Award No. 12707
Docket No. TE-13214

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Louis Yagoda, 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:

The Carrier on or about July 3, 1960, initiated and put into effect a program on a system wide basis of removing a large portion of communication work, namely — transmitting and receiving messages and reports of record, which has from time immemorial been performed by employes covered by the scope of the Telegraphers' Agreement. It is now requiring or permitting employes not coming within the scope of said Agreement to perform by means of the telephone in lieu of telegraph, printer and other mechanical telegraph machines, communication service which is reserved to employes of the class enumerated in the Agreement. In doing so, the Carrier violated, and continues to violate, the provisions of the Telegraphers' Agreement as is shown in the violations and claims listed. These are continuing claims for all violations subsequent to the dates shown herein.

CLAIM NO. 1

Violation No. 1: July 14, 1960, Night Chief Dispatcher Davis, Alexandria, Virginia, received and transmitted by telephone messages of record to F. H. McKenzie, Clerk-Telegrapher at Charlottesville, Virginia.

Violation No. 2: July 13, 1960, Yard Clerk Curd, Monroe, Virginia, transmitted by telephone, a message of record to Night Chief Dispatcher Davis, Alexandria, Virginia.

For violation No. 1, Carrier shall compensate B. R. Whitmer, idle regular employe on rest day, Washington Division, by paying him one day, 8 hours' pay at the rate of pay for Clerk-Telegrapher, $2.53 per hour, Washington Division, July 14, 1960, and the same compensation shall be allowed B. R. Whitmer for each subsequent date that the violation of transmitting and receiving messages and reports of record is permitted.

For violation No. 2, Carrier shall compensate D. L. Buchanan, idle regular employe on rest day, Washington Division, by paying him one day, 8 hours' pay at the rate of pay for Clerk-Telegrapher, $2.53 per hour, Washington Division, July 13, 1960, and the same compensation shall be allowed D. L. Buchanan for each subsequent date that this violation of transmitting and receiving messages and reports of record is permitted. Further that the Carrier shall compensate B. R. Whitmer, idle regular employe on rest day, Washington Division, by paying him one day, 8 hours' pay at the rate of pay for Clerk-Telegrapher, $2.53 per hour, Washington Division, July 13, 1960, and the same compensation shall be allowed B. R. Whitmer for each subsequent date that the violation of transmitting and receiving messages and reports of record is permitted.

CLAIM NO. 2

On August 12, 1960, Dispatcher W. A. Ellis received by telephone report of record from Telegrapher J. W. Bible at Johnson City, Tennessee.

Carrier shall compensate I. D. Courtney, senior idle extra employe, Knoxville Division, August 12, 1960, by paying him one day (8 hours) at the minimum rate of pay for Clerk-Telegraphers, Knoxville Division, August 12, 1960, and the same compensation shall be allowed I. D. Courtney for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

CLAIM NO. 3

On July 20, 1960, Gang Foreman J. R. Grushiam at Block, Tennessee, transmitted by telephone message of record to Mrs. Johnson, an employe not covered by the Telegraphers' Agreement, in the office of the Chief Engineer.

Carrier shall compensate L. E. Adams, senior idle extra employe, Knoxville Division, July 20, 1960, by paying him one day (8 hours) at the minimum rate of pay for Clerk-Telegraphers, Knoxville Division, July 20, 1960, and the same compensation shall be allowed L. E. Adams for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

Further, the Carrier shall compensate P. O. Byerley, senior idle employe, Knoxville Division, July 20, 1960, by paying him one day (8 hours) at the minimum rate of pay for Clerk-Telegraphers, Knoxville Division, July 20, 1960, and the same compensation shall be allowed P. O. Byerley for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

CLAIM NO. 4

On July 15, 1960, Buck Newton, Gang Foreman at Greeneville, Tennessee, transmitted, by telephone, message of record to W. C. Richards, a clerk in the Chief Engineer's Office at Knoxville, Tennessee.

Carrier shall compensate C. K. Davis, second senior idle employe, Knoxville Division, by paying him one day (8 hours) at the minimum

rate of pay for Clerk-Telegraphers, Knoxville Division, July 15, 1960, and the same compensation shall be allowed C. K. Davis for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

Further, the Carrier shall compensate M. L. Jennings, third senior idle employe, Knoxville Division, by paying him one day (8 hours) at the minimum rate of pay for Clerk-Telegraphers, Knoxville Division, July 15, 1960, and the same compensation shall be allowed M. L. Jennings for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

CLAIM NO. 5

On July 16, 1960, at an office of the Carrier in Danville, Kentucky, an employe not covered by the Telegraphers' Agreement, transmitted, by telephone, message of record to J. E. Bailey, Chief Clerk at John Sevier, Tennessee.

Carrier shall compensate H. T. Yates, senior idle employe, Knoxville Division, by paying him one day (8 hours) at the minimum rate of pay for Clerk-Telegraphers, Knoxville Division, July 16, 1960, and the same compensation shall be allowed H. T. Yates for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

CLAIM NO. 6

On July 16, 1960, Night Chief Dispatcher O. E. Dyer transmitted, by telephone, message of record to J. R. Farr, Operator at John Sevier, Tennessee.

Carrier shall compensate C. L. Crowe, senior idle extra employe, Knoxville Division, by paying him one day (8 hours) at the minimum rate of pay of Clerk-Telegraphers, Knoxville Division, July 16, 1960, and the same compensation shall be allowed C. L. Crowe for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

CLAIM NO. 7

On July 23, 1960, Chief Caller F. J. Boshears transmitted by telephone, message of record to J. E. Matthews, Telegrapher at Jellico, Tennessee.

Carrier shall compensate C. W. Clayton, senior idle extra employe, Knoxville Division, by paying him one day (8 hours) at the minimum rate of pay for Clerk-Telegraphers, Knoxville Division, July 23, 1960, and the same compensation shall be allowed C. W. Clayton for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted.

EMPLOYES' STATEMENT OF FACTS: On or about July 3, 1960, the Carrier put into effect a program on a system-wide basis of removing a large portion of the communication work, namely, transmitting and receiving messages and reports of record which had from time immemorial been performed by employes covered by the scope of the Telegraphers' Agreement.

ment, for reasons set forth in parts I through V of this submission, and that therefore they cannot serve as the progenitors of any valid monetary claims in behalf of the claimants for unspecified, undescribed alleged violations on an indefinite number of unnamed subsequent dates ad infinitum.

The ORT demands that **each claimant** be allowed eight hours' pay at the minimum pro rata rate for clerk-telegraphers "for each subsequent date that the violation of receiving and transmitting messages and reports of record is permitted." In the literal language quoted there is no reference to telephone conversations or incidents of the particular kind that occurred on the dates involved, nor is there even any reference to subsequent "violations" on the division where claimants hold seniority. Therefore, the above quoted term, as used by the ORT in each claim, must refer to alleged violative instances anywhere on Southern Railway System, this conclusion being further supported by the general assertions, made in statement of claim, alleging wide-spread violation of the agreement. To advance any such general unsupported assertions as the purported basis for the "continuing claim" is preposterous.

Nor does the statement of claim indicate how many eight-hour penalty payments each week are demanded for each claimant. It does not even indicate **who** would be the judge as to what telephone conversations would constitute a "violation" of the agreement. In short, for lack of support and specificity, the "continuing claim" obviously is not of the type referred to in the August 21, 1954 Agreement; it requests carrier to do the impossible.

By filing these seven claims, which cover specific dates and circumstances, the employes themselves have recognized that none of them are properly continuing claims of the type covered by Article V, Section 3 of the August 21, 1954 Agreement. If they were, it would have been necessary to file but one claim.

The evidence of record does not support petitioner's contention that the agreement was violated, nor does it support the claims for pay. Carrier has shown that the claims are designed to exact monetary compensation for service not performed and not needed. For the reasons set forth herein, the claims should be denied and carrier respectfully requests that the Board so decide.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim involves eight alleged violations on seven specific dates in July and August, 1960, on the Carrier's Washington and Knoxville divisions. It is claimed that in each case employes not covered by the Scope Rule of the Telegraphers' Agreement had in violation thereof been required or permitted to do work which is reserved to employes of the categories enumerated in the Agreement.

Accompanying the seven specific claims (the first of which alleges two violations) is a general charge that the Carrier initiated and put into effect a system-wide program of "removing a large portion of communication work" which had hitherto been performed by employes coming under the Telegraphers' Agreement.

In addition to the specific redress demanded for each claim, the Petitioner states that: "These are continuing claims for all violations subsequent to the dates shown herein."

The Petitioner presents 25 exhibits in support of its charge that a system-wide program has been put into effect of shifting to other employes work which "from time immemorial" had been performed by employes covered by the Agreement between Telegraphers and the Carrier.

These 25 exhibits were presented in an earlier series of claims under the docket number TE-13184, and were analyzed by us in our award thereon. We found there and reiterate here that these exhibits are not convincing evidence of the extent to which, if any, the work claimed has been improperly diverted to other than telegraphers who had customarily and traditionally performed said work. Under the general type Scope Rule of the controlling Agreement, these exhibits fall short of proof of exclusive rights to a body of work, and do not in themselves constitute proof that there has been an impermissible transfer of said work to others.

As to the specific claims:

CLAIM NO. 1

Violation No. 1

On July 14, 1960, a Telegrapher on duty at Charlottesville, Va., telephoned the Night Chief Dispatcher at Alexandria, Va., and read to him a message from a conductor in connection with a bad order which had been set out of a train at that location. The Night Chief Dispatcher responded in the same conversation by instructing the telegrapher to leave the message for the car inspector, so that the latter could make the necessary repairs.

A telegraph office had for some time been maintained and was then in existence at Charlottesville with round the clock assignments, twenty-four hours a day. At Alexandria there had been telegraphers on two daytime tricks over a seven-day week and also a rest day relief position performing rest day relief work. On July 3, 1960, eleven days before the handling of the message in issue, one of the daytime tricks had been abolished.

The Petitioner asserts that telegraphers working in the Alexandria office have in the past handled "all communications, messages and reports of record, including those from the Chief Dispatcher's Office." The Carrier responds that (a) the Night Chief Dispatcher did not transmit a message; he "merely issued instructions to the telegrapher, who was under his jurisdiction, with respect to what should be done with the message", and (b) "neither the past practice of many years standing nor the Telegraphers' Agreement supports their position."

Although the record is devoid of supportive evidence for the assertions made by both parties, we find the Petitioner's position the more persuasive on this claim.

Our basis for so doing is the fact that Carrier's answers to the Petitioner fall short of clear, specific denial, even by statement. Furthermore, Carrier does not attempt specifically to justify the transmission of this message by the Night Chief Dispatcher. It says instead that the dispatcher's statement should be regarded as "instructions" rather than "message." This is a distinction without a significant difference for purposes of this issue.

In addition, on the vital point of past custom and tradition, Carrier's denial of the past practice claim by Petitioner is put in far less specific terms than the Petitioner's statements so asserting it.

Bearing in mind the fact that there had been a subtraction of a telegrapher at Alexandria within a short period before the messages had been sent and received, and in the absence of a clear and specific denial that at that location, work such as that described in this claim had been exclusively performed by telegraphers, a reasonably persuasive showing is made that work formerly done exclusively by telegraphers was here performed by the dispatcher.

Violation No. 2

On July 13, 1960, a Yard Clerk at Monroe, Virginia, telephoned the Night Chief Dispatcher at Alexandria information of cars handled by yard engines and amounts of overtime for the current and preceding years. In this matter, there has been no claim or showing that the dispatcher transmitted any messages, or that there had been a history of exclusive sending of such messages by operators from Monroe, or that there had been a discontinuance of personnel at Monroe, immediately preceding this event.

We conclude that there was no showing of a customary or traditional practice of exclusivity of assignments which was here deviated from.

CLAIM NO. 2

On August 12, 1960, the telegrapher at Johnson City, Tennessee, telephoned the Dispatcher on duty at Knoxville and advised him that the Southern had delivered to the C. C. & O. at Johnson City one system car and 34 foreign cars.

It is claimed that the Dispatcher impermissibly performed the work of a telegrapher in receiving this message.

No evidence is presented by the Petitioner to support its assertion that the telegraphers employed at Knoxville "have in the past handled all communications, messages and reports of record including the one shown herein." The Carrier, on the other hand, asserts that this type of communication has been carried on by Dispatchers for many years.

There is therefore a conflict in essential facts which cannot be resolved by us, and the claim must therefore be dismissed.

CLAIM NO. 3

On July 20, 1960, Maintenance of Way Supervisor J. R. Grushiam, in charge of a T&S gang at Block, Tennessee, a blind siding where no telegrapher is employed, telephoned his work report for the day, to a non-telegrapher employe in the Chief Engineer's office at Knoxville, Tennessee.

We do not find the Petitioner to have successfully established that where no telegraphers are employed at a location from which maintenance-of-way work reports are communicated, it is a violation of the Scope Rule for messages of this kind to be communicated directly to the Chief Engineer's office.

A question, however, remains as to whether the receipt of the message at Knoxville by a non-telegrapher was not an improper denial of the work to a telegrapher. The record contains only generalized assertions by the Petitioner and counter-assertions by the Carrier on the subject of the customary and traditional practices in this respect.

Inasmuch as we cannot resolve conflicts of fact where there is not a clear showing by convincing evidence either way, this claim will accordingly be dismissed.

CLAIM NO. 4

The claim concerns a message telephoned on July 15, 1960, by a maintenance of way gang foreman at Greeneville, Tennessee, to a clerk in the Chief Engineer's office at Knoxville, Tennessee.

The record shows that the Petitioner, by letter to Carrier dated November 26, 1960 (Carrier's Exhibit C, page 92 of record) withdrew the claim in behalf of one of the two claimants (C. R. Davis), retaining its claim for the other, M. L. Jennings. The claim to this board includes, however, the denial for compensation to Davis. Inasmuch as claims not made, or withdrawn on the property cannot be considered by us, this aspect of the claim is dismissed from consideration.

In other respects:

1. It is undenied by Carrier that a telegrapher was employed at Greeneville on the date of the claimed violation.
2. There has been no showing to counter the usual presumption that where there is a telegraph office at a gang location messages of this kind are routed through it.
3. The parties made the usual assertions and counter-assertions on the question of custom and practice, without supportive proof offered by either.

Our conclusion is that a violation must be found in respect to remedy demanded on behalf of M. L. Jennings. The matter of future remedy is dealt with below.

CLAIM NO. 5

A clerk at Danville, Kentucky, telephoned the chief yard clerk on duty at John Sevier Yard, Knoxville, Tennessee, advising him that train No. 57 out of Danville had four cars of perishables for Knoxville.

The Petitioner argues that "Under craft lines, the Clerk-Telegraphers, by virtue of their seniority and title coverage under the Telegraphers' Agreement are entitled to perform all of the communications work at their office or station for the carrier" and also makes the same general assertion that it has enunciated in all similar claims, i.e., the charge that the Carrier has put into effect a system-wide program of removing a large portion of communications work which has "from time immemorial been performed by employes covered by the Scope of the Telegraphers' Agreement."

The Carrier states that the conversation which took place was an act "performed in the same manner as has been done for many years in the past."

The facts are thus in conflict concerning the basic criterion: whether the work has customarily and traditionally been exclusively reserved to claimants.

We cannot resolve the conflict here and must accordingly dismiss the claim.

CLAIM NO. 6

The highest Chief Dispatcher at Knoxville, Tennessee, telephoned the telegrapher on duty at John Sevier Yard, Knoxville, and gave him a message addressed to the conductor and engineer of train No. 72 to pick up a car of U. S. Mail at Bull's Gap, Tennessee.

The parties are in conflict concerning whether this work has customarily been the exclusive assignment of Claimants. The Petitioner offers no proof beyond its assertions on this subject (together with allegations of a general attack on its jurisdiction by the Carrier throughout the system).

The Carrier states:

> "This method of communication has been used by Mr. Dyer since he was awarded this assignment in 1952, and in fact, has been used by Night Chief Dispatchers on the Knoxville Division throughout the years." (Letter dated 9-20-60, Carrier's Exhibit D, page 94 of record)

The claim must be dismissed because of conflicts of fact which cannot be resolved by us.

CLAIM NO. 7

On July 23, 1960, the Chief Caller on duty at Knoxville telephoned the telegrapher on duty at Jellico, Tennessee, a notice to a train and engine service employe at that location that he had been displaced by another employe effective July 25.

The statements of the parties are in conflict as to whether this work had been exclusively assigned traditionally and customarily to Claimants. The only documentation or first-hand statement on this subject in the record is a signed declaration by the Chief Caller involved, in which he states that he had been following the practice in question for 44 years.

The record contains no response by the Petitioner to the statements of the Chief Caller.

Under the circumstances and facts made available, it must be found that the Petitioner has failed to substantiate its claim on the vital points of exclusivity by custom, tradition and practice.

REMEDIES

In those cases in which violations have been found to have occurred, the remedy must be limited to the specific circumstances on the specific dates and the redress confined to those individuals who on those dates and under those specific circumstances were adversely affected. We cannot look beyond the particularized circumstances of a specific claim of injury into the future concerning which facts are necessarily not before us either as to violation or to individuals adversely affected.

Accordingly, we dismiss consideration of allegations of "continuing claims."

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 in Claim No. 1, the Carrier has violated the Agreement in respect to Violation No. 1 to the extent indicated in Opinion. It has not violated the Agreement in respect to Violation No. 2.

That in Claims Nos. 2, 3, 5 and 6, it has not been proved that the Agreement was violated.

That in Claim No. 4, Carrier has violated the Agreement to the extent indicated in Opinion.

That in Claim No. 7, the Carrier has not violated the Agreement.

AWARD

Claim sustained for Claim No. 1, Violation No. 1 to the extent that Carrier shall compensate employe B. R. Whitmer, by paying him one day, 8 hours' pay, at the rate for Clerk-Telegrapher for July 14, 1960.

Claim sustained for Claim No. 4, to the extent that Carrier shall compensate employe M. L. Jennings by paying him one day (8 hours) at the minimum rate of pay for Clerk-Telegrapher, Knoxville Division, July 15, 1960.

Claims dismissed for Claims Nos. 2, 3, 5 and 6.

Claim denied for Violation No. 2 in Claim No. 1 and for Claim No. 7.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of July 1964.