

Award No. 11908

Docket No. TE-10655

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ANN ARBOR RAILROAD COMPANY

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

1. The Carrier violated the parties' Agreement when, on July 9, 10, 11, 12, 16 and 17 it required or permitted Supervisor A. E. Schultz, an employe not covered by the Telegraphers' Agreement to handle train orders for work extra 20 at Dundee, Michigan, prior to the starting time of the agent-telegrapher at this station.

2. The Carrier shall, because of the violations set forth above, compensate Stephen Lipka, the regularly assigned agent-telegrapher at Dundee, Michigan, a call of two hours at the time and one-half rate of the position occupied.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute effective September 1, 1955, as amended.

At page 10 of an agreement between the United States Railroad Administration and the employes in the telegraphers' class and craft as represented by The Order of Railroad Telegraphers on this property effective October 1, 1918, is, among other things, listed:

	Hourly Rate
"Dundee.....Agent....."	\$ 56.75"

At page 3 of this same agreement prefacing the rules are the following forewords:

"Agreement with Telegraphers effective April 1, 1917, as to Rules and Rates of Pay, is hereby changed to comply with Supplement No. 13 to General Order No. 27 issued by the Director General of Railroads United States Railroad Administration effective October 1, 1918.

Addenda, supplements and interpretations thereto will be applicable to this schedule."

concerning rates of pay, rules, or working conditions. This Board has no authority to add to, change or eliminate any rules of existing agreements or to place the carrier in any position other than that in which it placed itself by collective bargaining agreement.

This carrier and its employes represented by The Order of Railroad Telegraphers have not by agreement provided that train orders may be handled only by telegraphers nor have they placed a prohibition upon employes other than telegraphers from being permitted to handle train orders at telegraph or telephone offices where an operator is employed and, in fact, although The Order of Railroad Telegraphers requested such prohibition on two separate occasions, it was not adopted by the parties or included within the bargaining agreement.

In order to sustain this claim, this Board must ignore the bounds of its authority and the processes provided by law for the progressing of requests for changes in agreements relating to rates of pay and working conditions for railroad employes and thereby deprive the persons who own this company of property without due process of law.

This Board has no jurisdiction to supply that which the parties' agreement does not contain.

In view of the foregoing, the claim should be dismissed for lack of jurisdiction, and if not dismissed, denied for the reason that it is not supported by the rules of the agreement.

The carrier affirmatively states that the substance of all matters referred to herein has been made the subject of correspondence or discussion in conference between the representatives of the parties hereto and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no disagreement as to the facts which give rise to this claim:

Dundee, Michigan, is a one-man station. The one position is classified as Agent-Telegrapher. Regular assigned hours are 7:30 A.M. to 4:30 P.M. The dates involved in this claim were regular assigned workdays for the Claimant, Stephen Lipka. On the dates set forth in the Claim, certain train orders were issued by Ann Arbor train dispatcher to Operator-Leverman on duty at Diann. The orders were addressed, in each instance, to Conductor and Engineer, Engine 20, a work extra. The Operator-Leverman at Diann delivered the train orders to Track-Supervisor Schultz who carried the orders to Dundee and there delivered same to Conductor. Supervisor Schultz was in charge of the employes working with the work train. He accepted delivery of the train orders at Diann at approximately 6:30 A.M. and gave them to the Conductor and Engineer at Dundee at approximately 6:45 A.M.

It is the position of the Claimant that under the Scope Rule of the effective Agreement the Agent-Telegrapher at Dundee had the exclusive right to handle train orders at Dundee; further, that this right was recognized by the Carrier in its operating Rule 211 and in compliance with the same, the pertinent part of which provides: "The Operator . . . will personally deliver

a copy to each person addressed"; that the train orders were delivered in these instances by one not covered by the Agreement when the Agent-Telegrapher at Dundee should have been called to deliver them; that the Carrier has violated the Agreement.

Carrier, to the contrary, contends that there is nothing in the Telegraphers' Agreement which prohibits someone other than a telegrapher from taking a train order from a telegraph office to the members of the crew, that this work does not belong exclusively to employees under the Agreement.

To dispose of Claimant's reference to Carrier's Operating Rule No. 211 we need only to quote Petitioner's own statement:

"It must be made clear, that the Employees' reference to the Carrier's operating rules is made with the knowledge that such rules are unilateral in character and in no sense contractual in their nature. The Employees do not rely on the Carrier's operating rules to circumscribe the extent of their jurisdiction under the scope rule with respect to the handling of train orders. . . ."

* * * * *

"Before leaving the subject of Operating Rules it must be clearly understood that the Employees do not rely on the language of the operating rules as a means of circumscribing the Employees' train order jurisdiction. The Employees hold that the claim must stand or fall on the rules cited rather than on the duties prescribed by operating rules; . . ."

That brings us then to a consideration of Claimant's contention that the Scope Rule of this Agreement does give to the telegraphers the exclusive right to handle or personally deliver train orders. The Agreement on this property does not contain the "Standard Train Order Rule." The Awards of this Board are in conflict on the question presented by the Claimant. Many of the Awards supporting Claimant's position rely on and support Award 3114—(Youngdahl), as is evidenced by the following Awards—Award 3521—(Carter); Award 3670 (Miller) which is cited by Award 5871 (Yeager); Award 3602—(Rudolph) and Award 4458 (Carter).

The conclusion reached in these Awards was challenged in Award 4770—(Stone) where it was held:

"In the situation before us, the Train Order was properly sent to and received and copied by a telegrapher at the station where it was to be delivered. . . . The only ground for objection is that the telegrapher did not hand it personally to the conductor. . . ."

"It has been settled by a long line of awards that the action here challenged was in violation of the Train Order Rule as customarily worded, but not that it violated the Scope Rule. . . . That the Train Order Rule rather than the Scope Rule is the basis of such claims as here made is re-emphasized in recent Awards 4104, Referee Parker, and 4259, Referee Shake. True, Award 3670, Referee Miller participating, was to the contrary on a claim arising on the property of this very carrier. That award held the Scope Rule rather than the Train Order Rule violated. To reach that conclusion.

it relies on Award 3114, which was premised on the sending of a train order by a dispatcher directly to a conductor, and cites as precedent Awards 2928 and 3612, both of which are based without discussion, on prior awards where the Train Order Rule was in effect. . . ."

In addition to the comment made concerning Award 3114 in Award 4770 it is important that we comment further on Award 3114. In that Opinion the following language from Award 1983—Bakke was cited with approval:

" . . . The Award there quoted with approval a statement from the United States Labor Board as follows:

"Thus, it is law by order and contract that employes whose duties require the transmitting and/or receiving messages, orders and/or reports of record by telephone in lieu of telegraph are properly classified as working under the Telegraphers' schedule and such duties belong exclusively to that class.'"

In using this statement in Award 1983, the Opinion cited Award 604 (Swacker), and from that award Referee concluded that Decision No. 757 of the United States Railroad Labor Board had held as he had quoted in Award 1983. This was in error, as what the Referee in Award 1983 had quoted as a decision of the United States Railroad was in fact nothing more than argument presented by the Order of Railroad Telegraphers in their Submission in Award 604. An Award is no stronger than the reasoning and authority behind it. Consequently, we must reject the Awards cited in support of Claimant's position.

It will be noted that the Scope Rule involved here is of the general type which does not define nor describe work, but simply lists, by title, the classes of employes who are covered by the terms and provisions of the Agreement. In interpreting such general type scope rules, this Division has consistently applied the principle of determining whether or not the work in dispute has been performed exclusively by Claimants through practice, custom and tradition on the property of the Carrier involved, and that under this principle the burden rests with the Petitioner to prove the Claim. See Award 4791 (Robertson); Award 5564 (Elson); Award 10425 (Dolnick); Award 10675 (Ables); Award 10951 (Ray); Award 10954 (Dolnick); Award 10967 (Dorsey); Award 11812 (Christian).

In Award 11661 (Engelstein), a recent Award on this property between the same parties involving the same Scope Rule though the facts are not similar, we do find the following statement in the Opinion which is significant; "Although the Board recognizes that the telegrapher generally gives and receives train orders by telephone and telegraph, it nevertheless cannot ignore the fact that the Scope Rule does not exclude others than telegraphers from receiving train orders."

Claimant has failed to show that, historically, it has been the custom and practice on this property to reserve the delivery of train orders exclusively to employes coming under the Telegraphers' Agreement. To the contrary, Carrier has asserted that it has been the practice for many years for track supervisors to pick up train orders at telegraph offices and take them to members of a work train crew with whom they are to work, as a matter

of convenience. This was not contradicted anywhere in the record by Petitioner.

It was contended during the panel argument that there was a distinction between this and other claims because Management itself had performed the work; that Management cannot perform that which is contained in the bargaining agreement. This issue was not raised on the property and cannot now be considered by us here.

For the reasons stated in this Opinion there must be a denial Award.

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 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 20th day of November 1963.