

Award No. 12485
Docket No. TE-11192

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN RAILWAY COMPANY**

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

CASE NO. 1

1. Carrier violated the terms of the Agreement when on the 19th, 23rd days of December, 1957 and the 3rd day of January, 1958 it required and permitted Conductor H. S. Mills of Train No. 86 to perform work belonging to the Agent-Telegrapher's position at Lake City, Tennessee.

2. Carrier shall now compensate Mr. D. C. Brown, Agent-Telegrapher for a call of 2 hours and 40 minutes at time and one-half the prevailing pro rata rate of \$2.32, for each day this violation was permitted to occur. Total amount due \$27.84.

CASE NO. 2

1. Carrier violated the terms of the Telegraphers' Agreement when on the 30th day of March, 1958 it required and permitted Conductor Tiller of Extra 4186 East to perform work belonging to the Agent-Telegrapher's position at Lake City, Tennessee.

2. Carrier shall now compensate Mr. D. C. Brown, Agent-Telegrapher for a call of 3 hours at time and one-half the pro rata rate of \$2.32 for the aforementioned violation. Total amount due \$10.44.

3. This claim is filed as a continuing claim for all such violations as they occur in the future and at the rate of pay prevailing at the time of the violation and in the name of the occupant of the position of Agent-Telegrapher at Lake City, Tennessee, on such future dates.

EMPLOYEES' STATEMENT OF FACTS: Lake City, Tennessee is located on a Branch Line of this Carrier running from the main line at Clinton, Tennessee to Jellico, Tennessee; 10.5 miles east of Clinton and 33.9 miles west of Jellico. It is located in the Clinch Mountains, where a vast number of coal mines are located. The Carrier maintains one regular scheduled train in

Train crews also weigh cars at Lake City, as well as at many other points on the railroad. In fact, the weighing of cars is a type of work performed by employes of several different crafts. With respect to the dispute in this particular case, it is carrier's position that such work may continue to be performed at Lake City by the Agent, by train crews, or by both, and that neither has been given the contractual right to perform this work to the exclusion of the other.

The evidence of record does not support the claim that the agreement was violated. For the reasons set forth herein, carrier respectfully requests that the claim be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts are not in dispute. On each of the dates involved in the claim a conductor was required by the Carrier to weigh cars of coal at the Claimant's station when he was not on duty. The issue here is whether the Agent-Telegrapher's rights were violated by this method of weighing cars of coal.

The Organization contends that the Scope Rule of the Agreement (Rule 1) was violated by the Carrier because under it the Agent-Telegrapher has an exclusive right to perform this work at the Lake City, Tennessee station. The Organization basically relies on two sworn statements from former Agents to support its contention that for approximately fifty years only the Agent at this one man station has performed the service of weighing cars.

The Carrier asserts that the Scope Rule does not reserve the work exclusively to the occupant of the Agent-Telegrapher position and denies that the Agent has always been called out and used when coal is weighed during the night or at other times when the Agent is not on duty. The Carrier alleges that train crews have weighed cars of coal at night without the Agent's presence over the years at the station and that the Agent-Telegrapher during his assigned hours merely assists the switcher crew in weighing cars brought in during the day as well as westbound cars set out by train crews during the previous night.

The Carrier offered in evidence the sworn statement of a former supervisor who had made many trips over the Knoxville Division in various capacities during his forty years of service. He stated that it was never the practice of the Carrier to call the Agent-Telegrapher outside of his assigned hours for the purpose of weighing cars and that train crews performed the work in dispute after the office of the Agent was closed.

The Scope Rule in the Agreement is general in nature. In this record, we have conflicting evidence as to past practice which we cannot resolve. Neither party has submitted any probative evidence concerning custom and practice from May 1952 to the date of the dispute; a period of over five and one-half years.

The Organization has failed on the basis of the record before us to adduce clear and convincing evidence that the work here in question has by tradition, past practice and custom been exclusively performed by the Agent-Telegrapher at the Lake City, Tennessee station. We must, therefore, deny the claim.

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 jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

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 May 1964.

DISSENT TO AWARD NO. 12485, DOCKET NO. TE-11192

This Award is plainly in error.

The Referee recognized "past practice" as the proper means of evaluating the effect of the scope rule on the facts. Then he said: "In this record, we have conflicting evidence as to past practice which we cannot resolve." The so-called "conflicting evidence" consisted of two positive, unequivocal statements from former agents who held the position in question for nearly fifty years that they and they alone had weighed the west bound coal at Lake City, and one statement from a former Superintendent (improperly downgraded to "supervisor" in the Award). The Superintendent's actual participation was confined to a period of unknown duration when he worked as a trainman. He said that during that period the coal was weighed "by the train crews after office hours of the Agent". Otherwise he merely disagreed with the two Agents.

In short, the majority could not accept two positive, specific evidentiary statements, covering a period of some forty-seven years, in favor of the Employees' position when there was one rebuttal statement about a lesser period of time—and in more general terms—with which to make a comparison.

If this kind of unfairness were to continue the Board would quite surely become nothing more than a mockery of the principles and purposes of the Railway Labor Act. But those attributes of the law will in time prevail over the failure of individuals to observe them.

The claims here asserted by the Employees were valid and should have been sustained. Therefore, I dissent.

J. W. Whitehouse
Labor Member