

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Frank J. Dugan, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Texas and Pacific Railway that:

(1) The Carrier violated Rule 1 (Scope Rule) and other rules of the Telegraphers' Agreement when on January 1, 1954, it required or permitted employees not under the jurisdiction of The Order of Railroad Telegraphers at Dallas Yard and at East Yard Fort Worth to take or copy consists of trains 55 and 65 from telegraphers at Mineola Yard, via telephone, and,

(2) It violated said rules of the Agreement when on March 1, 1954, it required or permitted employees not under the jurisdiction of The Order of Railroad Telegraphers at Dallas Yard to take or copy consists of trains 55, 65 and 67 from telegraphers at Mineola Yard, via the telephone,

(3) It further violated said rules of the Agreement when on March 2, 1954, it required or permitted employees not under the jurisdiction of The Order of Railroad Telegraphers at Dallas Yard and East Yard Fort Worth to take or copy consists of train Extra 1531 West from telegraphers at Mineola Yard, via the telephone, and,

(4) It likewise violated the Agreement when it on all other dates subsequent to January 1, 1954, including these specified in claims, required or permitted employees not under the jurisdiction of The Order of Railroad Telegraphers at Dallas Yard, East Yard Fort Worth or at any other point to take or copy train consists or portions thereof or other matter of record from telegraphers or other employees at Mineola Yard or other points, and,

(5) The senior telegrapher, extra in preference, on the seniority district or districts on the date of original violation (January 1, 1954) and on all subsequent dates specified or unspecified herein on which these violations occurred or like violations may occur be com-

pensated for eight (8) hours' pay at the current minimum pro rata of pay on the district on which violations occur. Each eight-hour period at each location involved in these violations to be considered as one eight-hour day in making payments in accord with these Claims.

EMPLOYEE'S STATEMENT OF FACTS: There is an agreement in effect between the parties with effective date of May 15, 1950. On January 1, 1954, the following consist was sent by the operator on duty at Mineola Yard and received and copied by Clerk Sweeney at Dallas Yard at 4:00 A. M. via the message phone:

"No 55 Engine 1534 cut 3:37 a.m. has Condr. Peters —

63-39-4932
39- 4-2522 — Dallas
24-35-2410 — Ft.Worth

Rear Dallas car is
NW 45671 mdse agent
T&P 18029 zinc Bartlesville, 210 MKT
ART 28069 juice Safeway Store
PFE 94188 same
WFEX 65722 same
PFE 95115 same
PFE 47684 same
CBQ 33681 Coffee Dwight Edwards
GATX 51795 XT Swift
NATX 4240 SB oil Garland, MKT
SHPX 22365 same
GATX 68931 same
NYC 71081 chair Startford Furn
GATX 69552 XT Milit Kans MKT
ART 27802 bans Standard Frt and Vegt Co
NRC 19198 bans Goodman Prod Co
IC 50082 bans Amer Prod Co
NRC 16055 bans Texas Prod Co
T&P 17387 zinc Bartlesville, MKT
T&P 17344 same
T&P 17673 same
T&P 18125 same
T&P 17838 same
T&P 18154 same
T&P 17508 same
T&P 18135 same
T&P 17581 same
T&P 17671 same
T&P 18056 same
T&P 17117 same
T&P 40091 same
T&P 1718 XEB 210
T&P 30231 shingles 246 Fsco
MoP 33141 same
S P 83218 same
T&P 32118 same
CBQ 26570 Wall board Buell Lbr Co
DIC 355 ice Pure Carbonic Co

"The record discloses that the telegraphers have always been permitted to utilize part of their working day to perform clerical duties. We think that right must necessarily continue because it is hard to believe that all telegraphers can be continuously kept busy performing only telegraphic duties. **Likewise it appears clerks have always made use of various means of communication to transmit or receive information or messages in conjunction with that incident to their clerical work. Certainly that privilege or right should continue even though the method of communication used for that purpose have changed, because otherwise clerks will be seriously handicapped in the performance of their duties.**" (Emphasis added).

And truer words were never spoken. We hasten to again point out here that the information received by the clerks is information they need incident to their other duties. The information is used by them in compiling switch lists and other similar details. Now, let us see what the respective Committees did with that portion of the Emergency Board's Report. Article VIII of the Agreement of August 21, 1954, emanating from the Emergency Board's Report reads as follows:

"This proposal is disposed of with the understanding that present rules and **practices** are undisturbed." (Emphasis added)

Petitioner can't deny that this practice existed long before the above Article VIII became effective, and they cannot deny that it was in effect at the very time indeed, the very moment, said Article was adopted. Much more could be said, but what more need be said?

We have not asserted a third party interest here, because it appears to us that Article VIII above, is positive in its application, and provides that the practice be continued. Petitioner, as well as the Clerks are parties to that rule.

The Carrier respectfully urges that the claim should be dismissed for the reasons set forth in items 1, 2 and 3, above. In the alternative, it should be denied for lack of merit, as set forth in items 4, 5 and 6 above.

It is affirmed that all data submitted herein in support of the Carrier's position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The basic issue here is whether the Carrier violated their Agreement with the telegraphers when it permitted clerks to handle consists (or as the Carrier maintains switching lists) at points where no telegrapher is assigned.

While the decisions of the Board on this question are not in harmony the later decisions of the Board hold that where there are Agreement rules such as we have involved here past practice is the deciding factor. As this Board held in Award No. 8207 (McCoy):

"The Scope Rule merely lists the positions covered, and names among others telegraphers and telephone operators. Under such a

general rule the decisions of the Board are unanimous that the question whether exclusive jurisdiction is conferred depends upon tradition, historical practice and custom."

See also Awards 6959, 7955, 9502 and 9343.

Exhibits attached to Carrier's initial Ex Parte Submission received by this Board on March 5, 1956, show that it has been the practice for 31 years for clerks to take consists from clerks at Mineola Yard and Lancaster Yard over the phone. Such has also been the long established practice at the East Dallas Yard and the East Yard Fort Worth. The Organization, however, contends that these exhibits cannot be considered because they were not part of the record made on handling the dispute on the property, and are, therefore, in violation of Circular No. 1, Rules of Procedure of this Division.

This Board has had occasion to deal with this problem before. In Award No. 9552 this Board held:

"The same exhibits, which were presented for the first time at the oral argument, although hearing dates prior to the original submission, do not meet the requirements of Circular No. 1 for ex parte submissions that carrier set forth 'all relevant, argumentative facts, including all documentary evidence. . . .' The exhibits were submitted in support of a contention made earlier, i. e. in the Carrier's Ex Parte presentation. **They should have been presented then.** Their later offering was untimely."

See also Awards No. 8705, 10132.

Under these holdings documentary evidence attached to the original submission can be considered by the Board. While there are decisions of the Board to the contrary the decisions cited seemed based on better reasoning inasmuch as there are usually no formal hearings with a right of cross examination on the property and no formal records except, of course in disciplinary cases. Furthermore, the Organization did not raise this issue in subsequent submissions to the Board. It was first raised at panel argument. Under these circumstances the Organization cannot claim surprise and, in any event, has waived this point.

The procedural points raised by the Carrier are deemed to be without merit.

In view of past practice and custom the claim is denied.

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 Agreement was not violated.

AWARD

The Claim is 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.