

Award No. 11844

Docket No. TE-9865

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Martin I. Rose, 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 and continues to violate the agreement between the parties when, at Kansas City, Missouri, it requires and permits employes not covered by the agreement to handle messages.
2. Carrier be required to compensate L. E. James on July 26, 1956 and E. H. Oliver on August 4, 1956, in the amount of a two hour call payment; and
3. On each subsequent date the violation occurs, compensate the available telegrapher employed at "RO" Office, Kansas City, Missouri in the amount of a two hour call payment until the violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

Kansas City, Missouri is a station on this Carrier's lines and is the southern terminus of the railroad. "RO" Telegraph office is located in the Yard Office in the Central Industrial District (commonly called "West Bottoms") of the city.

Prior to the year 1951, the Carrier maintained continuous telegraph service at this office with three shifts, each working seven days per week. Some time in July 1951 one shift was abolished and the hours of the two remaining shifts were rearranged. At the time the cause for this claim arose the first shift was assigned 4:00 A. M. to 12-noon and the second shift 4:00 P. M. to 12-midnight. Assigned rest days of the first shift were Sunday and Monday and the second shift Tuesday and Wednesday, with rest day relief furnished by a regular relief position. L. E. James is the regularly assigned incumbent of the first shift position and E. H. Oliver of the second shift position.

In accordance with practice and instructions of many years standing, when the operator was off duty the teletype or printer machine was cut out

is not contained in the contractual agreement, the Employees have endeavored from time to time to secure such a rule by the process of negotiation pursuant to formal notice served on the Carrier under terms of Section 6 of the amended Railway Labor Act, and by invocation of the services of the National Mediation Board under Section 5, First, of the aforementioned Act. As previously indicated herein, the Employees by their actions have recognized that the right to perform the work in dispute is a negotiable matter which is simply another way of saying that the work is not included within the Telegraphers' Agreement.

In Third Division Award 5331 it was said:

"Except insofar as it has restricted itself by the Collective Bargaining Agreement or it may be limited by law, the assignment of work for its operation lies within the Carrier's discretion."

We have previously shown that neither the Telegraphers' Agreement nor the Clerks' Agreement contains any reference whatsoever to teletype or printer machines and up to the present time the Carrier has been unable to negotiate an agreement with the O.R.T. and B.R.C. covering such work. In the absence of any restriction or prohibition in either of these agreements the Carrier has assigned the work of operating teletype machines, which it has the right to do, according to the exigencies of the service. Clerks at Kansas City are not obliged to remove messages from teletype machines and it is the practice for the telegrapher to remove such messages, which practice was followed in the instant case.

Claim clearly is not based upon any supporting rule of the contractual agreement but rather upon the unsupported theory that certain work "historically, traditionally and customarily" flows to employees under the Telegraphers' Agreement. In the handling of the case on the property the Employees failed to produce any evidence in support of their theory. Damages are not awarded on theory alone and there must be compelling proof, supplied by the Employees, in support of that theory. This Division has held:

"The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance."
(Award 4011 — also, see Awards 7964, 7584, 7362, 7180, 7179, 6964, 6829, 6828, 6824, 4758, 3523, 3477, 2577 and others).

Under the Railway Labor Act this Division is required to give effect to the collective agreement and adjudicate this dispute in accordance therewith. On the basis of that Agreement and the awards of this Division in similar cases, claim 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 the particular question in dispute.

OPINION OF BOARD: The claim is predicated upon the view that the receipt of certain messages on a teletype machine at Kansas City when no telegrapher was on duty violated the agreement between the parties. The messages were sent on each of the claim dates by a telegrapher at St. Joseph, Missouri, and concerned the pick-up of cars by two trains.

The record shows that there "is a dispute between the parties concerning the use of the teletypes and printing machines, jurisdiction of the dispute

was taken by the Mediation Board and the case designated as Case A-4077 is still pending;" and that the Brotherhood of Railway Clerks has also asserted an interest, and claimed the work involved, in the mediation case.

The circumstances presented by the record indicate that the dispute here is substantially the same as that in Award 11221 which also involved the parties here. In that Award, the Board said:

"This Board has on repeated occasions held when a jurisdictional dispute exists between two Organizations, it is not equipped nor empowered to decide.

"We must therefore remand the claim before us for further negotiations between the parties. If negotiation fails, their proper forum is the National Mediation Board."

Nothing in the instant case distinguishes it from this prior award and disposition of the same issue.

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 no jurisdiction over the dispute involved herein.

AWARD

Claim remanded in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1963.