Award No. 8704
Docket No. TE-7327

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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

1. Carrier violated and continues to violate the terms of the agreement between the parties when it declined and continues to decline to assign to employes covered by the agreement, the duties of performing communication work at Bellmead, Texas; such work properly coming within the scope of the agreement.

2. The Carrier will be required to assign all of the duties in connection with such communication work, properly coming within the scope of the agreement, to employes covered by such agreement.

3. In consequence of this violation the Carrier shall pay to the senior idle employe and/or employes under the agreement, an amount equal to a day's pay at the applicable rate for each shift on which employes not covered by the agreement performed communication service properly coming within the scope of the agreement. Such payment to be made retroactive one hundred (100) days prior to June 13, 1950, and continuing until the violative condition is corrected.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of September 1, 1949, by and between the parties to this dispute, is in evidence, copies of which are on file with your Board. The following rules are invoked in support of the contention of the Employes:

"**RULE 1**

EMPLOYES INCLUDED

(a) These rules and working conditions will apply to Agents, Freight Agents, or Ticket Agents, Agent Telegrapher, Agent Tele-

stricted to the employes specifically named therein, since the correspondence shows that they were the only ones discussed in conference."

The First Division has also consistently declined to recognize and pass upon such claims. Award 11642 is typical and held as follows:

"But that part of the claim 'for all Sacramento Northern trainmen' is too broad and indefinite and is not susceptible of ascertainment. We do not propose to require the Carrier to search its records to develop claims for unidentified trainmen on unspecified dates. All employes who have filed claims such as the claimants here, which were disallowed by the Carrier, shall now be paid."

Award 15389, First Division, held as follows:

"* * * This claim for subsequent dates for unknown or unascertained persons is not sufficiently specific in character and should be denied."

The Board is therefore requested to deny the claim in its entirety.

All data submitted in support of Carrier's position as herein set forth have been heretofore submitted to the employes or their duly authorized representatives.

Except as expressly admitted herein, the Carrier denies each and every, all and singular, the allegations of Petitioner's claim, original submission and any and all subsequent pleadings.

(Exhibits not reproduced.)

OPINION OF BOARD: For a considerable number of years prior to June 13, 1950, the date the instant claim was filed, and continuing to April 5, 1954, train dispatchers on the second and third tricks at Bellmead Yard, Texas (the freight terminal about 2.5 miles from Waco), performed the work of receiving and sending messages of record, wheel reports and consists, operating a CTC machine and copying and delivering train orders. According to petitioner, this work properly belongs to the telegraphers and Carrier's action in assigning it to train dispatchers breached the Agreement between Carrier and petitioner effective September 1, 1949 and applicable throughout the period in question. The Carrier denies that the Agreement supports petitioner's claim or that the afore-mentioned work belong exclusively to the telegraphers. It maintains that the claim must be denied for several procedural and substantive reasons.

The first point to be considered is whether petitioner's claim is barred by Rule 25 of the Agreement which stipulates that "claims arising under this agreement shall not be subject to monetary recovery unless presented in writing within one hundred (100) days from the date of the event or circumstances upon which the claim is based." Whatever its merits, the claim before us alleges a continuing violation of the Agreement throughout the period in question. In view of that fact, the claim could have been properly filed at any time until the alleged violation ceased to exist and the only effect of Rule 25 is to limit retroactive monetary recovery, if any, to a period going back no more than 100 days from the date the claim was filed. The first point therefore is without merit and petitioner is not precluded from asserting its claim on June 13, 1950. See Award 3836.

It is contended that an affirmative decision on the merits must be postponed until notice of the claim and proceedings thereon is given to certain third parties whose rights may be affected by an affirmative award. The record indicates that a motion to give such notice was made and seconded by the Carrier members of the Division but failed to carry. The problem of notice has been before this Board for a considerable period of time and has been subjected to a good deal of judicial as well as administrative discussion. See **Whitehouse et al. v. Illinois Central R.R. Co., et al,** 75 S. Ct. 845,349 U.S. 366, 99 L. Ed. 1155 as well as Awards 8669, 8070, 8040 and 7387.

In the case at hand, it is unnecessary to resolve the broad problem of notice that confronted the courts and Board in the cases just cited, inasmuch as the record clearly establishes that the claim is for a limited and definite period of time that closed April 5, 1954, when the Carrier terminated the condition complained of by assigning the duties in question to the telegraphers.

It accordingly appears that the procedural question of notice is moot, since the interests of the third parties, in this case the American Train Dispatchers Association and members, could no longer be directly affected. A requirement that the desired notice be given at this time is, in our opinion, impractical. See Awards 6293, 6357 and 6693.

Turning now to the merits of the case, we direct our attention to the Agreement and more specifically to Rule 1, its Scope provision. This rule comprises five subdivisions, the first of which is in the general form found in many agreements, merely listing the job classifications covered by the Agreement without setting forth their functions. If that were all to the provision, it would certainly be necessary, because of ambiguity, to give major emphasis to such elements as custom, practice and historical background in order to determine the intent of the contracting parties. See Awards 6996, 5407 and 1314.

However, in subparagraphs (b) and (c), the Scope provision goes on to specify the stations and agents that are not subject to the rules of the Agreement. Then in subparagraph (d), the provision provides as follows:

> "(d) Station or other employes at closed offices or non-telegraph offices shall not be required to handle train orders, block or report trains, receive or forward messages, by telegraph, telephone or mechanical telegraph machines, but if they are used in emergency to perform any of the above service, the pay for the Agent or Telegrapher at that office for the day on which such service is rendered shall be the minimum rate per day for Telegraphers as set forth in this agreement plus regular rate. Such employes will be permitted to secure train sights for purpose of marking bulletin boards only.
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> NOTE: (It is understood that 'closed offices' also mean an office where other employes may be working not covered by this agreement, or an office which is kept open a part of the day or night.)"

This language is clear and unambiguous. It specifically sets forth the functions that are to be handled by no one outside the Agreement "at closed offices or non-telegraph offices" and carefully prescribes that the only exceptions are in the event of emergency or marking bulletin boards. One additional exception is provided by sub-paragraph (e) which permits train dispatchers to handle train orders. These provisions dispel any doubt that may exist on the merits of the question before us. They studiously delineate the functions not

to be performed by non-telegraphers and detail the specific exceptions. If train dispatchers were by the Agreement to be permitted to perform such functions as receiving and sending messages of record, wheel reports and consists, these exceptions could readily have been set forth in the same manner as are train orders in subparagraph (e). Rule 1 of the Agreement, and more particularly its subparagraphs (d) and (e), are clear and cogent and completely support petitioner's position that the Carrier violated its Agreement by diverting the functions under consideration to train dispatchers on the second and third shifts rather than to the telegraphers. On all days during the period in question, there was a telegrapher on duty at Bellmead Yard and there is no doubt that it constituted "closed offices" within the plain language of Rule 1, subparagraph (d) since it was kept open a part of the day or night. See Awards 5765, 1657 and 1680. We consider it manifest that the word "offices", as used in this Rule, means the entire station rather than a single room in the station, as urged by the Carrier.

We find no merit in the contention that the claim is too indefinite, inasmuch as the names of and compensation due employes referred to in part 3 of the claim are readily and practicably ascertainable. Cf. Awards 8256, 4305.

It does appear that the condition of which petitioner complains existed for some years prior to the date a formal claim was filed. That petitioner should have pressed its point more diligently prior to 1950 is beyond question. However, petitioner did pursue the matter with all due speed after its claim was formally presented to the Carrier on June 13, 1950. Moreover, the monetary claim was not unduly aggravated by any delay on petitioner's part but instead is limited both by the provisions of the Agreement and petitioner itself to a reasonable period. Under these circumstances, we are not disposed to dismiss the claim because of laches. Cf. Awards 7135 and 7074 where the agreements contained no time limitations, the monetary claims were unrestricted and the petitioning organizations had increased the claims by delaying appeals to the Board.

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 applicable Agreement, effective September 1, 1949, has been violated by the Carrier.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Date at Chicago, Illinois, this 4th day of February, 1959.

DISSENT TO AWARD NO. 8704, DOCKET NO. TE-7327

The claim involved in this dispute was filed on June 13, 1950. It was handled in the usual manner on the property and declined by the Carrier's Chief Operating Officer designated to handle such disputes, on November 10, 1950. On December 1, 1954, after a delay of more than four years, the Petitioner submitted the dispute to this Division. Section 2 (4), (5), of the Railway Labor Act contemplates that diligence will be exercised in progressing claims. An unreasonable delay in doing so is sufficient to permit the Carrier to assume that its declination has been accepted, and the claim abandoned. Under the circumstances present here, the Division should have refused to take jurisdiction on the merits and denied the claim for want of reasonable diligence in prosecution. Instead of doing so, the Majority flaunted well-reasoned precedents on delay and laches and, contrary to the Record in this case, held that the Petitioner progressed the matter "with all due speed". Similar claims have been denied for much less delay, e.g., **Awards 5190** (3 years delay); **6229** (2 years delay); **7074** (28 months delay); **8162** (26 months delay); **8209** (2½ years delay). In **Award 8543,** where there was no money claim, a delay of three and one-half years caused the Division to deny the claim under the dictates of sound policy. That course should have been followed here.

When the Majority failed to deny the claim because of the delay in progression, and accepted jurisdiction on the merits, it was duty bound to deny the claim under the consistent holdings of the Division which interpret the coverage of general Scope Rules by resort to custom and historical pratice on the property. Here, it was undisputed that for more than twenty years the Carrier has maintained a train dispatching office at Bellmead, Texas for the primary purpose of authorizing train movements on the 268 mile Texas Central Sub-Division which extends westwardly from Waco to Rotan, Texas. It was also undisputed that Train Dispatchers have performed the type of service involved in this dispute as an incident to their primary duties, and this practice had continued through the negotiation of six Telegrapher Agreements without protest from the Petitioning Organization. Claims arising under similar circumstances were denied in **Awards 4922, 5256, 5468, 6379, 6650, 6676** and **6996** and these sound precedents should have been followed here.

The Majority also committed serious error in assuming that Train Dispatchers will not be "directly affected" by this Award and that due notice under Section 3, First (j) of the Railway Labor Act need not be given them. The Employes' Submission stated the work involved in this dispute was being performed by Train Dispatchers on the first trick. That statement was not refuted in the Record. This Division does not have to resort to conjecture in determining whether or not parties not before it will be adversely affected by an Award. Nor is it justified in holding that due notice is not required where the claim happens to be for a closed period. **Award 8669.** The Division had an adequate method for determining whether or not Train Dispatchers would, in fact, be adversely affected by this Award. In similar cases, hearings on the merits were deferred pending notice to other parties to appear and defend their interests, if any; e.g., see **Awards 7975, 8050, 8200, 8022, 8023, 8105, 8106, 8107, 8216, 8258, 8336, 8378, 8379, 8408, 8669 and 8672.**

Under no circumstances should an award on the merits have been rendered without giving the American Train Dispatchers Association, its General

Chairman, R. R. Holden, and the individual train dispatchers listed in the Carrier's motion to postpone hearing, "due notice" and an opportunity to be heard.

For the foregoing reasons, we dissent.

/s/ J. E. Kemp

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan