



Award No. 14287

Docket No. TE-14114

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

KANSAS, OKLAHOMA & GULF RAILWAY CO.

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Kansas, Oklahoma & Gulf Railway Company, that:

1. The Carrier violated the Agreement between the parties in each instance set forth below when it permitted and/or required employes not covered by said Agreement to handle the following train orders (and one message) and, further, that it has failed and refused to pay the designated claimants in accordance with Rule 5 of such Agreement.

Station	Date	Order Number	Train Number	Time	Claimant
Tupelo, Okla.	2-22-62	9	X-753	5:50 A.M.	W. T. Coventon
Allen, Okla.	3-2-62	Message	X-North	5:00 P.M.	W. L. Holly
Calvin, Okla.	3-8-62	34	X-808	11:20 P.M.	W. R. Prichard
Tupelo, Okla.	3-15-62	6	X-809	3:55 A.M.	J. W. Russell
Calvin, Okla.	3-5-62	8	X-809	5:27 A.M.	W. R. Prichard
Calvin, Okla.	3-23-62	1 & 2	X-1551	12:28 A.M.	W. L. Holly
Calvin, Okla.	3-17-62	27	X-805	9:46 P.M.	W. L. Holly
Allen, Okla.	3-24-62	1	X-802	12:39 A.M.	J. W. Russell
AB Junction, Okla.	3-28-62	2	X-754	1:40 A.M.	J. R. Dowd
Tupelo, Okla.	4-19-62	6	X-801	4:46 A.M.	J. W. Russell

2. Carrier shall now be directed to pay said claimants pursuant to Rule 5 — a day's pay at the minimum rate for agent-telegraphers because of such violations.

EMPLOYEES' STATEMENT OF FACTS: The Agreement between the parties, currently effective since October 1, 1947, (which by reference is hereby placed in evidence) provides:

the Time Limit Rule under Article V of the Chicago Agreement effective November 1, 1954, and not under any rules relied upon in this complaint. See Exhibit A attached.

4. The second item listed:

Allen, Okla. 3-2-62 Message X-North 5:00 P.M. W. L. Holly

There is no message of record in the dispatcher's office. If the conductor did in fact call the dispatcher, he did not deem it of sufficient importance to make it a message of record, thus it could not have directed the movement of the train. Message or telephone conversations are not recorded in the train order book.

(Exhibits not reproduced.)

OPINION OF BOARD: This submission presents eleven disputed claims. It is contended that the Carrier violated the Telegraphers' Agreement in that train orders and a message were handled by employees not covered by the Telegraphers' Agreement.

Each of the alleged violations arose at points where no Telegrapher was employed. Moreover, each of these points (Calvin, Tupelo, and Allen) was a station that had been previously abolished by order of the Oklahoma Corporation Commission, on the following dates: Calvin — April, 1957; Allen — February, 1960; and Tupelo — May, 1961. The alleged violations took place from February, 1962 to April, 1962.

It is not disputed that at the times alleged, Carrier's conductors copied train orders at Tupelo, Calvin, and Allen, and on one occasion a conductor sent a message from Allen. On another occasion, an assistant superintendent of Carrier copied a train order at AB Junction where a station had never existed, nor had an agent or telegrapher ever been employed.

Claimants, through the Organization, contend that such action violated Rules 1, 4, and 5 of the Agreement by permitting or requiring employees not covered by the Agreement to handle train orders and one message, and should be required to compensate the named claimants as provided in Rule 5 of the Agreement.

The issue presented in these claims is whether the Claimants had the exclusive right to handle train orders and other communications at stations which had been abolished.

Rule 4 of the Agreement provides:

"No employees other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

It is clear that Rule 4 has no applicability to the facts giving rise to these claims. This rule, protective rather than permissive in its terms, provides that no employees, other than those covered in the schedule (Rule 1) shall be permitted to handle train orders. However, the rule obtains only

"at telegraph or telephone offices where an operator is employed and is available or can promptly be located * * *." (Emphasis added.)

We cannot extend its application beyond the plain meaning of its words to include abolished stations where no operator is employed. In this context we prefer the rationale of Awards 5866 and 12645 to that of Award 5992.

Rule 5 is given particular emphasis by the Claimants as a basis for recovery. It states:

"Station employees at closed stations or non-telegraph stations shall not be required to handle train orders, block or report trains, receive or forward messages by telegraph or telephone, but if they are used to perform any of the above service, the pay for the agent or telegrapher at that station for the day on which such service is rendered shall be the minimum rate per day for agent-telegraphers, as set forth in this agreement."

Again, the facts giving rise to these claims do not come within the ambit of Rule 5.

We cannot construe Rule 5 to include conductors within the meaning of "Station employees", or to include abolished stations within the meaning of "closed stations". To so hold would do violence to the logic and intention of the Rule taken as a whole, particularly when it makes provision for payment to the "agent or telegrapher **at that station** for the day on which such service is rendered * * *". (See Award 1657 — Mitchell)

It has been seen, therefore that the two rules set forth above prescribe jurisdiction and remedy in situations anticipated by the parties to the Agreement. Rule 4 covers those situations where there exists a telegraph or telephone office, and where an operator is employed and is available or can be promptly located. Rule 5 anticipates situations where the station is closed in the sense that there is no operator on duty, or the station is non-telegraph.

Neither of these rules encompasses a situation where there is, in effect, no station and consequently, no operator.

Claimants contend that, in any event, Scope Rule grants and reserves to those employes coming under the Agreement the exclusive right to handle train orders, and such exclusive right continues even after a station has been abolished.

The Scope Rule (Rule 1) states:

"This schedule will govern the employment and compensation of

"Agent-Telegraphers,
"Agent-Telephoners,
"Telegraphers,
"Telephone Operators (except Switchboard Operators),
"Towermen,
"Levermen,
"Tower and Train Directors,

"Block Operators,
"Staffmen,

"and such Agents and other employes as may be shown in the appended wage scale."

As stated, the Scope Rule, standing alone, does not grant to those coming under the Agreement the exclusive right to handle all train orders. "It is a general scope rule which does not by its terms explicitly reserve any particular work to the Employees." (Award 13972 — House).

In such cases, the prevailing and better-reasoned opinions hold that the Claimants have the burden of showing in the record that there prevails a system-wide practice, custom or tradition which reserves such work exclusively to them.

In Award 12383 (Engelstein), it is stated:

" . . . We find that the Scope Rule is of the general type which enumerates positions, but does not define the work specifically allocated to telegraphers. We then search the record for evidence that the work in dispute has been performed exclusively by this craft through practice, custom, and tradition. We do not find that it is enough for Petitioners to show that telegraphers customarily perform the work. They must prove that the telegraphers handled the messages to the exclusion of all other classes of employes . . ."

And in Award 12787 (Ives), it is stated:

"It is well established on this Division under such scope rules that the work performed must have been traditionally and customarily performed on a system wide basis by the employes covered by the particular Agreement to the exclusion of all others. The burden of proof through competent evidence is upon the Petitioner.

" . . . Mere assertions do not constitute proof and will not support a claim. Awards 11834, 11645, 11525. Petitioner has failed to meet its burden of proof and we have no alternative but to deny the claim."

See also Awards 11758 (Dorsey); 11526 (Dolnick); 11239 (Moore); and 10615 (Sheridan).

It is therefore incumbent upon the Claimants to show by competent and convincing evidence in the record that by reason of system-wide past practice, custom, or tradition, there is reserved to employes under their Agreement schedule the exclusive right to handle train orders at stations which have been abolished. This they have failed to do.

Claimants cite Award 13290 (Zack) as authority for the proposition that a unilateral abandonment of a station by the Carrier does not affect the rights of the parties under the Agreement. More specifically, such abandonment did not give the Carrier the right to require employes, other than those coming within the purview of the Scope Rule, to handle train orders at abandoned stations.

An examination of that award indicates that the opinion was predicated on a finding from the record that the telegraphers had exclusive jurisdiction based on past practice and custom **at the point**, and not on past practice and custom **system-wide**, which is the prevailing view.

Under either test, the Claimants have failed to meet the burden in the claims before us.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1966.