

Award No. 12625

Docket No. TE-14181

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific (Pacific Lines), that:

CLAIM NO. 1

1. Carrier violated the terms of an agreement between the parties hereto when on June 1, 1962, it required or permitted a maintenance of way employe at Lakeside, Utah, to transmit and a clerk in the Roadmaster's Office, Ogden, Utah, to receive a communication of record over the telephone.

2. Carrier shall, because of the violation set out in paragraph one hereof, compensate:

(a) L. P. Chamberlin, Telegrapher-PMO-Clerk, Ogden, for a day's pay at the overtime rate of his position for Friday, June 1, 1962, and

(b) D. W. Ward, Relief Manager-Wire Chief-Telegrapher-PMO, Ogden, for one special call of two hours at the overtime rate of his position for Friday, June 1, 1962.

CLAIM NO. 2

1. Carrier violated the terms of an agreement between the parties hereto when on July 16 and September 8, 1961, it permitted or required an employe in the Chief Dispatcher's Office, Ogden, Utah, to transmit, and Carman Purin at Montello, Nevada, to receive communications of record over the telephone.

2. Carrier shall, because of the violation set out in paragraph one hereof, compensate:

(a) W. R. Godwin, 3rd Wire Chief-Telegrapher-PMO, Ogden, Utah, for one special call for Sunday, July 16, 1961.

(b) D. D. Terry, Relief Wire Chief-Telegrapher-PMO, Ogden, Utah, for one special call for Friday, September 8, 1961.

(c) H. E. Scott, Agent-Telegrapher, Montello, Nevada, for one special call for Friday, September 8, 1961.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement by and between the parties to this dispute, effective December 1, 1944, reprinted March 1, 1951, and as otherwise amended. Copies of said agreement are, as prescribed by law, assumed to be on file with your Board and are, by this reference, made a part hereof.

The claims incorporated into this appeal were handled separately on property. However, since the question at issue, namely, the performance of telephone work by employees outside the scope of the parties' agreement, is the same in both claims and progressed under the same rules in the interest of brevity and to eliminate repetitious handling, the employees incorporated both claims into this appeal.

CLAIM NO. 1

Briefly, the facts in Claim No. 1 are: At page 50 of the parties' agreement there are listed the positions existing at Ogden, Utah, on the effective date thereof. The list, for ready reference, reads:

"Manager-1st Wire Chief
2nd Wire Chief
3rd Wire Chief
1st Telegrapher-Clerk-PMO
2nd Telegrapher-Clerk-PMO
3rd Telegrapher-Clerk-PMO
Printer Machine Operator-Clerk
Printer Machine Operator-Clerk
Printer Machine Operator-Clerk
Printer Machine Operator-Clerk"

At page 44 of the agreement effective December 1, 1944 (which is the agreement prior to the reprinting) are listed the positions existing at Lakeside, Utah, on the effective date of that agreement. The date upon which these positions were discontinued is not in the record.

At or about 6:29 A.M. June 1, 1962, a maintenance of way employee at Lakeside, Utah, transmitted the following message over the telephone to an employee at the Roadmaster's Office at Ogden, Utah:

"Stop No. 22 tonight to entrain Lakeside and detrain Ogden. Stop No. 27 tonight to detrain Lakeside, to entrain at Ogden. Stop No. 27 tonight to detrain Winnemucca and Imlay. Stop No. 27 Sunday at Lakeside to detrain. Stop No. 28 Sunday at Imlay and Winnemucca to entrain. Stop No. 28 Sunday at Lakeside to detrain."

On the ground that the transmission and reception of the above message (referred to in the record as the communication of record) over the telephone by employees outside the scope of the parties' agreement constituted a violation thereof, the District Chairman by a letter dated July 9, 1962, instituted this claim. Copy of said letter is attached as ORT Exhibit No. 1.

the current agreement. Not only is the practice entirely proper, but Petitioner has never produced one shred of evidence as to any agreement having been entered into by the Carrier allocating the duties in dispute to employees represented by Petitioner.

Insofar as the claim for overtime rate in these claims is concerned, if there were any basis for claims submitted, which Carrier denies, nevertheless the contractual right to perform work is not the equivalent of work performed. That principle is well established by a long line of awards of this Division, some of the latest being 6019, 6562, 6750, 6873, 6974, 6978, 6998, 7030, 7094, 7100, 7105, 7110, 7138, 7222, 7239, 7242, 7288, 7293, 7316, 8114, 8115, 8531, 8533, 8534, 8568, 8766, 8771, 8776, 9748, and 9749.

CONCLUSION

Carrier has conclusively shown herein the claim is unwarranted and totally lacking in merit, and if not dismissed for lack of proper notice to other interested parties, Carrier asks that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The two claims are predicated upon two violations of the Agreement.

Claim No. 1

A Maintenance of Way employee at Lakeside, Utah, telephoned the following message to an employee at the Roadmaster's office in Ogden, Utah:

"Stop No. 22 tonight to entrain Lakeside and detrain Ogden. Stop No. 27 tonight to detrain Lakeside, to entrain at Ogden. Stop No. 27 tonight to detrain Winnemucca and Imlay. Stop No. 27 Sunday at Lakeside to detrain. Stop No. 28 Sunday at Imlay and Winnemucca to entrain. Stop No. 28 Sunday at Lakeside to detrain."

Neither the Maintenance of Way employee who sent the message, nor the employee who received it were covered under the Telegraphers' Agreement.

Petitioner contends that this was a communication of record which should have been transmitted and received by employees covered in its Agreement. Carrier's position is best stated in a letter dated November 14, 1962, from Carrier's Assistant Manager of Personnel to Petitioner's General Chairman which, in part, says:

"As stated to you in conference, this was simply a telephone conversation on date here involved between a Maintenance of Way foreman at Lakeside and the Roadmaster's Clerk at Ogden whereby the former advised the latter to arrange for certain passenger trains to make unscheduled stops at Lakeside on certain dates to entrain or detrain passengers (employees), and no provision of the Telegraphers' Agreement allocates or reserves these duties to telegraphers, but, on the contrary, they are duties of the employees that performed same."

Carrier's position is untenable. Employees covered in the Telegraphers' Agreement were regularly assigned to work at Ogden, Utah. The message in question is clearly a communication of record. It deals directly with the

operations of trains. This Division of the Board has repeatedly held that communications of record is work which belongs to employees covered by the Agreement. See Award 8663 and others on the same property.

There is no good reason why employees covered by the Agreement did not transmit or receive the message, except because of economy or efficiency. Neither is a good or sufficient cause for Carrier to violate the Agreement.

Carrier argues that the claims should be denied because of our findings in Awards 10492 and 10493 on the same property. The messages considered in those Awards are not comparable.

In both Award 10492 and 10493 the messages had to do with foreman reports of employees' working time and amounts earned, material on hand for section gangs, report on distressed cars and the reasons cars were held up. These telephone conversations were clearly not communications of record. They had nothing to do with the operation of trains or with the safety of passengers and products. The claims were denied because the Organization had failed to show that the type of communications therein involved was work which by history, custom and practice belonged to employees covered in the Telegraphers' Agreement.

The principle enunciated in Awards 10492 and 10493 may not be applied to the instant claim because the message now under consideration is a communication of record, whereas those upon which the claims in Awards 10492 and 10493 were predicated were not communications of record.

There is merit to Claim No. 1, and it should be sustained.

There are two parts to Claim No. 2.

Claim No. 2 (a)

The following telegram was transcribed at the Chief Dispatcher's office at Ogden at 10:45 A.M., P.S.T., July 16, 1961, and received via pneumatic tube at RO Ogden telegraph office at 11:01 A.M. the same day:

"Ogden July 16, 1961
CBF SSG LCB Ogden
JCT Mfst Clerk Sparks.
EWB EIC Carlin
ASM Oakland
Agent Vallejo

I-A-BCW-16 mdse extra 6234 West Conductor Rose from Ogden date delayed 40 minutes between Valley Pass and Pequop cooling hot-box on SP-70450 cattle Solano Meat Company. Vallejo, California and delayed 20 minutes at Pequop setting out car. This is one car from shipment of eight cattle destined Solano Meat Company, Vallejo. Car Foreman Montello make prompt repairs advising when car ready to move. N-894

F.W.S. 10:50 A.M."

This information had been previously telephoned by an employe in the Chief Dispatcher's office direct to the car repairman at Montello, Mr. D. Purin. When telegram was received at Ogden, it was noted that a copy was not addressed to Mr. Purin although the text called on him to make repairs.

The information was telephoned to him from the Chief Dispatcher's office and a confirming telegram was sent by a Telegrapher at Ogden to the Agent at Montello.

Claim No. 2 (b)

On September 8, 1961, an employe of the Chief Dispatcher's office at Ogden, Utah, telephoned the Car Repairman at Montello and said:

"The cut-off is setting a car out at Groomer account running hot. Needs 6 x 11 brass. Hotbox R-1. Let me know when it is ready to move."

Petitioner contends that the telephone conversation violated the Agreement because they were communications of record, which is work that belongs to employes covered in the Telegraphers' Agreement.

Carrier's position is best set out in a letter dated July 18, 1962, to Petitioner's General Chairman which says, in part:

"As stated to you in conference, the telephone conversation between the train dispatcher and the carman involved nothing more than a phone call covering the usual advice to the car foreman that certain cars had been set out on line and were in need of repairs, this being solely the work of the carman involved and the train dispatcher, which handling did not involve nor contravene any provision of the Telegraphers' Agreement."

Neither the telephone conversation of July 16, 1961, nor the one on September 8, 1961, are communications of record. They had nothing to do with the operation of trains or the safety of passengers and property. While fully sound cars are necessary for the safety of passengers and property, not all communications directing car repairs affect the safety of passengers and property. Each situation needs to be considered and appraised when this principle is applied.

In the two instances upon which Claim No. 2 is predicated, the passengers and property were not immediately in any danger. The cars were set out away from oncoming trains or other hazards. The messages were merely directions to the Car Repairmen to make the necessary repairs and advise when completed.

There is no merit to Claim No. 2.

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 Carrier violated the Agreement with respect to Claim No. 1 and did not violate the Agreement with respect to Claim No. 2(a) and 2(b).

AWARD

Claim No. 1 is sustained.

Claims No. 2(a) and 2(b) are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of June 1964.

AWARD 12625, DOCKET TE-14181
CARRIER MEMBERS' DISSENT TO THAT PORTION
OF THE AWARD SUSTAINING CLAIM 1
(Referee Dolnick)

All that the employees have proved with reference to Claim 1 is that a foreman in the Maintenance of Way Track Department used the telephone at Lakeside (a point where no Telegrapher was employed) to advise the Roadmaster's office that certain Maintenance of Way Employees for whom the foreman was responsible would entrain and detrain during the weekend. Lakeside is approximately 47 miles from Ogden, the nearest telegraph office, yet the award erroneously states:

"There is no good reason why employees covered by the Agreement did not **transmit** or receive the message, except because of economy or efficiency . . ."¹

The Award holds that this telephone call was a "communication of record", but significantly fails to cite any authority whatever for that ruling. Certainly, the type of communication and the other facts involved in Award 8663, the only award cited to support the decision, do not have the remotest resemblance to this foreman's conversation with the Roadmaster's office. In Award 8663 the Claimant was assigned at the point where a Clerk telephoned traffic information to the Chief Dispatcher, and the Claimant alleged this was his own assigned work, that he did it every day during his regular hours, and that it had been the practice to call him out to do such telephoning when it became necessary during his off-duty hours. In contrast to Award 8663 which involved an open station, in Award 5866 (Douglass) this Board denied the claim that a track foreman was doing exclusive Telegrapher work on this Carrier's property when he telephoned the number of loaded and empty cars on hand at a point where Telegraphers were no longer employed.

There is nothing in evidence to support the holding in this award that Telegraphers had an exclusive right to telephone this information to the Roadmaster's office. It is arbitrary judicial legislation and beyond the

¹Emphasis herein ours unless otherwise indicated.

Board's power (Award 12530 — Seff) to hold that the Telegraphers have a right to do any telephoning to the exclusion of others when there is no competent proof in the record that such telephoning has been exclusively reserved to them, either by the express terms of their Agreement or by a controlling past practice under a general Scope Rule. Awards 10492 and 10493 (Dugan), involving the same parties and the same Agreement, properly applied the past practice test to determine the exclusive rights of Telegraphers, and that is the test which should have been applied here.

It is ironical that this Award should attempt to distinguish Awards 10492 and 10493 (Dugan) by resorting to the completely arbitrary conclusion that the telephoning involved in this case is a communication "of record." The Board has frequently noted that discussing a case of this kind in terms of messages "of record" merely adds confusion. In Award 10425 (Dolnick), which involved passenger reservations, the Board took the correct and realistic attitude toward the effect to be given the Organization's unsupported arguments that certain telephoning constituted communications "of record."

AWARD 10425 (Dolnick)

"The Scope Rule is general in character. It does not specifically and clearly define the work which is specifically reserved to the telegraphers. The 'Claimant's right to the work which they contend belonged exclusively to them must be resolved from a consideration of tradition, historical practice and custom; and on that issue the burden of proof rests on the employees.' Award 6824 (Wenke). Also see Awards 4464 (Wenke), 4791 (Robertson), 7076 (Whiting), 9953 (La Driere) and 9552 (Bernstein).

* * * * *

The Organization argues that the real issue before this Board is whether the messages are 'of record.' . . .

* * * * *

There is, however, no consistency in the Awards of this Board on what constitutes messages 'of record.' It will serve no useful purpose here to discuss and distinguish each of them. . . .

* * * * *

Claimants have failed to establish by a preponderance of evidence that they are entitled to perform the work in question to the exclusion of others either through custom, practice or tradition."

Claimants have absolutely no proof in the record to support their claim that they should have made this telephone call, to the exclusion of the foreman and the Roadmaster's Clerk, and Claim 1 should have been denied for that reason.

G. L. Naylor
R. E. Black
R. A. DeRossett
W. F. Euker
W. M. Roberts