

Award No. 10673
Docket No. TE-9169

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO GREAT WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago Great Western Railway, that

1. Carrier violated the Agreement between the parties when on August 2, 9, 10, 16 and 17, 1955, it required or permitted an employe not covered by the Agreement to transmit messages from Graf, Iowa.

2. Carrier be required to compensate the senior idle employe under the Agreement, E. A. Genz, one day's pay for each day of the violation.

EMPLOYEES' 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.

Graf, Iowa, is a station located on the Eastern Division of the Carrier; effective April 1, 1949, the Carrier abolished the position of Agent-Telegrapher (under our Agreement) at this station after an existence of many years.

On August 2, 1955 the Carrier caused, required or permitted the Section Foreman (an employe not covered by the Agreement), to transmit by telephone the following messages:

"Graf August 2, 1955—6:15 P. M.

ETR JHS HWJ AK Oelwein

Worked Foreman and 5 men 48 hours, 32 hours surfacing track surfaced 780 feet of track. 16 hours repair private crossing between MP 197-22 and MP 197-29.

FLO Foreman"

claimed here but the rate of the position to which entitled and \$2.50 per day expenses.

In conclusion, it is the Carrier's position that:

1. There is no evidence that the telephone calls complained of were made from Graf. All the calls were made on the Dubuque city telephone, some, if not all, were made from within the city limits of Dubuque.
2. The only rule cited by the Employees in the handling of claim, Rule 1, does not reserve to telegraphers included in the scope of the Telegraphers' Agreement, the exclusive right to perform the work subject of this complaint.
3. It has been a traditional and customary practice on this and other railroads for maintenance employees and others to use telephones located at non-telegraph stations and outlying points where no telegrapher is available, for the purpose of communicating with telegraphers at adjacent stations. That practice was followed in the instant case.
4. This Division has repeatedly held that the use of telephone under circumstances of this case is "in lieu of a personal trip or of messenger service," and does not constitute a violation of the Telegraphers' Agreement.
5. In view of the fact there was no violation of the Telegraphers' Agreement in requiring the section foreman to telephone the telegrapher at Fair Ground, it was not necessary for claimant telegrapher to be on duty at Graf at the time the work report was transmitted.
6. Employees should be required to furnish evidence in support of claim in behalf of a regularly assigned employee on his rest day for alleged violation occurring at a distant point where no telegrapher assignment exists.
7. Claim is without rule support or merit and should be denied.

The Carrier affirms that all data in support of its position has been presented to the other party and made a part of this particular question in dispute.

OPINION OF BOARD: The issue here is whether telegrapher's rights were violated when a maintenance-of-way section foreman telephoned certain required work reports to a telegrapher for further transmission to other locations on the railroad.

The facts are not in dispute in any material respect. On the dates indicated in the claim, the section foremen assigned to track maintenance and related work in the vicinity of Graf, Iowa, used a commercial telephone to transmit the messages or reports shown in the record to the telegrapher at Fair Ground (Dubuque, Iowa), for further transmission to other locations on the railroad. The messages or reports were matters of record. Graf was a non-agency station—the station having been closed and the telegrapher's position abolished in 1949.

The essence of the Employee's argument in support of their claim is that, under the Scope Rule, communications of the type here involved are reserved exclusively to telegraphers. They maintain that when the Carrier abolished the telegrapher's position at Graf it manifested an intention to discontinue all work of that position, and when the Carrier required the section foreman to transmit communications of record it violated their right to perform the work. Furthermore, having made the case that such communications are

reserved to telegraphers, through recitation of numerous awards, the Organization argues that the claim must be sustained "unless in the Carrier's position there is established a clear exception to the general rule that such work belongs to telegraphers."

The Carrier's position is that the work involved is not reserved exclusively to the telegraphers; that history, tradition, custom and practice must be regarded to determine the scope of work reserved to telegraphers; that the burden to show this is on the Employees; that this was not done; and that the practice on this property has been to permit others than telegraphers to handle communications of record.

Only the Scope Rule is pressed on this Division as having application here. Therefore, the rights of the parties flow from whatever meaning may be given to such rule under the facts involved.

It is well settled that the Scope Rule does not define the work to be done or who is to do it. To give intelligence to this, the circumstances under which the work developed must be examined. After repeated examination of this troublesome question, the phrase "history, tradition, custom or practice" has caught on as being most appropriate.

Although this formula has served as a valuable guide it has created new difficulties. The trouble is that many consider the elements of the formula to have become inseparable so that they are regarded as one.

This should not be.

History is essentially a record of past events; tradition is closely allied, but less exact since transition from past to present is based on oral transmission of information and beliefs; custom is an habitual or usual course of action—having implicit in it change depending on existing conventions; and practice, although having a strong element of repeated action, is most meaningful when regarded as actual performance.

Thus, the words do have different shades of meaning and should be so regarded.

Probably, when the formula came into prominence all elements were intended to apply to the experience of the past. But there is no reason why the interpretation of the Scope Rule must depend exclusively on past events. In the absence of definitive agreements spelling out the work to be performed, the Scope Rule may be regarded in the light of existing events as well as the past. The past is the father and the present is the son.

Applying these thoughts to the claim here, the controlling question is whether the Scope Rule, as construed, does or does not permit the type of communications involved in this claim by someone other than telegraphers.

Certainly, these work reports were handled exclusively by telegraphers in the past. Who else could have? And, although the Employees have the burden to show this to justify their claim they virtually have a prima facie case—and we so find.

If we apply the established formula of history, tradition, custom or practice we should sustain the claim. This is the test used in many awards and we respect the authority contained therein. However, we go one step beyond. If the Carrier can show that there has been a practice for employees other than

telegraphers to handle the type of communications involved here then the presumption that the work is exclusive with telegraphers is rebutted. Such practice would have to be of sufficient time, importance and notoriety as to constitute an exception to the Scope Rule, as historically applied. We find such exception in this case.

Openly and in published form the Carrier instructed all its section foremen and others in 1939, sixteen years prior to this claim, to submit work reports as follows:

"At non-telegraph stations and other points where telegraphers are not employed, section and extra foremen, crane operators, etc. will transmit work reports, force reports and similar reports over the telephone to a telegrapher at an open office to be re-transmitted by the latter to those whom addressed."

The communications in this case were in compliance with this instruction. We hold these communications, therefore, to be in accordance with an established practice of the Carrier and not in violation of the Telegrapher's Agreement.

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

Claim Denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July, 1962.