Award No. 13290

Docket No. TE-12348

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Arnold Zack, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO & ILLINOIS MIDLAND RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago & Illinois Midland Railway, that:

(1) The Carrier violated the parties' Agreement at Kilbourne, Illinois (a closed station) when on May 12 and 13, 1959, it required a section foreman, an employe not covered by the Telegraphers' Agreement, to transmit a message of record over the telephone to the Telegrapher-Clerk in Shops Tower, Illinois.

(2) The Carrier shall, because of the violation set out above, compensate J. E. Heaberlin a day's pay (8 hours) at the rate of the Agent-Telegrapher's position at Kilbourne, rated in accordance with prevailing wage rates, for each date set forth in Item 1 above.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement by and between the parties to this dispute, effective November 1, 1946, revised and reprinted December 1, 1956, to include all appendixes and supplements to that date, and as amended.

At page 44 of said Agreement is listed the position existing at Kilbourne, Illinois, on the effective date of said Agreement. The listing reads:

"AGENT-TELEGRAPHERS

LOCATION	RATE PER HOUR
* * *	
Athens, Oakford, Kilbourne, Topeka, Forest City	$1.55

The date upon which the Agent-Telegrapher's position at Kilbourne was discontinued is not available in the record of this case.

At or about 3:30 P. M. on May 12, 1959, Section Foreman N. A. Wilson, an employe not covered by the Telegraphers' Agreement, reopened the Agent-Telegrapher's position at Kilbourne by transmitting the following message of record to the telegrapher-clerk in Shops Tower, over the telephone:

CONCLUSION

Inasmuch as the organization did not cite (in their notice of filing or during handling on the property) a single rule in support of their contentions for the exclusive use of the telephone or a rule to support their request for an additional day's pay to an on-duty Agent-Telegrapher at Havana when a section foreman made a telephone call from a "closed station" to the Telegrapher at Shops, the carrier must regard these efforts as an attempt to accomplish that which could not be arrived at across the bargaining table. A denial of the claim is therefore respectfully requested.

OPINION OF BOARD: On April 8, 1959, N. A. Wilson, extra gang foreman working on tie renewals in the vicinity of Kilbourne, Illinois, was instructed by the Chief Dispatcher to advise the operator at Shops Tower daily as to his working limits for the following day. This was to enable the dispatcher to put out an order for trains passing the work area.

According to the Carrier, Wilson telephoned the Shops Tower operator daily beginning April 9, 1959 from a "wayside" company phone at Kilbourne. The Company ceased using Kilbourne as an Agent-Telegraphers position in 1958 and had had his building removed from the property.

The instant Claim arises from two occasions when the foreman's use of the telephone to contact the Shops Tower was, according to the Organization, first detected. The communication was made at approximately 3:30 P. M. on May 12, 1959 and read as follows:

> "Hours 7:15 A. M. until 2:45 P. M. Section men will be working between Mile Post 28 and Mile Post 30, May 13th."

The second communication at approximately 3:45 P. M. on May 13, 1959, read as follows:

> "Hours 7:15 A. M. until 3:45 P. M. section men will be working between Mile Post 28 and Mile Post 29, Thursday, May 14th."

Claimant Heaberlin, then a Relief Agent-Telegrapher at Havana, Illinois filed a claim for earnings denied him by virtue of the foreman's violation of the Telegraphers' Agreement.

The Organization asserts that the message transmitted was within the Telegraphers' jurisdiction; that the Telegraphers had had exclusive jurisdiction over all communications of record transmitted from the Kilbourne position when it had been manned; that their exclusive jurisdiction over such communications continued even after an operator had been removed from the location; and that the Carrier had violated the parties' Agreement by having a foreman telephone in a message of record instead of having it done by the most senior telegrapher available under the Agreement.

The Carrier takes the position that although telegraphers might have transmitted such a message prior to 1958 they did not have exclusive jurisdiction to telephoned messages of this type. It is certainly inconceivable that any rights they did have could continue once the office was closed, and the equipment sold and moved away. It argues that the Organization has not met the burden of proving its exclusive jurisdiction over this type of communication, and that accordingly its claim must be denied.

Three essential questions are raised in this dispute. Is a notice of the type telephoned to the operator a message of record? If so, does the Scope Rule of the parties' Agreement reserve all such communications to the Telegraphers for handling? And, if it does, did the Organization's right to handle such a communication survive the closing of the Telegrapher's position at Kilbourne?

In resolving the first question we are concerned with a communication that was specifically requested by the Chief Dispatcher "so that all trains will have copy of this order at the effective starting time" (Carrier's ex-parte submission—p. 1). The purpose was to inform trains to "approach these limits at reduced speed unless given proceed signal." As noted by Referee Guthrie in Award 8663:

> "They do not appear to be purely informational but are communications of record and have to do in part with the operations of trains."

It may be claimed that messages dealing with daily location of work are not necessarily messages of record, but it is evident that they were an essential element in the Carriers efforts to operate its trains most efficiently in light of safety requirements and that they were placed in writing. Thus when the Dispatcher acted on these messages, he was clearly controlling the movement of trains passing the work area in terms of speed for the safety of persons and property which this Board has held to be a message of record (Award 5182). The same would be true to the extent that these messages informed that a certain portion of the track was cleared of equipment, inasmuch as it permitted the resumption of normal speed. To say that such messages may be ignored is to interfere with efficient operations throughout the line, and to create additional problems of safety.

The Carrier raises the claim that they were not messages of record at the time when they were orally communicated by telephone to the tower operator, but could only have become so after transmittal by the operator. With this, the Board must disagree for it is clear that this message was, of its very nature, a message of record and accordingly required handling by a telegrapher whenever it was transmitted on the property. As noted by Referee Carter in Award 4458 wherein a foreman telephoned a message to a dispatcher informing him of a cleared line in the absence of a telegrapher at the position, the telephoned message:

> "* * * was clearly a report of record as that term is used in the established rule."

The second question for solution is whether the telegraphers have exclusive jurisdiction over all such messages of record. The pertinent Scope Rule is clearly a general rule, and, as the Carrier points out in many relevant awards, does not per se reserve to employes an exclusive right to do specific work (12383). That must be shown by virtue of traditional custom, practice and usage by the record to the exclusion of others, and in such proof the burden rests upon the Claimant (11643). As noted by Referee McCoy (8059), if the work is:

> "* * * traditionally and customarily performed exclusively by the class named in the scope rule it is violative of the agreement to turn any such work over to others."

The test established by Referee Stark in Award No. 11510 dealing with a disputed position being filled by telegraphers and clerks is relevant in this case.

"It seems apparent, then, in the case at hand, that if telegraphers always performed the task in question and clerks never performed such tasks, Collins' claim is justified and should be sustained. On the other hand, if clerks as well as operators did such work, and did it consistently over long periods of time, there should be little doubt that the claim must be denied."

The facts in this case show quite clearly that message communication from this location had always been handled by the telegrapher, and that the foreman did not share in such message transmission "consistently over long periods of time." The telegraphers therefore, must be held to have had exclusive jurisdiction over messages of record emanating from the station (8687). There has been no showing that any other craft or class shared in this work. It is also clear that the exclusive right extended to the telephoning of messages of record once telephone replaced telegraph in message transmissions as here affecting the movement of trains.

"We think it is established as a general proposition that telephone communications consisting of messages and reports of record belong to the telegraphers by virtue of the scope rule of the Telegraphers' Agreement." (Referee Carter—3524)

It is true that there has been a practice for foremen to use telephones as a normal part of their daily work, but when considering communications from stations which had customarily been staffed by telegraphers, it is clear that such communications are exclusively reserved to telegraphers, and beyond the jurisdiction of non-telegraphers. The fact that the Organization in some instances failed to protest against similar incursions immediately preceding the instant claims did not constitute acquiescence and does not detract from their right to protest herein (1720).

Accordingly we find that the telegraphers maintained exclusive jurisdiction over not all telephone communications, but merely those which telegraphers had formerly transmitted by telegraph, as the ones in dispute (4516, 10356).

Turning then to the final question: Did the telegraphers' exclusive right to transmit such messages of record continue after the position had been closed? Here again, logic and the weight of precedent indicates that the locus for the commencement of messages of record remained within the exclusive jurisdiction of the telegraphers and any work arising therefrom, even after the removal of the building from which they emanated, continued reserved to them.

The employes within the Scope Rule

" * * * held positions listed in the schedule and such positions were protected by the seniority rules of the Agreement. We do not hold that there is a guarantee of positions. The Agreement . . . authorizes the Carrier to abolish positions when no work remains to be done in that position. But so long as there is work to be performed in the position, the seniority rights of an employe to the position attaches to that work. It is axiomatic that seniority rights may not be destroyed unilaterally." (Referee Elson, 5384)

It was not necessary for the Carrier to maintain the position at all times, but in the absence of a telegrapher at that position when a message of record of this type is to be conveyed, it is still necessary to protect the exclusive jurisdiction of telegraphers to such work.

In this respect, the reasoning of Referee Carter in Award 5122, although applied in that case to a situation where a telegrapher was unavailable to deliver a train order, is equally relevant here, since this was the sending of a message upon which depended the movement of traffic.

> "The work of sending, receiving, copying and delivering train orders is reserved to telegraphers by their Agreement. * * * It is urged that no other practical method exists for the delivery of train orders under the situation existing in the claim before us other than by sending them in care of another train crew. This is undoubtedly true upon occasion. But, on the other hand, the presence of a penalty for such a violation, restrains the indiscriminate delivery of train orders by those outside the scope of the Telegraphers' Agreement. While the payment of a penalty which the Carrier is unable to avoid may occasionally be required, it is more economical than the maintenance of additional telegraph stations and at the same time it safeguards the work reserved to telegraphers by their agreement with the Carrier."

It should be noted that although the alleged violation of telegraphers' jurisdiction occurred on only sporadic occasions, and for a few minutes at a time, a diminimus rule is not applicable. In Award 4289, Referee Rader held:

> "* * * if it can be said that such work which has been traditionally the work of one craft, can be transferred to employes of another craft, if only in a minor degree, it then logically follows that such violation, granted that they may be of a minor nature, establish a precedent which if followed to its logical conclusion by extension of the principle involved, defeats the very purpose of the right to be protected, i.e., the designating of the work to be performed by any given craft or class under Agreements of this nature."

In view of the foregoing, the Carrier must be held to have violated the parties' Agreement when the foreman performed telegraphers' work.

In considering the proper remedy for this violation we are unable to agree with the Organization that the Claimant is entitled to eight hours compensation under Article 3 of the Agreement.

Our holding is that a member of the Organization should have been called upon to perform the tasks in dispute. A careful reading of the pertinent Agreement provisions leads to the conclusion that Article 7, as supported by the language of Article 13 is the relevant provision to accomplish that end rather than Article 3. Accordingly we find that the Claimant is entitled to three hours pay for each violation in accordance with the terms of Article 7. The fact that he was elsewhere employed does not prohibit recovery under the ruling of this Board in Award 6063, wherein Referee Wenke held:

> "This claim is primarily to enforce the scope of the Agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. This is done to maintain the integrity of the Agreement. As to who gets the penalty, that is but an incident to the claim itself and not a matter in which the Carrier is concerned for if the Agreement is violated, it must pay the penalty therefor in any event."

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 the Agreement was violated to the extent shown by the opinion.

AWARD

Claim sustained as indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of February 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13290, DOCKET TE-12348

The Majority predicates its conclusions on early, and long-since discredited, awards. By utilizing awards no longer recognized as reflective of this Board's thinking, the Majority establishes the basic premise that the conversations herein involved were messages of record the telephoning of which was exclusively reserved to telegraphers. The Majority award, based as it is on this invalid premise, fails for lack of proper subject matter.

It is unfortunate that the Majority opinion fails to note that the messages here transmitted by telephone (an instrument this Board has consistently held is not an exclusive instrument of the telegrapher's craft) contained information related to the work for which the employe was responsible in the course of his regular duties.

> "We are not persuaded that because these telephone communications were put in writing they were messages of record, and, therefore, exclusively work of telegraphers. This interpretation would limit the functioning of the many employes in carrying out their duties and responsibilities. Telephone conversations are an integral part of their routine activities. Considering the nature and purpose of these messages and considering that Carrier was not required by rules to keep records of this type of message, we conclude that they are not messages of record and, therefore, not the exclusive work of telegraphers." (Award 12382 (Engelstein)

For these reasons, among others, we dissent.

C. H. Manoogian

R. A. DeRossett

W. F. Euker

G. L. Naylor

W. M. Roberts