Award No. 11510

Docket No. TE-9613

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Seaboard Air Line Railroad, that:

1. Carrier violated agreement between the parties hereto when on July 16, 18, 23 and August 7, 1956, it caused, required or permitted employes not covered by Telegraphers' Agreement, to transmit communications of record, by telephone, from Birmingham Yard, Birmingham, Alabama, to Cedartown, Georgia, at times when telegrapher was not on duty but was available for call.

2. Carrier shall compensate E. C. Collins, regular occupant, first shift, Clerk-Operator position, Birmingham Yard, for one call (2 hours, at time and one-half rate) for each day of violation as above set forth.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement entered into by and between Seaboard Air Line Railroad, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The agreement was effective October 1, 1944, and has been amended in several respects. The agreement, as amended, is on file with this Division, and is, by reference, included in this submission as though set out herein word for word.

The dispute submitted herein was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes, and failed of adjustment. The dispute involves interpretations of the collective bargaining agreement, and is, under the provisions of the Railway Labor Act, as amended, proper to be submitted to this Board for decision and award. The Third Division, National Railroad Adjustment Board has jurisdiction of the parties and the subject matter.

This dispute involves the diversion of work claimed by the Employes to belong exclusively to employes covered by our agreement at Birmingham, Alabama. The dates involved are July 16, 18, 23 and August 7, 1956.

At Birmingham, Alabama, until about eighteen months ago, there were three shifts performing round-the-clock telegraph and telephone service at this

OPINION OF BOARD: Birmingham, Alabama, is the home terminal and extra board point for train service employes assigned to work between Birmingham and Atlanta (Birmingham Sub-Division of Georgia Division). Clerks in the Birmingham Yard office (not covered by the O.R.T. Agreement) handle the calling of train crews, operation of the crew boards and filling of train service vacancies at Birmingham as well as road switchers and locals terminated at outlying points. Cedartown — 106 miles from Birmingham — is located on one of the two telephone circuits between Birmingham and Atlanta.

The Agreement between the Carrier and O.R.T. contains this Scope Rule (Rule 1):

> "This agreement will govern the employment and compensation of agent-telegraphers, agent-telephoners, division car distributor-operators and report clerk-operators, telegraph and telephone operators (except switchboard operators), clerk-operators, morse-teletype operators, towermen-telegraphers, towermen-telephoners, levermen, levermen-operators, and also such station agents, assistant station agents and ticket agents as are listed herein."

Prior to about October 1955 the Carrier employed clerk-operators (covered by the O.R.T. Agreement) on three shifts at Birmingham who performed telegraph and telephone service. In 1955 the third shift was abolished. Thereafter, one man was assigned to a 6:50 A. M.-2:50 P. M. shift, another to a 7:00 P. M.-3:00 A. M. shift.

On July 16, 1956, at 4:55 P. M. a Trainman claimed a vacancy on the Cedartown switcher, displacing a junior man effective July 17. A Birmingham clerk (not covered by the O.R.T. Agreement) transmitted a telephone message to Cedartown at 5:05 P. M. which was noted by the Cedartown Telegrapher (Telephoner) as follows:

> "Local Wire
> Golden and Moore
> Cedartown, Ga.
>
> E. C. Howells claimed Cedartown Switcher and will protect July 17th."

The name of W. A. Stroupe, who is General Yardmaster, was appended to this message.

Upon learning of this incident, the 6:50 - 2:50 Clerk-Operator, E. C. Collins, submitted a claim for one "call"; i.e. for two hours' pay at time and one-half pursuant to Rule 8:

> "When notified or called to work outside of established hours employes will be paid a minimum allowance of two hours at overtime rate."

Similar incidents occurred on July 18 and 23 and on August 7. Collins submitted claims for a "call" on each of these days. The details:

July 18. At 3:20 P. M. a Trainman claimed a vacancy on the Cedartown switcher displacing a junior man. The Birmingham Crew Clerk (not covered by the O.R.T. Agreement) telephoned the Cedartown Telegrapher (Telephoner):

"Local Wire
A E Rhea
T G Golden
Cedartown, Ga.

Trainman J. H. Sewell claims breaking job on Cedartown Switcher under advertisement misplacing A. E. Rhea will protect Thursday, July 19th joint original AER cy TGG EMS JGS MVA.

W. A. Stroupe"

Later that day the same message was transmitted to three Carrier officials in Howells, Georgia by the Birmingham 7:00 P. M. - 3:00 A. M. Clerk-Operator.

July 23. At 5:00 P. M. Trainman Ingram, who lived in Cedartown but who was to protect a vacancy at Birmingham that evening, was displaced by a senior man. As a result, Ingram had the opportunity to displace Sewell, a junior man working on the Cedartown switcher. Telephone calls at 5:03 P. M. and 5:05 P. M. were made by the Birmingham Chief Clerk (not covered by the O.R.T. Agreement) to Cedartown, as follows:

"Local Wire Birmingham, Ala. July 23, 1956

W F Ingram
Cedartown, Ga.

J. F. Scott has rolled McCarty as Flagman of Cab 5673 for regular job which misplaces you from McCarty vacancy.

W. A. Stroupe"

"Local Wire Birmingham, Ala. July 23, 1956

J. H. Sewell
Cedartown, Ga.

Ingram has been displaced off McCarty's vacancy. Do not know yet when he will protect Cedartown Switcher. Can you advise phone number where you may be contacted tonight?

W. A. Stroupe"

August 7. At 4:10 P. M. a trainman reported he would be back for regular assignment on the Cedartown switcher on August 8 (thus replacing extra Trainman Pope). The Birmingham Crew Clerk (not covered by the O.R.T. Agreement) telephoned this message to Cedartown:

"Local Wire Birmingham, Ala. Aug. 7, 1956

T. G. Golden
D. A. Pope
Cedartown, Ga.

W. R. Williams will protect job on Cedartown Switcher tomorrow August 8th.

W. A. Stroupe"

All these messages were transmitted word for word by the Birmingham clerk to the Cedartown Telegraphers on duty who, in turn, made copies for each person to whom the messages were addressed. The Telegrapher either delivered these messages personally or placed them in appropriate boxes. (The Organization asserts that had Collins been on the job he would have transmitted them by Morse telegraphy.)

The Organization contends that Collins is entitled to Rule 8 "call" pay for each of the days in question since, under the Agreement, Management was obligated to use an O.R.T. employe to transmit the messages. It argues in substance: (1) The handling of communications (messages, orders and reports of record) belongs exclusively to employes covered by the Birmingham O.R.T. Agreement; (2) The communications in question were "messages of record" requiring immediate transmission; (3) These messages were totally unrelated to work being performed by clerical employes; (4) There has been no practice at Birmingham for clerks not covered by the O.R.T. Agreement to handle messages of this type; (5) Decisions of the Third Division (and others) support the Organization's contentions, including Awards 602, 1983, 4516, 5281, 6675, 1657, 6419 and 6693; (6) Two decisions arising under the same Agreement on this property are particularly compelling: Awards 3900 and 8266.

Management, on the other hand, denies that the O.R.T. Agreement is violated when crew clerks use the telephone to relay train crew information to telegraphers or others. It argues that O.R.T. men do not have the exclusive right, under the Scope Rule, to perform all communication service, as evidenced by (1) The wording of the rule, (2) The Organization's October 1956 request for a new rule which, had it been adopted, would have prohibited any but O.R.T. employes from operating "any telegraphic, electrical, mechanical, or electro-mechanical apparatus, used directly or indirectly to transmit, receive or reproduce messages, orders, reports and similar intelligence . . ."

The matter of clerks performing communication duties and telegraphers performing clerical duties, the Carrier affirms, was disposed of by Article VIII of the August 21, 1954 National Agreement which contained the "understanding that present rules and practices are undisturbed." Here, Management contends, it has been a long-standing practice for (1) practically all employes to use the telephone constantly and daily, (2) crew clerks to call train crews and notify them of assignment changes. In fact, Carrier says, notifying train service employes of changes in status is "the very essence of a crew clerk's job." Moreover, the messages in question were not "communications of record."

The Carrier finds support for its position in Awards 603, 652, 700, 6330, 2090, 1826, 5660, 10604 and others.

In a recent decision involving these parties (Award 10604) we noted that the Scope Rule under this Agreement does not define the work which belongs exclusively to the telegraphers nor does it indicate the circumstances of performance under which the Organization has jurisdiction. "Its general character", we stated, "requires that we examine other pertinent Rules in the Agreement as well as the tradition, historical practice and custom which may apply" to the claim. It seems apparent, then, in the case at hand, that if telegraphers (clerk-operators) always performed the task in question and clerks never performed such tasks, Collins' claim is justified and should be sustained. On the other hand, if clerks as well as operators did such work, and did it consistently over long periods of time, there should be little doubt that the claim must be denied.

The question, then, is one of fact and proof. What does the record show?

Collins' four claims were denied on August 9, 1956 by Superintendent J. White who stated he knew of no contractual provisions which would permit payment. On September 6 Local Chairman D. S. May wrote White that since the messages were communications of record they were covered by the Scope Rule. On September 12 General Chairman L. G. Parker submitted a formal appeal stating that Collins should have been called to perform the work because "such communications is included in telegraphers' work." On October 30 the appeal was rejected by Director of Personnel J. S. Riggan who noted, in part, that (1) not all communication work is reserved for telegraphers, (2) the Scope Rule does not encompass all telephonic communications, (3) on this property the telegraphers have never, by either rule or practice, obtained exclusive rights to use of the telephone. Following a joint conference, the Organization's General Chairman advised Riggan that the case would be appealed further, commenting that he (Parker) "took the position that employes covered by the Telegraphers' Agreement have the exclusive right to perform all communication service, and that when it is delegated to outsiders, violative action takes place." Management made no response and the matter was submitted to this Board.

It is apparent, from the above recitation, that while it pursued its claim on the property, the Organization made no effort to demonstrate the existence of a practice (as distinguished from a contractual requirement) regarding the use of a telephone in instances such as those occurring in July-August, 1956, nor did it even raise the question of practice. Management, on the other hand, stated that the telegraphers had never, by rule or practice, obtained exclusive rights to the use of a telephone for communications. While a more affirmative statement might have been clearer, it is our belief that this opened the door to a consideration of practice. But no convincing facts have been provided by the Organization.

True, in their submissions to this Board the parties have made conflicting assertions. The Organization (in its Rebuttal) has denied that there was a practice at Birmingham with regard to the handling of messages like those delivered in July-August, 1956. Carrier, with at least equal force, affirmed (in its Rebuttal) that crew clerks have regularly called train crews on the telephone to notify them of assignment changes. Where the truth lies in these opposing contentions is impossible to determine from this record.

We can find no help, moreover, in Awards 3900, 8266 and 10604 which concerned these parties. The facts and circumstances in those cases were sufficiently different as to be of no use in ascertaining the existence of a prevailing practice with respect to the issue at hand.

In sum, it is our conclusion that there is not sufficient proof in this record to warrant a sustaining award. The claim will therefore be 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 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 claim should be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1963.

LABOR MEMBER'S DISSENT TO AWARD 11510 DOCKET TE-9613

The pernicious error of this award is so obvious that its adoption by the majority, which consisted of the Referee and Carrier Members, raises serious doubts as to the wisdom of attempting settlement of such basic problems by neutral persons who apparently have not acquired the ability to discern the facts in a morass of fiction.

This record contained no more than the usual mass of truths, half-truths, evasions, and honest argument. But the job of sifting the wheat from the chaff was woefully inadequate.

One example will suffice to illustrate: In the third last paragraph of the Opinion of Board it was noted that the Organization denied the existence of a practice at Birmingham of handling messages of the type involved in the manner complained of. Countering this point, the majority observed that:

> ". . . Carrier, with at least equal force, affirmed (in its Rebuttal) that crew clerks have regularly called train crews on the telephone to notify them of assignment changes . . .".

Then, with amazing disregard for the obvious fact that the Carrier's response was entirely beside the point, the Opinion continues with the flat statement that:

> ". . . Where the truth lies in these opposing contentions is impossible to determine from this record."

There were no opposing contentions. The Employes were referring to the transmission of messages, addressed not only to train service employes but to others as well, from Birmingham to Cedartown, a distance of 106 miles, where they were received by a telegrapher who made the requisite number of copies and effected delivery in the usual manner. The Employes said there never had been a practice of clerks doing such work, but to the contrary all such work was done by telegraphers until the Carrier abolished one of their jobs leaving such work unprotected for several hours each day.

The Carrier said it had always been the practice for crew clerks to call train crews on the telephone to notify them of assignment changes. That is very likely a true statement as far as it goes. I am confident that crew clerks regularly call crew members on the telephone not only to report for work, but to notify them of assignment changes.

So what? This case had nothing to do with crew clerks calling crews. The clerks did not call any crew member. They called the telegrapher at Cedartown and transmitted messages — formal, written telegrams, addressed to persons located at Cedartown and signed by the Carrier's General Yardmaster at Birmingham.

The Employes clearly showed that such work not only is reserved to telegraphers by their scope rule, but has, as a matter of fact and customary practice, been performed by use of the Morse telegraph at the locations here involved until the Carrier chose to abolish one of the telegraphers' jobs.

Perhaps one other instance of glaring error should be specifically noted. The Referee obviously was impressed by the Carrier's contention that "The matter of clerks performing communication duties and telegraphers performing clerical duties . . . was disposed of by Article VIII of the August 21, 1954 National Agreement which contained the 'understanding that present rules and practices are undisturbed' . . .".

Assuming without in any manner conceding the Carrier's contention on this point to be correct, a proper application to the facts would have required an opposite result from the one adopted. At the time the August 21, 1954 Agreement became effective the rules and practices then existing at Birmingham were that telegraphers, on a full time around the clock basis, were performing all the work of transmitting messages to Cedartown. But the Carrier did disturb those rules and practices by abolishing one telegrapher position and then requiring clerks to perform the communication work left unprotected. Such actions quite obviously violated the particular article referred to as the Carrier professed to understand it.

In view of these errors, and others equally obvious, I cannot sit idly by while the rights of employes, acquired by years of patient and heartbreaking struggle, are wiped out. This decision is palpably wrong and I hereby express not merely dissent but militant indignation at its inept trampling of contractual rights.

J. W. Whitehouse