Award No. 12639
Docket No. TE-11158

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis-San Francisco Railway, that:

1. The Carrier violated the parties' Agreement on May 12, 1958, when it required or permitted Assistant Superintendent J. F. Christian, an employe not covered by said Agreement, to handle communications (train reports and messages) of record over the dispatcher's telephone from Kiefer, Oklahoma.

2. The Carrier shall, because of the violation set forth above, compensate K. R. Foust, the senior idle extra telegrapher entitled to the work, a day's pay of eight (8) hours at the rate of $2.192 per hour.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute effective May 16, 1928, revised effective May 16, 1953, and as amended.

The locale involved in this dispute is Kiefer, Oklahoma. Kiefer is located on Carrier's main line between Tulsa, Oklahoma, and Dallas, Texas, five miles south of Sapulpa, Oklahoma.

On the date in question, Assistant Superintendent Christian, who was at Kiefer with a work train, came in on the dispatcher's telephone at 10:20 A. M. and reported Train No. 30 by Kiefer together with the information that Train No. 30 had 144 cars. He (Christian) also instructed the train dispatcher to permit Train No. 30 to go around Train No. 4 at Sapulpa. And, finally, Assistant Superintendent Christian relayed a message of instructions to Dispatcher W. T. Gordon to give No. 37 a message at Sapulpa informing Train No. 37 that the work train at Kiefer would flag No. 37 and put it through the siding at Kiefer.

On the ground that Assistant Superintendent Christian's action constituted an infringement of the communication jurisdiction conferred by the parties' Agreement, General Chairman Anthis did, on May 16, 1958, in a letter

OPINION OF BOARD: On May 12, 1958, Assistant Superintendent Christian, officer in charge of a work train at Kiefer, Oklahoma, made a report via portable telephone to the Carrier's dispatcher. He reported train No. 30 by Kiefer and reported the number of cars in such train. Further, he instructed the dispatcher to let train No. 30 go by Sapulpa ahead of train No. 4. He also instructed the dispatcher to relay a message of instruction to train No. 37, to the effect that such train would be flagged through the siding at Kiefer, rather than on the main line.

The Organization contends that these communications come within the scope of work reserved to telegraphers, and that such reporting of trains by the Assistant Superintendent, a non-covered employe, violates the agreement.

The scope of the agreement provides:

"ARTICLE I.

(1) Employes, except train dispatchers, who are required by direction of officer in charge to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines (defined as telegraphers, telephone operators, block operators, operators of mechanical telegraph machines, agent-telegraphers, agent-telephoners), agents, assistant agents, ticket agents, assistant ticket agents and car distributors, listed in appended wage scale, also tower and train directors, towermen, levermen, staffmen, are covered by this Agreement and are hereinafter collectively referred to as employes, and when so referred to all are included."

The Scope Rule has been interpreted by this Board and declared to be a specific Scope Rule rather than a general Scope Rule. See Awards 11699, 8183 and 5872.

The Carrier denies that the acts above set forth constitute a violation of the agreement. Their first contention is that the above quoted Scope Rule does not prohibit a non-covered "officer in charge" from making reports, but only prohibits non-telegrapher "employes" who are directed by an officer in charge from making reports. Such an interpretation would seem to allow Carrier to circumvent the agreement by the simple expedient of requiring all train reports to be performed by "officers in charge" and this was obviously not intended by the parties. Further, this Board has already rendered an award on this property between these same parties which held that an officer of the Carrier violated the agreement by sending a communication encompassed by this Scope Rule. In Award No. 11699 (Engelstein) the Board held that a Chief Dispatcher (a non-covered officer) violated the agreement in making a telephone call to a dispatcher, directing a brakeman to get off at Haydi. The Carrier's primary argument in that case was that the Chief Dispatcher was excepted from the scope. However, it also took the position that the Scope Rule above quoted did not apply to officials of the Carrier. Therein, it stated:

". . . Article I, which the parties have agreed to, provides 'Employes' and makes no reference to officials of the Carrier and contains no prohibition therein against officials of the Carrier performing any work referred to therein. If the rule had been intended to include 'officers' it would have so provided, and would have read

'Officers and Employes' — but it does not include 'officers' although it recognizes a distinct difference between 'officers' and 'employes' because the rule goes on to provide 'Employes * * * who are required by direction of officer in charge . . ."

To hold in this case that the officer in charge is not encompassed by the Scope Rule would be inconsistent with the above award. Because of this, and because the parties only excepted train dispatchers from the employes covered by the Scope Rule, we hold that the Assistant Superintendent was, in this case, encompassed within the Scope Rule.

Carrier next contended that the communications involved were not encompassed within the above quoted Scope Rule. It bases its argument upon the fact that the communication involved was not a "written communication" or a formal OS. However, the Organization contends that it is a train report, and is, therefore, covered. We agree with the Organization.

We therefore hold that the agreement has been violated and turn to the second part of the claim.

"ARTICLE I.

* * * * *

(2) Station employes at closed offices shall not be required to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines, but if they are used to perform any of the above service, the pay at that office for the month in which such service is rendered shall be at the minimum hourly rate for telegraphers as set forth in Article XII of this Schedule. This paragraph applies where either railroad or commercial telephone is used by station or other employes, except in cases of emergency, defined as: train accidents, fires, washouts, personal injuries, main line obstructions or engine failures."

This Article was "interpreted" by a Memorandum of Agreement dated July 25, 1942, which reads as follows:

"MEMORANDUM OF AGREEMENT

As to Application of

Paragraph 2 of Article I, also Article XIII,

Telegraphers' Schedule Agreement Dated

May 16, 1928, as Amended,

With Respect to Emergency Telephones.

* * * * * * * * *

1. The term 'emergency telephone' is construed for the purpose of this agreement to mean a telephone ordinarily kept under lock and key at fixed locations for use in emergencies, and commercial telephones when used in lieu of an emergency telephone.

2. The term 'emergency' is construed to mean train accidents, fires, washouts, floods, personal injuries, main line obstructions,

engine failures, train equipment failures, broken rails and failures of block signals or other fixed signals, which could not have been anticipated by dispatcher when train was at previous telegraph office and which would result in serious delay to trains.

3. If emergency telephones are used contrary to provisions of Paragraphs 1 and/or 2 of Article I of Telegraphers' Schedule Agreement, except in case of emergency as defined in Paragraph Two (2) of this Agreement, employes covered by Telegraphers' Schedule Agreement shall be paid as follows, provided claims are submitted within thirty (30) days of date of occurrence:

(a) At stations or locations between stations where there is no occupied position covered by Telegraphers' Schedule Agreement, one day's pay to senior idle extra telegrapher of that date.

(b) At stations where agent-telegrapher or telegraphers are employed and not on duty, a call as defined in Article II, Paragraph Seven, to agent-telegrapher or telegrapher whose hours of service converge nearest with the time violation occurred.

(c) At stations where no telegraph service is maintained but there is a non-telegraph agent, or there are non-telegraph towermen employed, non-telegraph agent shall receive telegrapher's rate applicable at such station for the month in which such violation occurs, or towerman whose hours of service converge nearest with the time violation occurs shall receive telegrapher's rate applicable at such tower for the month in which such violation occurs.

4. It is agreed following usage of emergency telephones shall not be considered a violation of this agreement or Telegraphers' Schedule Agreement:

(a) Installation of emergency telephones at any place in absolute permissive block territory or in centralized traffic control territory and their use by trainmen or enginemen to obtain verbal authority to pass automatic block or interlocking signals in a restrictive position.

(b) Use of emergency telephones by trainmen or enginemen at junction points to report arrival or departure or request permission to occupy main track.

Dated at St. Louis, Missouri, this 25th day of July, 1942."

Inasmuch as Kiefer is a "closed station" within the meaning of paragraph 2 of Article I, the agreement above quoted would seem to be applicable in providing the measure of damages for a violation of the contract. Paragraph 3 (a) provides that in case of a violation such as is involved here, the senior idle extra telegrapher shall receive one day's pay. Since this is the claim made by the Claimant herein, it should be sustained.

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 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 has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12639, DOCKET TE-11158

(Referee West)

This award is palpably wrong. The Referee has ignored the most elementary rules for the interpretation and application of contracts in order to reach the preposterous conclusion that Carrier's Assistant Division Superintendent was "encompassed within the Scope Rule" of the Telegraphers' Agreement when he used a portable telephone to discuss with the dispatcher matters which were directly connected with his own duties.

To support their version of the nature and content of the telephone conversation between the Assistant Superintendent and the dispatcher, the Employes have sumitted no evidence other than Carrier's own admissions. Carrier admits that:

> "On May 12, Assistant Superintendent Christian was with work train at Kiefer, which is five miles south of Sapulpa. Because of this work train, the Assistant Superintendent was concerned with the operation of trains 30 and 37 and called the Train Dispatcher at Tulsa over the Dispatcher's telephone circuit to discuss the handling of these trains. In his telephone conversation with the Train Dispatcher, the Assistant Superintendent advised, or instructed, the Train Dispatcher with reference to the handling of trains 30 and 37 in order to expedite the movement of such trains. The conversation between Assistant Superintendent Christian and the Train Dispatcher was nothing more than a conversation, and it would **not have been feasible for the Assistant Superintendent to have handled this matter by wire instead of by telephone conversation as the Assistant Superintendent's advice to the Train Dispatcher depended upon the two-way exchange of information between them.** * * * Insofar as contention that Mr. Christian reported train No. 30 by Kiefer is concerned, Kiefer is only five miles south of

Sapulpa and fourteen miles north of Beggs, with telegraph service at both of those points. In addition to those two points, telegraph service is also maintained south of Kiefer at Okmulgee, Henryetta, Watumka and Holdenville. While it is possibly so that the Assistant Superintendent advised the Chief Dispatcher that train 30 had passed Kiefer, **this was not a formal OSing of train 30, was not information required by the Dispatcher and did not take the place of any OSing required of telegraph service employes between Francis and Sapulpa. . . .**" *

The Employes do not contend that it would have been feasible, much less useful, for a Telegrapher to have intervened between the Assistant Superintendent and the Dispatcher. In view of the obvious fact that it would have been a cumbersome and useless act to inject a Telegrapher into the telephone conversation between the Assistant Superintendent, who was admittedly the officer in charge, and the Dispatcher, requiring them to converse through a third person instead of directly, it is elementary that we should give the Agreement a construction that would not require this useless act if the language of the Agreement is reasonably susceptible of such a construction. Instead of applying this elementary rule, the award adopts an unnatural and unreasonable construction of plain language in order to construe the Agreement as requiring this useless act.

The award rules that the Assistant Division Superintendent who is the "officer in charge" and who is not an "employe" within the definition of that term in the Railway Labor Act is himself a "Telegrapher" within the following definition:

> "**Employes, except train dispatchers, who are required by direction of officer in charge** to handle train orders, block or report trains, receive or forward written messages by telegraph, telephone or mechanical telegraph machines, . . ."

This definition itself could hardly be more clear in recognizing that there is a vital distinction between an "officer in charge" and an "employe."

Even the Employes recognize this distinction in their handling of this case on the property, and they base their case on the erroneous contention that the Assistant Division Superintendent is a "subordinate official" and hence "an employe" within the definition of the Railway Labor Act. At no point in the record have the Employes argued that this claim is valid if the Assistant Superintendent is not in fact "an employe", and the only source they have referred us to for a definition of the term "employe" is the Railway Labor Act.

Carrier's position on this point is clear and correct. Carrier contends that the Assistant Division Superintendent is an officer and not a "subordinate official", therefore is necessarily not an "employe" as that term is defined in the Railway Labor Act. The Railway Labor Act, Title I, Section 1, Fifth; "Ex Parte No. 72" of the ICC, and the official "Rules Governing the Classification of Railroad Employes" prescribed by the ICC effective January 1, 1951 (page 14 of the publication), all of which were submitted to the Referee, establish beyond any conceivable doubt that the Assistant Division

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*Emphasis ours unless otherwise indicated.

Superintendent is an officer and not an "employe" within the definition applied to that term in the Railway Labor Act.

Since the Railway Labor Act establishes with crystal clarity that the Assistant Division Superintendent is not an "employe", and since that Act is the source to which the Employes contend we must go for a definition of the word "employe" in this case, we must reject the Employes' contention that the Assistant Division Superintendent is an "employe."

When we recognize that the Assistant Superintendent is not an "employe", we cannot properly rule that he was a Telegrapher within the definition of this "specific Scope Rule", for to do so would be to ignore completely the word "employe" and to give an obviously distorted and unnatural effect to the words "directed by officer in charge." We cannot ignore clear provisions of the Agreement, but must give reasonable effect to each word, applying the generally accepted meaning to each word in the absence of proof that the parties had a contrary intention. Awards 4322 (Elkouri), 5096 (Coffey), 9572 (Johnson), 10987 (Hall), 11757 (Dorsey), 12 Am. Jur., CONTRACTS, Section 236.

This award significantly contains no discussion of the important question, whether the Assistant Division Superintendent is an "employe." It is merely observed in the award that Carrier's interpretation of the rule:

> ". . . would seem to allow Carrier to circumvent the agreement by the simple expedient of requiring all train reports to be performed by 'officers in charge' and this was obviously not intended by the parties . . ."

This observation is erroneous and unwarranted for at least three distinct reasons. First, we must be governed by the ordinary rules of contract law for the interpretation of contracts, and certainly there is no rule that permits a court to ignore the plain meaning of words used in the Agreement because of any alleged fear that one party or the other might abuse the rights spelled out in the clear language of the Agreement. Second, as a practical matter, no Carrier could afford the luxury of having the very few and select members of management who are classified as officers under the Railway Labor Act go out on the railroad and take over the train reporting functions of the Telegraphers. Third, it is conceded in this case that the Assistant Division Superintendent did not take over any of the usual reporting functions of the Telegraphers; the telephoning was admittedly done at a point where trains are not reported by Telegraphers, and there is no contention that Telegraphers were relieved from reporting the involved trains at all established reporting points. The telephone conversation between the Assistant Division Superintendent and the dispatcher took place because the Superintendent was concerned about the performance of certain trains on his territory. Everything that was said over the telephone by the Assistant Superintendent related directly to his performance of his own duties as the officer in charge.

It is not denied that:

> ". . . The telephone has been used in this manner by division officers ever since we have had telephones in service on this Carrier." (Telephones have been in service on this Carrier since 1910.)

Certainly the Scope Rule definition of Telegraphers and their work, when interpreted in accordance with established rules of contract law, does not

include the telephoning done in this case by the Assistant Division Superintendent. It is, therefore, not surprising to find that the award contains no analysis of the rule, nor any reference to established practices, but is based primarily on an erroneous interpretation of a prior award of this Board dealing with the same rule. **Award 11699** (Engelstein) is cited as authority for sustaining the claim and it is concluded that:

> "To hold in this case that the officer in charge is not encompassed by the Scope Rule would be inconsistent with the above award. . . ."

This conclusion is categorically wrong, and the record could not be more clear on that point. **The only question properly presented, and the only question decided by this Board in Award 11699 (Engelstein) is whether a "chief dispatcher" is a "dispatcher" as the latter term is used in the Telegraphers' Scope Rule.** The record is abundantly clear in establishing that no other question was before the Board and no other question was resolved.

The memorandum which the Carrier Member submitted to the Referee in that case stated (page 4 thereof):

> ". . . Therefore, the basic and **sole issue to be decided** is whether Chief Train Dispatchers are included within the generic terminology 'train dispatchers'."

This narrow statement of the issue by the Carrier Member was clearly required by the record. The Employes' Statement of Facts stated:

> ". . . It bases its denial of the time claimed on the Scope Rule exception with respect to train dispatchers, alleging that the Chief Dispatcher is a 'train dispatcher' within the meaning of the rule."

The Position of Employes stated:

> "The only challenge on the part of the Carrier is grounded on the proposition that Chief Dispatchers (or Trainmasters) are within the exception made in the scope rule for 'train dispatchers'."

The correspondence on the property bore out these statements of the Employes, for the denial of the Director of Labor Relations gave as the sole reason for denying that the Scope Rule supported the claim:

> "I would like to point out to you that paragraph (1) of Article I provides 'employes, except train dispatchers, . . .' In view of the specific exception contained in this rule, I am unable to agree with you. . . ."

Not at any point in that record, not even in the extract which has been so judiciously selected from the record and quoted in this award, do we find any allegation by Carrier that the chief dispatcher was an "officer in charge." The argument of Carrier which is quoted in the award was not injected into the case as an affirmative defense, but merely by way of rebutting certain sweeping contentions which the Employes had made with reference to officers.

Award 11699 tells us in unmistakable terms that the only issue decided therein was the single issue that had been properly framed in the record,

namely, whether the chief dispatcher must be regarded as a "dispatcher" coming within the exception relating to dispatchers that is provided for in the Telegraphers' Scope Rule. See the last three paragraphs of the decision. Also see **Award 11846** (Rose) as to defenses not raised in prior cases.

The award is also in error in holding that the particular communications involved in this claim would have justified a sustaining award, even on the assumption that the Assistant Division Superintendent has no greater rights than other individuals on Carrier's payroll.

We dissent.

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