Award No. 5133
Docket No. TE-5025

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee.

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY
(EASTERN AND WESTERN DIVISIONS)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile & Ohio Railroad Company, (Eastern & Western Divisions), that G. E. Morgan, the regularly assigned agent-operator at Higbee, Mo., hours 8:00 A. M. to 5:00 P. M., with one hour for meals, shall be paid for a call under Rule 5 of the Telegraphers' Agreement on July 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, August 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 30, 31, 1948, on which a section foreman, not under the Telegraphers' Agreement, copied a lineup of train movement by telephone at Higbee direct from the train dispatcher, and on September 1, 2, 3, 4, 7, 8, 9, 10, 11, 1948, and on every week-day thereafter on which the section foreman copied a lineup of train movement by telephone at Higbee direct from the operator at Mexico, Mo., at a time when the agent-operator at Higbee was not on duty at this one-man station.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date June 16, 1944, as to rules of working conditions, revised September 1, 1949, as to rates of pay, is in effect between the parties to this dispute.

Claimant G. E. Morgan, is the regularly assigned agent-operator at Higbee, Mo., a one-man station, with assigned hours 8:00 A. M. to 5:00 P. M. on week-days. No Sunday assignment.

Prior to July 1, 1948, he regularly each week-day received by telegraph direct from the train dispatcher a lineup of train movement addressed to the section foreman for delivery each week-day morning at this station.

Effective on or about July 1, 1948, the Carrier installed a train dispatcher's telephone in the Higbee station office for use in lieu of the telegraph. Effective July 2, 1948, the section foreman located at Higbee, an employe not under the Telegraphers' Agreement, was permitted or required by the Carrier to copy a lineup of train movement each week-day morning by telephone at Higbee direct from the train dispatcher until September 1, 1948, and was thereafter required or permitted to copy a lineup of train movement each week-day morning by telephone from the operator at Mexico, at a time prior to the agent-operator at Higbee coming on duty.

Claim was filed by the agent-operator at Higbee for a call for each day on which the section foreman was thus permitted or required to copy a lineup at his station before he came on duty. The Carrier declined the claim.

August 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 30, 31, 1948.

September 1, 1948;

and from the operator at Mexico on September 2, 3, 4, 7, 8, 9, 10 and 11, 1948.

Agent Morgan issued a time slip for a call on each of these days and the claim was denied by the Superintendent, after which the Organization also handled the matter with the Superintendent, who again denied the claim.

The copying of line-ups by the Section Foreman at Higbee is a violation of Rule 1 of the Telegraphers' Agreement. The claim is proper and we are appealing from the decision of the Superintendent, and will appreciate your prompt attention and decision.

Yours very truly,

(Signed) E. E. Gentz
General Chairman."

In all of the prosecution of the claim with the Manager of Personnel, the claim was never amended by the Employes and remained the same as stated in their letter of February 5, 1949, quoted in the foregoing. Since the Employes did not prosecute with the Carrier any claim after September 11, 1948, no investigation was made as to those subsequent dates and the Carrier has no information that there was in fact any subsequent dates involved. In these circumstances, it is the position of the Carrier that, in accordance with the rules of your Board, the claim of the Employes is limited to the dates listed by them in the period, July 6 to September 11, 1948, inclusive.

The Employes may allege that the Carrier has paid some prior claims involving copying of line-ups by Section Foremen or other Motor Car Operators. The Carrier has been unable to find record of any such claims paid. If, in fact, any such claim was paid in the past, of which the Carrier now has no record or knowledge, it was an isolated case not properly authorized and did not constitute recognition by the Carrier of the validity of such claim.

It is the position of the Carrier that the claim of the Employes fails of support and should be denied for two reasons:

1st—The claim had its origin in the very reprehensible action by the Agent-Operator at Higbee, who deliberately set a trap for the Section Foreman by suggesting and inducing him to copy line-ups, which fact the Agent-Operator, 2½ months later, used as basis for fifty-eight (58) time claims, which were all made and sent at the same time and received by the Superintendent on September 15, 1948.

2nd—The Carrier believes it has shown that the work in dispute, all of which was handled by telephone, cannot be considered as covered by the Scope Rule of the agreement, and, therefore, is not exclusively the work of Telegraphers.

This dispute has been handled by the Carrier in accordance with the provisions of the Railway Labor Act and the rules of your Board.

OPINION OF BOARD: On authority of Award 4018, same Agreement, same parties, and the rule at issue, the Board here finds that copying line-ups by means of the telephone, at stations where an operator, under the Telegraphers' Agreement, is employed, even though the work is performed prior to the starting time of the regularly assigned operator, comes within the scope of the subject Agreement.

The cited Award also forecloses the Carrier's contention that negotiations on the property, prior to the date of the Award, is evidence that the

work is not reserved to employes covered by the Agreement. Aside from the fact that evidence of past negotiations is of questionable value, except in cases where the intent of the parties is clouded in doubt, such evidence must always give way to clear and unambiguous language, or later rules interpretations by this Board. It does not admit of dispute that the Board's interpretation of rules becomes a part of the Agreement to all intents and purposes as though written into the rule book. Thus, the parties are governed by Award 4018, subject to valid distinctions on the facts and rules at issue, or until the weight of judicial opinion shifts. This Board has many times held, when confronted with Scope Rules, general in character, as here, that "tradition, historical practice and custom" shall govern the work covered. Therefore, evidence of negotiations on the property in conflict therewith has no place in resolving this vital point at issue, and we are compelled to hold that, by tradition and custom, of which the Board's Award 4018 is a part, the work of receiving and copying line-ups is under the Agreement.

At this point we are confronted with what the Carrier contends is a controlling distinction between the instant case and Award 4018. In the precedent Award the Section Foreman secured the line-up direct from the Train Dispatcher. Here the Section Foreman copied some line-ups direct from the operator at another station. The Carrier says this was not in violation of the Agreement and calls attention to Awards 1145, 1305, 1320, 1553, 1671, 1752, 3363 and 3459 as authority for the proposition that, where line-ups were received from a Telegrapher, even though at a distant point, claims are not valid. That this Board's decisions on the point raised have had at best only a transitory efficacy, is shown by a citation of contrary opinion. See Awards 1281, 1283, 1563, 3671, 3881, 4320, 4506, 4516, 4772, 4919, 4923.

The earlier Awards, on which the Carrier relies, very clearly make a distinction between cases where the line-up is secured direct from the Dispatcher and those where it is received from another operator, holding in the latter instance that there is no violation of the Scope Rule. However, the Awards relied on by the Organization expressly hold there is a violation. That which we have elected to call the "transitory efficacy" of the Awards is pointed up by the fact that the Board has overruled earlier Awards on the same property. Compare Awards 3363, 3881, 4516. Therefore, we do not believe this difference of opinion is attributable to rule differences, as contended by the Carrier. Further, we do not find any marked difference between the Scope Rule of the instant Agreement and those under review in the reported cases.

As to the Carrier's reference to (b), under the Scope Rule, pertaining to copying train orders, we fail to see how it has any application to this dispute. In another case in this same assignment, Award 5079, calling for interpretation of a like rule, we held, on the basis of the facts and circumstances peculiar to that case, there had been no violation of the Agreement, when, at points where no telegraph offices were maintained, a train order was copied by others than Telegraphers. However, we are definitely of the opinion that the enumeration of train orders under Rule 1(b) of the subject Agreement does not make their handling the only work reserved to employes covered by the Agreement. See Award 4919.

Failing to find a basis for reconciling or harmonizing the conflict in Board precedent, we must elect to follow the more recent opinions which, to say the least, represent a definite trend away from earlier Awards, and at the same time carry added weight by reason of the fact that the decisions were reached only after giving a full measure of attention to such earlier opinions. Accordingly, we hold that the Agreement does not permit an employe not covered by the Agreement to obtain a train line-up by telephone at a station, or vicinity, where there is a regularly assigned Agent-Telegrapher, even though not on duty, from a telegraph operator at another station. See Awards 4516, 4919.

We do not believe the Carrier itself holds much to the proposition that the work in question is outside the Agreement. It charges, in a sense, that

the Agent-Operator at the station in question is now and has been assigned the duties of copying line-ups, but that he voluntarily passed the work on to others without the Carrier's knowledge or consent. We think, even so, there has been a violation of the Agreement. Individual employes covered by a collective bargaining Agreement cannot by voluntary act or deed, or individual contract, waive, excuse, or condone violations of the collective Agreement. See Award 2602.

The serious aspect of the charge, as originally framed, that the Agent-Operator participated in the violation of the Agreement, is that it had all the attributes of a charge of entrapment. Whether the Board, on being confronted with a charge of that nature, would overlook a contract violation, under such circumstances, either as a means of indirect discipline of a guilty person, or to prevent him from profiting by his own wrong, we are not called on to answer. An essential element of entrapment is removed from this case when the Carrier ultimately concedes that the "Agent saw nothing wrong with the Section Foreman copying the line-ups". We believe unwitting participation in a contract deviation is lacking in the guilty knowledge, or wrongful intent, necessary to support a charge that one seeks to profit by his wrongful act. Neither do we see any merit in the presumption that, except for the Organization's participation, a claim might not have been filed by the Agent-Operator. The right of the Organization to present and prosecute claims is no longer an open question with the Board. Awards 137, 444, 547, 2724.

The claim for compensation impresses us as having merit. We see therein a situation where an employe has mistakenly and unintentionally given up work to which he was entitled under the Agreement. Work under a collective bargaining Agreement has some of the attributes of a property right. One who parts with his property inadvertently under excusable circumstances has a right to recover at the hands of those who have trespassed thereon. While we recognize that this amounts to a windfall for the employe, his claim is only incidental and the Board's first concern is to uphold the sanctity of Agreements and to see that they are correctly applied according to the letter and spirit of the solemn undertaking to which the Carrier and Organization are parties. Compare Awards 2724, 2282, 1646.

The Carrier's objection to the general nature of the claim is overruled. The claim embraces future violations only so long as they continue. This is proper. See Award 4821.

We hold that the claim has merit.

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 Carrier violated the Agreement as contended by the Petitioner.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of December, 1950.

DISSENT TO AWARD NO. 5133—DOCKET NO. TE-5025

The record shows the action here complained of was instigated by the claimant agent-operator and was accomplished without the knowledge or consent of the Carrier. One who instigates an action not permissible under the provisions of the Agreement, should not be rewarded for his improper and unauthorized action.

Another inconsistency is the allowance of compensation for 23 dates in July, 1948, whereas in Award 4018, dated July 30, 1948, involving the same parties, the Board held claimant was not entitled to recover retroactive compensation because of the long existing practice and because of what was apparently considered as conflict in the awards on this subject. The action here, with respect to retroactive compensation, is directly contrary to the holdings in Award 4018.

(s) J. E. Kemp
(s) R. H. Allison
(s) A. H. Jones
(s) R. M. Butler
(s) C. P. Dugan