Award No. 9572

Docket No. TE-8178

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk Southern Railway that:

1. Article 1 and other rules of the Telegraphers' Agreement were violated when and because the Carrier required or permitted,

a. The star agent at Norman, North Carolina, which position is classified as a non-telegraph, non-telephone agency, to transmit and/or receive messages by commercial telephone on the dates of June 25, June 29, July 5, July 7, August 23, and August 24, 1954.

b. The star agent at Ellerbe, North Carolina, which position is classified as a non-telegraph, non-telephone agency, to transmit and/or receive messages by commercial telephone on the dates of June 28, June 29, July 21, July 22, August 31 and September 2, 1954.

c. The star agent at Glendon, North Carolina, which position is classified as a non-telegraph, non-telephone agency, to transmit and/or receive messages by Carrier's dispatcher's telephone on the dates of August 30, August 31, September 1, September 2, and September 9, 1954.

2. The Carrier shall be required to compensate a senior idle operator, extra in preference, a day's pay for each date at each point specified because of such violative action.

EMPLOYES' STATEMENT OF FACTS: The basic agreement between the parties bears the effective date of August 1, 1937, with amendments from time to time thereafter. All references to the Agreement will bear on rules or rates of pay currently effective unless otherwise noted.

Norman, North Carolina is situated on the Carrier's Star—Candor—Ellerbe branch of its Western District approximately 102 miles southwest of Raleigh, North Carolina.

Ellerbe, North Carolina is located on the same branch 8 miles beyond Norman.

"The Board does not intend in the slightest to impinge upon or limit the principles asserted by the Clerks, but it is a mistaken concept that the source of the right to exclusive performance of the work covered by the agreement is to be found in either the scope or seniority rules; they may be searched in vain for a line even implying that they purport to accord to the employes represented the exclusive right to the performance of the work covered by the agreement."

Respondent respectfully submits that no where in the scope rule of the controlling agreement is there anything contained, either expressly or impliedly, which purports to be a specification of the work reserved exclusively to the employes enumerated in the rule. In such cases, your honorable Board has held, and rightly so, that to determine where the parties have placed themselves by their agreement we must look to tradition, historical practice and custom; such historical practice and custom on this railroad is fully set forth in this submission, supported and substantiated by Carrier's Exhibits A and B. The petitioners have brought the case to this Board, and the burden is upon them to prove by substantial evidence that such has not been the practice, and that the incidents forming the basis for this claim are violative of the agreement. Petitioners have failed in this responsibility. Many awards of your Board have thus held.

All of the data contained herein has been discussed with the employe representatives, either in conference or by correspondence, and/or is known and available to them.

For the reasons stated hereinbefore, the respondent carrier holds that the claim is without contractual basis or merit, is contrary to recognized, accepted and agree-upon practice of many years, and that same should be denied, and urges that your honorable Board so hold.

(Exhibits not reproduced.)

OPINION OF BOARD: When the present agreement became effective on August 1, 1937, Norman and Ellerbe were classed as telegraph stations, but they subsequently became non-telegraph (non-telephone) agencies, like Glendon, with star agents, under a lower pay scale than for regular telegraph (telephone) positions.

The claim is that Article 1 and other rules of the Agreement were violated when during 1954 the Carrier required or permitted star agents "to transmit and/or receive" nine messages at Norman on six specified dates in July and August, seven messages at Ellerbe on six specified dates in June, July, August and September, and seven messages at Glendon on five specified dates in August and September.

The Carrier's dispatcher's telephone was used at Glendon and commercial telephones at Norman and Ellerbe. None of the messages involved train orders or traffic operations. Ten of them related to waybills, twelve to shipping rates, and one related to a check for a dragline operator.

Except for Article 1, the scope rule, which lists the employes covered, including agents and telegraphers, but without defining their duties, no specific rule is cited as having been violated. But the Employes' Position is that star agents are not authorized to use any telephone, commercial or otherwise, for any purpose, and that on the date of each such use an idle senior telegrapher should receive a day's pay. Since neither point is definitely established by any rule cited, the question is whether they are reasonably implied by any rule, or by the Agreement as a whole.

The Claimants rely upon the Memorandum Agreement of May 20, 1937, which settled some controversies then pending before this Division, by establishing rates for certain non-telegraph, non-telephone agencies, including Glendon "with the understanding and agreement that telegraph and telephone instruments installed at or about those stations (except at Norman) shall be removed by July 1st, 1937". The question is whether the requirement for the removal of the Carrier's operations telephone reasonably implies a total ban against the use of any telephone for any purpose by star agents.

The removal of the telephone instrument had an obvious purpose and result; the star agent would not be regularly accessible over the Carrier's communications system by which its operations were conducted. He would thus not constitute a part of the telegraph or telephone system by which traffic operations are continuously and regularly conducted.

But we cannot construe therefrom an agreement that star agents shall not use any telephone for any purpose, which could and presumably would have been stated definitely if so intended.

This conclusion necessarily follows from the express wording of Article 13 of the Agreement effective August 1, 1937. It prescribes the classification of employes as follows:

> "(a) When **regular** telegraph and/or telephone duties are added to a non-telegraph or non-telephone position the rate of pay shall be increased to conform to that of existing positions of similar work and responsibility; * * *.
>
> (b) Where **regular** telegraph or telephone offices are discontinued as such and the wires removed, compensation will be adjusted to conform to that of existing positions of similar work and responsibility." (Emphasis ours.)

In other words, the classification of employes for rates of pay depends upon "work and responsibility", classified in terms of the existence or absence of "**regular** telegraph and/or telephone duties", and not upon the infrequent use of telephones, as shown in the instances complained of. The parties themselves having adopted that classification, there is no basis upon which this Board can find star agents barred from such use of telephone, which certainly did not constitute regular telephone duties.

It is obvious that "regular telegraph and/or telephone duties" in the operation of a railroad involve higher training and responsibility than work in which the use of telephones is only occasional or incidental. While the telephone has superseded the telegraph, not all telegraph rights have attached to it. Consequently, it is well settled that telegraphers have not the exclusive right to use telephones. Awards 1983, 4208, 4516, 4280, 5181, 5660, 7968. It is equally true that the right does not belong exclusively to those members of the Organization holding telegraph or telephone positions unless the rules so provide. Under Article 13 the classification is based upon the presence or absence of "regular telegraph and/or telephone duties", and this Board cannot disregard the word "regular".

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 7th day of October, 1960.

DISSENT TO AWARDS 9572 AND 9573, DOCKETS NOS. TE-8178 AND TE-9078.

The reasoning by which the majority arrived at a decision to deny the claims in these two dockets appears to be faulty for several reasons.

First, there is an obvious failure to recognize the nature of the use to which the telephones were put. These were not merely conversations about matters that could have been handled by other means. The telephones were used by the agents to transmit and receive communications of types which are normally and regularly handled by telegraphers. They involved matters that would have required the use of the telegraph prior to the advent of the telephone if the same purpose were to be served.

This Board, and earlier tribunals, have long held that such work belongs exclusively to telegraphers. Examples of such holdings are to be found in various directives of the United States Railroad Administration at the time of World War I, such as Interpretation No. 4 to Supplement No. 13 to General Order No. 27, where it was specifically held that use of the telephone in lieu of telegraph for transmission of messages such as were involved here requires payment of the employes performing such work on the basis of classification as "telegrapher".

This concept has been carefully observed down through the years in many hundreds of decisions. Typical of these are Awards 4249, 4516 and 6419.

Clearly, it was with these facts in mind that the parties negotiated their agreements, both the general contract and the special Memorandum Agreemen of May 20, 1937. In the latter, they specifically agreed that the wires would be removed from those locations where only employes paid a low rate for performance of non-telegraph work were to be maintained. Certainly there was no intent on the part of the Organization that such employes were to be required to perform communication work of a type recognized as belonging exclusively to the craft of telegraphers, a classification requiring a higher rate of pay than that agreed to for these non-telegraph employes.

Further, the reliance of the majority upon Article 13 of the general agreement appears to be based upon both a misconception of the purpose of such rules, and a highly strained interpretation of the work "regular".

Article 13 is merely a guide for adjustment in the rates of pay when certain changes in classifications are made. Paragraph (b) has no application to any of the facts we had before us. The arrangements contemplated by this paragraph were made long ago, when the wires were removed and the rates reduced. Paragraph (a) was not involved. There was no charge that "regular telegraph and/or telephone duties" were added to any position, and there was no claim for a rate increase. There was only a claim that on certain dates employes classified and paid as non-telegraph or non-telephone agents were required to perform the higher rated work of transmitting and receiving messages by means of telephones. The issue thus raised required application of the scope rule, as such rules historically have been applied, and the Memorandum Agreement of 1937, not Article 13.

Finally, the majority's discussion of the cliche about all telephone work not belonging exclusively to telegraphers is beside the point. It seems to me that when contracting parties agree that the wires will be removed at those places where only a non-telegraph or non-telephone employe is employed at a lower rate than that paid telegraph or telephone employes, they have agreed that the non-telephone employes will be used only in conformity with their classification: To perform non-telephone work.

These awards, therefore, have not shaken any conviction that when the Carrier required these non-telephone employes to perform telephone work at non-telephone rates of pay it violated the agreement.

For all of these reasons, I believe Awards 9572 and 9573 to be incorrect. The claims should have been sustained.

J. W. Whitehouse
Labor Member.