by the scope rule of the Telegraphers' Agreement, to employes outside of the agreement violated the agreement and the claim must be sustained.

It is contended on behalf of the Carrier that the above awards are not applicable to this case because the practice which occasioned this claim has continued on this System for an uninterrupted period of 25 years and, when

the agreements were re-negotiated in 1924 and 1928, no protest was made by the General Committee against the practice; that the first complaint made by Petitioner against the practice was made in September 1939, and that said circumstances establish an acquiescence by the employes, through their Organization, in the practice and a recognition that copying line-ups has not been work included in the scope rule of the agreement since the telephone was substituted for the Morse code.

The General Chairman of the Order of Railroad Telegraphers states in the submission of the Petitioner:

> "There can be no question but what this practice is a regular one on this property; neither can there be any question as to whether or not it is condoned by the management as we have earnestly endeavored to prevail upon them over a long period of time to discontinue the practice, thus far we have been powerless to enforce the provisions of our agreement or the decisions rendered in identical cases on other property by this Board with respect to section foremen copying line-ups of trains."

The complaints referred to in this statement are not set out in the record.

The contentions of the Carrier that the Employes consented to the transfer of this work to positions not covered by the agreement, that the formal contract between the parties was amended or modified by acquiescence of the employes in the continuing violation of the agreement should not be sustained unless established by clear, positive, and convincing evidence.

The Division is of the opinion that the delay by the Organization in asserting the right of the employes to perform this work which is clearly granted by the contract, its mere failure to question the practice, if in fact no complaint was made, is not sufficient proof of acquiescence in the illegal practice or an abandonment of such right or of a modification of the scope rule by mutual consent of the parties and that Petitioner is not barred or estopped in complaining at this time of the illegal practice. As stated in Award No. 137: "A party to an Agreement cannot revise it by repeated violations of it."

The Board finds no justification in the record for refusing to apply said awards to this dispute.

A similar defense was interposed in behalf of Carrier in Awards 604, 919, 941, 1282, 1671, and other awards and in each case the decision was in favor of the employes.

For example, in Award 1282 the Carrier states:

> "The complete absence of a protest from the Organization is evidence of their long recognition of the right of a section foreman to secure train line-ups in connection with the performance of his work through the use of booth telephones without any violation of the Telegraphers' Agreement."

In Award 604 the claim, facts, and respective positions of the parties are substantially the same as in the instant award. In the Carrier's position it is stated:

> "The practice which is the source of this complaint, has existed for many years with the full knowledge of the officials of the employes' organization and no exception has ever before been taken to this practice."

However, the opinion held that the said regular practice was not a defense to the claim.

Award No. 1671, dated January 5, 1942, involved the same parties and agreement and substantially the same facts as in this dispute. The opinion in holding that the employes were not barred from asserting their right

under the scope rule of the agreement because of the long existing practice shown to have existed without opposition or question by Representatives of the employes during revisions of the agreement and until 1939, states:

"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."

Award No. 735 states on the question of acquiescence to illegal practices:

"While it may be said that such acquiescence in the practice followed is evidence of satisfaction with the method used, it does not amount to a modification of the agreement. In agreements of this character more conclusive proof is required than evidence of mere acquiescence in practices followed to warrant a finding that an agreement has been modified. Definite proof is required of an understanding between the parties that **for the future** such practices may be continued. There is no evidence of any such understanding in this case."

Award Nos. 849 and 864 also tend to support the conclusion reached in this case.

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 record shows a violation of the Scope rule.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of February 1942.

Dissent to Award 1720—Docket TE-1603

The conclusions which constitute the premise of the Opinion in this award, aside from acceptance of certain prior awards of the Division as being controlling, are to the effect that the copying of line-ups direct from

train dispatchers was and is the usual and ordinary duty of telegraphers on this railroad and, hence, is work now covered by the Scope rule of the Telegraphers' Agreement unless the Agreement is shown to have been amended or modified by acquiescence of the Employes established by clear, positive, and convincing evidence.

In developing this premise to a final conclusion that no such modification exists, the Opinion takes cognizance of, but rejects as not being clear, positive, and convincing evidence of acquiescence, the recognized regular and system-wide practice in obtaining line-ups since 1918; the re-negotiation of the Agreement in 1924 and again in 1928 with knowledge on both occasions by the General Committee of the practice but no complaint against its continuance, and, finally, the first complaint concerning the practice of September 5, 1939.

We perforce record our dissent to this award in the light of the foregoing facts, which it is our firm conviction give ample proof that the General Committee, having knowledge of the widespread practice then existing during re-negotiation of the Agreement in 1924 and 1928 without question or complaint then or thereafter for more than eleven years, did, in each instance by such re-negotiation of the Agreement, acknowledge their acquiescence for the future that the practice of section foremen and other motor car operators securing line-ups of trains from dispatchers was not in conflict with the Scope rule or other provisions of the Telegraphers' Agreement. That the other awards of this Division here deemed controlling, although clearly distinguishable in their factual situations from the instant case, constituted the real basis of the Employes' conception of illegal practice rather than the Scope rule of their Agreement, is evidenced by the belated complaint of September 1939, not made until more than one and one-half years after the issuance of the first Award, No. 604, by this Division, relating to another carrier with its separate Agreement and practices. Recognition of long existing practice under circumstances similar to the situation here presented is found in Awards 1145 and 1320.

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