# Award No. 9952
# Docket No. TE-8473

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Raymond E. LaDriere, Referee**

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## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY (Wheeling and Lake Erie District)

STATEMENT OF CLAIM: Claim of The General Committee of The Order of Railroad Telegraphers on the Wheeling and Lake Erie District of The New York, Chicago and St. Louis Railroad Company that:

1. The Carrier is in violation of the Agreement between the parties, when beginning on December 1, 1953, it required or permitted employe or employes outside the scope of the Agreement to handle message, lineups daily, except Sundays and holidays, at South Lorain, Ohio, and

2. Beginning on December 1, 1953, the occupant of the position of operator at South Lorain, Ohio, A. H. Bertwell, his successor or relief, shall be paid one call each day that this violative action is required or permitted until the violation ceases.

EMPLOYE'S STATEMENT OF FACTS: There is an agreement between the parties, Rules effective February 1, 1952, as amended, Rates of Pay effective February 1, 1951, as amended. This agreement is on file with this Board and Division.

Claimant Bertwell, his relief or successor, if any, employed at South Lorain Ohio, assigned hours 9:00 P. M. to 6:00 A. M. daily except Sundays and holidays, was available to perform this service on each day it was required or permitted.

The Carrier, instead of using Claimant, his relief or successor, used a Section Foreman to perform the work in dispute.

POSITION OF EMYLOYES: This claim was filed by the General Chairman with the Chief Dispatcher on December 1, 1953.

It was handled in successive appeals in accordance with Agreement provisions.

It was declined by the highest operating officer on May 25, 1954.

when the line-up was secured through an adjacent telegrapher by the use of a telephone at a station where no telegrapher's position had been maintained.

In a much later award on the DL&W (Award 7154), claims were denied when line-ups were copied from an adjacent telegrapher, the precise situation in the instant claim. Referee Larkin, in denying such claims, recognized the inconsistency of the Board's previous decisions involving line-up cases on that property.

With respect to obtaining line-ups from an adjacent telegrapher, the Carrier wishes to point out that should it be required to accede to the Employes' request and call out the claimant telegrapher to copy the morning line-up, the section foreman, whose headquarters are some distance removed from the telegraph office, would nevertheless be required to use the same telephone to secure the line-up from the claimant telegrapher that he now uses to secure the line-up from the telegrapher at Wellington. The Board has held on many occasions that it is not improper to use the telephone to secure a line-up, in lieu of making a personal trip or employing a messenger.

The Carrier has shown that the copying of line-ups on this property has never been exclusively the work of telegrapher. For this reason, and in this particular instance the fact that the line-ups were copied from an adjacent telegrapher, there is no valid basis for the claim. It should therefore be denied.

All data contained herein is known by or available to the Employes and their representatives.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The Claimant occupies the position of operator, the hours of which were formerly 7:30 A. M. to 4:30 P. M., and included the handling of train orders for the one train operating out of such point and the copying of a morning motor "line-up" for use by the section foreman. A year or more before this claim arose, December 1, 1953, such position was moved some two miles away and the hours of the operator were changed to the period from 9:00 P. M. to 6:00 A. M. After this change, on Monday through Friday the Section Foreman began obtaining the morning "line-up" on the telephone by calling the telegrapher at Wellington, Ohio, who in turn received it when it was broadcast by the train dispatcher at 7:35 A. M. However, on or about February 18, 1954, owing to other changes, arrangements were then made that the operator should leave his work at 5:00 A. M., and make delivery of a special motor car "line-up" obtained by him for the section foreman some two miles away.

The Organization relies on the "Scope" (Rule 1) of the Agreement between the parties which is general in character and includes "Telephone operators (except telephone switchboard operators)"; and also on, Rule 26, which reads:

> "It is not the disposition of the Railroad to displace employes covered by this agreement by having trainmen or other employes operate the telephone for the purpose of blocking trains, handling train orders or messages. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator."

The Carrier points out that the Agreement between the parties became effective February 1, 1910 and since then has, with minor changes, gone through about seven renewal periods; that in 1947 a proposal was made to greatly expand the existing Scope rule and prohibit employes not under the agreement from, among other things, receiving or transmitting "train lineups", but the proposal failed of adoption. The Carrier also says that the above quoted Rule 26, was to be changed so that the words "motor car lineup, or matters of record" would be inserted after the first sentence. Rule 26 seems to have been in effect since 1926.

The Carrier contends that the "Scope" rule merely lists positions instead of describing work and therefore it is necessary to look to tradition, historical practice, and custom to determine the work covered, and that Rule 26 does not aid the claimant because it has to do only with matters other than "lineups".

On this latter point the Organization refers us to seven awards touching a similar provision having to do with another railroad and states that it was there "interpreted and applied". We have carefully reviewed all of these awards and find that six of them did not consider "lineups" at all. The remaining one (Award 33 of Special Board of Adjustment 132) did involve lineups and it was pointed out that the Carrier had settled some previous claims of an identical nature and that a ranking official of the Carrier had construed section 35 (our Section 26) to mean that "such work should be performed by an employe covered by the telegraphers agreement". The Special Board, evidently relying on such admission, then said: "Accordingly, we held that it was a violation of the telegraphers agreement for the section foreman at Otter to copy track car lineup over the telephone from the operator at Gassaway".

There is abundant holding that given a Scope Rule which lists positions instead of dolineating the work to be done thereunder, resort should be had to tradition, historical practice and custom. Award 5133-Coffey, Award 4919-Boyd, Award 6032-Whiting, Award 7970-Elkouri, and many others.

Facing a body of awards which are hopelessly irreconcilable, with none of the Board's prior decisions arising on the property of this Carrier, the Referee is free to follow the line of precedents that appeals to him (Awards 7970—Elkouri, Award 8314—Shugrue.)

In arriving at a conclusion, we have carefully considered all the elements present—including the interesting information furnished by Carrier in the record as to the development of the handling of lineups over a great period of years, the attempts of the Organization to amend the agreement so as to obtain a better position from which to deal, and other matters in the case, particularly the great weight of the Awards which favor the Organization, and it is our opinion that we should adhere to the position that the sending or receiving of lineups under the circumstaances herein has been and is the work of telegraphers. Award 4516-Carter; 5181, 5182-Boyd, 8183-Smith, 6588-Rader, 4772-Stone, and numerous others.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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 violated the Agreement, and Claimant is entitled to payment for a call on the dates mentioned up to February 18, 1954.

**AWARD:** Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 26th day of May 1961

## DISSENT TO AWARD NO. 9952, DOCKET NO. TE-8473

Forty years of unchallenged custom and practice on the Carrier's property, recognized by the Board in the Opinion, have been perfunctorily disregarded in sustaining this claim; and this in the face of a Scope Rule that lists positions instead of delineating work.

Award 9952 correctly holds:

> "There is abundant holding that given a Scope Rule which lists positions instead of delineating the work to be done thereunder, resort should be had to tradition, historical practice and custom. Award 5133-Coffey, Award 4919-Boyd, Award 6032-Whiting, Award 7970-Elkouri, and many others."

The Award also recognizes, but disregards, the fact that the Organization unsuccessfully sought, through negotiation, to amend the Agreement so as to include "line-ups" as part of its work on at least two occasions "* * * so as to obtain a better position from which to deal * * *" and then interprets the Agreement as if it contained the amendments sought by the Organization. This is palpably wrong.

For the foregoing reasons, among others, Award 9952 is in error and we dissent.

**/s/ R. A. Carroll**

**/s/ P. C. Carter**

**/s/ W. H. Castle**

**/s/ D. S. Dugan**

**/s/ J. F. Mullen**