Award No. 13189
Docket No. TE-12101

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Lee R. West, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, Chicago and St. Louis Railroad (Wheeling and Lake Erie District) that:

1. The Carrier violates the parties' Agreement at Kent, Ohio, when it requires or permits employes not covered by the Telegraphers' Agreement to transmit and/or receive messages of record over the telephone outside the assigned hours of the agent-telegrapher and the rest day relief agent-telegrapher at this station.

2. The Carrier shall, because of the violation set out above, commencing December 2, 1958, and thereafter so long as the violations continue, compensate F. M. Franck, the regularly assigned agent, and D. C. Gardner, the regularly assigned rest day relief agent at Kent, in accordance with the provisions of the Call and Overtime Rules. A joint check of the Carrier's records to be made to ascertain the date of subsequent violations and the compensation due claimants.

EMPLOYES STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute, effective, as to rules, February 1, 1952, and as to rates, effective February 1, 1951, and as amended.

At page 58 of the said Agreement are listed the positions existing at Kent, Ohio on the effective date of said Agreement. The listings are:

Location	Position	Hourly Rate
Kent	Agent	$1.830
Kent	Telegrapher–3	$1.698

As the above wage scale listing indicates, the Carrier maintained round-the-clock telegraph (telephone) service at Kent, Ohio for the purpose of handling all of the communication work arising at or destined to this station.

OPINION OF BOARD: Claimants allege that the Carrier violates the effective Agreement when it requires or permits employes who are not under the Telegraphers' Agreement to transmit and/or receive messages or record over the telephone outside the hours of the agent-telegrapher and the rest day relief agent-telegrapher at Kent, Ohio. Claimants ask that the regularly assigned agent and the rest day relief agent be compensated according to the Call and Overtime Rules for each violation. The messages included in the record, generally speaking, are telephone messages from clerks to the Chief Dispatcher reporting what was in the yard, what was ready to move and where it was going. The Dispatcher thereupon would transmit a train order to a train to pick up and deliver some or all of the cars located in the yard.

Claimants rely upon Rules 1 and 26, which read as follows:

"RULE 1. SCOPE

This agreement will govern the working conditions and rates of pay of telegraphers, agents, telephone operators (except telephone switchboard operators), agent-telegraphers, agent-telephoners, manager-telegrapher, telegrapher-clerks, levermen, towermen, tower and train directors, block operators, staffmen, operators of mechanical telegraph machines, and other combined classifications listed in the accompanying wage scale, all of whom are hereinafter referred to as 'employes'."

"RULE 26 — HANDLING TRAIN ORDER

It is not the disposition of the Railroad to displace employes covered by this agreement by having trainmen or other employes operate the telephone for the purpose of blocking trains, handling train orders or messages. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator."

Claimants' position is that Rule 1, together with a past practice of telegraphers handling these messages, gives them the right to this work and/or that Rule 26 specifically grants them the right to this work.

Carrier denies that there is a past practice whereby telegraphers handled the type of messages involved exclusively. It then argues that neither Rule 1 nor Rule 26 specifically, and without ambiguity, grants or reserves the right to transmit the messages involved by telephone.

A few observations, to guide in analyzing and understanding our decision, would seem to be in order. The telephone is not and should not be considered as a tool belonging or to be used exclusively by telegraphers. It is obviously a means of communication available to be used by a wide variety of employes. Certainly many non-telegrapher employes may properly use the telephone in the course of their duties without violating the Agreement. However, it is equally certain that certain types of communications or messages can only be transmitted by telegraphers.

It is admitted that an Agreement between the Carrier and the Telegraphers' Organization can, and does, reserve unto the telegraphers the right to do certain kinds of work. This reservation may be in clear and unambiguous terms. In such an event, it is the specific and contractual right of the telegra-

phers to perform this work. No amount of deviation from the exact provisions by the Carrier, in assigning this work, to other than telegraphers can serve to deprive the telegraphers of their specifically granted right. Thus, the first question to be asked is: does the Agreement specifically, and without ambiguity, grant or reserve the work involved to the class of employes claiming same? If so, the claim can be sustained.

Even if the Agreement does not specify or detail the type of work reserved or granted in an Agreement, this does not mean that work is not reserved or granted. It is universally agreed that this is one of the primary purposes of the Agreement. However, where the work is not specifically reserved or granted, we can only know that some work is reserved or granted by implication. The great difficulty arises in seeking to ascertain just what work is impliedly reserved or granted in an Agreement containing a nonspecific or general reservation or grant of work. To determine this question, we look to the custom and practice of the parties to the Agreement. By their conduct, both before and subsequent to the Agreement, one can often determine what they intended to be granted or reserved. It is this intent that determines what was impliedly granted or reserved by the general provisions of the Agreement.

Once it is ascertained that a certain kind of work belongs to a class or craft of employes under the provisions of an Agreement, either specifically or impliedly, that work belongs to such class or craft, regardless of the method or equipment used to perform the work. The Agreement applies to the character of the work and not merely to the method of performing it.

We now view the above quoted rules in the light of these observations, and apply the facts of this case to them. We are of the opinion that Rule 1 does not, of itself, specifically reserve the right to the work involved. It does not even appear to be seriously contended that the Scope Rule above provides the specific reservation. Claimants' strenuously urge, however, that Rule 1, together with and aided by Rule 26, does specifically reserve the work involved. However, we are of the opinion that even Rule 26 does not declare, in unambiguous terms, that the telegraphers shall have the exclusive right to transmit messages such as are involved herein. The Rule purports to affect the blocking of trains, handling of train orders or messages. In Award 9952, this Board held that handling of train lineups belonged to the telegraphers after a finding that the Scope Rule did not specifically reserve the work to telegraphers. It is not altogether clear that the Board was relying upon a rule identical to Rule 26, or whether it was relying upon past practice. We are unable to find any language or reasoning in that case to the effect that Rule 26 specifically reserves or grants unto telegraphers the right to handle messages such as the yard reports which are involved herein. In Award 11667, this Board held that Rule 26 specifically reserved the handling of train orders to the telegraphers in clear and unambiguous terms and disregarded an alleged Carrier practice to the contrary. Without evaluating the merits of that decision, we are of the opinion that the messages involved in this case are not so clearly and unambiguously referred to as was the train orders involved therein. It is true that the Rule refers to "messages." However, it cannot be seriously argued that all telephone messages of whatsoever kind or character can only be sent by telegraphers. Such was obviously not the intent of the parties. Claimants seem to concede this but attempt to classify the yard reports involved as "messages of record." They then contend that these messages of record "are the messages reserved to them under Rule 26." However, this would appear to attempt to interpret or read something

into what they contend is so clear and unambiguous as to compel us to disregard an attempt at interpretation by looking to past practice. This is further pointed out by the Organization's undenied attempts to negotiate this contended interpretation in 1950 when it tried to include "reports of record" in Rule 26. We are persuaded that such attempt does support our finding that the term "messages" in Rule 26 does not intend to reserve the handling of all messages to telegraphers and is therefore inherently ambiguous.

We are of the opinion that we do not have to overrule Award 11667 in order to reach this conclusion. It is sufficient to point out that the handling of train orders, which was involved in that award, is more specifically and unambiguously mentioned in Rule 26 than is the yard report type messages which are involved herein. Likewise, we do not believe that these reports are "lineups" which were held to be exclusively the work of telegraphers in Award 9952. Even if the messages are undistinguishable we would hold that Rule 26 does not unambiguously reserve the right to transmit them to telegraphers. Since it is possible, although not at all clear, that the Board looked to past practices to interpret Rules 1 and/or Rule 26 in Award 9952, we cannot say that the award is wrong so as to require us to overrule same.

Having decided that the work involved herein, transmission of yard reports and the like, is not specifically reserved or granted to the telegraphers under either Rule 1 or Rule 26, we must now attempt to ascertain what work the parties did intend to reserve by the ambiguous language involved. In doing so, we look to the past practice of the parties as the best indication of this intent. Both parties have alleged a past practice favorable to their interpretation. However, the only evidence supporting an assertion is presented by Carrier. It is sufficient to say that Claimants have not met the burden of proving a past practice favorable to them. Award 8663 is distinguishable in that it did not involve the past practice on this Carrier, which is the determining factor in this case. For these reasons, the claim must be denied.

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 not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of December, 1964.