

Award No. 5564

Docket No. TE-5373

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Erie Railroad, that: (1) The Carrier violated the terms of the agreement between the parties when on May 21, 1950 it permitted or required an employe outside the scope of said agreement to handle (copy) a train order at Akron, Indiana; and

(2) As a result of this violative act the Agent-Operator at Akron shall be compensated in accordance with Rule 7(a) for a "call" payment on this day that he was improperly deprived of work.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date of January 1, 1939 as to rates of pay and working conditions, with subsequent amendments, is in effect between the parties to this dispute, hereinafter referred to as the Telegraphers' Agreement; copies are on file with the National Railroad Adjustment Board.

The position of Agent-Operator at Akron is listed in that wage scale of the Agreement, hence it is fully covered by the rules and entitled to all the protection and benefits accruing thereunder.

The claimant, Mr. F. F. Roe, is the regularly assigned Agent-Operator at Akron, with hours 6:00 A. M. to 11:00 A. M. and 12 Noon to 3:00 P. M., daily except Saturdays and Sundays.

On Sunday, May 21, 1950 at a time when Agent-Operator Roe was not on duty but subject to call under Rule 7 of the Agreement, the Carrier permitted or required Conductor Lamb on Extra 3318 East, to copy and handle train order No. 4 from the train dispatcher by use of the telephone at Akron station for movement of this train.

Agent-Operator Roe lives in the village of Akron within a few minutes walk from the station. His telephone number is on file with the Carrier. Directions are posted on the telephone booth door at Akron station with full explanations as to where claimant lives and how he can be located. Claimant Roe was at home at the time and date of this violation and he was ready and willing to handle this train order, but the Carrier made no attempt to call him.

This dispute has been progressed on the property in accordance with the recognized procedure for handling such disputes, without settlement.

train lineup by telephone, was adopted. No similar claim has ever been made on this property until the instant case. While we believe that as a general rule traditionally the work of transmitting or receiving of messages, orders or reports of record by telephone constitutes the telephone work generally reserved to telegraphers under their Agreement, in the instant case, at the time of writing of the effective Agreement on this property, the parties by their conduct and admissions had on this property established an exception to the general rule insofar as obtaining train lineups by section foremen is concerned. Why the Organization did not seek to change this policy is not clear. It could have been because under this present Scope Rule dispatchers were included in the Telegraphers' Agreement or because of the fact (as the record shows) that train lineups on this property were very informally handled, no file being kept of them at the place of receipt and it being questionable as to whether there was or is a clearly defined requirement with respect to keeping a permanent record thereof at the place of transmission.

We are fully cognizant of, and are in agreement with, the many Awards of this Board holding that repeated violations of an Agreement do not change it, or stated differently, that a long existing practice does not change the clear terms of an Agreement. However, it is also a well-established rule of contract construction that the re-adoption of a rule generally has the effect of re-adopting the mutual interpretation placed upon it by the parties themselves. In fact, it evidences an intent not to change the existing interpretations. Both parties at the time of the adoption of the Scope Rule into the current Agreement were fully cognizant of the fact that under the previous Agreements the work of obtaining train lineups by telephone was not being treated as exclusively reserved to the classes of employees listed therein. Consequently, it must be held that the re-adoption of the rule, in the instant Agreement as well as in other earlier Agreements, was not intended to change the meaning previously given to it. It follows that under this Agreement on the property it is not a violation of the scope Rule of the Telegraphers' Agreement for the section foremen to have obtained the lineups in question by telephone from the dispatchers. This is so, whatever may be the rule as to similar rules on other properties where the circumstances here present do not exist."

The Carrier has shown conclusively that the claim herein involved is without merit and should be denied, because:

1. There has been no rule violation.
2. There is no rule to support the claim.
3. Practice of employees, other than Telegraphers, copying train orders has been in effect for at least thirty-five (35) years and has not been changed by negotiation.
4. When it is borne in mind that the Organization is presently attempting to negotiate a rule calling for the payment of a call in such cases such as this, there can be no doubt that the proper disposition of this case is that indicated by the Carrier.
5. Third Division Awards 4104, 4259 and 4791, First Division Awards 9227, 11877 and 13946.

OPINION OF BOARD: This claim involves an alleged violation of the Scope Rule.

It is admitted that a conductor copied and handled a train order received during the time that the claimant was off duty. The record also shows that the claimant lived within walking distance from the station in question and

that the Carrier and its employes were fully advised as to how he could be located. The claimant was at home at the time of the date of the alleged violation and states he was ready and willing to handle the train order in question. The train order grew out of an emergency resulting from the uncoupling of the train and the need for rerouting that train.

The Carrier justifies its action in permitting the conductor to copy the train order on the basis of the past practice extending over 35 years permitting such handling of train orders in emergencies. It claims that this practice does not violate the Scope Rule and further that the Organization for many years has attempted to secure from the Carrier an exclusive train order rule. It states that attempts were so made by the Organization in 1915, 1922, 1923, 1926, 1935 and 1937, and that during the time that this case has been pending, the Organization has again proposed such a rule, which is still pending. Part of the proposed rule reads as follows:

"(e) Only employes covered by this agreement shall be required or permitted to handle train orders or clearance cards, or to report or block trains or to transmit or receive by telephone, telegraph or other communicating device; train orders, clearance cards, messages, train lineups, reports of record, or other information in connection with train movement at stations where an employe covered by this agreement is employed, except in case of extreme emergency, in which event the employe at such station shall be notified and paid a call."

The Organization replies that although it has attempted to secure a train order rule, that the work belongs to the Telegraphers by virtue of the Scope Rule. This rule reads as follows:

"(a) The following rates of pay, rules for overtime and working conditions will govern positions held by telegraphers and telephone operators (except switchboard operators), agents included in the wage scale, agent telegraphers, agent telephoners, towermen, levermen, tower and train directors, block operators and others whose positions are included in the wage scale.

(b) Where existing payroll classification does not conform to Rule 1 (a), employes performing service in the classes specified therein, shall be classified in accordance therewith."

The Scope Rule as it is now contained in the Agreement has been in the same form since 1919 despite continuous efforts by the Organization to obtain a train order rule along the lines of the one above set forth. It will appear from an examination of the Scope Rule that it does not define the work encompassed within it. It sets forth the classes of positions covered and by reference a list of employes shown in a wage schedule attached to the Agreement.

It is fundamental that in deciding what work is encompassed within the Scope Rule that we look to the customary work performed by the classes of positions listed within the rule. We do this because we must assume that the parties in writing the Agreement intended that certain work be reserved for classes of employes listed therein. If this was not so, there would be little point to the Agreement.

The practice and custom of the parties is of primary importance in determining their intent. It is undisputed that the practice of permitting conductors and others to copy train orders under emergency circumstances has existed on the property for some time. Thus in 1922, the General Chairman of the Organization addressed a letter to the Carrier asking for a conference for the purpose of discussing the handling of train orders by train crews. In this letter the General Chairman says: "It seems that the practice of train crews performing this work is increasing right along * * *."

Again a joint conference with all committees was held in 1935 regarding the copying of train orders. In a letter sent by the Carrier at that time, reference is made to an instance where a train order was handled by someone other than a telegrapher in the case of an emergency. At that time the Carrier refused to adopt a special train order rule.

It will appear that while there is a past practice, it is limited to cases of an emergency character. In the face of this past practice, the parties have since 1919 regularly entered into agreements continuing the language of the Scope Rule. This, despite the fact that in each instance the Organization attempted to secure a change in the Scope Rule.

The Organization relies on a long series of awards by this Board holding that the Scope Rule bars copying of train orders by other than those covered by the Agreement despite past practice. We are in agreement with these awards and their basic principle that long existing practice does not change the clear meaning of the Agreement. However, this Board has also adopted by numerous awards the well-known principle of contract construction, that the incorporation of a rule in an agreement which has been in effect prior to that agreement has the effect of readopting the mutual interpretation which the parties have placed upon that rule. The failure to change the existing interpretation evidences a mutual intent that the existing interpretation shall continue.

It is also significant that despite the long list of awards which are relied upon by the Organization, going back to 1937, enforcing the Scope Rule under similar circumstances, the Organization has not heretofore sought to secure any relief from this Board. Neither can we disregard the numerous attempts by the Organization to secure by negotiation the result which it seeks from this Board, especially its pending request of the Carrier to adopt a train order rule in the language as set forth above.

Giving effect to the interpretation of the Scope Rule which the parties have evidenced by their conduct in similar emergencies, it is our opinion that the Carrier did not in the instance before us violate the rule.

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 Employees involved in this dispute are respectively Carrier and Employees 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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of November, 1951.