NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19406
Docket Number TE-7327

Harold M. Weston, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
((Formerly The Order of Railroad Telegraphers)
(
(Missouri-Kansas-Texas Railroad Company
(Missouri-Kansas-Texas Railroad Company of Texas

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

1. Carrier violated and continues to violate the terms of the agreement between the parties when it declined and continues to decline to assign to employes covered by the agreement, the duties of performing communication work at Bellmead, Texas; such work properly coming within the scope of the agreement.

2. The Carrier will be required to assign all of the duties in connection with such communication work, properly coming within the scope of the agreement, to employes covered by such agreement.

3. In consequence of this violation the Carrier shall pay to the senior idle employe and/or employes under the agreement, an amount equal to a day's pay at the applicable rate for each shift on which employes not covered by the agreement performed communication service properly coming within the scope of the agreement. Such payment to be made retroactive one hundred (100) days prior to June 13, 1950, and continuing until the violative condition is corrected.

OPINION OF BOARD: The present claim has travelled a rather long and circuitous route and has been subject to a number of delays in the course of its journey. As a matter of fact, this Board considered it over thirteen years ago and issued an award, Award No. 8704, on February 4, 1959. That Award was based on the submissions of Carrier and Petitioner and no other Organization was given formal notice of the proceedings prior to the date just mentioned.

On November 29, 1961, the Federal District Court for the Northern District of Illinois, Eastern Division, in its case No. 59 C 777, ordered the Third Division to vacate Award No. 8704 and reopen the present case for the purpose of giving the American Train Dispatchers Association and "others possibly interested" notice of the claim and an opportunity to present written submissions and participate in the hearing to be held in the matter.

This Board complied with the Court's Order and the American Train Dispatchers Association and other interested parties were apprised of, and took part in, the proceedings that were thereafter held to resolve the dispute involved in the claim. We have studied the entire record with care, including the submissions and evidence presented by Carrier, the Telegraphers, American Train Dispatchers Association and seven individuals who appeared in the proceedings and submitted evidence. These seven individuals are Carrier officials (one is a general superintendent, three are superintendents, two are assistant superintendents and one is an assistant director of personnel) who formerly were employed by Carrier as dispatchers on the property.

The question at issue is whether or not Carrier breached its Telegraphers Agreement by permitting train dispatchers on the second and third tricks at Bellmead Yard, Texas, to perform the work of receiving and sending messages of record, wheel reports and consists, operating a CTC machine and copying and delivering train orders. The record establishes that the period covered by the claim begins 100 days prior to June 13, 1950, the date the claim was filed, and continues until April 5, 1954, when Carrier awarded the work in controversy to the Telegraphers.

Basically, communication work involving the handling of messages of record, wheel reports, train orders and the like belongs to Telegraphers and are not performed by other classes of employes. Exceptions are made where an applicable agreement provides to the contrary or the scope rule is so vague in its terms that it is appropriate to consider evidence showing that, as a matter of past practice, non-telegraphers have handled such communication work on the property.

In the instant case, Carrier, the American Train Dispatchers Association and the seven individuals mentioned above submitted documentary evidence in support of their contention that on the property involved, it has been an established practice for dispatchers to perform the disputed communication work. Indeed, each of the seven individuals just referred to stated under oath that, on the basis of their own personal experience as dispatchers, they knew that dispatchers regularly attended to those communication responsibilities.

This evidence might be persuasive if Rule 1, the Scope Rule of the Telegraphers' Agreement, were ambiguous. The first three paragraphs of Rule 1 certainly might lead to that result, if the Rule stopped there, for they do not define the work embraced by the Agreement and, in that regard, merely list the positions that are covered in the same manner as do generally worded scope provisions of other agreements.

Here, however, the contracting parties did not stop after the first three paragraphs of Rule 1. They went on to commit themselves to the following language in the fourth paragraph, Rule 1 (d):

> "(d) Station or other employes at closed offices or non-telegraph offices shall not be required to handle train orders, block or report trains, receive or forward messages, by telegraph, telephone or mechanical telegraph machines, but if they are used in emergency to perform any of the above service, the pay for the Agent or Telegrapher at that office for the day on which such service is rendered shall be the minimum rate per day for Telegraphers as set forth in this agreement plus regular rate. Such employee will be permitted to secure train sights for purpose of marking bulletin boards only.
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> NOTE: (It is understood that 'closed offices' also mean an office where other employes may be working not covered by this agreement, or an office which is kept open a part of the day or night.)"

This provision is definite and clear and allows for no exceptions where, as here, a closed office is involved, no emergency has been shown to exist and bulletin board marking duties are not in issue. In Rule 1(d), the contracting parties unambiguously manifest their intent, reached in the give and take of the collective bargaining process, to reserve the work in question for telegraphers and to require no "other employes" to perform that work. In spelling out that intent, they are careful to provide for exceptions, namely, emergencies and marking of bulletin boards, but they carve out no exception whatever to the term, "other employes", although it would have been an easy matter to do so.

In view of the clarity and sweeping nature of Rule 1(d), there is no occasion or sound basis for considering evidence of past practice in this situation. Carrier has plainly violated Rule 1(d) by using train dispatchers at a closed station to handle messages of record "by telegraph, telephone or mechanical telegraph machines."

We have reached this conclusion on the basis of Rule 1(d)'s language to which Carrier as well as Petitioner have committed themselves, and we do not find awards dealing with different properties and rules impressive precedent. Rule 1(e), which applies to telegraph or telephone offices where a telegrapher is employed and not to closed offices, does not affect the result; at the most, it establishes another exception under a different set of circumstances.

It is Carrier's position that the claim must be dismissed in any event because of procedural defects. It argues for example, that the claim is barred by Rule 25's stipulation that "claims arising under this agreement shall not be subject to monetary recovery unless presented in writing within one hundred (100) days from the date of the event or circumstances upon which the claim is based." The present claim alleges a continuing violation, and although it may have had its genesis in events that occurred a considerable number of years before it was filed, it could have been initiated at any time while the violation was still being committed. The effect of Rule 25 is to limit monetary recovery, if any, to a period going back no more than 100 days from the date the claim was filed. Petitioner is not precluded from asserting its claim on June 13, 1950, and Carrier's objection will be overruled. See Third Division Award 3836.

Another point raised by Carrier is that Petitioner filed a similar claim based on an identical complaint and situation towards the end of 1930 but allowed it to lapse by not processing it before a system adjustment board that had been established by agreement between Carrier and Petitioner. Although this point was not argued while the Third Division was passing upon the case back in February 1959, it was ably and vigorously pressed by Carrier's representative in our current discussions of the case and since it was raised by Carrier on the property, it will be considered at this time. The contention is not unpersuasive, particularly as it was argued by Carrier's representative; it certainly makes practical sense that disputes be resolved with finality.

The difficulty with the contention, however, is that there was never any resolution of the merits of the dispute by the system board or other competent authority or settlement of the issue by the parties. The fact that Petitioner permitted a 1930 claim to lapse does not establish, in the absence of other evidence not presented here, that it agreed to settle the question and permit Carrier to violate the plain terms of Rule 1(d) for all time. The claim Petitioner presented in 1930 can not be resurrected for it lapsed under the provisions of the agreement setting up the system adjustment board. This Division, however, is certainly at liberty to pass upon a similar claim covering a period some twenty years later, particularly when it finds that the merits of the issue have never been adjudicated or settled and that the system board is no longer in existence, the agreement establishing it having been superseded by subsequent agreements.

While it does appear that the condition of which Petitioner complains existed for some years prior to the date it filed the present claim, we are not satisfied that the claim should be dismissed because of laches, particularly since the monetary portion of the claim was not increased by any delay on Petitioner's part but is limited by the provisions of the Agreement and Petitioner itself to a reasonable period.

We also find no merit in the contention that the claim is too indefinite, inasmuch as the names of and compensation due employes referred to in part 3 of the claim are readily and practicably ascertainable.

The claim will be sustained.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E A Killeen
Executive Secretary

Dated at Chicago, Illinois, this 15th day of September 1972.