

Dissent to Award No. 12,  
Special Board of Adjustment No. 353.

I must dissent to this award.

It holds that a conductor on a local freight train violated rights of an agent-telegrapher by looking at a car which had been placed for unloading at an intermediate station and observing that it was sealed and consequently not empty. The conductor had instructions to pick up the car if empty. He took no further action after noting that it was not empty. Thus the only act involved was determining that the car was not empty.

This occurred on rest day of the agent-telegrapher, and claim for a call was sustained. It is well known in the industry that various persons determine whether cars are empty or under load. It is incidental to the work of train crews, their work of switching and picking up or setting out cars often being contingent upon their determination whether a car is empty or under load.

It is also well known that cars unloaded are commonly reported empty by the consignee and most cars are switched out on this determination, and determination by the train crews handling the switching, rather than on basis of any physical check of the cars by station forces.

The locals, which handle most of the switching and movements to and from intermediate stations, arrive at Grapevine in the late afternoon and at night. Northbound local (No. 24) usually arrives between 4 PM and 6 PM and the southbound local (No. 23) after 10 PM.

The Employees advanced nothing in support of the claim except reference to the morning check of the station tracks made by the agent-telegrapher when going on duty about 8 AM, stating:

"The checking of the yard for loaded or empty cars is the exclusive work of the agent-telegrapher at Grapevine. Said function is an important and necessary duty of the agent-telegrapher as confirmed in Carrier's Book of Instructions. It is work regularly and normally performed by said employee Monday through Friday. When empty cars are found by the agent-telegrapher at Grapevine as a result of his yard check, it is his duty to send a switch list to Hodge, listing all the switching to be done by train No. 24 at Grapevine. It is not a duty of train crews to check cars in yards."  
(Emphasis supplied)

This morning check to which they refer is for assessing demurrage charges against consignees who fail to unload cars within

a certain period of time and for compiling the daily car situation report. Most cars, of course, are unloaded during the day and evening, and empties move out on the locals late that afternoon or that night. Consequently, it is obvious that the cars usually do not move out because of being found empty by the agent during the morning check. They move out because they are reported empty by the consignee or because they are found empty by the train crew pursuant to instructions to pick up a car or cars if found empty.

The agent-telegrapher, of course, lists cars for movement if and when found empty on the morning check, but any finding that empty cars move out of Grapevine only after the agent has determined by a physical check that they are empty manifestly conflicts with obvious facts. Cars are not held from 24 to 30 hours so that someone may make a simple determination that they are empty. That determination is not even a function reserved to railroad employees, as pointed out above.

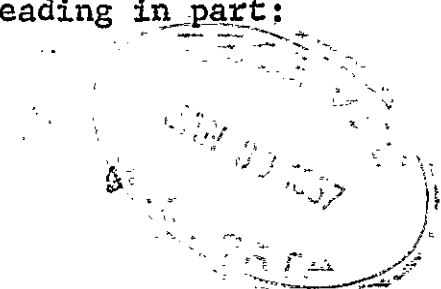
Third Division Award 14305, with the same Neutral acting in this case, in construing a rule identical with the rule on which present claim was sustained, held:

"The awards of this Board are clear and the Claimant is entitled to a sustaining award if it can be shown that he alone performed the work in question during his assignment. The Employees must bear the burden of proving their case." (Emphasis supplied)

In the present case the Opinion indicates telegraphers hold still broader rights:

"It is clear from the record that the work in question is work regularly performed by Claimant during his assigned hours."

The fallacy in this conclusion is illustrated by other duties which it is well known are handled by the agent-telegrapher and also handled by train crews. For example, the agent-telegrapher at Grapevine, like other telegraphers, inspects trains which pass the office during his assigned hours for hot boxes, dragging equipment, etc., as shown by Rule 110 of the Code of Operating Rules applicable to train crews and telegraphers, reading in part:



"110. Running Inspection of Trains on Road.--  
All employes must, as far as practicable, observe passing trains for defects.

"Trainmen of freight and passenger trains, yardmen and operators must observe passing trains for defects.

"Operators at intermediate stations, unless excused by train dispatcher, will stand on station platform when trains are passing.

"Defects to be looked for include brakes sticking, wheels sliding, brake rigging down, swinging doors, hot journals, protruding objects, lading dangerously shifted, evidence of fire or any other condition which will endanger movement of train."  
(Emphasis supplied)

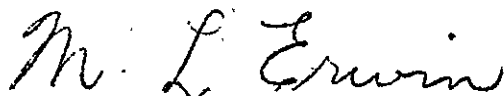
Train crews, waiting for another train to pass, station themselves to inspect the passing train regardless of whether telegrapher is on duty. Also, they inspect their own train when they stop at a station regardless of whether telegrapher is on duty, either by walking the train or by watching it pull by a member of the crew as it departs.

Other illustrations could be given such as unloading freight, etc., but the above shows that the simple fact that an agent-telegrapher performs a certain duty during his assigned hours is not proof in itself that he has right to perform it to the exclusion of others, either during or outside his assigned hours.

Looking at a car to determine whether it is empty manifestly is not a duty that the Carrier could reasonably assign exclusively to an agent to the exclusion of train crews, and other persons whose work is with cars and is affected by the simple fact whether they are loaded or empty.

As pointed out above, it does not follow from the fact that agent-telegrapher checks tracks for morning reports, that he checks all cars at other times to see whether they are empty. The Employees clearly did not meet the burden of proof they assumed in filing claim.

In my opinion the award is erroneous.

  
M. L. Erwin, Carrier Member