

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
MISSOURI-ILLINOIS RAILROAD COMPANY

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

(1) The Carrier violated the provisions of the agreement between the parties when it permitted Section Foremen, employees not covered by said agreement, to copy train lineups on certain working days at Nashville and Oakdale, Illinois, at a time that the telegraph service employe at each of these stations was not on duty.

(2) In consequence thereof the Carrier shall now be required to compensate Agent-Telegraphers O. M. Hendricks; F. M. Burke and E. J. Holcomb on the basis of a "call" for each occasion Section Foremen copied lineups at Nashville and Oakdale at a time that the Agent-Telegrapher was not on duty, commencing with the first day of the violation, October 22, 1951, and continuing on a day to day basis until the violation was corrected, December 17, 1951.

EMPLOYEES' STATEMENT OF FACTS: An agreement bearing date as to effective rules, September 1, 1949, and rates of pay February 1, 1951, is involved in this dispute, hereinafter referred to as the 'Telegraphers' Agreement.

Nashville and Oakdale stations are located on the Sparta Subdivisions of the Illinois Division.

The assigned hours of the Agent-Telegraphers' positions at both Nashville and Oakdale prior to December 17, 1951, were 8:00 A. M. to 5:00 P. M., with one hour for lunch. Subsequent to December 17, 1951, the Carrier changed the regular assigned hours of these positions 7:15 A. M. to 4:15 P. M. with one hour out for lunch. These stations have always been closed on Sundays.

The assigned hours of the Section Foremen and his crew are 7:30 A. M. to 4:30 P. M., except during the Summer months when these employes usually work between the hours of 7:00 A. M. and 4:00 P. M.

O. M. Hendricks is the regular assigned Agent-Telegrapher at Nashville, being relieved by extra Agent-Telegrapher E. J. Holcomb for vacation during

ment of the parties of the same type as that deemed necessary in this agreement relating to train orders, and found in Rule 2 of the agreement."

From Award 3363, Referee Messmore:

"In view of the continuity of the awards of this Board since Award 1283, and the fact that Awards 1305, 1320 and 1553 adhere to Award 1145, we conclude that Awards 1145, 1305, 1320, and 1553 govern in the type of case before us and therefore deny the claim."

As early as May 1938, Your Honorable Board held that the handling of messages over telephone by non-covered employees was not exclusively telegraphers' work. This handling even included messages of record. We quote from Award 652 issued May 19, 1938:

"The practice of handling messages either by telephone or by messengers between 'KN' telegraph office and the Traffic Offices as here shown is no different from the recognized practice in effect at practically every station on this and other railroads. There is no rule in the existing Telegraphers' Schedule restricting the right of the carrier to have employees other than employees covered by that schedule handle messages and reports of record over the telephone or by messengers as shown by the record in this case, and there is consequently no violation of the current agreement between the parties."

The same principle was upheld in Awards 653 and 700.

With respect to Rule 10(d) cited by the Employees in support of these claims, it is the position of the Carrier that obviously this rule cannot apply to work that is not within the scope of the Agreement. The presence of a provision in the Agreement prescribing the method of payment if an employee is called for service within its scope cannot serve to determine the issue of whether other work is or is not covered by the Agreement in the first place. We are not in dispute about the meaning of the call rule which is clear and easily understood. The issue here is the question of Agreement coverage; the call rule has no place in the argument.

It is the position of the Carrier that line-ups, whether of record or not, may be handled as the line-ups were handled in these instances without infringement upon the Telegraphers' Agreement because such work has not been contracted to the Telegraphers.

(Exhibits not reproduced.)

OPINION OF BOARD: Between October 22 and December 17, 1951, the Carrier's section foremen at Nashville and Oakdale, Illinois, began work at 7:30 A. M., which was thirty minutes before the agent-telegraphers went on duty at those points. By direction of the Carrier, during said period, its maintenance of way foremen were required to obtain train line-ups from telegraphers at other points for the use of the maintenance of way gangs in operating track cars to and from work. The Claim is that the agent-telegraphers should be paid on the basis of a "call" for each day that the section foremen copied such line-ups.

The Employees rely on the Scope Rule of the effective Agreement, which says that it covers the working conditions and rates of pay of Telegraphers, and other named groups of employees, as are required to perform the duties of a Telegrapher.

The Carrier resists the Claim on the theory that what was here done was in accordance with past practice.

We adhere to the doctrine laid down in numerous Awards to the effect that where, as here, the Scope Rule of the Agreement does not describe the character of the work encompassed within it, but, on the contrary, sets forth only the classes of positions covered, it is proper to look to past practices to ascertain what work was covered by the Scope Rule at the time the Agreement was entered into. See Awards 4464, 4791, 4504 and 5416. This conclusion does no violence to another line of awards to the effect that when the (scope) rule is clear and unambiguous it cannot be nullified by past practices, though acquiescence in such a practice, contrary to the provisions of the rule, may sometimes be invoked as an estoppel against a retroactive claim for back pay. See Awards 5407, 4457, 4129 and 4054.

Applying what we consider to be the sound and practical test, we think it is our problem to determine whether the functions performed by the foremen with respect to obtaining the line-ups was treated as belonging to the telegraphers on the property at the time the effective Agreement was executed. In reaching this conclusion we are mindful of the fact that there are numerous awards that were predicated on entirely different approaches. Some of these turned upon the issue as to whether the line-ups received were communications of record, while others laid stress upon the question as to whether the information was transmitted by telegraph before the advent of the telephone. We think, however, that the better test is that which we have concluded to follow.

There are in the record of this case signed statements of a Division Trainmaster, a Division Engineer and two section foremen to the effect that there has been a well-recognized practice on this property of permitting foremen to obtain their line-ups when telegraphers are not on duty, under the circumstances of this case, since 1942, if not since 1936. While the Employees deny the existence of this practice, we think the proof preponderates in the Carrier's favor. In view of the failure of the Scope Rule to spell out the work covered by the Agreement, it is our conclusion that the past practices as they existed when the Agreement was entered into are controlling. See Awards 6032 and 6607.

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 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

That the evidence does not establish that the Carrier violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 18th day of October, 1954.