Award No. 27

Docket No. 27

SPECIAL BOARD OF ADJUSTMENT NO. 553

TRANSPORTATION - COMMUNICATION EMPLOYEES UNION

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

CARRIER: TEL-152-1106
TEL-152-1107
COMMITTEE: I-481-1
I-482-1
GR. DIV.: 762.1/53

ROY R. RAY, Referee

STATEMENT OF CLAIM:

"1. (A) Carrier violates and continues to violate the Agreement between the parties when it requires or permits employes not covered by said Agreement (usually the Assistant Chief Clerk) at Yuma, Arizona to transmit messages ('FS' Reports) by telephone to someone in the Chief Train Dispatcher's Office at Los Angeles, California.

(B) Carrier shall be required to compensate in the amount of a special call payment on each date mentioned: J. P. Ray, 2nd Wire Chief-Telegrapher-Clerk, Yuma on November 19, 20, 21, 22, 25, 26, 27, 28, 29, December 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 1959, January 1, 2, 3, 6, 7, 8, 9, 10, 1960 and W. T. Huey, Relief Wire Chief-Telegrapher-Clerk, Yuma, on November 23, 24, 30, December 1, 7, 8, 14, 15, 1959, January 4, 5, 1960; and, on each date subsequent to January 10, 1960 compensate the above named claimants, or their successors, in the same amount continuing on a day to day basis until the violation is corrected.

"2. (A) Carrier violates and continues to violate the Agreement between the parties when it requires or permits employes not covered by said Agreement (usually the 'Ink Clerk') in the Chief Train Dispatcher's Office at Los Angeles, California to receive and copy, by use of telephone, messages ('FS' Reports) from someone at Yuma, Arizona.

(B) Carrier shall be required to compensate employes in 'HU' General Telegraph Office Los Angeles in the amount of a special call payment on each date mentioned: G. Parke, Telephone-Message-PMO, on November 19, 20, 25, 27, 30, December 1, 2, 3, 4, 8, 9, 10, 11, 14, 15, 16, 1959, January 4, 5, 6, 7, 1960; O. S. Johnson, Extra Telephone-Message-PMO, November 23, 24, 27, 1959; Laura O'Day, Extra Telephone-Message-PMO, December 7, 21, 22, 23, 24, 28, 29, 30, 1959; William Rogers, Extra Telephone-Message-PMO, on December 17, 1959; J. F. Hayes, Extra Telephone-Message-

"PMO, on December 18, 1959, D. M. Severns, Extra Telephone-Message-PMO, on December 31, 1959, R. K. Clifford, Relief Printer Machine Operator, on November 21, 26, 28, December 5, 12, 19, 1959, January 2, 9, 1960; R. G. Cohen, Printer Machine Operator, on November 22, 29, December 6, 13, 20, 25, 26, 1959, January 1, 3, 10, 1960; and, on each date subsequent to January 10, 1960 compensate the above named claimants, or their successors, in the same amount continuing on a day to day basis until the violation is corrected."

OPINION OF BOARD: The claim is in two parts covering both ends of a conversation between clerical employees at Yuma, Arizona and Los Angeles which the Union alleges was in violation of the Agreement. It charges that on the dates set forth in the claim and on each subsequent date the clerk in the chief dispatcher's office called the clerk at Yuma and received from him by phone a detailed report on the arrival and departure of trains from Yuma during the preceding twenty-four hour period and the reasons for any delays. This is known as the "Terminal Delay Report" (it was erroneously referred to in the Union's original claim and in its brief as an FS Report). A copy of the report for November 19, 1959, which is in the record, is a typical example of the character of the daily telephone communication. Carrier does not deny that such telephone report was made by the clerk at Yuma to the clerk at Los Angeles nor does it take issue with the contents as illustrated by the November 19th Report.

The Union takes the position that this report was a communication of record and under the Scope Rule as generally interpreted, belongs to the telegraphers; that it was handled by telegraphers until Carrier abolished an operator's position at Yuma sometime prior to November 19, 1959, and began to have a clerk telephone the information

to Los Angeles. In rejecting the original claim Carrier took the position that these were merely telephone conversations between clerical employees incident to their duties. In its brief and at the hearing however, Carrier contended that the Union had failed to show any exclusive practice on the property for telegraphers to transmit this type of information, and therefore had established no right to the work. It says that while it was the practice of telegraphers to handle this information at some locations such as Sacramento and Dunsmuir, in four of the dispatching offices including Los Angeles the practice was for the clerk of the chief dispatcher to get this information from the clerk of the yardmaster. It asserts that there was no change in this procedure on November 19, 1959; that the information in this report was the same as had been transmitted previously.

The Union produced sworn statements from various telegraphers stating that for many years (going back at least as far as 1941) they transmitted such terminal delay report by teletype each night until the Company discontinued this sometime prior to 1959. Carrier produced statements (unsworn) from several clerks covering various periods of time, stating that for many years the terminal delay report had been telephoned each day by the clerk at Yuma to the clerk at Los Angeles. One said he had done it for fourteen years. The evidence is sufficient to support a finding that for many years the telegraphers had sent this report daily by teletype. It also supports a finding that for many years the clerk at Yuma had been telephoning the same information each day to the ink clerk at Los Angeles. The evidence does not establish that the telegraphers were aware prior to November 19, 1959 that the report was also being telephoned. It is difficult, however,

to see how the telephoning could have existed for so long without the knowledge of the Union.

It is evident that the parties are in disagreement as to past practice on the property as well as in this particular location. But we do not believe this case is controlled by past practice. The issue is the type and character of the communication. In our judgment this was a communication of record in the strictest sense of that term. It contained train numbers, engine numbers, car numbers, arrival and departure times. It was necessary to prepare the report before transmission and it had to be copied by the receiver. The transmission and receiving of communications or reports of record has been determined many times by the Third Division to be work within the Telegraphers' Scope Rule. Awards 6419, 6343, 12610, 12623. We have so held in Award 12 of this Board. It is not necessary for them to show an exclusive practice in the performance of the work. This being so, evidence of a past practice on the part of clerks to telephone these reports cannot destroy telegraphers' rights to the work. Award 12667 (Dorsey) where the Board said "evidence of practice cannot abrogate the rule although it may bar past violations. Either party may at any time require that the practice be stopped... ." See also Award 10355 where the Board said, "For a past practice to ripen into an agreement it must have been clearly understood and clearly adopted by both parties for a long time as recognized by their mutual acquiescence." In the case at bar the evidence in the record does not establish any adoption or recognition by telegraphers of the practice relied upon by carrier, and we cannot say that it has become a part of the agreement. As was said by Referee Dolnick in Award 12623, "If

Carrier is permitted to use employees other than those covered by the Telegraphers' Agreement to transmit communications of record whether by telegraph, telephone, or other means, then the fundamental purpose of the Agreement is nullified. It is conceivable that the use of other employees may be more economical or more efficient. But there is no justification for their use. Carrier may acquire the right to use such employees only by modification and amendment to the Agreement arrived at through collective bargaining as provided in the Railway Labor Act." For the reasons expressed we regard the claim as meritorious.

AWARD

The claim is sustained for a call payment only for the dates mentioned therein. The continuing part of the claim is denied.

SPECIAL BOARD OF ADJUSTMENT NO. 553

Roy R. Ray, Chairman

D. A. Bobo, Employe Member

L. W. Sloan, Carrier Member

San Francisco, California
September 2, 1965