

Award No. 5431
Docket No. TE-5405

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD
COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, New Haven & Hartford Railroad, that:

- (1) the agreement between the parties is violated when the Carrier permits or requires employes having no rights thereunder, by use of the telephone, to act as telephone-block operators, in obtaining permission for trains and motor hand cars to occupy and use the main tracks within designated block limit territory, report the time that trains and motor hand cars clear such block limit territory, and copy motor hand car orders Form 1433-b, at Rising, Massachusetts, during times that employes under the agreement at that location are not on duty.
- (2) the employes under the agreement at Rising, Massachusetts shall be compensated in accordance with the provisions of the Overtime or Call Rules, whichever is applicable to the situation, in each instance on each day, beginning March 28, 1948, and continuing each day thereafter that such employes are not called to perform these duties that are theirs under the agreement.

EMPLOYES' STATEMENT OF FACTS: Rising, Massachusetts is located on the New Haven Division of the New York, New Haven and Hartford Railroad. Prior to March 28, 1948, two operator-clerks were employed at Rising, with assigned hours 5:30 A. M. to 1:30 P. M., and 1:30 P. M. to 9:30 P. M., the positions appearing at page 41 of the Wage Scale. The incumbents of those positions performed, in conjunction with their other assigned duties, the communications-of-record service pertaining to the movement of trains and Motor Hand Cars and blocking of trains at their station.

Effective March 28, 1948, one operator-clerk position was declared abolished; the hours of the remaining position being made 11:00 A. M. to 8:00 P. M. with lunch hour 2:00 P. M. to 3:00 P. M., rest day Thursday. Concurrently with this change, employes not under the agreement were required or permitted to perform the functions of these positions during the time the remaining operator-clerk was not on duty.

open office. This brief description reveals how impracticable it would have been to use the form in the days of telegraphic communication.

The scope rule of Carrier's agreement with the telegraphers does not specify the categories of work included. Like many other agreements with this organization, it simply names the positions covered. In these circumstances this Board has frequently held that the work involved is to be determined by what traditionally was performed by use of the telegraph. As is already apparent Form 1433-B could not have been used when the telegraph was the only available means of communication.

Equally untenable is the claim that blocking motor hand cars may be handled only by telegraphers. When a motor hand car occupied the main track carrier's rules require that the block be clear of all but preceding traffic moving in the same direction. Consequently before placing a motor hand car on the track, the employe in charge uses the telephone, either fixed or portable, to call the operator in charge of the block involved. If the block is clear of traffic other than preceding trains or motor hand cars, permission is verbally given to occupy the track. Similarly when the motor hand car is removed from the track, the block station is called to report the track clear. Having in mind that these stops must necessarily be at many different and constantly changing locations, it is apparent that the method of communication now employed is essential.

And we submit the scope rule of the agreement does not require a different result. Under Carrier's rules a single qualified operator must at all times be in control of each block. He is the "Block Operator," named in the scope rule of the Telegraphers' agreement, without whose permission it is improper to occupy the main track. No other employe is authorized to block trains or other equipment. Without the use of the telephone to call the nearest block operator it would obviously be impossible to give block protection to motor hand cars. Equally as impracticable would be a requirement that an operator be assigned at each of the numerous and constantly changing points where such communication might take place.

The wide use of the telephone by operator to issue Form 1433-B and to block motor hand cars has made possible on Carrier's lines protection for employes using such cars which was unavailable when the telegraph was the only useful method of rapid communication. The telephone is not here displacing the telegraph.

Accordingly Carrier submits this claim should be denied.

OPINION OF BOARD: The facts as we glean them from the record will be summarized very briefly.

Rising, Massachusetts, listed in the Carrier's timetable as a station, is a block point located at the Junction of two of Carrier's single track lines. Prior to September 28, 1941, no telegraphers were assigned there. Commencing on that date the Carrier assigned operators at such points on two tricks, hours 5:30 A. M. to 1:30 P. M. to 9:30 P. M., and the incumbents of such positions performed, in conjunction with their other assigned duties, communications pertaining to movement of trains and motor hand cars and blocking of trains.

Effective March 28, 1948, one of the two positions above mentioned was declared abolished and the one remaining was assigned hours from 11:00 A. M. to 8:00 P. M. with lunch hour 2:00 P. M. to 3:00 P. M. Thereafter, from 5:30 A. M. to 11:00 A. M. and from 8:00 P. M. to 9:30 P. M., the work formerly performed by telegraphers was delegated to section foreman or other maintenance of way employes who had always performed that work from 9:30 P. M. to 5:30 A. M. at Rising.

The record is long, tedious and replete with confusing arguments which are wholly extrinsic to the single issue on which the Employes base their

right to a sustaining award. That issue is defined by them in a clear and concise statement, appearing in one of the early paragraphs of their ex parte submission, which reads:

"It is the position of the employes that the Carrier violated the Agreement when and because it declared abolished (in name only) one of the operator-clerk positions at Rising and transferred the performance of the work (which was not abolished) to employes not under the Telegraphers' Agreement; and further, that employes who were illegally deprived of said work shall be compensated under the applicable rules for each and every instance of such violation."

One of the elementary principles early established by decisions of this Division of the Board and so uniformly adhered to that it needs no citation of awards to support it, is that a position established pursuant to the provisions of an existing agreement cannot be abolished and its work assigned to employes belonging to another craft.

Under the facts established by the record in the instant case we are satisfied that prior to March 28, 1948, the date on which the Carrier abolished one of the then existing Operator-Clerks positions at Rising, the work here involved was being performed by the occupants of those positions from 5:30 A. M. to 9:30 P. M. that it had not disappeared to the extent necessary to permit the Carrier to abolish one of such positions without negotiation or agreement. Since it is clear the Carrier had recognized the work belonged to those two positions, application of the rule heretofore stated impels the conclusion that it could not assign such work to employes covered by other agreements without violating its contract with the telegraphers. Therefore, its action in abolishing one of the telegrapher tricks at Rising and establishing a single trick in lieu thereof, with hours 11:00 A. M. to 5:00 P. M., left work to be performed at that point between the hours of 5:30 A. M. to 11:00 A. M. and from 8:00 P. M. to 9:30 P. M. which the occupant of the newly created position was entitled to perform on the call basis, if and when it was required, under Article Seven of the then, and the now, current agreements.

We are not impressed with the Carrier's contention the telegraphers acquiesced in its action of September 28, 1948, because the wage scale of the latest agreement, effective September 1, 1949, lists but one Operator-Clerk position at Rising whereas the one antedating it, effective June 15, 1947, listed two such positions. There may be situations where arguments based on that premise would be entitled to weight but that is not true under the confronting facts and circumstances. The primary consideration for execution of the current agreement was to conform to and comply with the Forty-Hour Week Agreement effective as of the same date. Moreover, it is certain the Employes have been claiming the work in question at all times since the date of the Carrier's action and there is nothing in the record to indicate the listing of but one position in the present wage scale is to be regarded as an intentional relinquishment of rights then and now claimed by them.

An entirely different situation prevails with respect to the work claimed by the employe at Rising from 9:30 P. M. to 5:30 A. M. Heretofore we have called attention to the fact that work had never been performed by telegraphers. This, it should be added, is true notwithstanding the fact the parties have negotiated three agreements without correcting what clearly appears has always been established custom and practice. In such a situation with a scope rule which does not spell out the work encompassed by its terms we do not believe it can be said the parties intended such work was not to be assigned to other employes. This phase of the instant claim is governed by the principles enunciated by this division of the Board in Award No. 5416 and is denied for the reasons and upon the grounds set forth in its Opinion.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 as set forth in the Opinion and that because of such violation the employes are entitled to reparation to the extent of the minimum call allowable under Article 7 of the current agreement for all dates on which work was performed at Rising, by employes not covered by the Telegraphers' Agreement, between the hours of 5:30 A. M. to 11:00 A. M. and 8:00 P. M. to 9:30 P. M.

AWARD

Claim sustained in part and denied in part as indicated in the Opinion and Findings.

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.