Award No. 8567
Docket No. TE-6791

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Sempliner, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY
(South-Central District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Union Pacific Railroad, South Central and Northwestern Districts, that:

1. The Carrier has violated the provisions of the agreement between the parties when, acting alone, it removed from the scope of said agreement and from the employes covered thereby at Pico, Arimo, Nipton, Jean, Sloan and Arden, the duties of loading, unloading and handling mail, baggage, freight and express to and from trains and station buildings, outside the assigned hours of the agents at these one-man stations; and

2. The Carrier improperly transferred to the members of the train crews at such times and places mentioned above work contracted to be performed by telegraph service employes at these one-man stations; and

3. These duties and the work here involved shall be restored to said agreement and to the employes under the agreement; and

4. The agents at these one-man stations named herein shall be compensated under the call and/or overtime rules, for each occasion on which employes not covered by said agreement have been, or are, required to perform the aforementioned work.

EMPLOYES' STATEMENT OF FACTS: There was in full force and effect at all times hereinafter mentioned, an Agreement covering rates of pay, wages, hours of employment and other conditions of employment between the Union Pacific Railroad Company, hereinafter referred to as Company or Carrier, and The Order of Railroad Telegraphers, hereinafter referred to as Telegraphers or Employes.

The dispute involves performance of work at Nipton, Sloan, Jean, Arden, Nevada, Arimo, Idaho and Pico, California, in the handling of mail, baggage and express by the agents at these one-man stations.

All information and data contained in this Response to Notice of Ex Parte Submission is a matter of record or is known by the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: This matter involves Head-End Work.

The Complainant alleges violation of agreement in regard to so-called "One-man-stations" at Pico, Arimo, Nipton, Jean, Sloan, and Arden, claiming the Head-end-work was assigned to other than agents during off-duty hours.

Under date **November 21, 1946,** Order 40 by V. W. Smith, Superintendent, directed trainmen to handle mail, baggage, and express at Arden, Sloan, Jean, and Nipton, when agents were not on duty. At Arimo, as of **August 6, 1947,** when the agent was off duty, the head-end work was similarly handled by train crews. At Pico, as of **July 21, 1949,** carrier discontinued round the clock service, leaving just the agent in charge. At times when the agent was off duty, head-end-work was handled by train service employes.

The organization relies on the agreement, particularly the scope rule, and past practice in regard to work traditionally, historically, and customarily performed. Basically it is the claim that at a "One-man-station", the agent has the sole and exclusive right to perform all work." The burden is on the organization to sustain this position.

The agreement in force April 1, 1938, and then later, as modified June 1, 1947, is applicable. Article I, Rule I, the scope rule, provides for an Agent-Telegrapher, but fails to define his duties, hence we must look elsewhere. This is necessarily to the usage, custom and practice at the stations involved. Award 4160 interpreting the same agreements on similar facts holds for the organization but is careful to limit the finding to the facts in that case where "by custom and practice" claimants had been doing this work. Stress is laid on the one-man-station doctrine, which we will examine. We must also examine the, so-called, rights of the parties. Are these rights fixed once the classification of a station, as a "one-man-station", is fixed.

There are many awards dealing with the problem, which will be discussed herein. This referee has read over forty awards in an attempt to find some common thread of doctrine and principle which runs through the awards.

Award—8044 (Elkouri) in denying a similar claim, held that head-end-work at "one-man station", Alderpoint, California, was not exclusively telegrapher-agent work, in that "The agent-Telegrapher at Alderpoint never handled "Head-End-Work".

Award—535 (Millard) sustains the claim of telegraphers for similar work, which had previously been done by the claimant on an overtime basis and was now assigned to a third party, saying: "'When the change was made and the station or depot was opened and the work formerly performed by the Agent-Telegrapher was assigned to an employe not covered by the existing schedule, the carrier clearly evaded the application of the established rules and violated the terms of the existing Agreement between the parties."

Award—3931 (James Douglas) concerns 9 stations. It also has an added element in that other organization employes (Clerks) were performing the

work when the agent was not on duty, thus making it no longer strictly a "One-Man-Station". The award says: "We have here a somewhat unique situation in that station work has ordinarily been performed by employes under both the Telegraphers' and Clerks' Agreements. Such work is done by an agent under the Telegraphers' Agreement at one-man stations, and by station employes under the Clerks' Agreement at other stations. But that does not mean an Agent is entitled to every bit of the station work regardless of amount. It is our opinion that Carrier is authorized to assign to bona fide employes under the Clerk's Agreement such extra work as occurs at one-man stations beyond the Agent's normal tour of duty." The same award, in regard to "Head-End" work at Mansfield, Arkansas, holds the claim sustained, where handled by train crews, but not sustained, where handled by clerks. The language, however, is strong: "It is clearly improper to assign such work to train crews and an agreement to pay train crews for such work does not validate such practice." The authority for the quotation is lacking, and the position is not reasoned. This Referee cannot find such assignments, per se, clearly improper.

Award—4160 again deals with similar subject matter to that in question here, and says: "The fact situation as presented in this claim would seem to be an important factor. That is, the stations involved are one man stations. Also, another factor which must be given serious consideration is that of established practice and custom in this type of station. It is well recognized that at one man stations, the man in charge, at each station, has for many years been called on to load and unload mail, baggage and express at his station from train to station building or buildings. And this is true when train arrivals come outside of the assigned tour of duty as well as train arrivals coming within the assigned hours." But this is later qualified on page 27 of the award: "The handling of mail and baggage had, by custom and practice, been the work of the employes, members of the Organization. Therefore, the findings will be that for the period of time in question it was the work of the claimants. This finding is not made under the Scope Rule and is based upon the custom and practice long established at the stations under consideration and relates exclusively to Trains Nos. 517 and 520 which later reverted to normal schedule, i.e., Sunday only."

Award—8265—Involves the "one-man station". Carrier had had "Head-End" work performed by agent during other than assigned hours for which agent did not receive extra pay, apparently being content with the commissions on cream, etc. When the agent retired, the carrier did not attempt to continue the same practice with his successor agent, but assigned the work to the train crew, whereupon the successor agent claimed the work and a call for doing it. The claim was sustained.

Award 6824 (Shake) concerns "Head-end work" at one-man stations" at times when the agent was not on duty. The carrier in this instance used a special train employe. The Award again is governed by past custom: "Since the Scope Rule of the effective Agreement is general in character and does not undertake to enumerate the functions embraced therein, the Claimant's right to the work which they contend belonged exclusively to them must be resolved from a consideration of tradition, historical practice and custom; and on that issue the burden of proof rests upon the employes." The evidence does not disclose work by agent-telegrapher in off duty hours.

Many other awards were analyzed. Some of these dealt with similar work, and most with "one-man" stations. A partial list of these are as follows:

529	2086	6975
553	2282	7078
602	2415	7076
1082	2418	7153
1083	2931	7400
1273	4791	
1275	5949	
1566	6032	
2155	6071	
	6409	

In view of the awards quoted and also those cited without quotes, certain principles seem to emerge which will be detailed at a later point herein.

RIGHTS AND DUTIES OF CARRIER AND ORGANIZATIONS—

The carrier has the inherent duty to so regulate its affairs and run its system that the rights of the public will not be jeopardized. The public is paramount. These same rights and duties devolve with all their force and effect on the organization. Where conflicts arise between the carrier and the public, the public will prevail. Where conflict arises between the organization and the public, the public will prevail. The tariffs of the carrier are arranged by a public agency with the public's rights being given paramount consideration. Where the work has been detailed as a part of the contract provisions, then the contract governs. When the contract does not specifically control the work assignment, then we must look to custom and past practice. If the work is not assigned in the contract, or is not controlled by custom and past practice, the carrier is free to assign the work at will as the dictates of its best business judgment require. In doing this, the carrier is given the benefit of the assumption that they are acting in the public interest, one of the requirements of "in-the-public-interest" being economy. Once assigned for a substantial period the work in question will only at that station become controlled by past usage and custom. It then can only be reassigned by contractual agreement or by showing of benefit in the public interest.

The very doctrine of premium pay as embodied in the system of "Call", "Overtime", implies practice other than ordinary, and in some instances censor. The practice is growing among labor organizations of forbidding their members by the rule from putting themselves in a position to accept such pay. However, here organization members, in the interest of service, are required to accept the assignments, but the spirit of censor is still there against the carrier. By paying the premium pay they are penalizing themselves, and the public.

While provision is made for premium payments in our laws, and in our contracts, such provisions are not to encourage such premium work. Employers are not urged to create premium work, but rather penalized if it is resorted to. Employes are compensated in premium work for the extra effort beyond that which has been provided as a fair share for a day's pay. It is well known to labor, government and management alike, that if the extra hours required for premium pay, become so commonplace that they become normal, then the premium pay will become a victim of erosion, and will fail to maintain the necessary equasion for premium pay. It must be kept an emergency measure. Premium pay is penalty pay to the employer. It is a gentle nudge to reduce such practices and create normal situations. Like the child born to the mistress out of wedlock, premium pay does not justify the original association. We have laws to support the child after it is born, as

we have provisions for the premium pay, but the association of master and mistress is not justified because of these support provisions. It should end as quickly as possible.

Past awards have held that work, by custom performed by one craft, should remain with that craft, even though it is not exclusively their work. This would appear to be solid doctrine only where it did not create premium pay. However, where the carrier can have the same work content performed by the alternate craft without premium work, it would appear the carrier can do so unilaterally in the public interest. Thus a carrier, in a one-man-station can change its status by employing a member of the clerks' organization (see awards Ibid) and do so unilaterally. The same freedom of action would apply in shifting call work performed by the telegraphers to trainmen where the scope of the contract was not controlling. Should both of the alternate crafts require extra hours, then a showing of public necessity would be required. The question of public interest, being contrary to contract provisions, is not here involved.

The awards, in the main, therefore, establish the following principles:

A. That at a "one-man-station" the carrier has a free election to convert to more than one man operation, thus changing its status.

B. That at a "one-man-station", where extra work has not heretofore been performed, and the assignment thereof is not dictated by the contract, the carrier has a free election to assign that work in accordance with its managerial discretion.

C. That once such work, not categorically assigned by contract, capable of being performed by alternate crafts, is assigned at a specific station to one of the alternate crafts, it becomes the work of that craft, and:

1. Can only be reassigned by the carrier unilaterally to another alternate craft for the purpose of reducing premium work, for which there is no premium pay paid.

2. Can only be reassigned to another eligible craft in the public interest.

The claims herein will be considered accordingly.

PICO—At Pico, prior to July 21, 1949, the station force consisted of an agent-telegrapher and two telegraphers, providing around the clock service without any premium situation. The carrier was therefore free to assign the work to other than claimants. The claim at Pico is denied.

ARIMO—At Arimo, prior to August 6, 1947, the agent had received a call to handle head-end-work. This call was discontinued and the work shifted to trainmen. There is no showing of public interest or showing that premium pay was thereby eliminated by reassignment to an alternate craft. Claim will be sustained.

ARDEN, JEAN, SLOAN, NIPTON—At Arden, Jean, Sloan and Nipton calls for claimant were discontinued May 16, 1944. (Page 73 et seq.) Since that time, head-end-work has been handled by train crews, and no evidence is introduced of objection to the practice in nearly five years. As the claimant is only one of several crafts eligible for this work, and its rights accrue

through custom and usage, so too, do its rights abate through custom and usage. Claimants' rights have now been abated. The claims are denied.

Another question raised is that of third party notice under Section 3, Par. J., providing for due notice. This Referee has dealt with this problem at length in Award 8496, to which reference is made. The ostensible third party here is the trainmen who are not answerable to this Division. There is no provision in law or in the rules of the Board permitting the trainmen to appear, or be given proper notice. The doctrine expressed on page 3, Award 8496, "What cannot be done, becomes a useless and idle gesture, and need not be done" is therefore applicable.

The carrier has attached certain statements to its submission, pages 106-113 of the docket file. These statements appear for the first time as a part of the carrier's ex parte submission. They are clearly new evidence, not previously presented during the disposition of the claim on the property. Not being evidence submitted on the property, they cannot be considered.

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 claim at Arimo is sustained; all other claims denied.

AWARD

The claim at Arimo sustained; all other claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December, 1958.