

Award No. 10946

Docket No. TE-9165

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific Company (Pacific Lines) that:

1. The Carrier violated the provisions of the Agreement between the parties when it required or permitted an employee not covered by the terms of the Agreement to perform the duties of Agent at Lordsburg, New Mexico, October 10 to 28, 1955, inclusive.

2. In consequence thereof, the Carrier shall compensate each of the following named employees a day's pay of eight (8) hours at the rate of the position involved, on the dates shown:

B. L. Brown, October 10, 17 and 24, 1955

J. D. Emmons, October 11, 12, 18, 19, 25 and 26, 1955

J. C. Maxwell, October 13, 14, 20, 21, 27 and 28, 1955.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an agreement between the parties bearing a date of December 1, 1944 (Reprinted March 1, 1951, including revisions).

A monthly rated Agent fully covered under the rules of the Telegraphers' Agreement, is employed on the Rio Grande Division at Lordsburg, New Mexico, shown at page 71 of the current Agreement. This position has a regular assignment of 8 hours Monday through Friday; Saturday and Sunday being rest days.

Mr. F. E. Johnson is Agent at Lordsburg. He has some 14 employees under his direct supervision at this station, including telegraphers working around the clock and clerical employees.

Agent Johnson was granted a vacation during the period October 10 to 28, inclusive, 1955. Instead of assigning a telegraph service employee to relieve Agent Johnson during this period of absence the Carrier

Petitioner also cites the following from Referee Morse's interpretation of Rule 10(b) of the Vacation Agreement:

"(e) The referee agrees with the carriers that the distribution of work under Article 10(b) need not necessarily be among employees with common seniority, but it is to be definitely understood that the agreement cannot be applied in a manner which will cross craft or class lines . . ."

The employees at Lordsburg, during the absence of the agent on vacation, did not perform any duties other than those they perform during other periods of the year. It is therefore apparent that the interpretation quoted above does not support the instant claim.

CONCLUSION

Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support and therefore requests that it be denied.

All data herein submitted have been presented to the duly authorized representative of the employees and are made a part of the particular question in dispute.

The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carriers' station force at Lordsburg, New Mexico, consists of the Agent who has a regular assignment of 8 hours Monday through Friday, with assigned rest days of Saturday and Sunday each week; three telegrapher-clerks—PMO positions (one position on each shift around the clock); three train clerks (one position on each shift around the clock); two callers (not more than one on duty at anytime); one cashier; and, one clerk-warehouseman. The positions of Agent and telegrapher-clerk—PMO are covered by the Telegrapher Agreement; the remaining positions by the Clerk Agreement. The Agent supervises the force. He does no communication work.

In accordance with the existing Vacation Agreement the Agent was on vacation for 15 working days from October 10 through October 28, 1955. During this period Carrier blanked the position.

Telegraphers contend that: (1) during the Agent's vacation the duties of the Agent were performed by Employees covered by the Clerk's Agreement in a manner which crossed craft lines; and, (2) the position of Agent should have been filled by the three telegrapher-clerk—PMO Employees on the dates set forth following the name of each in paragraph 2 of the claim and each should be made whole. In support of its contentions Telegraphers list, in the record, 9 items of railroad work and one item of Railway Express Agency work and alleges such work is performed by the Agent during his assigned hours.

Since the initiation of the claim the Carrier has steadfastly denied that the clerical Employees on duty during the absence of the Agent did any work other than that which they normally did at other periods when the Agent was on duty. It argues that Telegraphers has the burden to prove that "exclusive" duties of the Agent under the Telegrapher Agreement were performed by Employees under the Clerk Agreement. Further, Carrier avers that the record shows that Telegraphers has not satisfied this burden of proof; and, therefore, the claim should be dismissed, citing Award 8135 as authoritative precedent.

The facts are strikingly similar in the instant case and in Award 8135. They differ radically only in that in the instant case the Agent acted as agent for the Railway Express Agency.

The Agent, in the case before us, was compensated for work performed as Agent for the Express Agency on a commission basis. Carrier reduced the Agent's monthly salary because of on the job time devoted to Express Agency work. By Agreement between Agent and Carriers' Cashier at the Lordsburg station the former, for the period of his vacation, turned over to the latter the duties of agent for the Express Agency. The record does not reveal the terms of the Agreement. The evidence does not support a finding that Carrier was a party to the Agreement between the Agent and Cashier or that it exercised any control relative thereto; or, that the provisions of the Telegrapher Agreement encompasses "exclusive" jurisdiction of work performed by the Agent for the Express Agency.

The pivotal issue in this case is whether Telegraphers has proven, by a preponderance of the evidence, that "exclusive" duties of the Agent under the Telegrapher Agreement were performed by Employees under the Clerk Agreement during the period the Agent was on vacation. Telegraphers assert they were; but, the assertion is not supported in the record by clear and convincing evidence having probative value. Consequently, Telegraphers have failed in their burden of proof.

For the reasons set forth in the Opinion of Board in Award 8135, the claim herein must be dismissed.

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 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 Claim should be dismissed in accordance with the Opinion.

AWARD

Claim dismissed in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December 1962.