Award No. 8183
Docket No. TE-7174

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis, San Francisco Railway and the St. Louis, San Francisco and Texas Railway:

(a) That the Carrier violated the terms of the Agreement when it required or permitted employes not covered by said agreement, to copy by use of emergency and/or portable telephones line-ups of train movements as follows:

December 2, 1952 at Milepost 361
January 29, 1953 at Milepost 397 plus 9 poles
January 30, 1953 at Milepost 392-14
February 2, 1953 at Milepost 387-13
October 8 and 12, November 2 and 5, 1953 between McCoy and Ste. Genevieve.

(b) The Carrier shall be required to compensate the senior idle Telegrapher, Extra in preference, an amount equivalent to one day's pay for each of the above enumerated days on which the violations occurred.

EMPLOYES' STATEMENT OF FACTS: On December 2, 1952, at 12:30 P. M., Section Foreman Parrish used Dispatcher's phone No. 1 and sent the following message:

"Dispatcher, this is Parrish at MP 361. Will you give Operator Winslow a lineup for me?"

Dispatcher: "All right."

The Dispatcher rang operator L. V. Canady at Winslow, and requested that she give Mr. Parrish a lineup. Operator Canady transmitted the following line-up over the Dispatcher's phone:

"No. 46

To all concerned:

No. 742 and 731 are annulled. This lineup for use between Van Buren and Fayetteville and is void at 5:01 P. M.

O. E. H."

but the employes have so subtly drafted paragraph (b) of their claim that if this part of the claim were allowed as submitted, they would secure from this Division a change in the Memorandum of Agreement of July 25, 1942 which they have been unsuccessful in obtaining on the property.

Paragraph 3 of the Memorandum of Agreement of July 25, 1942 specifically defines the penalties which the parties have agreed would be paid under that agreement. The penalty specified in paragraph 3 (a) is "one day's pay to senior idle extra telegrapher of that date". This particular provision has been mutually interpreted to mean that when there is no "senior idle extra telegrapher of that date" no penalty accrues against the Carrier. The employes by their claim also hope to secure an award which will enlarge upon this specific penalty so that in the event the Carrier becomes liable for a penalty under Section 3 (a) and there is no "senior idle extra telegrapher of that date", the Carrier will be required to compensate a senior idle regularly assigned telegrapher. A senior idle regularly assigned telegrapher would be one who is off on his rest day or days.

It is evident that this claim has a dual purpose: First, to have this Division reinterpret the working agreement rules and the July 25, 1942 Memorandum of Agreement as prohibiting the use of emergency telephones by Maintenance of Way and other employes to secure motor car lineups or train information except in emergencies. This is equivalent to a request for a new agreement rule. Secondly, to amend paragraph 3 (a) of the July 25, 1942 Memorandum of Agreement to modify the penalty payment required by that rule. These matters are beyond the jurisdiction and purposes for which the National Railroad Adjustment Board was created and if it is the desire of the employes to amend or revise existing rules, they should proceed in accordance with Section 6 of the Railway Labor Act.

The claims here presented should be denied or dismissed for the reasons herein stated and this Division is requested to so find.

All data in support of Carrier's position have been submitted to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: The confronting claim is made in behalf of the senior idle Telegrapher, extra in preference, for reparations to the extent of a day's pay, pro rata rate, for each of the dates enumerated in the claim, account of alleged violation of the Scope Rule of the effective Agreement and the Memorandum of Agreement bearing date of July 25, 1942, when employes not covered by the agreement were permitted to receive written messages, commonly described as "line-ups."

The Organization took the position that the "line-ups" in question were clearly "written messages" within the meaning of the Scope Rule of the effective Agreement which provides:

"ARTICLE I.

"(1) Employes, except train dispatchers, who are required by direction of officer in charge to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines, (defined as telegraphers, telephone operators, block operators, operators of mechanical telegraph machines, agent-telegraphers, agent-telephoners) agents, assistant agents, ticket agents, assistant ticket agents and car distributors, listed in appended wage scale, also tower and train directors, towermen, levermen, staffmen, are covered by this Agreement and are hereinafter collectively referred to as employes, and when so referred to all are included."

Memorandum of Agreement bearing date of July 25, 1942 provides as follows:

"MEMORANDUM OF AGREEMENT

"1. The term 'emergency telephone' is construed for the purpose of this agreement to mean a telephone ordinarily kept under lock and key at fixed locations for use in emergencies, and commercial telephones when used in lieu of an emergency telephone.

"2. The term 'emergency' is construed to mean train accidents, fires, washouts, floods, personal injuries, main line obstructions, engine failures, train equipment failures, broken rails and failures of block signals or other fixed signals, which could not have been anticipated by dispatcher when train was at previous telegraph office and which would result in serious delay to trains.

"3. If emergency telephones are used contrary to provisions of Paragraphs 1 and/or 2 of Article I of Telegraphers' Schedule Agreement, except in case of emergency as defined in Paragraph Two (2) of this Agreement, employes covered by Telegraphers' Schedule Agreement shall be paid as follows, provided claims are submitted within thirty (30) days of date of occurrence:

(a) At stations or locations between stations where there is no occupied position covered by Telegraphers' Schedule Agreement, one day's pay to senior idle extra telegrapher of that date.

(b) At stations where agent-telegrapher or telegraphers are employed and not on duty, a call as defined in Article II, Paragraph Seven, to agent-telegrapher or telegrapher whose hours of service converge nearest with the time violation occurred.

(c) At stations where no telegraph service is maintained but there is a non-telegraph agent, or there are non-telegraph towermen employed, non-telegraph agent shall receive telegrapher's rate applicable at such station for the month in which such violation occurs, or towerman whose hours of service converge nearest with the time violation occurs shall receive telegrapher's rate applicable at such tower for the month in which such violation occurs.

"4. It is agreed following usage of emergency telephones shall not be considered a violation of this agreement or Telegraphers' Schedule Agreement:

(a) Installation of emergency telephones at any place in absolute permissive block territory or in centralized traffic control territory and their use by trainmen or enginemen to obtain verbal authority to pass automatic block or interlocking signals in a restrictive position.

(b) Use of emergency telephones by trainmen or enginemen at junction points to report arrival or departure or request permission to occupy main track.

Dated at St. Louis, Missouri, this 25th day of July, 1942."

It was pointed out that the above scope was not one of the type that has been construed as being general in nature but rather, one that specifically enumerates the work inuring to the employes covered thereby and sets out work therein by special reference, thus clearly demonstrating the

intent of the parties to reserve to the employes identified the task of receiving written messages by way of telephone and telegraph. It was further asserted that the scope rule had in effect been interpreted by the parties by way of Memorandum of Agreement and that thereby it was agreed that when emergency telephones were used contrary to the provisions of the Agreement certain payments would be made. It was further asserted that past custom and practice contrary to the intent of the rule as interpreted by the parties could not here prevail inasmuch as both the rule and the supplementary agreement was clear and without ambiguity.

The Respondent asserted that the "Line-ups" in question were received from an employe covered by the Agreement and at a point on the property where there was no telegrapher stationed, and further at a point where no telegrapher had ever been stationed. It was pointed out that a "Line-up" was not a train order, and did not have control over the movement of trains or the operation thereof, and further that the information was received from a telegrapher covered by the Agreement and as such constituted permissible use of the telephone by the "Non-covered" employe in question. The Respondent took the further position that a long and uninterrupted custom and practice, contrary to that which the Organization here contends the rules require, has prevailed and that likewise, contrary to the Organization's contentions settlements on the property were predicated on factual situations not here present.

This dispute concerns the receipt of information regarding train movements at points between stations by operators of Motor cars, through the use of either "emergency" or portable telephones. The operator of the Motor Cars contacted the train dispatcher who in turn requested a telegrapher on duty at some intermediate station to furnish the requested "Line-ups." The record indicates that such information is made of record by the dispatcher and/or telegrapher issuing same as well as the recipient thereof.

The Scope Rule with which we are here concerned is different than most such rules in that it sets out or lists the various phases of work inuring to the employes covered by the agreement. In addition thereto the parties here have by "Memorandum of Agreement" in effect "interpreted" the parties intended application of the rule under specified circumstances, which includes provision for the payment of reparations when telephones are used contrary to such specific circumstances.

The rule itself concerns "Employes * * * who * * * receive or forward written messages by telegraph, telephone or mechanical telegraph machines * * *."

In Award 5407, wherein conditions in all pertinent particulars were similar to those here present, we stated:

> "* * * Carrier states that lineups are merely information to the person receiving them; that there is no prescribed form in which this information is written, and that it is not retained and becomes obsolete within a few hours. However, the record shows that employes required to operate motor cars shall be given train lineups by the dispatchers under instructions of the Carrier. Likewise, such employes are instructed to secure information concerning train movements from the train dispatcher. For a few fleeting hours at least and irrespective of the form on which they are noted, Carrier has made the possession of train lineups a job obligation and necessarily a matter of record in the performance thereof.
>
> "We have previously conceded that train lineups are not train orders in the sense that they grant no authority to use or obstruct tracks over which trains are running. They are, however, essential transportation communications in that they protect a necessary

branch of the service from the dangers of another (Award 4516). Such transportation communications have in numerous Awards of this Division been found traditionally to be the work of telegraphers under scope rules similar to Rule 1 in the instant Agreement. * * *"

The Respondent here asserts a long and continued practice contrary to the Organization's position, will in itself invalidate the confronting claim. In Award 5872 we considered past practice as it concerned the parties hereto and the same scope rule. Therein we held:

"The Carrier urges that because of past practice this kind of handling cannot be regarded as a violation. This Division has often held that past practice in and of itself no matter how long continued will not have the effect of permitting an agreement to be violated. Past practice may be considered in determining what the parties regarded as the true meaning of an ambiguous or uncertain Rule or provision thereof. It may also be considered in instances where it is contended that there has been an agreed to interpretation whereby the parties have become bound. Also there are Awards wherein it has been held that there was a violation of the Agreement but that equitably and reasonably on account of past practice it was improper in the particular instance to assess a penalty. But in instances such as this where the carrier asserts that there was a long continuing well known practice of which complaint has not been previously made this Division has quite consistently held that such practice and delay is no bar to the assertion of a proper claim.

"The conclusion therefore is that the Agreement has been violated as claimed and that nothing has been shown that would justify its denial on the basis of past practice."

We are of the opinion that the above precedents are controlling and that a sustaining award is warranted here.

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 effective Agreement.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1957.

DISSENT TO AWARD 8183, DOCKET TE-7174

Here, error is compounded upon error. First, reliance is placed on Awards factually distinguishable from the instant case and then, a sustain-

ing award is rendered without regard to and in direct conflict with the controlling and unambiguous language of the Agreement.

To find a violation of the Agreement, the Referee relies on **Award 5407** and states conditions there "in all pertinent particulars were similar to those here present * * *." In making such a statement it is clear the Referee failed to properly analyze the facts in that Award, for the facts there are wholly distinguishable from the instant case. Here, a Maintenance of Way employe, while at a point where no telegrapher had ever been employed, obtained line ups, via telephone, from a telegrapher at the adjacent station. **Award 5407** involved a situation where a Maintenance of Way employe copied line ups at a point where a telegrapher was employed but not on duty. Obviously conditions in **Award 5407 were not** "in all pertinent particulars" similar to those here present. The Award is in serious error on that account.

It will be further noted that **Award 4516** is cited in the Referee's excerpt from **Award 5407**. This Referee is fully familiar with **Award 4516**, and he well knew that **Award 4516** involved several claims, **one of which was factually identical to the instant claim and was denied.** Similar claims were likewise denied in **Awards 7154, 6588, 6123 and 4772.**

Quoting from **Award 5872**, involving these same parties, the Referee makes the erroneous assumption of a similar violation to support a holding that a practice in conflict with an Agreement will not invalidate a claim. Looking to the facts in **Award 5872** the Referee should have found that his excerpt therefrom was directed to a situation wholly and factually dissimilar to the instant case. There a telegrapher copied train orders which he pinned to the train register to be picked up by crews leaving the station after he had gone off duty.

We fail to comprehend how the Referee could sustain this claim on the basis of the cited Awards. Even then, the unconditional sustaining of this claim constitutes nothing less than an emasculation of the controlling rule, assuming a violation was found. The Opinion clearly discloses a failure by the Referee to properly apply that rule to Claim (b) as presented.

Twice this case was argued before the Referee, and his particular attention was directed to Claim (b) and the Memorandum of Agreement between the parties dated July 25, 1942. The Referee freely admitted the Memorandum of Agreement controlled. Reference to this Memorandum of Agreement is found in the Opinion wherein the Referee states:

> "The Scope Rule with which we are here concerned is different than most such rules in that it sets out or lists the various phases of work inuring to the employes covered by the agreement. In addition thereto the parties here have by 'Memorandum of Agreement' **in effect 'interpreted' the parties intended application of the rule under specified circumstances, which includes provision for the payment of reparations when telephones are used contrary to such specific circumstances.**" (Emphasis added)

The specific circumstances referred to above appear in Paragraph 3 of the Memorandum of Agreement which sets out the compensation for three distinct circumstances.

The record discloses that (a) of Paragraph 3 would be applicable here because the use of emergency telephones, including portable telephones, was at points between stations where no telegraphers were ever employed.

Paragraph 3 of this Memorandum of Agreement provides:

> "3. If emergency telephones are used contrary to provisions of Paragraphs 1 and/or 2 of Article I of Telegraphers' Schedule Agreement, except in case of emergency as defined in Paragraph

Two (2) of this Agreement, employes covered by Telegraphers' Schedule Agreement shall be paid as follows, provided claims are submitted within thirty (30) days of date of occurrence:"

and (a) thereunder stipulates:

"(a) **At stations or locations between stations where there is no occupied position covered by Telegraphers' Schedule Agreement, one day's pay to senior idle extra telegrapher of that date.**" (Emphasis added.)

Yet, in face of the above, the Award sustains Claim (b) which reads:

"(b) The Carrier shall be required to compensate the senior idle Telegrapher, Extra in preference, an amount equivalent to one day's pay for each of the above enumerated days on which the violations occurred."

Paragraph 3 (a) is a special rule, and provides that reparations are to be made **only** to the **senior idle extra telegrapher of that date. It contains no provision that reparations will be paid to the senior idle telegrapher, extra in preference.**

The authority of this Board, by statute, is limited to construing Agreements as written, and we are without authority, under the guise of an interpretation, to change a plain and unambiguous provision in the Agreement. That is a matter for negotiations. **Awards 7166, 7577, 7631, and 7718,** among others. It is in excess of the statutory function of this Board to allow compensation where the Agreement itself does not authorize it.

An Award is no better than the reasoning contained within it. This Award is grossly in error and for the reasons stated we dissent.

/s/ C. P. Dugan
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp