Award No. 5430
Docket No. TE-5345

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, 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 agreement between the parties when it required or permitted employes not covered by said agreement at West Jackson Yard, Mississippi, to perform communication service of record on the following dates: July 10, (two calls), 11, 14, 15, 16, 18, 20, 21, 22, 23, 24, 27, 29, 30; August 1, 2, 11, 12, 13; September 2, 4, 5, 7, 1948; and

(2) C. V. Barrow shall now be paid a call payment in each instance as shown in paragraph 1 under the provisions of Article 3, Rule 10 (a).

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.

C. V. Barrow, Claimant, was the regularly assigned Telegrapher at West Jackson Yard Office, Mississippi, on the days named in the statement of claim, with assigned hours 6:00 P.M. to 3:00 A.M. with one hour allowed for meals.

The duties of the telegrapher at West Jackson Yard were to handle all communications service of record such as train orders, train consists, train lineups, clearance orders, telegrams, "OS" work and other related duties.

At a time that the telegrapher was not on duty the Carrier required or permitted other employes working at West Jackson Yard Office to perform communications service of record belonging to and handled by the telegrapher when on duty.

Claims were filed in behalf of claimant Barrow, the regular incumbent of the position of telegrapher, at the time of the violations mentioned, for payment on the basis of a Call for each occasion when outside employes performed communications service, under the provisions of Article 3, Rule 10 (a) of the Telegraphers' Agreement on the ground that he was available to have performed this work but was not used. The Carrier declined to pay the claim.

POSITION OF EMPLOYES: As indicated in the Employes' Statement of Facts during the period of this claim West Jackson Yard was a communication

readily be sustained. But the failure of the parties to deal directly with these practices in subsequent agreements and their recognition by the parties for more than fifteen years after the negotiation of the last collective agreement furnishes convincing proof that their abrogation was never intended. See Award 1435. The conduct of the parties to a contract is often just as expressive of intention as the written word and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, affords a safe guide in determining what the parties themselves had in mind when the contract was made."

Third Division Award No. 2576—Referee Curtis G. Shake

"Where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in and, as a consequence, he acts on that belief over a long period of time, this Board will treat the matter as closed, insofar as it relates to past transactions."

In conclusion the Carrier reiterates the Agreement with The Order of Railroad Telegraphers contains no provisions relative to the procuring of train information by yardmasters or their assistants, and if it had been the intention that such a provision be included, it would have been done as was the case relative to handling of train orders as covered by Rule 4 which provides that, "No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed."

There is no basis in support of this claim and to do other than completely deny the claim in the absence of a rule would be changing the agreement as written. The desire for a change in the schedule rules to sustain the claim has been demonstrated by the Employes by their attempt to change them by negotiations as well as the recognition of the former and present General Chairman of the practice under the rules over the years.

It has been held in many awards by the Third Division that the purpose of the Adjustment Board is not to make new rules but, instead, to interpret 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: In its ex parte submission the Carrier impliedly concedes, if in fact it does not actually admit, that on the dates in question the communications involved in this case were given by the Chief Dispatcher at Vicksburg, Mississippi, to the Yardmaster, or other employes not covered by the Telegraphers' Agreement, at West Jackson Yard, a communication station on the Vicksburg Division where Telegrapher Barrow, the Claimant, was on duty daily, except Sunday, between the hours of 6:00 P. M. and 3:00 A. M. Since it makes no material difference, we shall

assume, for purposes of this Opinion, that such messages were delivered to the Yardmaster.

The Carrier does not admit evidence of the information received as above indicated, submitted in the form of a detailed exhibit, was copied by the Yardmaster. However, our careful examination of the record convinces us the messages were not only received, but copied by that employe during the hours Telegrapher Barrow was off duty. We also conclude from the same source that Barrow was available for call during those hours, and that messages so received and copied were similar to those which the latter exclusively received and copied while on duty, as a part of the duties of his regular assignment.

Thus it appears the only serious factual dispute existing between the parties has to do with the nature of the messages received and copied by the Yardmaster. On this point the Carrier takes the position that such messages were not matters of record, and were given to the Yardmaster for the purpose of yarding trains, splitting them up, the handling of bad order equipment, and the general handling necessary in a make-up and break-up of train yard. On the other hand, the Employes insist the messages were necessary for the efficient and safe operation of the Railroad, and that for all intents and purposes they were train lineups; also, that under the existing conditions and circumstances they must be regarded as communications of record.

Turning again to the record, we are obliged to conclude the Employes' version of the existing factual situation must be accepted. Examination of the exhibit, to which we have heretofore referred, reveals that more than two-thirds of the communications therein listed and detailed contained express information regarding the location and movements of trains while the remainder, although not as definite, are susceptible of a like construction. Therefore, if, as the Carrier suggests, they were not identical in form to lineups Section Foremen and other employes usually obtain regarding the movement of trains, they were tantamount to the same thing, and must be so regarded. This conclusion does away with the necessity for determining whether they were communications of record, although it should perhaps be stated the Carrier inferentially concedes they were copied and kept by the involved employe until they had served their purpose.

Unless the record discloses some other ground which precludes it, the conclusion just announced respecting the force and effect to be given the communications here in question means that under the rule now well established by Awards of this Division of the Board, our decision in the instant case must be that action of the Carrier as heretofore related, resulted in a violation of Article 1, Rule 1 (Scope) of the current Agreement, for which Claimant was entitled to be called on the dates set forth in the claim, under the provisions of Article 3, Rule 10, of the same contract.

We are not here disposed to rehash the reasons given in the many holdings of this Board, to which we adhere, that the receiving of essential transportation and operational communications in the nature of train lineups, is work reserved to Telegraphers under the Scope Rule of an Agreement such as is here involved, even though the work itself is not specifically described in the contract. It suffices to say those reasons are all spelled out in the following Awards, and apply with equal force to Section Foremen, including B&B and Track (Awards Nos. 1671, 1720, 3881, 4009, 4018, 4320, 4506, 4772, 4919, 4923, 4925, 4967, 5133); Conductors (Awards Nos. 4459 and 4624); Signal Maintainers (Award No. 4516); Station Masters (Award No. 4882); and Switch Crew Foremen (Award No. 5230).

If and when, as here, the communications in question are tantamount to train lineups, the fact the employe who receives and copies them is a Yardmaster, instead of an employe of the type mentioned in the foregoing

Awards, afford no sound ground for holding the principles therein announced are not applicable and decisive. Therefore, based on such Awards and our most recent Awards Nos. 5407, 5408 and 5409, which we pause to note are equally as applicable, we hold the Carrier's action as heretofore related was in violation of the current Agreement.

Arguments advanced by the Carrier to the effect the work involved in the instant case—(1)—is not covered by the Scope Rule,—(2)—were not communications of record, and —(3)—the Awards heretofore cited are clearly distinguishable, have all been given consideration and disposed of in what has been heretofore stated; hence, they need not be labored.

In conclusion, certain contentions advanced by the Carrier and not thus far mentioned, are entitled to and should be given consideration.

At the outset it is argued failure of the Employes to request a joint submission requires a dismissal of the claim. No prejudice resulted to the Carrier from this action, and under similar circumstances we have refused to sustain such a contention.

Another argument advanced is that there is no rule in the Agreement providing for a call. There is no merit to this claim—Article 3, Rule 10, makes express provision therefor. Then, it is asserted that even so, the Claimant is not entitled to a call. The Rule, so well established that it requires no citation of the Awards supporting it, is that under the confronting conditions and circumstances the penalty is a call for each day the record establishes a violation.

Next, practice is relied on as a defense. We have carefully reviewed the evidence and have concluded that if it existed, the Carrier has failed to establish it, by the preponderance of evidence required to warrant us in holding the work in question was not included within the Scope of the Agreement. Indeed, our view is this phase of its claim is an after-thought, if in fact it is not actually spurious. It is certain the Employes have long and frequently complained of just what is here involved, and a fair inference to be derived from the record is that when they did so the Carrier would lead them to believe any existing violations of the Agreement would be discontinued.

It is urged the Employes have endeavored to negotiate a more favorable rule, thereby recognizing and acknowledging the work did not belong to them. We are inclined to the view this action was an attempt to eliminate a controversy which would seemingly be corrected, and then spring up again. Be that as it may, we have held an attempt to obtain a more favorable and less controversial rule does not constitute a limitation on a rule already in existence. (See Awards 4506 and 5133.)

Finally, acquiescence is relied on as barring a sustaining Award, or in any event, retroactive reparation. We doubt if the record established acquiescence. Even so, we do not agree. Under our decisions (See Awards 2926, 3168, 5013 and 5161) acquiescence in the violation of an agreement does not prohibit enforcement of its terms, and precludes retroactive application of reparation only for the period prior to the time the claimed interpretation was first asserted. Here, that was long before any of the dates involved in the claim.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.