Award No. 11592
Docket No. TE-9587

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CLINCHFIELD RAILROAD COMPANY

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

1. Carrier violated the Agreement when on July 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31; August 2 and 3, 1956, it required or permitted Section Foreman Flanary, Johnson City, Tennessee, an employe not covered by Telegraphers' Agreement, to copy train line-ups from Train Dispatcher, when Clerk-Operator was not on duty but available for call.

2. Carrier shall compensate W. C. Morrell (or other employe occupying position) Clerk-Operator, Johnson City, Tennessee, for one call (two hours at time and one-half rate $2.961 per hour) for each and every day and date set forth above; and, for one call, to employe entitled thereto, for each and every date thereafter that the Section Foreman (or other employes not covered by Telegraphers' Agreement) is required or permitted to copy train line-up at Johnson City, Tennessee.

EMPLOYES' STATEMENT OF FACTS: There are in full force and effect several collective bargaining agreements entered into by and between Clinchfield Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. All of such agreements are on file with this Division and are, 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 claims and failed of adjustment. Under the provisions of the Railway Labor Act, as amended, this Division has jurisdiction of the parties and the subject matter.

At Johnson City, Tennessee, parties to dispute have negotiated for two positions covered by the Telegraphers' Agreement. The positions are described in the Agreement as follows:

OPINION OF BOARD: In July, 1956 Claimant W. C. Morrell was the assigned Clerk-Operator at Johnson City, Tennessee, 8:00 A. M.-5:00 P. M. He was covered by the ORT Scope Rule which provides:

> "This agreement applies to telegraphers, telephone operators (except switchboard operators), agents specified in list attached hereto and none other, agent telephoners, agent telegraphers, towermen, levermen and block operators."

Motor car operators (including Section Foremen), who are not covered by the ORT Agreement, receive a morning lineup by telephone at about 7:15 A. M. On the days in question Section Foreman P. H. Flanary, headquartered at Johnson City, received train lineups on the telephone from the Erwin, Tennessee Dispatcher.

On August 6, 1956 Petitioner's General Chairman submitted a claim on Morrell's behalf, contending that this employe had "the exclusive right to perform all work covered by Rule 1 of the Agreement," and citing three Third Division Awards. On August 10 Carrier declined the claim, stating, "We cannot agree that the agreement was violated." In its August 15 appeal Petitioner, by way of argument, attached a copy of its original claim. Management's September 7 denial noted, "We find no rule in the agreement to support this claim and it is respectfully disallowed."

A considerable number of cases involving the question of Telegraphers' exclusive right to handle lineups have been handled by this Board. The holdings have not been consistent. The more recent — and more persuasive, in our judgment — awards have held that in interpreting a general scope rule which merely lists positions or titles, guidance must be obtained from a consideration of custom, tradition and practice on the property (see Awards 10970, 10951, 10918, 10604, 10581, 10493 and others). In other words, there is no presumption of exclusivity — at least in certain areas — based merely on the listing of a job title and the fact that the employe possessing that title has performed the work in question. In a contested case such as this, the question must be asked: Did Claimants, by tradition, custom and practice on this property, perform the work to the exclusion of others?

While there is some disagreement in the case at hand concerning the timeliness and admissability of certain Carrier evidence, there is no proof whatsoever that receiving lineups has been considered or treated as work belonging exclusively to telegraphers. Petitioner, as a matter of fact, never even makes that assertion but, instead, relies on the Scope Rule and favorable Board Awards such as 10367, 9241, 7345, 5407, 4925, among others.

It is unfortunate the parties were so reluctant, in their handling of this dispute on the property, to present to each other their full positions. (Carrier offered laconic denials to Petitioner's lean contentions. The Organization did not unfold its rather elaborate historical presentation, containing facts dating back to the turn of the century, including references to World War I actions of the Federal Administrator of Railroads, decisions of the U.S. Railroad Labor Board, court decisions, and the like. It did not produce actual lineups, although these were attached as exhibits to its Ex Parte Submission. Carrier, similarly, failed to present evidence and argument concerning practice until the case was appealed to this Board.) Had there been a complete and frank exchange of information and argument, perhaps the claim would not be before us now. But, be that as it may, we can find no justification for sustaining the claim in the absence of persuasive evidence (or any evidence) that

the parties, on this property, have treated lineups such as those involved here as the exclusive property of telegraphers. (Incidentally, even if we disregard Carrier's assertions — essentially undenied — that for almost fifty years the disputed work has been handled by Section Foremen and others in addition to telegraphers, there is some independent evidence which tends to support such a finding. Section Foremen headquarters are located at tool houses along the line. Many of these are situated several miles from the nearest agency. Moreover, there are only eight points on 277 miles of railroad where operators or agents are on duty at 7:15 A. M. It would thus seem reasonable to conclude that Foremen have not been required to receive lineups from an operator if one was not on duty where that lineup was obtained.)

It may also be noted that in Award 10367, cited by the Organization, the Telegraphers' claim was sustained because of a consistent pattern of Carrier settlements which, the Board found, warranted the conclusion that "practice, custom and tradition has been established **on this property** to allow the telegrapher at the adjacent station a call where the regular morning lineups are copied by an Employe . . . direct from a dispatcher. . . ." But, as noted above, in the case at hand there is no evidence or proof of an established practice or consistent pattern which would support Petitioner's claim. Under the circumstances the claim must be denied. (Emphasis ours.)

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 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 12th day of July 1963.

LABOR MEMBER'S DISSENT TO AWARD 11592
DOCKET TE-9587

I have no quarrel with the criticism of the parties for their failure to give this dispute more thorough handling on the property.

But I emphatically disagree with the action of the majority in committing the same fault. Thorough consideration of the position of the Labor Members would have clearly revealed that there was no contention that a "presumption

of exclusivity" was based "merely on the listing of a job title and the fact that the employe possessing that title has performed the work in question." The purpose and effect of the structure of the scope rule was fully set forth and documented in the Labor Members' brief.

The degree of "proof" which this majority would require of employes is neither required by the historical interpretation and application of scope rules nor possible in point of fact.

In short, this award says to the employes that in order to support a valid claim they must offer unimpeachable proof of the impossible. This Board was not created to spawn such absurdities.

For these and other obvious reasons I consider Award 11592 to be erroneous, and hereby register extreme dissent.

J. W. Whitehouse