Award No. 6842
Docket No. TE-6710

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (Western Lines)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway; that,

1. Since May 17, 1949, on which date the position of Roundhouse Foreman at Lamy, New Mexico, was discontinued, the Carrier has violated the Scope and other rules of the Telegraphers' Agreement by unilaterally imposing upon the Agent at Lamy, New Mexico, a portion of the duties and responsibilities which were attached to the position of Roundhouse Foreman; and

2. These duties shall be removed from the Agent at Lamy unless a mutually satisfactory agreement is reached by the parties regarding additional compensation for their performance; and

3. Until the violation mentioned above is corrected, or until suitable compensation for performance of these added duties has been negotiated, the Carrier shall pay to the employes who have occupied the position of agent at Lamy, New Mexico, the monthly rate of pay which was applicable to the position of Roundhouse Foreman at Lamy, on a day-to-day basis, commencing May 17, 1949, for such added duties and responsibilities, in addition to the established salary of agent's position.

EMPLOYES' STATEMENT OF FACTS: Agreements bearing effective dates of December 1, 1938, and June 1, 1951, between the parties are in evidence, and are to be considered a part hereof as though quoted in their entirety.

Prior to May 17, 1949, there was in existence at Lamy, New Mexico, a position classified as Roundhouse Foreman, the function of the occupant of which was to supervise and perform work generally in connection with the operation of the roundhouse. Effective May 17, 1949, this position was declared abolished and the agent at Lamy was verbally instructed to assume a portion of the duties and responsibilities of the abolished position which consisted in part of the general supervision of the operation of the roundhouse, personal operation of the coal chute, chemical plant, issuance of

adjudication. Article II (a) and (b), referred to above, are quoted in the Carrier's Statement of Facts and lend no support whatever to the Employes' claim. Since the classification of the Agent Position occupied by the claimant at Lamy, New Mexico has been in conformity with the scope of the Agreement both prior and subsequent to the assignment of the complained of duties, which did not serve to change the classification, it will be obvious that Article II (a) was not violative.

Article II (b) relates to the rating of new positions and since the assignment of the complained of duties to the occupant of the Agent position did not create a new position, it will also be apparent that there was no violation of that rule. Moreover, both of those rules may be searched in vain for anything which could, either by inference or otherwise, serve to support the Employes' claim for additional compensation in behalf of the agent at Lamy. Neither is there anything in those rules which requires the Carrier to negotiate with the Employes and their representatives with regard to the payment of additional compensation.

Even if there was support therefor under the Agreement rules, and there is none, the **unreasonableness** of the increase of twenty cents (20c) per hour in the rate of the Agent's position at Lamy, requested by the Employes in the claim they originated and handled to a conclusion on the property **and which is not before the Board for adjudication,** as well as the additional compensation claimed in item 3 of the claim submitted to the Board and **which was never submitted to and handled with the Carrier on the property, should be apparent to all.** The Employes' initial request for twenty cents (20c) per hour in the rate of the Agent would amount to $1.60 per day for the performance of a maximum of 38 minutes work on the basis of the Agent's own estimate, (Carrier's Exhibit "A"), of the amount of time devoted to the work in question. The additional compensation now requested in Item 3 of the claim submitted to the Board **is still more unreasonable.** In Award 16021 of the First Division, National Railroad Adjustment Board, the majority had the following to say regarding claims for unreasonable penalties.

> "Our American courts of justice have consistently adhered to the principle that when a penalty is sought to be exacted grossly disproportionate to the actual damage sustained, convincing evidence is required to prove a willful or deliberate breach of an agreement. In the instant case, it undisputably appears that claimants are demanding payment of a penalty grossly out of proportion to the established rate of compensation for the services performed. The record before us falls far short of evidence sufficient to convince the minds of reasonable men that the claimants were held in excess service as the independent result of the carrier's failure to furnish relief."

The Employes cannot submit convincing evidence of a breach of contract or agreement in the instant dispute, which is entirely without support under the Agreement rules and should be either dismissed or denied in its entirety for the reasons previously advanced herein.

The Carrier is uninformed as to the arguments the Organization will advance in their ex parte submission, and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are required in replying to the Organization's ex parte submission or any subsequent oral arguments or briefs submitted by the Organization in this dispute.

All that is contained herein is either known or available to the Employes or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The record discloses that prior to May 17, 1949, there was in existence at Lamy, New Mexico, a position classified as Round-

house Foreman. The roundhouse foreman was charged with the duty to supervise and perform work incident to the operation of the roundhouse. Due to improvement in operating methods, such as the substitution of heavier for lighter power, that is the use of Diesel instead of steam locomotives, the Carrier abolished the position of roundhouse foreman effective May 17, 1949. After the abolishment of the roundhouse foreman position, and from and after May 17, 1949, the Claimant, agent at Lamy, was verbally instructed to assume a portion of the duties and responsibilities of the abolished position. The duties so assumed by the agent consisted of some general supervision of the operation of the roundhouse, inspection of the coal chute and water-testing plant, and supervising the remaining mechanical department employes and making various reports incidental to the operation of the mechanical department.

The time consumed by the agent in doing such work varied, but was approximately thirty-eight minutes a day, and less as the mechanical department force was reduced at Lamy.

The Employes contend that the Carrier does not have the right to impose the duties of the roundhouse foreman, such as was done in the instant case, upon the agent, and by so doing it violated the Telegraphers' Agreement.

It is the position of the Employes that the Carrier has violated the Telegraphers' Agreement when it refused and continues to refuse to either negotiate an adjustment of pay upward for the performance of such added duties to the Agent, or remove the work from the agent.

The Carrier contends this Board is without jurisdiction to decide Items 2 and 3 of the Statement of Claim, asserting that those items were not presented and handled with the Carrier on the property.

The record discloses that the Employes made an attempt to agree with the Carrier to allow the agent (Claimant) an additional twenty cents per hour for performing the duties heretofore mentioned, which were performed by the roundhouse foreman. This attempt was unsuccessful. The Carrier makes no issue that the above was not properly handled on the property.

The General Chairman of the Organization, on November 7, 1952, by letter to the Assistant to the Vice President of the Carrier, called the latter's attention to the fact that he had denied the claim with reference to upward adjustment of pay for the agent at Lamy. The letter also contained a request of the Organization that "* * * this work, which is not within the scope of that historically and traditionally assigned to telegraphers, be removed from employes covered by the agreement or the upward adjustment on the rate as requested be applied."

The above letter was answered by the Assistant to the Vice President on December 16, 1952, as follows: "In replying to your letter of November 7, 1952, * * * I know of nothing in the current Telegraphers' Agreement which prohibits assignments of the duties which were the subject of your appeal claim of September 1, 1949, which now require their removal from the Agent's assignment at Lamy."

The Carrier asserts the request for removal of the work was first made on November 7, 1952, as shown by the above letters, therefore, item two (2) of the claim was not properly progressed on the property as required by Section 3, First (i) of the Railway Labor Act. This provision of the act relates to disputes, and does not make reference to claims as such. We believe the dispute here is the same as progressed on the property. The following is applicable to this phase of the case.

"The Carrier urges that the claim originally made is not the same claim that is now before this Board. It is a fact established by the record that variances in the form of the claim occurred from time to time until the claim

reached this Board. In this respect, it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes. The subject matter of the claim—the claimed violation of the Agreement—has been the same throughout its handling. The fact that the reparations asked for because of the alleged violation may have been amended from time to time does not result in a change in the identity of the subject of the claim. The relief demanded is ordinarily treated as no part of the claim and consequently may be amended from time to time without bringing about a variance that would deprive this Board of authority to hear and determine it. No prejudice to the Carrier appears to have resulted in the present case and the claim of variance is without merit." See Awards 3256, 3890, 5330.

As stated in Award 5195: "The essence of the claims made by the Organization is for a violation of the rules * * *. The claims for the penalty on behalf of the individuals named are merely incident thereto." See Award 1646.

This brings us to the Carrier's contention that there is nothing in the Telegraphers' Agreement which prohibits the assignment of additional duties of the type here involved, nor is there any provision in such agreement for additional compensation therefor, nor nothing which requires the Carrier to negotiate with the Employes under the facts in this dispute.

In this connection, the Carrier relies on Award 1078 of this Division, which involved the Scope Rule of the same Agreement between the identical parties that are now before this Board. In Award 1078, it was said: "The scope rule of the Agreement * * *, specifies the classes of employes subject to the Agreement; it does not specify the work which may properly be assigned to, or the duties which may properly be required of, these classes of employes. In point of fact, the employes here involved perform a great variety of services for the inclusion of which no express authority either exists or is required to exist. These services have developed in response to the exigencies of particular situations, and no reason appears why the duties prevailing at any given time should be deemed to be definitive. Reasonable flexibility in the administration of the railroad industry, except in so far as it is inhibited by law or restricted expressly or by necessary implication, through agreement of the parties, is essential to the welfare of the employes as well as to that of the carriers. * * *"

In the light of the above language taken from Award 1078, the Carrier asserts that under the Agreement here being considered it does not in any manner specify just the nature or kind of work that may be properly assigned to this class of employes; that the assignment of work is a prerogative of management. If there is to be any limitation of that discretion and any revision of the Scope Rule to regulate the assignment of work, this must be accomplished by negotiations between the parties to the Agreement.

See also Awards 2491, 5331, 6184.

It was also said in Award 1078: "It is true, of course, that the duties entrusted to these employes from time to time have developed along lines related in a general way to the work traditionally performed by them." The work assigned in that case to the class of employes was the requirement that they devote a few minutes each day to the flagging of crossings in the immediate vicinity of their stations for certain designated high-speed trains. This was said to be not unrelated tasks being performed by them without protest. It was held that there was no violation of the Agreement. We are in accord with the above cited award, and the authorities heretofore cited. However, we believe the instant case presents a somewhat different proposition.

Awards of this Board too numerous to cite, have considered that custom, tradition, and historical practice determine the work covered by Scope Rule such as we have here.

This is clearly indicated in Award 5948 of this Board. In this cited award the Carrier required telegraphers to operate certain tunnel ventilating fans. The work consisted of turning on and off an electric switch which is the remote control for starting and stopping the tunnel ventilating fans. One of the questions determined was whether the Carrier wrongfully assigned work belonging to another craft, or is this work such as may be added as an incidental duty without penalty or need for negotiation. It was held that the nature of the work was completely foreign to the customary duties of telegraphers; that the work did add responsibility upon the telegraphers, a responsibility never contemplated by the Agreement nor permitted by the historical concept of telegraph work.

We believe the work the agent was required to perform, as shown by the record, was that of a roundhouse foreman, work not usually attached to such position. It entailed new and additional responsibilities, and constituted some change in the duties and responsibilities of this agent. Part of such added duties required some supervision shown by the facts in the record.

With reference to part three (3) of the claim, it is sustained to the extent of allowing the employes who occupied the position of agent at Lamy, New Mexico, the difference in the rate of pay they received as agent and the higher rate of pay during the periods of time they performed work of a roundhouse foreman.

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 Parts one (1) and two (2) of the claim are sustained. Part three (3) of the claim sustained as provided for in the opinion.

AWARD

Parts one (1) and two (2) of the claim are sustained. Part three (3) of the claim sustained as provided for in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1955.

DISSENT TO AWARD 6842; DOCKET TE-6710

This is purely a question of negotiations between the parties having been erroneously turned into a claim presentation to this Board which has no jurisdiction in the field of negotiation.

A request for twenty-cents-an-hour increase in the basic rate of pay for the agent petitioner was progressed on the property. After these negotiations failed, a so-called claim was made, alleging violation of the Scope Rule of the Agreement. A charge that the Scope Rule was violated had never been handled "in the usual manner" and discussed in conferences with the Carrier. Therefore, when the dispute was changed from one of negotiations in connection with a request for an increase in the rate of

pay to a claim alleging violation of the Scope Rule, the very essence and character of the claim was changed. Thus the award is confused between the procedure for settling disputes arising out of the interpretation and application of agreements over which this Board has jurisdiction and those disputes sounding in negotiations for changes in rates of pay, rules and working conditions, all of which, of course, come within the jurisdiction of the National Mediation Board.

As to the Scope Rule contention set forth in claim (1), it will be seen that this goes to the allegation that the Carrier unilaterally imposed additional duties upon the petitioning agent. In considering the same Scope Rule on the same property, we said in the cited **Award 1078** that that very Scope Rule "does not specify the work which may properly be assigned to, or the duties which may properly be required of, these classes of employes." The majority opinion, therefore, ignores the res adjudicata character of claim (1). Furthermore, we have held through Referee Boyd, now of the Mediation Board, that even if duties and responsibilities are increased, as they were in his **Award 4988**, "The record does not furnish us criteria with which a comparison could be made in an effort to arrive at a rate." The record here is similarly insufficient which, coupled with the previously found absence of work specifications in the rule, establishes further ground for dissent against the majority holding. In the same vein our **Award 5131** holds that in the absence of these standards, or definite criteria, what constitutes a proper rate of pay is not provided for in the Agreement, and that award went on to say that our lack of authority to make changes in rates of pay "is so well established as not to require the citation of authority."

Claim (2) fortifies our dissent for it thrusts the entire case into negotiation by asking that the duties shall be removed from the agent "unless a mutually satisfactory agreement is reached by the parties regarding additional compensation."

In the statement of claim (3), the basis for this dissent is again patent for there the employes ask that "until suitable compensation for performance of these added duties has been negotiated", the Carrier shall pay "the monthly rate of pay which was applicable to the position of Roundhouse Foreman". In the face of our having held that the same Scope Rule between the same parties "does not specify the work which may properly be assigned to" the petitioner, this award purports to apply a nonexistent Roundhouse Foreman's salary, not covered by any agreement, to the claimant, on the minute basis, as an addition to his rate of pay "until **suitable** compensation for performance of these added duties has been **negotiated**" or until "these duties shall be removed". Thus the award attempts to say the Carrier shall apply an unsuitable rate of pay until a suitable rate of pay is negotiated. Such a holding flies in the teeth of our jurisdictional inability to set any rate of pay. We have said many times (e. g., **Award 6803** concerning the same craft), "This Board has no inherent authority to fix rates of pay."

Hence our dissent.

/s/ **E. T. Horsley**
/s/ **R. M. Butler**
/s/ **J. E. Kemp**
/s/ **W. H. Castle**
/s/ **C. P. Dugan**

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 to AWARD NO. 6842

DOCKET NO. TE-6710

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: The Atchison, Topeka and Santa Fe Railway Company (Western Lines).

Upon application of the representatives of the employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3—First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made.

The request for an interpretation in this case involves the meaning to be given to the following language of the award:

> "With reference to part (3) of the claim, it is sustained to the extent of allowing the employes who occupied the position of agent at Lamy, New Mexico, the difference in the rate of pay they received as agent and the higher rate of pay during the periods of time they performed work of a roundhouse foreman."

It will be noted by the quoted language above stated, that part three (3) of the claim was not sustained in its entirety, but sustained to the extent as shown by such language.

The effect of the award is to hold that the measure of relief under part three (3) of the claim is to allow the difference in the rate of pay during the periods of time, the employes, here involved performed work of a roundhouse foreman, not to exceed 38 minutes a day, that is what is meant by the language above quoted.

Referee Fred W. Messmore, who sat with the Division as a member when Award No. 6842 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

Attest: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 26th day of September, 1956.