

Award No. 12965

Docket No. TE-11772

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
GULF, COLORADO AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Colorado and Santa Fe Railway; that:

1. The Carrier violated the Agreement between the parties when on January 20, 1959, it required or permitted employees not covered by said Agreement to perform work covered thereby; and

2. The Carrier shall compensate Telegrapher J. V. Higginbotham at Temple, Texas, and Telegrapher E. L. Jones, Jr., at Somerville, Texas, the equivalent of a call (three hours' pay) at the rate of the positions they occupy.

EMPLOYEES' STATEMENT OF FACTS: An Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

At 12:28 P.M., January 20, 1959, a yard clerk at Somerville, Texas, contacted the Yardmaster at Temple, Texas, on a telephone asking to be given a list of the number of cars that Train No. 39 had for Train 239's connection and for Somerville proper. The Yardmaster at Temple, Texas, transmitted the following message of record to the Yard Clerk at Somerville, Texas.

"Train No. 39 has 36 loads 4 empties 2743 tons for No. 239, 3 loads Somerville proper and AT 8758 behind this set out."

The employees who transmitted and received the above quoted message are not covered by the Telegraphers' Agreement.

At Somerville and Temple, the Carrier maintains Telegraph offices in which employees covered by the Telegraphers' Agreement are employed in around-the-clock service.

The Employees instituted a claim, which arose out of the handling of the above quoted message by employees not covered by their Agreement on the date specified above, in behalf of employees covered by the Telegraphers'

without merit or support under the governing agreement rules and should be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: On January 20, 1959, the wheel report for train number 39 was not received on time at Somerville, Texas. The yard clerk at Somerville, called the yardmaster at Temple, Texas, and asked for a list of the number of cars on train number 39 that were to connect with train number 239, and the number for Somerville proper. The yardmaster at Temple transmitted the following message to the yard clerk at Somerville:

"Train No. 39 has 36 loads 4 empties 2743 tons for No. 239, 3 loads Somerville proper and AT-8758 behind this set out."

The employees who transmitted and received this message are admittedly not covered by the Telegraphers' Agreement.

The Carrier maintains telegraph offices at both Somerville and Temple. Persons covered by the Telegraphers' Agreement are employed in around-the-clock service at both of these offices. On January 20, 1959, there were telegraphers on duty in both of these offices at the time the message was sent and received.

This claim is presented on behalf of two off-duty telegraphers; J. V. Higginbotham at Temple, Texas, and E. L. Jones, Jr. at Somerville, Texas, for compensation of one call each. (Three hours' pay.)

The employees allege that the message was a message of record and that under the agreement, telegraphers are to wire confirmation of messages transmitted in this manner. They further allege that it is necessary to force the Carrier to provide compensation in cases of this nature, in order to deter further violations of the agreement.

The Carrier first contends that this message was not a message of record. As an alternative defense, it urges that if it was a message of record, the wheel report, which was subsequently received, was in fact, confirmation of such message. Carrier also contends that Claimants were not damaged and that any compensation awarded to them would be in the nature of a penalty. And further that such an award is not within the power of this Board.

In determining the merits of this claim, the Board has arrived at the following three conclusions:

FIRST: It is our opinion that the record clearly indicates that the information contained in this message was necessary to the operation of the train, and as such, is a message of record. In this regard, we direct attention to that part of Carriers ex parte submission which reads as follows:

"In this particular instance, it was of the utmost importance that the yard force at Somerville have this information because there had been three setouts of cars from other trains that were to be included in the consist of Train No. 239 and these cars needed to be switched and blocked in preparation of receiving cars from Train No. 39. Furthermore, since a 3-unit Diesel locomotive had been ordered for Train No. 239 on January 20, 1959, the number of loads and tonnage Train No. 39 had for Train No. 239 would determine the extent to

which the dead freight that had been included in the consist of Train No. 239 would have to be reduced so as to enable the 3-unit Diesel to handle the revenue loads through on schedule to their final destination or connection with foreign lines. In other words, it was necessary for Somerville Yard to obtain a picture of what Train No. 39 would have for Train No. 239 in order to arrive at the proper consist of Train No. 239 and to permit switching and blocking of that train prior to arrival of the connection on Train No. 39."

SECOND: There is no dispute that the agreement of these parties is to the effect that, "messages of record must, in other than emergency cases, either be (1) transmitted by telegraph, or (2) confirmed by telegraphic message if transmitted by telephone." Having found this to be a message of record, we must now determine if it was confirmed by telegraphic message. The wheel report is considered a usual and ordinary transmission which contains a variety of information. It is true, as Carrier alleges, that this particular report did in fact contain, among other items, the information which had been given by telephone. This was a part of the usual transmission made in the wheel report.

We are however, of the opinion, that the agreement requires that such confirmation be made by a separate and distinct telegraphic message, issued for the sole purpose of confirming the particular telephone transmission. Even though the wheel report contains the same information as would the confirmation, we do not believe that it satisfies the parties' agreement in regard to confirmation of telephone transmissions. Therefore, we hold that the agreement was violated by the Carrier.

THIRD: It is apparent that there have been no actual damages shown to be suffered by the Claimants. To grant a pecuniary award, other than nominal, we would have to make an order in the nature of a penalty. We shall not attempt in this claim, to make a justifiable determination as to the propriety of such an award.

The primary purpose of the employees in filing this claim was to protect and preserve to their craft, the work which they believe they are entitled to perform. Not only this award, but indeed, many prior awards of this nature, have upheld that right. No useful purpose could be obtained by assessing a penalty in this case. The Carrier has indicated by its actions, that our prior awards have not deterred subsequent violations and ensuing claims. The employees are forced, therefore, to continue to process these claims for the purpose of affirmatively contesting any threatened deterioration of the work to which they are entitled.

The Carrier should be on notice that the failure of this Board to assess a penalty in this case, should in no way give rise to the proposition that this work can be assigned to any other craft. In this particular claim, there were telegraphers on duty when other persons, not covered under the agreement, were allowed to handle the message. Since these telegraphers were fully employed, and since the Claimants would not have been called in any event, we do not feel it proper to grant a monetary award.

The important principle for this Board to reaffirm in this case, is that under this agreement, the telegraphers have the work of confirming telephone transmission messages of record, by a separate telegraphic message. If the Carrier chooses to pay telegraphers to "sit on their hands" while the other employees do their work, apparently there is little this Board can do to change the situation. But, it must be noted that such action will not be allowed to lead to the proposition that the work has become other than telegraphers.

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 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 Agreement was violated.

AWARD

The claim for monetary compensation is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1964.

CARRIER MEMBERS' DISSENT AWARD 12965 — DOCKET TE-11772 Referee Don Hamilton

The quotation from the record, page 2 of the opinion, and the telephone call from the yard clerk to the yardmaster, appearing on page 1 of the opinion, conclusively indicate the conversation was in connection with performance of work in the Somerville Yard. No record was required, nor made thereof, for the simple reason it was not authority nor a directive relating to the control or movement of a train; consequently, could not be construed as a "message of record" as that term has been interpreted by this Board.

Even though the Referee erroneously found the conversation to be a "message of record", further error was committed in finding that confirmation must be by a separate and distinct telegraph message. The information obtained by the clerk was ordinarily taken from the wheel report, but on this occasion the wheel report was late so the clerk obtained the information via telephone. The wheel report including this same information was subsequently transmitted as usual by teletype and constituted confirmation. Only one confirmation was necessary. Holding to the contrary is without sound basis in reason, logic or the agreement.

We concur with the denial of the monetary portion of the award.

For these and other reasons, the majority committed palpable error in sustaining part of the claim, and we dissent.

W. M. Roberts
G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian