Award No. 10379

Docket No. TE-9531

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

STATEMENT OF CLAIM:

1. Carrier violated the agreement between the parties when on January 4, 5, 10, 11, February 13, 15 and 16, 1956 it required or permitted employes holding no rights under the agreement to handle train orders and messages and to perform the duties of Block Operator at R. C. Junction, Kentucky.

2. Carrier shall now compensate the senior, idle employe under the agreement, extra in preference, in an amount equal to a day's pay of 8 hours at the appropriate rate for each day listed in paragraph 1 of this claim and for each day thereafter on which such violations occur, which days are to be determined by a joint check of the Carrier's records.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties to this dispute are available to your Board and by this reference are made a part hereof.

RC Junction, Kentucky is a station on Carrier's Big Sandy Subdivision approximately nine miles east of Shelby, Kentucky; there are no positions under the Telegraphers' Agreement at RC Junction. It is a junction point between the Big Sandy Subdivision and a branch line known as the Road Creek Subdivision commonly called the Road Creek Branch extending to Republic a distance of about 3 miles; on this branch line are located several mines. When a train is ordered to perform switching service at various mines including those on this branch line, the train receives a train order at Shelby granting the right to work within certain limits and requiring that this work extra protect itself against certain other trains, or an order to run extra from Shelby to RC Junction and return. After this extra has completed the switching at the mines on the Road Creek Branch it returns to RC Junction to enter the main line of the Big Sandy Subdivision for the return trip, and it is necessary that the train crew know whether or not any superior trains, which includes the trains against which they were ordered to protect, have passed. On the dates mentioned in the Statement of Claim and subsequent dates, some member of

OPINION OF BOARD: Before considering the merits of this case, it is necessary to dispose of the jurisdictional question raised by the Carrier.

The "Statement of Claim" alleges that the Carrier violated the Agreement on specific dates and continues as follows:

> "2. Carrier shall now compensate the senior employe under the agreement, extra in preference, in an amount equal to a day's pay of 8 hours at the appropriate rate for each day listed in paragraph 1 of the claim and for each day thereafter on which such violations occur, which days are to be determined by a joint check of the Carrier's records."

The Carrier contends that the claim does not meet the requirements of Article V of the August 21, 1954, Agreement because "and for each day thereafter on which such violations occur, which days are to be determined by a joint check of the Carrier's records" does not properly set out the names of the Claimants. Several awards by this and other Divisions are cited by the Carrier to support is position.

Section 1 (a) of Article V of the August 21, 1954, Agreement provides:

> "All claims or grievances must be presented in writing by or on behalf of the employes involved. . . ."

Although there are conflicting decisions construing this contract provision, there is one cardinal rule which seems to prevail in most of them. This is that the Claimant must be named or must be easily and clearly identifiable.

In Award No. 10010 (McMahon) there was no clearly identifiable Claimant nor were specific dates of contract violations noted anywhere in the record or in the submitted evidence. In Award No. 9785 (Fleming) the claim read:

> "Five clerks, to be named by the Brotherhood, should each be allowed eight hours' pay, as a penalty, for April 11, 12 and 13, 1955."

The Board held that "there is no identifiable Claimant in whose behalf the claim is made. . . ." In Award No. 9848 (Elkouri) there was also no clearly identifiable Claimant. The claim read:

> "Each Bridge and Building Department employe be allowed pay at their respective straight time rates for an equal proportionate share of the total man hours contained by the Contractor's forces in performing the work referred to in part one (1) of the claim."

The Board dismissed the claim because:

> "The present claim is made for each Bridge and Building Department employe; thus the claimants are not specifically named, nor are they easily and clearly identifiable in this case."

The case at hand is easily distinguishable from those cited above. Here, the Organization seeks compensation for "the senior employe under the agreement, extra in preference." That "senior employe" is readily identifiable from the extra seniority list which the Carrier is obliged to maintain. The Organization and the Carrier are both aware how and where the Claimant's

identity can easily be ascertained. It is not the purpose of the Board to construe the language of a contract strictly upon the literal meaning of the words. The purpose and intent of the parties must be considered and applied to the language in the Agreement. It is sufficient that the parties know on whose behalf the claim is filed, whether the individual or individuals are named or are readily identifiable. The claim in this case complies with this intent.

The same is true with Organization's claim that such senior Employe, extra in preference, be compensated for each day listed in the Statement of Claim "and for each day thereafter on which such violations occur, which days are to be determined by a joint check of Carrier's records." There is nothing indefinite or vague about the claim. Section 3 of Article V of the August 21, 1954, permits the filing of one claim for a"continuing violation of the agreement." The records are generally in the possession of the Carrier. It is not contrary to the provisions of this Agreement, nor is it vague and uncertain, to ascertain violations "by a joint check of Carrier's records."

The Carrier also contends that this claim was not "continuing," because the Organization made its claim for seven specific dates in a period of 44 consecutive days. A "continuing violation" does not mean that contract violations must be on a "consecutive day" basis. To so hold would be a miscarriage of intent and a reasonable construction of the Agreement. Award No. 9205 (Stone) fully supports this conclusion.

There is no disagreement on the facts in this case. There is disagreement only with the interpretation of the Scope Rule, Rule 58 and the applicability of the Coal Fields Agreement of March, 1937.

The Scope Rule does not define or describe the particular duties of the job titles enumerated therein. It merely recognizes the jobs covered by the Agreement and the representational jurisdiction of the Organization. This is a well determined principle which this Board has pronounced in numerous decisions. It is sufficient to cite only Awards No. 8793 (Dougherty), 8831 (Dougherty), 8838 (McMahon), 10070 (Gray), 9204 (Stone) and 9953 (La Driere). This principle was well stated in Award No. 9956 (La Driere) as follows:

> ". . . the claimant relies on the Scope Rule which is general in nature and specifies positions rather than work to be done, so that claimant's right to recover thereunder must be resolved from a consideration of tradition, historical practice and custom. . . ."

Rule 58 is not a limitation on the general rights enjoyed under the Scope Rule. Tradition, historical practice and custom needs to be considered in applying the rights of the Organization under the Scope Rule. It is reasonable to imply that under some circumstances it is the intent of Rule 58 to hold that "train orders could be copied by others than telegraphers without penalty" (Award No. 5079—Coffey). The circumstances in each case must govern the application of this rule. If they are isolated circumstances, Rule 58 applies. If, on the other hand, the Organization's representational rights are threatened and there is no tradition, historical practice or customs to consider, Rule 58 will not apply.

In the instant case, the Organization has stated that the "acts which violate the Telegraphers' Agreement occur frequently and regularly at RC

Junction; it is not something which occurs occasionally because of some unforeseen incident but is a part of the regularly programmed operation of these shifter trains, or work extras, which operate daily, occasionally two in one day, out of Shelby to perform the switching service for the mines located on the Road Creek Branch" (R-5). The Carrier's statement that conductors receive and copy train orders "four and five times a week" (R 14) is nowhere denied by the Organization. It is also admitted by the Organization that RC Junction "is a junction point between the Big Sandy Subdivision and a branch line known as the Road Creek Subdivision commonly called the Road Creek Branch extending to Republic a distance of about 3 miles; on this branch line are located several mines" (R 4). Further, the facts show that no telegraph operators have ever been employed at RC Junction even though trains are regularly routed to and from Shelby to RC Junction and the Road Creek Branch. The record also establishes the fact that train orders at RC Junction had been obtained by the train conductor either from a brakeman left at the junction or by telephone from the operator at Marrowbone. All of this fully establishes a tradition, an historical practice and custom which can not be ignored. It follows that unless such tradition, historical practice and custom is contrary to specific contract provisions they must be given full weight in interpreting the intent of the parties.

The Coal Fields Agreement dated March 22, 1937, referred to as Addendum 5, lists a number of stations where the Organization requested that telegraph offices be opened. This Agreement continues to provide:

> "In considering the opening of telegraph offices on branch lines, it is agreed that so long as there are only a reasonable (an average of two and one-half calls per trick during any two weeks period) number of calls for train orders at a point while no operator is on duty the Railway Company will not be obligated to employ an operator at that point . . ."

It is difficult to understand the Organization's argument that Addendum 5 does not apply to RC Junction in view of the fact that it has admitted that RC Junction "is a junction between the Big Sandy Subdivision commonly known as the Road Creek Subdivision commonly called the Road Creek Branch . . ." The line from RC Junction to the Republic Mines is definitely a branch line. The fact that the Organization did not request that a telegrapher's position be established at RC Junction does not invalidate the provisions of Addendum 5 quoted above. The two separate paragraphs are not related. The provision defining when an operator on a branch line should be established stands alone. The Carrier has admitted that if the number of telephone calls for train orders at RC Junction "were to average more than two and one-half calls per trick during any two week period" it would "under Addendum 5, put on an operator to do the train order work." There is no evidence in the record that the number of calls exceeded that number.

We have carefully read and considered all the awards submitted by the parties. The Board concludes that because of the historical past practice and the yardstick set out in Addendum 5 that the Carrier did not violate the Agreement as alleged by the Organization.

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 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 27th day of February 1962.