Under the

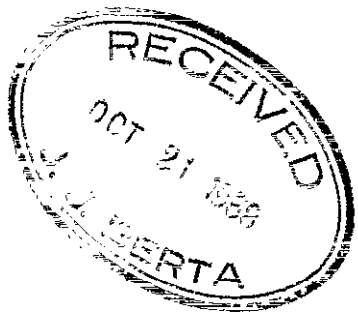
R A I L W A Y  L A B O R  A C T

Special Board of Adjustment No. 226

Hearings April 9-30, 1958

Dallas, Texas

Award No. 15




PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MISSOURI-KANSAS-TEXAS LINES

STATEMENT OF CLAIMS:

Group 3 claims, consisting of eight individual claims, listed below in behalf of B. J. Hoover, Extra Telegrapher, Muskogee, each for eight (8) hours' pay at the minimum rate for telegraphers account extra gang employe using a portable telephone at or near Canadian, Oklahoma, on April 8, 9, 10, and 11, 1957, to transmit "reduce speed" and work train material messages to Parsons and Muskogee in violation of Rule 1 (a) and 1 (d) of the Telegraphers' Agreement.

A listing of the essential communications information in the aforesaid eight individual claims in Group 3, follows:

| Group 3 Claim No. | From | To | Nature of Messages |
|---|---|---|---|
| MU - 14 | Canadian | Parsons and Muskogee | Reduce speed instructions for trains. |
| MU - 15 | " | Parsons | Reporting on ties laid. |
| MU - 16 | " | Parsons and Muskogee | Reduce speed instructions for trains. |
| MU - 17 | " | Parsons and Muskogee | Reduce speed instructions for trains. |
| MU - 18 | " | Parsons | Report on ties laid. |
| MU - 19 | " | Parsons and Muskogee | Reduce speed instructions for trains. |
| MU - 20 | " | Parsons | Report on ties laid. |
| MU - 21 | " | Parsons | Request for 100 kegs spikes. |

FINDINGS AND OPINION:

As indicated in the Statement of Claims, the ORT contends that the messages transmitted by the extra gang employe is work within the purview of the Scope Rule, which, when performed by others who are not subject to the ORT Agreement, violates Rule 1(d).

Canadian is a "blind siding." There are no ORT employes assigned to positions there. It is therefore not a "closed office" within the definition of that term in Rule 1 (d).

Rule 1 (d) provides that, if "other employes" at "closed offices" transmit or receive messages, or perform other enumerated communications "in emergency", "...the pay for the Agent or Telegrapher at that office for the day on which the service is rendered shall be the minimum rate per day for the Telegraphers as set forth in this agreement plus regular rate."

Rule 1 (d) is not a penalty rule for communications work performed at or near "blind sidings" with portable equipment by an extra gang employe.. It is a penalty rule for work performed at "closed offices" with permanently established positions.

Therefore, we find that the communications described in the claims, when performed from day to day by portable telephone at miscellaneous points between stations along the line of carrier at extra gang projects or at washouts and similar work jobs, may be performed by an employe who is not covered by the ORT Agreement. The portable telephone is a new convenience and facility and temporary work which can be performed by its use at "blind sidings" or other isolated points between station is not covered by the Scope Rule. Such work does not belong to ORT employes exclusively. The Scope Rule safeguards telegraphers' work at established positions. It does not guarantee work to them which is disassociated from established ORT positions.

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. 15 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 Award covers eight violative instances at Canadian, Oklahoma where an extra gang timekeeper, an employe not covered by the Telegraphers' Agreement, used the telephone to transmit messages in message form from Canadian to Parsons, Kansas and Muskogee, Oklahoma on four consecutive dates of April 8, 9, 10 and 11, 1957. The current agreement lists an agent-telegrapher's position at Canadian and each agreement since 1904 has listed such a position. The position was closed some time prior to the dates of violation.

As in Award No. 1, the majority decrees that inasmuch as this position is no longer manned by an employe covered by the Agreement it exists as a "blind siding" and in the light of such pseudo classification the Carrier may cause any amount of communication work to be performed by other employes so long as the Carrier fails and refuses to properly man the station with a telegrapher.

In its Award No. 14 the majority concluded that such communication work was covered by the Scope Rule and its handling by other employes violated the rule. But here it declares that the very same work is not covered by the Scope Rule! Of course the majority's first premise is faulty. There is no such thing as a "blind siding", either in Carrier's timetables or its Book of Rules. There is no such term in the Telegraphers' Agreement. The majority, however, seems to have had little trouble in conjuring the expression in order to arrive at its award.

The "choice" observation made by the majority is contained in the last two sentences:

> "The Scope Rule safeguards telegraphers' work at established positions. It does not guarantee work to them which is disassociated from established ORT positions."

In other words, the majority's holding is that the Scope Rule is meaningless, wholly without substance, and mere surplusage to the Agreement itself. The same view could be taken with respect to every other rule of the Agreement, i.e., that they will apply only when the Carrier proposes to apply them. On the matter of the Scope Rule safeguarding telegraphers' work at established positions. This is one more contradiction to be added to the others. Examine Award No. 14, where it was held that while the scope rule covered the work, nevertheless "we also find that the agreement does not contain any penalty rule for violations of the Scope Rule, as such." Now just in what way does the majority arrive at its conclusion in this award that the scope rule safeguards telegraphers' work? What rationalism is there demonstrated by such pronouncements? But, of course, it immediately modifies this position by adding that the scope rule "does not guarantee work to them which is disassociated from established ORT positions." So, after all of this strained effort of trying to prove that black is white, the majority comes up with a denial award which is so far off the target of a hundred or more awards of the Third Division as to make it an absurdity.

Compare this award with Third Division Award 1552:

"In our opinion it is established that the foreman and others of the Extra Gang did use the portable telephone for the purpose of sending and receiving information of record, such as line-ups of trains, distribution of labor reports, progress of trains, etc., all of which work is of the class that comes within the scope of the Telegraphers' Agreement, and that the senior idle telegrapher should have been assigned to perform this service. See Awards 604, 1220, 1303, and 1535."

The scope rule of any agreement preserves to the employes covered by its terms such work as they were customarily engaged in at the time of its negotiation. The Third Division of the National Railroad Adjustment Board has repeatedly held that work of a class covered by the scope rule of an agreement belongs to the employes in whose behalf the agreement was made and cannot be taken from them or delegated to others without violating such rules. In the agreement before us there is the express implication that all of the work of the several classes named will be performed by employes of those classes except in cases of emergency and even then penalty payments will be made to the employes. The first premise to be recognized is that all of the work performable by such classes is theirs to perform if it be required.

The current agreement, effective as to rules September 1, 1949, and as to rates of pay February 1, 1951, contains the following listing:

"Canadian:
Agent-Telegrapher . . . . . $1.5875 Hour"

There is no question that up until the Agent-Telegrapher's position at Canadian was closed by the Carrier the occupant thereof performed all of the communication work emanating at that point. The Carrier had the right to abolish the position when there was no further work to be performed. But when there was occasion for telegrapher's work to be performed at Canadian it was the Carrier's obligation under the Agreement to recall a telegrapher. Instead of doing so, it permitted or required an itinerant timekeeper who had no standing whatever as a telegrapher at Canadian or elsewhere to perform the communication work arising at Canadian on these dates. So long as a telegrapher was willing and available for such work, it was patently wrong for the Carrier to utilize a timekeeper in its performance.

The Carrier failed to establish by evidence any right to assign such work to an employe outside of the Telegraphers' Agreement. There were no emergencies involved and no exceptions set out in the Agreement. Could anyone for a moment assume that the Carrier would be privileged to recall the timekeeper back to Canadian a week later to perform similar communication work to no end simply on the ground that it did not maintain a telegrapher's position at that point? We think not. We think that when the Carrier wrongfully avoids assigning a telegrapher in such instances the telegrapher class under the Agreement is being deprived of the rights of seniority to perform extra telegrapher's work at a station specifically designated in the Telegraphers' Agreement.

The majority contends that Rule 1 (d) is not a penalty rule for communications work performed at or near "blind sidings" with portable equipment by an extra gang employe; that it is a penalty rule for work performed at "closed offices" with permanently established positions. The rule states that 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 written messages by telegraph, telephone, or mechanical telegraph machines, but if they are used in emergency to perform any of the above service * * *. There is the NOTE to the rule that states:

> "It is understood that 'closed offices' also means 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."

Canadian was not an office kept open a part of the day or night, but it was an office where another employe was working not covered by the Agreement. The timekeeper was the other employe. There was no emergency and, consequently, the Carrier was bound not to permit the transmission of messages from Canadian by such an employe. In the absence of an emergency the Agreement was breached, i.e., the Scope Rule was violated and the measure of damages - a day's pay - was the appropriate penalty for the violation. A rule which specifies that other employes at closed offices shall not be required to forward written messages by telephone means just that, with a single proviso that they may be used in emergency only. That the Carrier used a timekeeper to transmit messages by telephone at Canadian, Oklahoma in the absence of an emergency is positive proof that it disregarded its commitment that it would not require such service from "another employe" at such an office.

The majority alleges that the portable telephone is a new convenience and facility and temporary work which can be performed by its use at "blind sidings" or other isolated points between stations is not covered by the Scope Rule. In the first place, the "portable telephone" is not a "new convenience and facility." Portable telephones have been in existence for use in cases of emergency ever since a telephone system has prevailed on this property. Whether old or new, they are nothing more than telephones when employed for the same purposes as other telephones possessed by the Carrier. As for that, portable telegraph instruments have been in existence almost since the establishment of telegraph systems for use at wrecks, washouts and other temporary sites. The fact that a portable telephone was used at Canadian does not change the aspect of the claim a single degree. For the majority to dwell on it amounts to nothing more than a superficial window dressing for a denial award. The fact remains that the Agreement makes no exception between telephones and portable telephones because there is none, any more than there is a difference between a typewriter and a portable typewriter.

The award so arrived at is a travesty to arbitral jurisdiction.

W. J. Christopher
Employe Member