Award No. 8207

Docket No. TE-7217

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Whitley P. McCoy, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile and Ohio Railroad:

(1) That the Carrier violated the provisions of the Agreement between the parties when it required or permitted an employe not covered by the agreement to copy train orders as indicated in the following:

(a) at 4:15 P. M., March 19, 1952, train order No. 20 addressed to C&E, GCC 302 at North Slidell,

(b) at 9:52 A. M., April 3, 1952, train order No. 18 addressed to C&E Work Extra 736 at Deemer,

(c) at 1:03 P. M., April 9, 1952, train order No. 30 addressed to C&E Work Extra 727 at Kings,

(d) at 8:46 A. M., and 1:13 P. M., April 17, 1952, train orders Nos. 16 and 13 addressed to Work Extra 727 at Goshen Springs,

(e) at 12:17 A. M., May 3, 1952, train order No. 4 addressed to C&E No. 33 at South Yard.

(2) That Carrier shall be required to pay to senior idle telegrapher, extra in preference, holding seniority in the district, one day's pay on each date that the above violations occurred.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date February 1, 1928 and supplement thereto dated July 21, 1949, are in evidence and on file with your Board.

A continuous telegraph office is located at Slidell where trains for both the Shore Line Branch and the New Orleans District trains receive their running orders. North Slidell is located at a junction of the Shore Line Branch about one and one quarter miles distant from Slidell. The Carrier has installed a telephone at North Slidell which is connected with the dispatcher's circuit. It was by the use of this telephone that Conductor "MC" copied train order No. 20 on March 19, 1952, direct from the train dispatcher.

one ($1.00) Dollar for the call" have been changed to read "in which case the telegrapher will be paid for the call." The effect of the change in the new Agreement is that "where an operator is employed, and is available or can be promptly located", if a train order is copied at such a location, then the Telegrapher employed at such location will be paid under the "Call Rule" (Rule 6) except in cases of an emergency and in such cases, no payment will be made to the Operator employed. The effect of the change in the new rule in the June 1, 1953 Agreement from the rule in effect on February 1, 1928, is that under circumstances where, under the old rule, an Operator would be paid One ($1.00) Dollar, under the new rule, an Operator would be paid two hours at time and one-half rate or approximately $5.00.

We think the record in this case amply justifies a denial Award, based on (1) the interpretation placed on the contract by the parties to it over a period of more than twenty years; and (2) the fact that the Organization endeavored to change the contract to provide payments under circumstances such as presented here, but the Carrier refused to agree to such a change; and (3) the parties negotiated a new Agreement and for all practical purposes carried forward the provisions of the old Agreement that had been in effect for some twenty-nine years; and (4) based on analogous cases decided by this Board.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim alleges five incidents of contract violation in that on five specified occasions employes other than telegraphers, namely conductors, copied train orders. Two separate Agreements are involved, one covering the Carrier's Louisiana Division and the other covering its Alabama Division, but the contract provisions involved are substantially identical. They are the Scope Rule and the Train Order Rule.

The Scope Rule merely lists the positions covered, and names among others Telegraphers and Telephone Operators. Under such a general rule the decisions of the Board are unanimous that the question whether exclusive jurisdiction is conferred to perform any particular work depends upon tradition, historical practice, and custom. Awards 6824, 4464.

The Train Order Rule here reads:

> "No employes other than covered by this schedule and train dispatchers will be permitted to handle train orders at Telegraph or Telephone Offices, where an operator is employed and is available, or can be promptly located, except in an emergency, in which case the Telegrapher will be paid for the call."

The incidents of copying orders involved here occurred at telephone booths which the Carrier had set up at various points along the right-of-way. No Telegraphers or other employes were stationed at these isolated booths.

It is apparent from a mere reading of the Train Order Rule that it does not expressly provide that conductors or other employes not covered by the Agreement are permitted to copy train orders at unattended telephone booths, but neither does the Rule expressly prohibit it. The Rule by its terms applies only to Telegraph Offices and Telephone Offices where operators are employed. At such offices it reserves the copying of train orders to Telegraphers except in emergencies. It is argued for the Carrier that the fact that the Rule does not prohibit others from copying train orders at other places raises an inference that the Parties did not intend such a prohibition. But it can equally well be argued that the Rule was so written because it was taken for granted that the Carrier would not undertake to have train orders copied at other than Telegraph Offices and Telephone Offices where operators are employed. The Rule is not entirely clear and unambiguous, and so must, like the Scope Rule, be interpreted in the light of tradition, practice, and custom.

The undisputed facts in this case clearly resolve the question of tradition, practice, and custom on this Carrier. One of the Agreements was

entered into in 1926 and the other in 1928. One had thus been in effect for 24 years and the other for 26 years before the instant claims were presented. During all that time, and in fact since 1924, conductors have been copying train orders at telephone booths under similar circumstances to those involved in this case. They were doing so at the time the Agreements were negotiated and executed. Parties are generally held to contract in the light of conditions, practice, and customs existing at the time, and an intent to effect a change in them may not be left to inference but must be expressed in clear language.

The Organization argues that it is the practices and customs of the industry **in general**, not of a particular Carrier, that this principle applies to. It argues that the National Organization, which negotiates agreements with many Carriers, cannot be expected to be familiar in intimate detail with all the practices existing on a particular Carrier. But by the same token, neither can a Carrier be expected to be familiar in intimate detail with all the practices existing on other Carriers. The Carrier is held to a knowledge of practices existing on its property; and the National Organization, negotiating in behalf of its members who are employes of a particular Carrier, must be held to a knowledge of the conditions binding upon those employes for whom it acts. This is a familiar principle of the law of agency.

Of course, the practice in general might be of extreme importance in showing intent in a particular case. It might have been of importance in this case if the claim had been made in 1927 or even in 1929. But where, as here, the Agreement has been interpreted for many years as permitting a certain practice, it is too late to contend to the contrary. This is particularly true where, as here, the Organization has unsuccessfully tried to incorporate into the Agreement an amendment which would have barred the practice complained of.

It is true, as urged by the Organization, that repeated violations do not give rise to a right to violate the Agreement. But it is equally true that where an Agreement is ambiguous, repeated actions may show an interpretation that makes such action not a violation. The holding here is that there were no violations of the Agreement.

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 there was no violation of the Agreements.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 10th day of January, 1958.