

Award No. 15860
Docket No. TE-13651

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David H. Brown, Referee

PARTIES TO DISPUTE:

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

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri-Kansas-Texas Railroad, that:

1. The Carrier violated the Telegraphers' Agreement when, at 5:50 A. M., Sunday, June 18, 1961, it permitted or required an employe other than covered by the Agreement to forward (transmit) a consist message by telephone from Glen Park Yard Office, Kansas City, Missouri, to North Yard, Parsons, Kansas, in violation of Rule 1(a) and 1(d). (Item 1.)

2. Carrier shall be required to compensate Telegrapher A. H. Boyer, the regularly assigned operator at Glen Park, who was available for and entitled to perform such work, a day's pay at the minimum rate for Telegraphers as set forth in the Agreement, plus his regular rate.

3. The Carrier violated the Telegraphers' Agreement when, at 6:05 A. M., Sunday, July 23, 1961, it permitted or required an employe other than covered by the Agreement to forward (transmit) a consist message by telephone from Glen Park Yard Office, Kansas City, Missouri, to North Yard, Parsons, Kansas, in violation of Rules 1(a) and 1(d). (Item 2.)

4. Carrier shall be required to compensate Telegrapher A. H. Boyer, the regularly assigned operator at Glen Park, who was available for and entitled to perform such work, a day's pay at the minimum rate for Telegraphers as set forth in the Agreement, plus his regular rate.

EMPLOYES' STATEMENT OF FACTS: Glen Park Telegraph Office is located in Carrier's Kansas City, Kansas freight yard terminal. The office is manned by one Telegrapher-Clerk, assigned hours 8:30 A. M. to 5:30 P. M., seven days per week. In addition to telephones and Morse Telegraph the office is equipped with a mechanical telegraph machine and all of such equipment is

Office on company telephone and secured consist of train No. 43 out of Glen Park on instructions of Yardmaster at Parsons.

Claims were presented by General Chairman W. C. Thompson on behalf of claimant for two days pay each date, one at minimum rate of \$2.29 per hour for telegraphers, or \$18.32 per day, and one at the regular rate of \$2.5175 per hour or \$20.14, total of \$38.46, based on alleged violation of Rules 1(a) and (d) of current Telegraphers' Agreement. The claims were declined as they are not supported by the agreement.

Carrier's Exhibit A, attached hereto and made a part hereof, is copy of correspondence exchanged by the parties in handling these claims on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: In conformity with our long-established rules, we shall view the claim as it was handled on the property; since that time the file reflects a transmutation of substantial proportions.

On the property Carrier advanced only one defense — not that the disputed work did not belong exclusively to the Telegraphers, but rather that the Glen Park Yard Office was not a "closed office" within the meaning of the penalty rule, Rule 1(d).

The burden of Carrier's defense is that since continuous communication service was maintained at the Kansas City Terminal, of which Glen Park is a part, Rule 1(d) does not apply. Such continuous service was provided through an agreement with the St. Louis-San Francisco Railway and the Kansas City Terminal and by employees of those two lines.

On cursory examination there would appear to be merit to Carrier's position. Ordinarily, the existence of continuous telegraph service would eliminate any application of Rule 1(d). Ordinarily, the existence of a service provided through a pre-existing agreement with other carriers or concerns will provide shelter against a claimed violation of the Scope Rule where such service is utilized by the carrier charged with the violation. See our Awards 13718, 14660 and 14662.

But in the instant case Carrier, in addition to availing itself of the continuous service provided by the two aforementioned lines, maintained its own telegraph office at Glen Park which office was manned by one Telegrapher-Clerk with assigned hours of 8:30 A. M. to 5:30 P. M., seven days a week. The violations took place at 5:50 A. M. and 6:05 A. M., respectively. More importantly, the violations did not take place because Carrier chose to avail itself of the communication service provided by the St. Louis-San Francisco Railway and the Kansas City Terminal Railway. On the contrary, there is absolutely nothing in the record to show that the existence of that joint facility had anything to do with the disputed work as it was actually performed. Stated another way, these claims would not have arisen had Carrier availed itself of the services of the joint facility.

Our holding here is completely consistent with our previous decisions regarding jointly operated facilities. Such decisions were never intended to give a carrier with contracts for service through such facilities the authority

to breach an agreement with its employees by assigning work wholly independent of the operation of the joint facility.

The existence of the joint facility has no relation to the violations of which this claim is the subject. Nor will the existence of such facility be permitted to remove the telegraph office maintained by Carrier at Glen Park from the logical classification of a "closed office" under Rule 1(d) during the period it is closed in the sense that the one assigned Telegrapher-Clerk is not on duty. We think Rule 1(d) applies squarely.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago Illinois, this 20th day of October, 1967.

DISSENT TO AWARD 15860, DOCKET TE-13651

(David H. Brown, Referee)

This award was contrived to ignore, rather than follow, prior awards which, in part, decided, and denied, identical disputes between the same parties.

Rather than being consistent with previous decisions, as the award observes, it is directly contrary to, and indistinguishable from, Awards 14660 and 14663 (Brown) which not only involved the present parties, but, insofar as here pertinent, denied claims involving the same work which was handled in the same manner at the same location as involved in the subject award.

The foregoing is not the only error. Under a pre-existing joint facility agreement with other carriers, the validity of which the award recognizes,

continuous telegraph service was maintained. In such situations Rule 1(d) plainly was not applicable. This is in accord with Award Nos. 5, 6, 12 and 14 of Special Board of Adjustment No. 226 which involved the present parties. In other words, with continuous telegraph service having been maintained, it mattered not who may have used the telephone because Rule 1(d) was not squarely applicable.

Not only is this award erroneous for the reasons stated, it is equally erroneous in allowing two days' penalty pay to the claimant for each date.

For these and other reasons, we dissent.

J. R. Mathieu
R. A. DeRossett
W. B. Jones
C. H. Manoogian
W. M. Roberts