Award No. 12942
Docket No. TE-11817

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ERIE RAILROAD COMPANY

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

1. The Carrier violated the agreement between the parties hereto when it required or permitted Section Foreman Benson, an employe not covered by the Telegraphers' Agreement at Waverly, New York, to copy a line-up of train movements over the telephone direct from the train dispatcher before the first shift Telephoner-Clerk reports for duty.

2. The Carrier shall, because of the violation set out above, compensate E. W. Skelly, first shift Telephoner-Clerk, Waverly, a "call".

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement by and between the parties to this dispute, effective March 1, 1957, and as amended.

At Page 43 of said agreement are listed the positions existing at Waverly on the effective date of said agreement. The listing reads:

Location	Office	Position	No. of Positions	Rate
Waverly	W	OC	2	2.110

The symbols OC under the heading of Position, above, in accordance with the "Key" at Page 47 mean "C"—Clerk and "O"—Telegraph Operator, and/or Telephoner, and/or Printer Machine Operator.

The number of positions indicated by the above listing for Waverly is two immediately prior to the effective date of the current agreement. The Carrier provided telegraph service at Waverly on a twenty-four hour basis.

Concurrent with the abolishment of the third shift Clerk-Operator's position at Waverly, the Carrier rearranged the assigned hours of the remaining

Finally, even though the monetary claim must necessarily fail because Petitioner cannot show that operators have exclusive right to this work, Carrier has nevertheless shown that even if operators had exclusive right to this work (1) the 12:30 A.M. to 8:30 A.M. operator not the claimant could only be aggrieved (2) the call rule is not applicable for the reason that claimant would first have to be called before the pay provisions of the rule can become applicable (3) even if claimant was called under the call rule, paragraph (b) and not (a) would control.

OPINION OF BOARD: Petitioner claims Carrier violated the Agreement between the parties when it permitted Section Foreman Benson, an employee not covered by the Telegraphers' Agreement, to copy a line-up of train movements over the telephone direct from the train dispatcher before Telephoner-Clerk Skelley reported for duty.

There has been considerable litigation before this Board over the claim that the Scope Rule granted ORT exclusive jurisdiction over line-ups. The Awards do not follow a consistent line and there is no clear cut policy which applies. Each party, therefore, offered such authority as supported its point of view.

Petitioner relied on Award 604 (Swacker) in which the Board said "* * * work of a class covered by the Agreement belongs to the employes upon whose behalf it was made and cannot be delegated to others without violating the Agreement." It cited an impressive list of awards which referred to Award 604 favorably: 1983 (Bakke); 1605 (Blake); 1535, 1562, 1563 (Bushnell); 5079, 5081 (Coffey); 896, 941, 942 (DeVane); 2934, 4018 (Douglass); 1671 (Garrison); 11908 (Hall); 1261, 1268, 1303 (Hilliard); 1552, 1553 (McHaney); 11156 (McMahon); 3363 (Messmore); 3671 (Miller); 4009 (Parker); 1320 (Rudolph); 1145 (Sharfman); 1713, 1720, 1752 (Stiger); 1393 (Stone); 603, 645, 919 (Swacker); 1281, 1283, 1284 (Tipton); 5639, 6607 (Wyckoff).

Carrier met this argument with a long line of awards beginning with Award 6824 (Shake) which holds that where the Scope Rule "is general in character and does not enumerate the functions embraced therein, 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 upon the employes." 10970 (McMullen); 10442 (Gray); 10604, 10515, 10425, 11708 (Dolnick); 9953 (LaDiere); 11812, 11813 thru 11819 (Christian); 11592 (Stark); 10918 (Boyd); 10366 (McGrath); 10525 (Carey); 10700, 11720 (Hall); 10823 (Sheridan); 10951 (Ray); 11343 (Miller); 11895, 12150 thru 12171 (O'Gallagher); 12078 thru 85 (Kane); 12097, 12356 (Dorsey); 12383, 12385 (Engelstein).

The Petitioner, itself, cites with approval the comment on line-up practice by the Emergency Board in National Mediation Board Case H-4336, on Carrier's Proposal No. 25 which sought a rule "to recognize the right of the Carrier to require other than telegraph service employes to handle train orders, motor-car line-ups, or other communications." The Emergency Board said:

> "Some awards of the Adjustment Board are in irreconcilable conflict and in hopeless confusion on this subject, and there is merit in what the Carriers here propose. However, from the record before us, it is apparent the problem is not one that lends itself to uniform handling on a national basis, but, because of local complexities, it can best be dealt with on each individual Carrier."

In handling this problem the Board has at times relied on the language of the Scope Rule as in Award 604 and those following it. It has also recognized that a general scope rule, such as the one with which we are dealing, contains no description of the specific duties of a position. For this, we must look elsewhere. The name of a job does not give us its content. To learn what duties the parties regarded as embraced in a job title we must look to their custom and practice. We think this view should be preferred because it is based upon not only the language but also the setting in which the language was used. In accordance with recent Board awards and, as suggested by the Emergency Board, this question should, therefore, be decided by referring to the custom and practice on this property.

There are no previous cases between this Carrier and ORT concerning line-ups.

Although the main reliance of the Petitioner is on the language of the Scope Rule, which we reject in favor of custom and practice, Petitioner has also attempted to meet its burden of proof that copying line-ups, by custom and practice, was work of the telegrapher. We think Petitioner has met that burden. We start with the fact that at one time telegraphy was the sole method of communication, and the custom and practice was for telegraphers to handle all communications of record, among which were copying line-ups. They were generally deemed to be the work of telegraphers, not because exclusivity was granted by the Scope Rule, but because of custom and practice.

It is undisputed that until recently at this station a telegrapher was on duty at all times around the clock. Under the well settled rule of law that a state of facts is deemed to continue until proved otherwise, we must presume that the custom and practice of using telegraphers for communications of records continued. If the Carrier asserts otherwise it becomes its burden so to prove. In handling the claim on the property the Carrier made no attempt to meet this burden other than to assert that Track Foreman Benson "secured his line-up in usual manner."

When the local chairman protested that "prior to the time that the second trick was abolished at "W" Telegraph Office, Waverly, N.Y., that it was the usual manner for the section foreman to obtain all of their line ups from the telephoner or telegrapher on duty at that point," the Carrier again asserted that Track Foremen and other maintenance employes had obtained line ups for years directly from dispatchers and that this was the long standing practice.

Carrier's position was mere assertion and not proof. It was not until Carrier's reply to Employe's ex parte submission was made that evidence in the form of affidavits were submitted as to the alleged practice. Under Circular No. 1 of this Board such evidence, not having been presented to the Organization, may not be considered here.

It is unfortunate that Carrier waited so late to document its assertion as to the practice. But Petitioner never had an opportunity to examine or refute such evidence and if we were to consider it it would manifestly be unfair.

Carrier asserted that two similar claims by the Organization were abandoned by the Organization. It infers from this that Organization thereby acknowledged that there was "no foundation for the allegation that operators have the exclusive right to handle train line ups * * *". We do not agree that such an inference must be drawn. There are many reasons why a claim may

be abandoned. Inadequacy of evidence or oversight are equally tenable inferences. In the absence of more persuasive proof we cannot accept the Carrier's inference, especially so since this very claim refutes the inference.

Although the claim will be sustained we do not believe the Claimant is entitled to a call. The evidence is that Section Foreman Benson received the first line-up four minutes after the 12:30 A. M. to 8:30 A. M. operator, not the Claimant, finished his tour of duty. Skelley, the Claimant was on the 10:00 A. M. to 6:00 P. M. shift. If he had been called to handle the first line-up, it would have been at 8:34 A. M., one hour and 26 minutes prior to his scheduled starting time. He is entitled to overtime rate of time and a half for this hour and 26 minutes.

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 Carrier violated the Agreement.

AWARD

Claim sustained as set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October, 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12942
DOCKET TE-11817

The majority award correctly recognizes that in the absence of a specifically worded scope rule we must look to custom and practice to determine whether, in this instance, the work of copying line-ups has become the exclusive work of the telegraphers. The award further, and again correctly, recognizes that in this type of proceeding the Petitioner must assume the burden of proving that copying line-ups, by custom and practice, was the work of the telegrapher on the property.

Thereafter, however, the majority award applies to this case alleged historical background expressly rejected in other awards as justifying a sustaining award. Nowhere is it effectively established that the situation that allegedly prevailed historically in the industry did in fact prevail with equal

validity in the instant case. Neither is it established in the instant record that line-ups are communication of record.

In short, the majority award finds a **prima facie** case by reciting historical, if somewhat tortuous, possibilities and coupling such possibilities with unsupported assertions and allegations advanced by the Petitioner, and thus shifts the burden of proof to the Carrier.

We question the validity of this approach and commend to the attention of the majority **Award 12356** (Dorsey).

For these reasons, among others, we dissent.

/s/ C. H. Manoogian

/s/ R. A. DeRossett

/s/ W. F. Euker

/s/ G. L. Naylor

/s/ W. M. Roberts