Under the

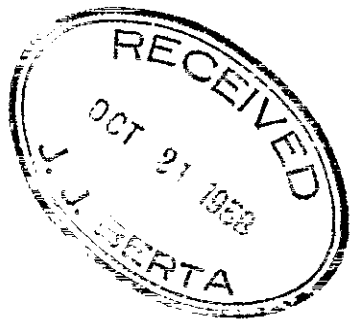
RAILWAY LABOR ACT

Special Board of Adjustment No. 226

Hearings April 9-30, 1958

Dallas, Texas

Award No. 14



PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI-KANSAS-TEXAS LINES

STATEMENT OF CLAIMS:

Group 3, ORT Claims, consisting of nine individual claims, listed below, in behalf of Extra Telegrapher, B. J. Hoover, Muskogee, Oklahoma, each for eight hours' pay at the minimum rate for telegraphers account employes not subject to Telegraphers' Agreement, usually clerks, transacting daily routine of railroad communications business, mostly, traffic business, during March, April and May, 1957, by means of telephone communications with employes at other stations, who also are not subject to the Telegraphers' Agreement.

A listing of the essential communications information comprising the nine individual Group 3 claims, follows:

Group 3 Claim No.	Office From	Office To	Nature of the Communication
MU - 2	Tulsa Traffic	Muskogee	Consist of train.
	" "	Denison	Record on car.
MU - 3	Muskogee Freight	Tulsa Agent	Supervisory Agent Tulsa refused to handle the message to Train No. 65 to pick up car send at sand pit. Muskogee Clerk then gave the message to the Dispatcher at Parsons to handle.
MU - 4	Muskogee Yard	Parsons Clerk	Request B-103 reports for April 6-7-8, 1957.
MU - 6	Tulsa Traffic	St. Louis Yard	Obtain record on two cars.
	" (Bishop)	Muskogee Yard	Order 40 ft. flat car for Tulsa.
	" (Magee)	Dallas	Clearance for overloaded tank car.
MU - 7	Muskogee Freight	Parsons Agent	To correct waybill on carload shipment.
	Parsons Agent	Muskogee Clerk	Repairs to flat car.
	Tulsa Agent	Dallas	Clearance for oversized carload shipment.
	Denison Clerk	Tulsa Clerk	Trace cars out of K. C. and St. Louis.
	Tulsa Clerk	Muskogee Rip Track	Obtain record on car from K. C.
	Muskogee Roundhouse	Tulsa Agent	Obtain address of Linde Air Products Company
MU - 8	Tulsa Clerk	Denison Yard	Obtain Consist Train No. 81.
	" "	Parsons Freight	Obtain report on carload shipment.
	" "	Muskogee Rip Track	Obtain report on bad order car.
	" Agent	Dallas Traffic	Obtain clearance for oversized carload.
	" Clerk	Parsons Freight	Diversion instructions on six cars for connecting line at Kansas City.

MU - 10	Muskogee Freight	Ft. Worth Clerk	To report arrival time of triple overload.
	Tulsa Clerk	Ft. Scott Clerk	To report arrival of carload shipment.
	" "	Kansas City Clerk	Trace car to connecting carrier.
	" "	Kansas City Clerk	Trace perishable shipments for No. 271.
	" "	Dallas Traffic	Obtain clearance on oversized tank car.
MU - 11	Tulsa Clerk	Parsons Clerk	Diversion instructions on 21 cars to connecting lines.
MU - 12	Muskogee Clerk	St. Louis Clerk	Obtain movement of C/L salt.
	Tulsa "	Dallas Traffic	(purpose of communication not stated).
	Glen Park "	Muskogee Yard	Obtain report on carload magazines.
	Tulsa "	Denison Clerk	Diversion instructions GATX 3012.

POSITION OF EMPLOYES:

It is the position of the ORT that the communications work described in the claims is work belonging to ORT employes under Scope Rule 1 (a) and that its performance by employes who are not subject to the Telegraphers' Agreement violates Rules 1 (a) and 1 (d).

POSITION OF THE CARRIER:

The carrier opposes the claims on the grounds that (1) in each case the telephone was used for an "ordinary conversational purpose" and such use is not in violation of the agreement, (2) all stations were open stations at the time the conversations were had, (3) Rule 1 (d) applies only at "closed offices" and payment made under the rule is to "Agent or Telegrapher at that office for the day on which the service is rendered," and (4) B. J. Hoover, is an extra telegrapher and accordingly he is not the payee agent or telegrapher at "that station" on any day for which claim is made, even if a violation of Rule 1 (d) should be sustained.

FINDINGS AND OPINION:

Logically, in order to determine whether penalty Rule 1 (d) is being violated, the work in question should first be tested by the Scope Rule, Rule 1 (a). Because if the work in question does not come within the purview of the Scope Rule, it lies wholly outside the terms of the agreement.

In Addendum No. 3 of the last agreement negotiated between the Carrier and the ORT, effective September 1, 1949, approximately four hundred (400) ORT communications positions are listed. These four hundred (400) positions are established at approximately two hundred twenty-five (225) stations on the Carrier's lines.

The cities (stations) mentioned in these claims comprise the principal stations on the Carrier's lines. By far the greater portion of the Carrier's total railroad communications service is handled between these important stations and between them and other stations on its lines.

At the stations mentioned in the claims and at other stations on the Carrier's lines are positions filled by ORT employes under such job titles as Agent, Freight Agent, Ticket Agent, Agent-Telegrapher, Telegrapher, Towerman, Wire Chiefs, et cetera. These job titles and still others are all enumerated in the Scope Rule.

Does the work described in the claims belong to established ORT positions included in the claims?

The communication work described in the claims is as old as railroad itself. For more than a half century before the advent of telephones to the railroads, the railroad telegraph wires were clicking out Morse code messages, daily, by the tens of thousands covering exactly the kinds of work described in the claims, i.e., consists, diversions, car records, car orders, car repairs, tracing shipments, clearances for oversized and overloaded cars, et cetera.

Such communications work, all authorities agree, is deemed to have followed the ORT Morse code employes into the telephone era. True, it did not follow the ORT Morse code employes by express terms in their agreements with the carriers. But the contracts, written or unwritten, union or non-union, have always been recognized as giving such communication work at established ORT positions to the telegrapher, exclusively. Indeed, for more than a half century preceding the advent of the telephones to the railroads, no one else could perform it.

In Award No. 1 of this Special Board of Adjustment No. 226, we have held that, since train order and train service work at "blind sidings" performed by train crew employes with the train dispatcher is unrelated to established positions under the Telegraphers' Agreement, it does not fall within the purview of the Scope Rule "Blind sidings" work is permissible as the result of a new use of the telephone. Such work has never been traditionally performed by Morse code telegraphers. Because, Morse code telegraphers have never worked at "blind sidings."

But the clerks and others who are performing railroad communications work, like the work described in the instant claims, are not working at "blind sidings", either. They are working at stations bearing such famous Katy names as Parsons, Muskogee, Denison and Dallas. Morse code telegraphers have handled the same kinds of railroad communications as those described in the claims, at these identical stations, for nearly a half century before the advent of the telephones to the M-K-T Lines.

It is unbelievable that the Carrier contends seriously that the communications work described in the instant claims is "ordinary conversation." Such contention is refuted by the history of railroading since its beginning in the last century, not only on the lines of the Carrier but elsewhere throughout the United States.

The mere designations of the communications, which the Carrier does not challenge, e.g., train consists, car tracing, diversion instructions, et cetera, prove that the sender had written messages before him. Some of them were long. Great care is required to transmit car number and initials. The receiver, by the very nature of the communications, was compelled to copy them for the further attention they required. They were not "ordinary conversation." They were not conversations in any sense of the word. They were the core of railroad communications business. They were communications which have been transmitted and received by ORT employes since the beginning of railroading.

If the kind of communication work described in the claims is "ordinary conversation" and therefore does not come within the purview of the Scope Rule, then all other conceivable kinds of railroad communications work is "ordinary conversation." Such a deduction, if ever fully activated, would destroy the value of the Telegraphers' Agreement for all communications work except train orders at established ORT positions.

It would be unfair to apply the doctrine of past practice, acquiesence or estoppel against the ORT in this situation in order to enable us to make a finding that the communication work described in the claims are "ordinary conversation." For forty years the Order of the Railroad Telegraphers on the property of this Carrier has been opposing the gradual shift of communications work of the kind described in the instant claims from ORT positions to clerical positions. Despite such efforts the trend has continued. How many established ORT positions have been closed on account of railroad communications work being performed by clerks and others by use of the railroad telephone system, it would require research to provide an answer.

In our findings that the Scope Rule has been violated we are not unmindful of the fact that it may benefit the carrier's business in a large measure for clerks and others who are engaged in traffic work to perform some of the related communications work themselves. Directness is conducive to greater efficiency. The Carrier is in dire need to use all available facilities and conveniences not only to increase efficiency but to eliminate waste in its operations.

But we have no authority to decide or "adjust" the problem confronting the parties in disregard of the long established contractual relationship between them. The matter of Scope Rule violations is a problem for the parties themselves to solve by adopting a coordinated program through negotiations or mediation.

Finally, although we find that the communication work described in the instant cases belongs to ORT positions at both the forwarding and receiving stations named in the claims, we also find that the agreement does not contain any penalty rule for violations of the Scope Rule, as such.

The next and final issue to determine is whether the Carrier by performing the communications work described in the claims, and thus violating the Scope Rule, has violated Rule 1 (d).

Rule 1 (d), follows:

> 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.
>
> 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.)

Obviously, from a reading of Rule 1 (d) we would need to find that the offices named in the claims were "closed offices" when the communications occurred before we could sustain penalty awards in favor of the employes under Rule 1 (d).

The ORT has not submitted any evidence that the offices, or any of them, were "closed offices" at the time the described communications services were performed. By asserting its right to penalty awards under Rule 1 (d), the ORT leaves it to us to infer, if we will, that the offices were "closed offices" at the time the communication services were performed.

On the other hand, the following are quoted statements from the Carrier positively asserting that the stations named in the claims were all open ORT offices at the time clerks or others performed the work described in the claims by phone:

1. The claims allege violation of Rule 1 (d). Rule 1 (d) has no application as Rule 1 (d) applies only to closed stations.

2. All stations were open stations at the time conversations were held.

3. These claims involve conversations at open offices on days on which claimant, an extra man, was not the Agent or Telegrapher.

4. Muskogee was an open office at all times and at the time alleged telephone conversation was alleged to have taken place.

5. Muskogee was an open station. Rule 1 (d) has no application as Rule 1 (d) applies only to closed stations.

6. Muskogee and Parsons were open stations. Rule 1 (d) has no application as Rule 1 (d) applies only to closed stations.

7. Tulsa was an open station.

8. Parsons, Muskogee, Tulsa and Denison was open offices at the time alleged telephone conversations were had.

Glen Park, Kansas City, and Dallas are included in similar statements of Carrier.

We find therefore that none of the offices involved in the claims were "closed offices" as defined in Rule 1 (d), and that Rule 1 (d) is not applicable.

In conclusion, we summarize our findings, as follows:

(1) The Scope Rule of the Telegraphers' Agreement was violated by the Carrier by its performance of the communications work described in the claims but the Agreement provides no penalty or other remedial relief for violations of the Scope Rule, as such.

(2) We find also that, inasmuch as the offices named in the claims were "open offices" as distinguished from "closed offices" as defined in Rule 1 (d), Rule 1 (d) was not violated.

AWARD:

Claims denied.

/s/ Daniel C. Rogers
Daniel C. Rogers, Chairman
Fayette, Missouri

Dissenting as shown below
W. I. Christopher, Employee Member
Deputy President, O. R. T.
3860 Lindell Blvd.
St. Louis 8, Missouri

/s/ A. F. Winkel
A. F. Winkel, Carrier Member
Ass't. General Manager
Missouri-Kansas-Texas Lines
Dallas, Texas

Dallas, Texas

August 1, 1958

DISSENT to Award No. 14 of M-K-T Special Board of Adjustment No. 226

The undersigned dissents from the Findings, Opinion and Award of the majority for the following reasons:

The nine claims represent 28 instances where communication service was performed by employes other than those covered by the Telegraphers' Agreement. The violations are briefly itemized by the majority.

The first question raised is whether the work involved was subject to the Scope Rule. On this the majority finds that:

> "The communication work described in the claims is as old as railroading itself. For more than half a century before the advent of the telephones to the railroads, the railroad telegraph wires were clicking out Morse code messages, daily, by the tens of thousands covering exactly the kinds of work described in the claims, i.e., consists, diversions, car records, car orders, car repairs, tracing shipments, clearances for oversized and overloaded cars, et cetera.
>
> Such communications work, all authorities agree, is deemed to have followed the ORT Morse code employes into the telephone era. True, it did not follow the ORT Morse code employes by express terms in their agreements with the carriers; but the contracts, written or unwritten, union or non-union, have always been recognized as giving such communication work at established ORT positions to the telegraphers, exclusively. Indeed, for more than half a century preceding the advent of the telephones to the railroads, no one else could perform it.
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> It is unbelievable that the carrier contends seriously that the communications work described in the instant claims is 'ordinary conversation.' Such contention is refuted by the history of railroading since its beginning in the last century, not only on the lines of the Carrier but elsewhere throughout the United States.
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> In our findings that the Scope Rule has been violated we are not unmindful of the fact that it may benefit the carrier's business in a large measure for clerks and others who are engaged in traffic work to perform some of the related communications work themselves. Directness is conducive to greater efficiency. The Carrier is in dire need to use all available facilities and conveniences not only to increase efficiency but to eliminate waste in its operations.

"But we have no authority to decide or 'adjust' the problem confronting the parties in disregard of the long established contractual relationship between them. The matter of Scope Rule violations is a problem for the parties themselves to solve by adopting a coordinated program through negotiation or mediation.

Finally, although we find that the communication work described in the instant cases belongs to ORT positions at both the forwarding and receiving stations named in the claims, we also find that the agreement does not contain any penalty rule for violations of the Scope Rule, as such."

But in spite of these observations the majority summarizes its findings:

"(1) The Scope Rule of the Telegraphers' Agreement was violated by the Carrier by its performance of the communications work described in the claims but the Agreement provides no penalty or other remedial relief for violations of the Scope Rule, as such.

(2) We find also that, inasmuch as the offices named in the claims were 'open offices' as distinguished from 'closed offices' as defined in Rule 1 (d), Rule 1 (d) was not violated."

In other words, the operation was successful but the patient died! Here, quite counter to its findings in Award No. 1, the majority does not hold that the locations are of the "blind siding" variety. It finds that the work performed is covered by the Agreement but that "the Agreement does not contain any penalty rule for violations of the Scope Rule, as such." In an early Railway Labor Act case, Texas and New Orleans Railroad Company, et al., Petitioners, vs. Brotherhood of Railway and Steamship Clerks, et al. (No. 469 - October Term, 1929), the Supreme Court of the United States had this to say about the absence of penalty provisions:

"The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. The same is true of the prohibition of interference or coercion in connection with the choice of representatives. The right is created and the remedy exists. Marbury v. Madison, 1 Cranch 137, 162, 163."

In Award 2855, the Third Division of the National Railroad Adjustment Board had this to say:

> "Where an employe sustains a loss by reason of a violation of the agreement, he must be compensated for such loss, even though no specific penalty is imposed by the rule violated. To hold otherwise would mean that agreements could be disregarded at any time. If agreements are to be effective, the guilty party violating the contract must be penalized."

Award 3001:

> "It is then urged that even if there be a violation of the Agreement that no penalty is specified for non-compliance and that Claimant is left without a remedy. It is true that no penalty is provided by Rule 37. That, however, does not prevent a recovery of compensation earned under the very terms of the Agreement. No penalty is being inflicted on the Carrier in requiring it to do what it voluntarily contracted to do. A penalty is ordinarily assessed for the purpose of punishing the offender, it is a requirement in addition to the ordinary liability which usually grows out of a breach of an Agreement."

Award 5186:

> "The position of the Carrier is that, while it has not fully performed its obligation under Article 8, Section 10, the Agreement provides no penalty for such failure to perform and the Petitioner does not show that it has been damaged.
>
> The Carrier has admitted that it has not complied with Article 8, Section 10 of the Agreement and the question now before the Board is whether the Petitioner may recover any penalty or damages for nonperformance.
>
> It must be conceded that the Agreement does not contain a specific provision for a penalty in case of nonperformance of the obligation imposed by Article 8, Section 10. It is also well established by the precedents of previous awards that the Board will not impose a penalty where none has been specified in the Agreement. This is a sound doctrine. But it does not necessarily follow that where no penalty has been provided, this Board is helpless and without authority to make an award which will tend to enforce compliance with the terms of the contract.
>
> It is a well established principle that if a party to an Agreement fails to perform that which he has undertaken to perform and such nonperformance results in a loss to the other contracting party, then the aggrieved may require the nonperforming party to compensate him for the loss suffered by reason of the breach. By terms of the Railway Labor Act, this Board is authorized to consider

"disputes arising out of grievances or interpretations of Agreements between the parties and to make an award. The Board would fail in its objective of settling disputes if there is not implied in the broad purposes of the Act the authority of the Board to enforce its awards by an appropriate finding of damages, if any exist, and directing payment thereof."

There are many other such awards emanating from the Third Division. The Board has necessarily followed the rule of law that where a party sustains a loss by reason of breach of contract, he is, as far as money can do it, to be placed in the same situation, as if the Agreement had been complied with. In other words, compensation to the injured party is the foundation principle of damages, even where no loss accrues from the breach claimant is nevertheless entitled to nominal damages. The claims here were for eight hours' pay for each of the days a violation of the Agreement occurred. Such a measure of damages, for a minimum day, has been upheld by the Third Division of the National Railroad Adjustment Board time and again, a few being Awards 1220, 2817, 4457, 4459, 4882, 5992, and 6809. The Carrier here is no stranger to this fair and reasonable penalty.

Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. Rarely do they specify the amount of damages which would flow from a breach. This is especially true of agreements in the railroad industry. The majority's failure to allow the damages requested is further indicative, as in Award No. 1, of its regard for the Agreement as being nothing more than a mere contract of employment rather than a craft and class agreement, made pursuant to the Railway Labor Act and on file with the National Mediation Board, wherein the employes covered thereby are to perform the work of the craft and classes subject to the Agreement in accordance with their seniority rights to such work.

The majority has found that the work was under the Telegraphers' Agreement and entitled to be performed by telegraphers. In the absence of specific performance of a contract the common law requires an assessment of damages which will put the injured party in as good a position as if the agreement had been actually performed. Here the majority has confirmed a violation but fails and refuses to declare for specific performance or damage payments in lieu thereof. The award, therefore, stands not only as a monumental injustice to the telegraphers on the M-K-T Railroad but also as an appalling illustration of the lack of judicative faculty in the field of contract law as it attaches to the Agreement and the instances cited in this award.

Employe Member