

Award No. 4010
Docket No. TE-4050

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHER

THE CINCINNATI UNION TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Cincinnati Union Terminal Company, that P. R. Campbell and A. Borros, regularly assigned operators at Cabin "E", Cincinnati, Ohio, shall each be paid at the rate of time and one-half on each of the specified holidays on which required to work commencing with Labor Day, Monday, September 2, 1946, in accordance with the provisions of the Memorandum of Understanding dated April 24, 1946, effective July 13, 1945, between the parties to the telegraphers' agreement, instead of the pro rata rate at which they were paid.

EMPLOYEES' STATEMENT OF FACTS: On September 2, 1946, Labor Day and specified holidays since that date, P. R. Campbell and A. Borros, regularly assigned employes at Cabin "E", were worked and paid pro rata rate for work performed on these holidays.

POSITION OF EMPLOYEES: P. R. Campbell and A. Borros are employes of the Cincinnati Union Terminal Railway, regularly assigned at a point designated as Cabin "E", with assigned hours:

P. R. Campbell—6:30 A. M. to 2:30 P. M.

A. Borros—4:00 P. M. to 12 midnight.

The two positions are covered by an agreement between the Cincinnati Union Terminal Railway and employes represented by The Order of Railroad Telegraphers, effective August 11, 1933 (as amended April 16, 1936) and supplements thereto.

One supplement to the Agreement is covered by a Memorandum of Understanding executed April 24, 1946, with a retroactive date of July 13, 1945, which reads:

"The Cincinnati Union Terminal Company agrees to pay the employes represented by The Order of Railroad Telegraphers for time worked on the following holidays, namely: New Years Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided, when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday) at the rate of time and one-half, effective as of July 13, 1945, minimum payments as provided under present call and overtime rules remaining unchanged."

Under the provisions of the above quoted agreement the employes working at Cabin "E" were entitled to payment for service performed on Holidays at

8. THE USE OF THE TELEPHONE DOES NOT CONVERT A SWITCH-TENDER TO A TELEGRAPH OR TELEPHONE OPERATOR.

The Third Division has held repeatedly that it is permissible for all classes of employees to use the telephone for purposes directly relating to their own basic duties.

On our property, the switchtenders at Cabin "D", who are represented by the B.R.T. under that organization schedule and as to whom there is no dispute, use the telephone regularly and frequently to keep advised of anticipated movements for which the switches must be lined up. The switchtenders in the station proper use the phone repeatedly to call either the Tower, or Cabin Clerks located adjacent to depot tracks, to ascertain what moves will next be made.

No contention is made that these other employees are not switchtenders because of such use of the telephone.

SUMMATION:

These men are switchtenders, performing switchtender duties, covered by the switchtender schedule, and paid in accordance therewith.

As switchtenders they came directly under the certification of the Mediation Board under date of December 11, 1945, Case R-1525, are represented by the Brotherhood of Railroad Trainmen and are included in the schedule made with that organization under date of July 15, 1946, covering the entire class of switchtenders.

The jobs have never been reclassified by proper authority, or at all, nor is there any ground for doing so.

Disputes relating to switchtenders are under the jurisdiction of the First Division, not the Third Division.

Any features running to the orders of the National Mediation Board are referable to that body.

The claim should be dismissed for lack of jurisdiction, and is of no merit aside from the question of jurisdiction.

(Exhibits not reproduced.)

OPINION OF BOARD: The sole issue in this case is whether the employees named in the claim are communication men covered by the Telegraphers' Agreement or switchtenders covered by the Trainmen's Agreement. If they can be properly classed as Telegraphers the claim should be allowed for it is conceded that under the terms of the current Agreement between the Carrier and the Order of Railroad Telegraphers all employees represented by the latter are entitled to pay at the rate of time and one-half for work performed on holidays.

Historically, the events giving rise to this dispute can be stated thus: From 1936 to 1945, switchtenders were under the Telegraphers' Agreement. In August, 1945 the Brotherhood of Railway Trainmen notified the Mediation Board there was a representation dispute among the switchtenders. On August 30, 1945, the Board notified all interested parties and the following November assigned a Mediator to handle the dispute. During conferences the Mediator, the Telegraphers' Organization, and the representative of the Trainmen apparently concluded there were five positions carried on the Carrier's payrolls as switchtenders whose primary duties were other than those of switchtenders, and the Mediation Board was notified accordingly. Just what agreement was reached after such conferences, which, so far as the record shows, were not participated in by the Carrier, is best reflected by portions of a letter written on December 4, 1945, by the then Vice President of ORT to the Mediation Board which reads as follows:

"It was agreed between the representatives of the Brotherhood of Railroad Trainmen and The Order of Railroad Telegraphers that the

three positions at Cabin C are in fact Levermen positions; that two of the positions at Cabin E (now occupied by P. R. Campbell and A. Borros) are in fact positions of telephone operators; that these positions cannot be properly classified as switchtenders and are not involved in this case. All other positions listed, with the exception of the relief day work on the five positions named above, are properly classified as switchtender positions and are the positions over which the Brotherhood of Railroad Trainmen seeks representation.

The Order of Railroad Telegraphers hereby relinquishes representation over all positions of Switchtenders as listed on the Carrier's payrolls with the exception of the three positions at Cabin C which are in fact levermen positions and the two positions at Cabin E, which are in fact positions of telephone operators and the relief work on those five positions."

The Mediation Board handed down its certification order in the representation dispute heretofore mentioned on December 11, 1945. In part that order reads:

"The services of the National Mediation Board were invoked by the Brotherhood of Railroad Trainmen to investigate and determine who may represent switchtenders employed by the Cincinnati Union Terminal Company, for the purpose of the Railway Labor Act, as provided by Section 2, Ninth, thereof.

At the time application was received these employes were represented by the Order of Railroad Telegraphers.

The Board assigned Mr. James M. Holaren, Mediator, to investigate. During the course of the investigation, representative of the Order of Railroad Telegraphers addressed a letter to the Board advising as follows:

"The Order of Railroad Telegraphers hereby relinquishes representation over all positions of Switchtenders as listed on the Carrier's payrolls with the exception of the three positions at Cabin C which are in fact levermen positions and the two positions at Cabin E which are in fact positions of telephone operators and the relief work on those five positions."

* * *

On the basis of the investigation and check of representation authorizations the National Mediation Board hereby certifies that the Brotherhood of Railroad Trainmen has been duly designated and authorized to represent switchtenders employed by the Cincinnati Union Terminal Company, for the purpose of the Railway Labor Act."

Shortly after receipt of the order, portions of which have just been quoted, the Carrier and a representative of the ORT wrote the Board expressing entirely different views as to its import and meaning. On January 16, 1946, Robert F. Cole, Secretary of the Mediation Board, wrote a letter to the ORT, a copy of which was sent to and received by the Carrier and by the BoRT. That letter reads:

"This will acknowledge your letter of January 3, 1946, suggesting an amendment to Certification dated December 11, 1945, issued by the Board in Case R-1525, representation dispute among switchtenders of Cincinnati Union Terminal Company.

Since the quotation from your representative's letter of December 4, 1945, addressed to the Board, carries a clearly stated exception of the three positions at Cabin 'C' and the two positions at Cabin 'E', it does not appear that any interpretation should be necessary. While it is true that the Certification does not contain any acceptance of your proposals, the Board's files, including the report of the Media-

tor, makes it clear that there was a verbal acquiesce of the Trainmen's representative in the exception stated by you.

We assume that the Brotherhood of Railroad Trainmen will not question the coverage of the Certification as issued and the parties should have no difficulty in clarifying the situation when their agreement is revised."

So far as the record shows, no response was made to Mr. Cole's letter by any of the parties receiving it and no question was thereafter raised by any one respecting the interpretation placed upon such order by the Board which made it until about September 3, 1946, when the workmen herein involved were advised in effect by the Carrier that they were classified by it as switch-tenders working under the BofRT Agreement and not as communication men under the Telegraphers' contract.

About four months after the Mediation Board's certification, to be definite, on April 24, 1946, the Carrier entered into the existing contract with the ORT whereby it was agreed, as heretofore indicated, that all employes represented by that Organization and covered by its terms were to be paid time and one-half for work on holidays. It was not until July 15, 1946, that the Carrier entered into its present contract with the BofRT, the terms of which make no provision for extra pay on holidays. Hence the real reason for this dispute.

It is of importance to note the record discloses the Carrier apparently recognized the two positions involved were covered by the Telegraphers' Agreement. In any event, it is charged by the Organization and not denied that it paid the occupants of such positions under and in accordance with the provisions of that Agreement up to and until shortly after the date of the execution of the BofRT contract.

Conceding, as the Carrier contends, that the two Organizations had no authority to reclassify positions by private understanding or without negotiation and agreement, the Mediation Board possessed the power to classify them for representation purposes. That, in our opinion, is exactly what it did in its certification of December 11, 1945. True enough, its order was no paragon of clarity but that its certification did not include five positions, two of which are here involved, is the reasonable inference to be gleaned from its terms. This is quite clearly indicated by the quoted portion of the Organization's letter appearing therein. That such was the Board's intention is definitely established by its Secretary's letter heretofore quoted. Under such circumstances and in view of all the other facts disclosed by the record, we are satisfied the BofRT has never been authorized to represent the two operator positions in question and that they have never been taken out from under the coverage of the Telegraphers' Agreement. Even if they had been, it is not too certain it would follow that they would now be covered by the Trainmen's contract. At all times since receipt of the copy of Secretary Cole's letter, the Carrier knew the Mediation Board, the Telegraphers and the Trainmen considered these positions as belonging to the Telegraphers. From about January 16, 1946, until shortly after July 15 of that same year it acquiesced in their views in that respect. It went further than that. It paid the occupants of such positions in accordance therewith. Acquiescence and action of the character to which we have referred can result in a binding obligation even in the absence of an express contract.

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 Employes involved in this dispute are respectively carrier and employes 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 two positions involved in the instant claim are covered by the Telegraphers' Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of July, 1948.