Award No. 5407
Docket No. TE-5291

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee.

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Illinois Central Railroad, that

1. The Carrier violated the terms of the Telegraphers' Agreement when it required or permitted a section foreman, an employe not covered by the aforesaid agreement, to copy and handle lineups by telephone at Maroa, Illinois, a location where an employe covered by the scope of the agreement is employed during the time such next above referred to employe was off duty on March 26, 28, 29, 30, 31, April 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 1949, and

2. Agent-Operator L. C. Hanley, Maroa, Illinois, shall be compensated as provided in Article 3, Rule 10-(a) of the agreement of June 1, 1939, for one call on each of the calendar days listed in paragraph one above.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of June 1, 1939 is in evidence, hereinafter referred to as the Telegraphers' Agreement; copies thereof are on file with the National Railroad Adjustment Board.

L. G. Hanley, Claimant, was the regularly assigned agent-operator at Maroa, Illinois, on the days named in the statement of claim, with assigned hours 7:15 A. M. to 4:15 P. M. with one hour allowed for meals. Prior to Hanley's assigned starting time of 7:15 A. M., a section foreman, an employe not under the Telegraphers' Agreement, whose headquarters are at Maroa, copied train lineups by telephone on each of the days specified in this claim at a time when agent-operator Hanley was not on duty.

Claims were filed in behalf of claimant L. G. Hanley, the regular incumbent of the agent-operator position, for payment on the basis of "calls" in accordance with the provisions of Article 3, Rule 10 (a) of the Telegraphers' Agreement on the ground that he was available and entitled to have performed this work but was not called. The Carrier declined to pay the claim.

POSITION OF EMPLOYES: The facts in this proceeding are simple, and in view of the majority of previous decisions in similar instances, which sustained the position of the Organization, an award sustaining this claim should be equally simple.

Employes' Exhibit No. 1, attached hereto and made a part hereof, illustrates clearly the practice of the Carrier requiring or permitting em-

them and apply them to the facts of the particular cases. See Third Division Awards 1299, 1682, 1813 and 2335. It was held in Award 2335 that, "For this Division to require reparation payments to all clerks under such circumstances would compel its entrance into a field of contract making—a field entirely foreign to the purpose of the Board." Therefore, the Board is without authority to make contractual obligations not agreed to between the parties, nor has the Board the power to create quasi-contractual obligations.

This claim should accordingly be denied inasmuch as there is no violation of the controlling agreement, and the Employes recognized and acquiesced in the established practice and procedure for over thirty-five years, during which time the agreement was revised fifteen (15) times without the inclusion of the provision they are now attempting to have your Board write into their contract.

(Exhibits not reproduced.)

OPINION OF BOARD: Agent-Operator Hanley's tour of duty at this point was 7:15 A. M. to 4:15 P. M., with one hour off for lunch. Prior to his assigned starting time on stated dates, the Section Foreman listened in on the train dispatcher's telephone circuit to obtain the train lineups for the day. The Organization contends that the Section Foreman was performing work belonging to the Telegraphers' by so doing and claim compensation for the Agent-Operator under the Call Rule, Art. 3, Rule 10-(a).

Carrier declined the claim upon the property, pointing out that the Section Foreman did not call the dispatcher nor did the dispatcher call the Section Foreman, the practice being for the dispatcher to make one or more early morning general broadcasts of the lineups which could be obtained by anyone coming in on his circuit. Carrier further defends on the grounds of alleged acquiescence and long standing practice.

The past Awards of this Division on the issue involved here are many and seemingly in conflict. Fundamentally the question finds answer in the determination of the scope of work covered by the Agreement effective upon the property on which the claim arose.

The pertinency of past practice is also dependent upon the construction given the Scope Rule of the Agreement. If the Scope Rule be vague and its coverage uncertain, past practice long acquiesced in is the best evidence of the parties' original intent and it is entitled to great weight. On the other hand, if the meaning of the rule be clear and certain, employe acquiescence in a contrary practice from now to kingdom come will not nullify its rights thereunder even though they may be estopped in their rights to retroactive pay for its violation (Awards 4457, 4129, 4054).

The work is not spelled out in the Scope Rule of the Agreement before us. Rather, the rule is of the general class type where tradition, historical practice and custom must be resorted to for a determination of its coverage. This does not constitute a patent ambiguity for such type of rules are common upon American railroads even though perhaps peculiar to the industry.

The submission before us reflects a long standing, acquiesced in practice for Section Foremen to obtain train lineups in the manner followed here. The practice is unusually well documented. But to be of controlling importance, as we have previously stated, we must first find an ambiguous Scope Rule.

This Division has sought to follow the communication work of the earlier Morse Code operators into the advanced methods of communication and preserve to the telegrapher the work which traditionally belonged to him. The Division's reasoning in cases of this kind is fully set out in Award 4516 and will not be repeated herein. This approach does not run counter to the general objectives of the parties as evidenced by the classifications set forth

in Rule 1. There, "telephone operators", "mechanical message machine operators" and "agent telephoners" are evolutionary positions and among the classifications listed in the 1939 Agreement.

While there is some conflict in the record as to whether or not lineups are orders of record, we are convinced that they were so considered by the Carrier. Carrier states that lineups are merely information to the person receiving them; that there is no prescribed form in which this information is written, and that it is not retained and becomes obsolete within a few hours. However, the record shows that employes required to operate motor cars shall be given train lineups by the dispatchers under instructions of the Carrier. Likewise, such employes are instructed to secure information concerning train movements from the train dispatcher. For a few fleeting hours at least and irrespective of the form on which they are noted, Carrier has made the possession of train lineups a job obligation and necessarily a matter of record in the performance thereof.

We have previously conceded that train lineups are not train orders in the sense that they grant no authority to use or obstruct tracks over which trains are running. They are, however, essential transportation communications in that they protect a necessary branch of the service from the dangers of another (Award 4516). Such transportation communications have in numerous Awards of this Division been found traditionally to be the work of telegraphers under scope rules similar to Rule 1 in the instant Agreement. We agree with the reasoning and conclusions of these Awards. Such being the case, we have no occasion to resort to past practice for intended meaning.

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 use of the dispatcher's circuit at a station where an assigned Operator is off duty but available for a call by an employe not under the Telegraphers' Agreement to obtain train lineups is a violation of the Agreement between these parties and entitles the Operator to payment for a call on each of the dates stated.

AWARD

Claims (1) and (2) 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, 1951.