

Award No. 9502
Docket No. TE-8410

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GRAND TRUNK WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Grand Trunk Western Railroad, that:

1. Carrier violated agreement between the parties hereto when on October 12, 1955, and continuing thereafter (Monday through Friday) it caused, required and permitted Section Foreman, an employe not covered by Telegraphers' Agreement, to handle (receive, copy and deliver) train line ups at Marcellus, Michigan, and

2. Carrier shall compensate J. T. Eddy, agent-operator, Marcellus, Michigan, for one call (Rule 5) for violation occurring on October 12, 1955 (2 hours at one and one-half times pro rata rate) (\$1.997 per hour), total \$5.99, and

3. Carrier shall compensate J. T. Eddy (or any other employe occupying position of agent-operator at Marcellus) for one call as aforesaid, for each and every day such violation occurs subsequent to October 12, 1955. Joint check of Carrier's records to be made to determine amounts and employes entitled thereto.

EMPLOYEES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement entered into by and between the Grand Trunk Western Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employees or Telegraphers. The agreement was made effective July 6, 1951, and has been amended. The agreement as amended is on file with this Division of the Adjustment Board and is, by reference, made a part of this submission as though set out herein word for word.

The dispute involved in this submission was handled on the property in the usual manner, through the highest officer designated by management to handle such disputes, and failed of adjustment.

"HANDLING TRAIN ORDERS

RULE 24

"No employe other than covered by this agreement 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 a call."

The absence of a similar rule to cover the handling of line ups leads to the obvious conclusion that no payment was intended to be made to an Operator when the Section Foreman obtained a line up as in the instant case. Numerous recent Third Division Awards have denied similar claims. These Awards include Award No. 5032 where a claim was declined in view of past practice on the property, and No. 6123 where the Board found:

"We have held that it is not a violation of the Telegraphers' Agreement for one not covered by the Agreement to use the telephone to obtain or receive line ups or information from an operator covered by the Agreement."

In Award 6364 the Board held as follows:

"As to other alleged violations, such as line-ups by employes not under the Agreement, we have held such is permissible to obtain or receive by telephone, and cannot be construed as a violation of the Agreement by Carrier."

Award 6607 concerned a case of Section Foreman receiving and copying line ups over the telephone, from a telegrapher on duty at an adjacent open station in the same seniority district. The case was remanded to the parties for further handling with the recommendation that if a substantially consistent and well-established practice was found to exist generally on the system, claim should be disposed of in accordance with the practice. In Award 6788 claim was made because Maintenance of Way Foremen at stations where the telegraph operator was not yet on duty in the morning, were required to obtain line ups from other points. The Board found it was past practice on the carrier so to require the foremen to get line ups and denied the claim.

In view of the Board's position on this question, as indicated in the above-cited Awards, and the facts of record in regard to the claim at issue as well as the well-established and consistent practice on the Carrier, the claim should be denied.

The case has been handled in the usual manner, up to and including the Vice President and General Manager, the highest officer on the property designated to handle claims and grievances.

All data contained herein have in substance been presented to the employes and are part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue herein is whether the applicable Telegrapher Agreement was violated when a Section Foreman not covered by that Agreement received line-ups, at a station where a telegrapher was assigned but

not on duty, from a telegrapher at an adjacent station. The present Referee participated in the rendition of Awards 7970, 8141 and 8146. The principles applied in those Awards apply to the present case, and past practice on the property accordingly is of paramount importance in the disposition of the case. Also see Award 8314. As to past practice on the property, the Record supports the Carrier.

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 Employees involved in this dispute are respectively Carrier and Employees 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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July, 1960.

DISSENT TO AWARD 9502, DOCKET TE-8410

From the beginning this Board has held to the principle, established long before, that work involved in the transmission—receiving and sending—of messages, orders and/or reports of record is by its very nature reserved to the class or craft of telegraphers, this reservation being made manifest by inclusion in the scope rules of agreements covering such employees the classifications descriptive of these communication workers.

In like manner this Board has held that the type of communication usually known as a "line-up" is a message or report of the kind which constitutes the work of a telegrapher and its handling is, therefore, reserved to telegraphers.

This Board, in a long line of well reasoned awards, has held that the principle holds even where there is a long history of practices contrary thereto. Award 5407, for example, held that scope rules of the general type are not ambiguous in their reservation to telegraphers of the work of handling line-ups, and that the intent of such rules, therefore, must prevail over a long standing and well documented practice of the carrier's having section foreman perform such work.

The first several awards on the subject dealt with instances where the messages had been received by the motor car operators in communication with both train dispatchers and telegraphers. No distinction by reason of the

method of transmittal was argued by the parties or made by the Board. All such claims were sustained.

In Award 1145 for the first time a carrier sought to establish a distinction based on the fact that the messages were not received directly from the train dispatcher but were relayed through a telegrapher at another location. The referee sustained the carrier's position and denied the claims. Almost immediately the Board, in Award 1283, held that in principle there is no distinction properly to be made by reason of different methods of transmittal, and reaffirmed the earlier line of awards. This had the effect of overruling Award 1145. The carriers, however, continued to cite it and repeat its arguments. In a relatively few instances they prevailed. The majority of our awards, however, continued to sustain line-up claims regardless of the method of transmittal, Award 3881 for example. Once or twice such claims were denied where the line-ups were transmitted directly from dispatcher to motor car operator. Thus arose what has been described as "irreconcilable conflict" in our awards on the subject.

In Award 5133, with Referee Coffey, this Board said:

"The earlier Awards on which the Carrier relies very clearly make a distinction between cases where the line-up is secured direct from the Dispatcher and those where it is received from another operator, holding in the latter instance that there is no violation of the Scope Rule. However, the Awards relied on by the Organization expressly hold there is a violation. That which we have elected to call the 'transitory efficacy' of the Awards is pointed up by the fact that the Board has overruled earlier Awards on the same property. Compare Awards 3363, 3881, 4516. Therefore, we do not believe this difference of opinion is attributable to rule differences, as contended by the Carrier. Further, we do not find any marked difference between the Scope Rule of the instant Agreement and those under review in the reported cases.

* * * * *

"Failing to find a basis for reconciling or harmonizing the conflict in Board precedent, we must elect to follow the more recent opinions which, to say the least, represent a definite trend away from earlier Awards, and at the same time carry weight by reason of the fact that the decisions were reached only after giving a full measure of attention to the earlier opinions. Accordingly, we hold that the Agreement does not permit an employe not covered by the Agreement to obtain a train line-up by telephone at a station, or vicinity, where there is a regularly assigned Agent-Telegrapher, even though not on duty, from a telegraph operator at another station. See Awards 4516, 4919."

At this point it would be reasonable to assume that the entire question of telegraphers' rights regarding the handling of line-ups should have been finally settled. Not so, however. Some referees have continued to revert on occasion to the erroneous and discredited theory that agreement violation is avoided by having the line-ups relayed through a telegrapher at another station.

More rarely referees apparently substitute their own personal opinion of what the relative rights should be. As noted in Award 5133, such opinions cannot be attributed to rule differences.

The present Referee, as he states, also served as such when Awards 7970, 8141 and 8146 were adopted. The basis upon which the Referee there acted—his view of the effect of practice—has many times been negated by our awards on the subject. Compare, for example, Award 5407. It thus becomes obvious that the Referee's personal opinion has been given more weight than is warranted by the subject of the present dispute and our prior awards on that subject.

Under such circumstances it becomes necessary to scrutinize the Referee's opinion with great care, and to point out its fallacies. The first fallacy, and one which requires no further comment, lies in the application of such an opinion to a dispute of this nature.

Secondly, even if the Referee's opinion regarding the effect of past practices were soundly based it would not necessarily lead to a conclusion that the work of handling line-ups is not reserved to telegraphers. Quite the contrary. Telegraphers have been performing such work ever since its advent upon our railroads.

Another fallacy is that the Referee does not apply his opinion or theory of "past practice" uniformly. For example, in Award 8141, one of those cited, the "past practice" at the station of Jacumba was that a telegrapher on duty early in the morning received the necessary line-up for many years. The position was abolished and thereafter, instead of using the one remaining telegrapher on an overtime or call basis, the carrier diverted the work to the section foreman. If "past practice" has the effect indicated by the Referee's reliance upon it, that portion of the claim, at least, would necessarily have been sustained.

Finally, the inference that once the Referee has spoken on a particular subject he must not change his mind is neither sound nor in accord with the facts. No one is justified in being wrong because he has been wrong before. With respect to another, but similar, type of communication work this Referee wrote Awards 6321 and 6322 sustaining telegraphers' rights to perform such work. On his next appearance as a referee he wrote Award 7976, where the essential issue was the same as in 6321 and 6322. But this time the claims were denied for no reason, that I can perceive, other than that the Referee had changed his mind. Incidentally, it required the complete handling of another series of claims, resulting in Award 8687, to correct the error of Award 7976.

Similarly, it will require further handling of claims by an already overburdened tribunal to correct the error of Award 9502.

For these reasons I consider it necessary to register my dissent.

J. W. Whitehouse

Labor Member.