Award No. 16954
Docket No. TE-15758

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David H. Brown, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Missouri Pacific Railroad (Gulf District), that:

1. Carrier violated the Agreement between the parties when on May 13, 14, 18, 19, 20, 21, 23, 25, 26, 28, 29, 30, June 1, 2, 3, 4, 5, 6, 9, 10, July 13, 14, 15, 17 and 19, 1964, it required or permitted a train service employe not covered by said Agreement to separate the waybills and prepare switch list of cars to be delivered to the Texas Mexican Railway at Robstown, Texas, thereby denying the agent-telegrapher at Robstown, Texas the right to perform work assigned to that position.

2. Carrier shall compensate the agent-telegrapher at Robstown, Texas, one call, three hours pro rata rate applicable to the agent-telegrapher position at Robstown, Texas for each and every day hereinabove listed for this violative act.

EMPLOYES' STATEMENT OF FACTS: This claim involves conductors on trains arriving at Robstown, outside the assigned hours of the agent-telegrapher, separating waybills and preparing switch lists for cars to be delivered to the Texas Mexican Railway at Robstown, Texas. Robstown is a station where only one man is assigned and he is the agent-telegrapher who performs all of the work including the preparation of the switch lists while on duty.

Evidence of copies of the original switch lists prepared by the conductor was furnished to the Carrier when the claim was instituted. Originally one claim was made for the dates of May 13, 14, 18, 19, 20, 21, 23, 25, 26, 28, 29, 30, June 1, 2, 3, 4, 5, 6, 9, 10, and 11, 1964. Later a second claim was made for the dates of July 13, 14, 15, 17 and 19. Both claims were handled to the highest officer and declined by him. Claims are now properly before your Board.

CARRIER'S STATEMENT OF FACTS:

1. There is an Agreement between the parties effective March 1, 1952, on file with your Board, which by reference is hereby made a part of this submission.

call, three hours' compensation at the straight-time rate, each date May 13, 14, 18, 19, 20, 21, 23, 25, 26, 28, 29, 30, June 1, 2, 3, 4, 5, 6, 9, 10 and 11, 1964, when it is alleged unspecified provisions of the Telegraphers' Agreement were violated by reason of the manner in which train service employes handle waybills in delivering cars in interchange to the Tex-Mex Railway at Robstown, Texas.

In our letter of November 2, 1964, we informed you that upon his arrival at Robstown the conductor separates the waybills of cars to be delivered in interchange to the Tex-Mex Railway from those to be set aside at Robstown and then leaves the waybills for the Tex-Mex in a waybill box located near the interchange track. The waybills for cars set out at Robstown are left in the waybill box at the depot. No switch lists are prepared by the conductor and none are required in order to perform this work.

During our conference we explained to you that there is no violation of any of the provisions of the Telegraphers' Agreement by reason of the manner in which waybills covering cars interchange to the Tex-Mex and set out at Robstown are handled, and called your attention to Award 83 of Special Board of Adjustment No. 117 (ORT vs. MOP), and Award No. 5 of Special Board of Adjustment No. 166 (Clerks vs. MOP), which denied claims identical to the ones here involved. For your information we enclosed a picture copy of said awards in another letter addressed to you today involving identical claims at Robstown, except for the dates.

For these reasons, we can find no justification for changing our decision given you in our letter of November 20, 1964, in which these claims were declined.

Yours truly,

/s/ B. W. Smith"

7. We are attaching hereto as Carrier's Exhibit A a copy of Award 114 of Special Board of Adjustment No. 61; also copy of Award 5 of Special Board of Adjustment No. 166, both of which have been available to the General Chairman and contents discussed during conference.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a typical case involving a Scope Rule which is general in nature, thus placing on Petitioners the burden of proof that the disputed work has been traditionally and exclusively reserved to members of the TCE Union. A review of the record made on the property reveals a welter of charges, counter-charges, assertions and denials. From this maze we are unable to extricate proof of exclusivity sufficient to support the instant claim.

It is further urged that Robstown, Texas is a one-man station and that in line with the doctrine first enunciated in our Award 602 all work at such a station belongs to the agent. Conceding the validity of such doctrine, there still devolves on Claimants the burden of proof that the disputed work was station work that had been performed exclusively by the agent under past practice. In the instant case Petitioners failed to meet this burden.

Our decision should not be taken as being ultimately dispositive of the issue on this property. No value of precedent should be attached to a decision which must be made without an adequate development of the facts attending the dispute. A more concise joinder of the issue here may, in the future, result in either a denial or a sustainment of the claim.

As is usually the case, here we find the submissions to this Board are more illuminative than were the exchanges on the property; however, under NRAB Circular No. 1 and our well-settled rules we must not consider this supplementive information. We trust that, if nothing more, this decision will serve to remind those handling claims on the property that it is essentially there, and no where else, that claims are won or lost.

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 was not shown to have been violated.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1969.

DISSENT TO AWARD 16954, DOCKET TE-15758

The majority says this is a typical case involving a scope rule that is general in nature, requiring proof that the work involved has been traditionally and exclusively reserved to the complaining employes. And it further says that the record reveals a maze from which it is unable to extricate proof of exclusivity sufficient to support the instant claim.

If those two conclusions or opinions were correct reflections of the state of the record and nature of the case, I would have little grounds for questioning the decision. But I cannot agree that either is correct.

The majority itself, in the second paragraph of the Opinion of Board, takes note of the fact that the station involved is a one-man station, thus bringing this case into a status different from those where the more general

scope rule theory could be said to apply. Thus it is recognized that this is not a "typical case" as stated in the first paragraph. The contradiction is obvious.

A short time after the present case was considered and a proposed award issued, the same referee, serving with the Supplemental Board, had for consideration two cases involving the "one-man station" theory of scope rule application where, after hearing essentially the same arguments and having cited to him the same awards as in the present case, he rendered awards correctly applying the doctrine. Awards 16951 and 16952. He wrote a well reasoned opinion, tracing the origin, development and retention of the "doctrine" with impeccable care. These awards are in the best tradition of the purposes for which this Board was established.

His refusal, however, to apply the doctrine to the present case is astounding. In Award 16951 we find the following, eloquently correct findings:

> "We likewise recognize the validity of the doctrine. The instant case is a typical one man station claim. The disputed work was undeniably performed by the Agent before the change in procedure. Under the authority of the many cases following the precedent of Award 602 we hold that the work properly belonged to the complaining craft and that the Agreement was violated when such work was assigned to persons outside the scope of the Telegraphers' Agreement. The claims are sustained."

That language — in its entirety — is equally applicable to the present case. Two of the "many cases following the precedent of Award 602" involved the same parties as are here involved — Awards 5654 and 5655 — and were rendered prior to readoption of the present scope rule.

Conceding that the record of this case left much to be desired by way of clarity, there still was no reason for failure to extricate the essential facts. The changed procedure for handling the interchange work necessary to effect delivery to the connecting line resulted in the conductors' performing at least some of the work formerly performed by the claimant agent-telegrapher. Otherwise there would have been no need for the changes. And the Carrier did not deny this. It obscured the General Chairman's showing on the point, but it did not deny his version of the basic facts. It is elementary that an essential assertion made and not denied needs no further proof.

It should be gratefully noted that the majority took care to state that this award should not be taken as being ultimately dispositive of the issues on this property, and that a more concise joinder of the issues may at some future time result in a true resolution of such issues. The parties should take note of these observations and be governed accordingly.

J. W. Whitehouse
Labor Member

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