**Award Number 245**
**Docket Number TE-231**

# NATIONAL RAILROAD ADJUSTMENT BOARD

## Third Division

**Lloyd K. Garrison, Referee**

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**PARTIES TO DISPUTE:**

**THE ORDER OF RAILROAD TELEGRAPHERS**
**THE BALTIMORE & OHIO RAILROAD COMPANY**

DISPUTE.—

"Claim of General Committee of the Order of Railroad Telegraphers on B. & O. R. R. that the carrier is violating Article 21 of Telegraphers' Agreement in permitting or requiring train and engine crews to copy train orders and block trains at Eidenau, Pa., as a result of closing of telegraph office at that point; and that telegraph positions shall be restored at Eidenau to perform this character of work covered by Article 1 of the Agreement and as defined in Article 21 of same, and further, that all employees displaced on this account be restored to their former positions and paid for all time lost."

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

An agreement bearing date of July 1, 1928, as to rules, and May 16, 1928, as to wage rates, is in effect between the parties.

The parties jointly certified to the following facts:

"Account of reduced business, telegraph office at Eidenau was closed effective 12:01 P. M., December 30th, 1932, since which time it is occasionally necessary for crews in charge of trains operating eastward between New Castle Jct. and Butler to copy train orders in Eidenau Tower which are relayed to them by the operator at Callery by telephone, however, when it is possible, these crews are given their orders at 'UN' Tower at New Castle Jct. for their movement direct to Butler. For the westward movement, Butler to New Castle Jct., crews receive clearance, form 'A', and instructions with reference to the clearance of trains and report themselves clear of the Ribold Cut-Off. Eastward trains get a form 'A' at Eidenau to crossover the westward track and permission to use the Ribold Cut-Off, then report clear of the main track after they get into clear on Ribold Cut-Off, which is given them over telephone by the operator located at Callery."

Prior to December 30, 1932, three consecutive shifts of telegraph block operators were in effect at Eidenau. This telegraph office handled train orders, messages, blocking, reporting trains, etc., operating between New Castle Junction and Butler. Eidenau also handled the block on the Pittsburgh-New Castle main line. Since the discontinuance of this office trainmen are being regularly required to copy train orders, handle Form "A" clearance card, report into clear of main track, secure permission to use Ribold Cut-Off, and other instructions over the telephone, service formerly performed by the telegraphers at that

point. This work has, however, been drastically reduced in volume, there being but one local passenger train, one through train, one local freight train and one assigned freight run in each direction each day over the double track main line through Eidenau.

Article 21 of the Agreement between the parties provides:

> "It is not the disposition of the Railroad to displace operators by having trainmen or other employees operate the telephone for the purpose of blocking trains, handling train orders or messages, except in bona fide cases of emergency. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator."

This case is fully governed by the principles laid down by this Division in Docket No. TE-230, Award No. 244, as follows:

> (1) Where the blocking of trains or handling of train orders or messages by trainmen is not a regularly established practice at a particular point, but is occasional, unexpected, and exceptional, Article 21 does not require the employment of a telegrapher. We think that this principle is fairly within the meaning of the emergency exception.
>
> (2) Where, however, the blocking of trains or handling of train orders or messages is a regularly established practice, even though small in volume, Article 21 requires the employment of a telegrapher, subject to the exception relating to passing sidings or spur tracks.
>
> (3) Where, during a portion of the 24 hour period, work of the category described in paragraph (2) above has to be performed, a telegrapher should be employed for the particular trick in which the work falls, but if during some other portion of the period not comprised within such trick, work of the exceptional character described in paragraph (1) above has occasionally to be done, it is not necessary to keep a telegrapher employed for the extra trick or tricks in question, but the telegrapher employed on the trick in which the established work falls should be called if available. This principle is within the meaning of the week day release rule.

Not wishing to pass upon more than is before us, we confine these principles to cases like the one before us, involving the displacement of jobs by the closing of a telegraph office at an important point on a main line, and the blocking of trains or the handling of train orders or messages by train crews over the telephone as an established regular policy.

As in Docket TE-230, we have insufficient facts upon which to base an exact award. We do not know whether or not the work which properly belongs to the telegraphers is comprised within a one-trick period or whether it stretches beyond that, nor do we know to what extent work of the character described in paragraph (1) above is occasionally being performed, nor what changes in the handling of traffic may have occurred since the positions were abolished. The matter, therefore, must be left for adjustment by the parties on the basis of the foregoing principles without prejudice to either party to submit the case to this Board, if either the facts or the application of the principles to the facts cannot be agreed upon. The employees in their submission indicated that "if continuous telegraph or telephone service is not needed at Eidenau * * * we contend that part time service should be established making operators available when needed." While there seems to be no specific provision in the Agreement for part time service of such a character, it is to be hoped that some such arrangement may be worked out by mutual consent, for the strict application of Article 21 to situations of this sort is undoubtedly so burdensome to the Carrier as to warrant its modification in the light of events which may well not have been foreseen when the Article was incorporated into the Agreement.

## AWARD

Claim sustained, subject, however, to adjustment by the parties in accordance with the principles outlined above.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 16th day of April 1936.

## DISSENT

The award in this dispute quotes a joint statement of facts by the parties concerning which there is of course no disagreement. This quotation covers the situation at the immediate period of the circumstances which occasioned the dispute and describes the method of delivering instructions to trains diverging from the main line at Eidenau following the discontinuance of the telegraph office at that point, in which description particular reference is made to the occasional necessity for train crews thereafter to copy train orders at Eidenau. The next paragraph of the award makes the statement that since the discontinuance of this office "trainmen are regularly required to copy train orders, handle Form "A" clearance card, report into clear of main track" and other items of service formerly performed by the telegraphers at that point, noting that such work has been drastically reduced in volume. This second paragraph gives an impression of extensive character of service though of reduced volume which we believe does not give faithful representation of the situation particularly in reference to trainmen being regularly required to copy train orders. The carrier's representative testified that the copying of train orders by the train crew was but of infrequent occurrence, and this was borne out by the previous quotation from the joint statement of facts. This reference is essential to an understanding of the relative importance of this case as compared with the immediately preceding Docket TE–230, Award Number 244, inasmuch as the award in the instant case, TE–231, states that it is "fully governed by the principles laid down in the award in Docket TE–230". The records clearly show a lower volume of traffic in the Eidenau case (TE–231) than in the Byers Junction case (TE–230) and a situation of even less requirement for use of telephone by trainmen than the comparatively small amount of such use made at Byers Junction. The degree of business that might warrant need for such use of the telephone in the instant case, had near approached the vanishing point and, in view of the non-arbitrary character of Article 21 which again only was applicable, the situation here at Eidenau should have left no doubt as to the proper discontinuance of an office at that point.

That such a conclusion was not reached of course is due to the statement and admission that the three principles laid down in the award on the preceding Docket TE–230 fully governed in this case (TE–231).

As this award is governed by those principles and they in turn followed the findings of the Referee in the award in Docket TE–230, reference is now made to the dissent registered to that award. The objections to the findings of the award in Docket TE–230 are contained in the first eight paragraphs of that dissent which are of identical pertinence therefore in the present award and follow herewith:

The award in this case follows an analysis of Article 21, the only term in the agreement between the parties recognized by the disputants to be involved. The analysis is searching and proceeds in plausible manner to translate the introductory words of the article, reading:

> "It is not the disposition of the Railroad to displace operators by having trainmen or other employees operate the telephone for the purpose of blocking trains, etc. * * *."

to mean that neither trainmen or other employes may operate the telephone for such purposes. It is unnecessary to follow through the analysis in order to arrive at this distortion of the ordinary meaning of the words quoted, for upon interrogation by the writer of this dissenting opinion of the Referee who made the award, asking if that were not an accurate statement of the effect of the award, the reply was given that it meant that "The railroad shall not displace" operators by having trainmen or other employes operate the telephone for the purposes stated.

This conclusion is deduced despite the evidence given in explanations by the representative of the carrier, Mr. Blaser, early in the period following adoption of the Article in respect to two certain instances which brought into question the intent of the Article as it related thereto. These explanations are in letters dated November 23, 1920, and October 24, 1922, and are covered by the analysis leading up to the award. The analysis in respect to the letter of November 23, 1920, however, rather than bearing directly upon the positive comments of the letter arising apparently out of an incident relating to use

of a trainman in operation of the telephone when an operator was available for call, which comments were extended to discuss certain other purposes of the Article, was extended to comments upon failure in that letter to give specification to another phase applicable to the Article, viz, whether or not displacement of operators by other employes could be effected when it became economical to do so. That Mr. Blaser did state certain circumstances such as locations "where no telegraph office had ever been established and there was no need for a telegraph office such as at an intermediate passing siding", is not to be accepted as a limiting statement of conditions under which the Article may be brought into question.

More particularly were the comments in the next letter of October 24, 1922, related to the two specific circumstances of release of regularly assigned employes on Sundays and where offices are closed a portion of the 24-hour period on week days. Thereupon the action of the parties in joint consideration and the comments of Mr. Blaser in his letter were limited to definite understandings in respect to those two circumstances. The fact that the present circumstance is not allied to those two former circumstances, or that the carrier's representative did not at that time extend his letter in respect to the agreed upon deviation "from a literal application" of the Article, does not establish that other circumstances may not arise that, too, would justify such deviation from a literal application of the Article, if indeed any literal application of the wording of it could be measured.

The fact is that literal application in the form of established measure for every circumstance that might arise is not embodied in the wording of the Article. Certainly the restrictive interpretation that the railroad shall not displace operators by having others use the telephone for the purposes stated was not therein expressed nor can ordinary and accepted meaning of the words used in the Article be transmuted into restrictive interpretation which it is admitted this award is based upon.

The proof of the meaning of the Article and of the intention and purposes of the wording of it lies in the application given to it in the experiences on the lines of this carrier in the years following its adoption, as it may be gleaned from the record in this case. That record too is reviewed in the analysis preceding the award: that analysis concluded the review of twelve instances cited by the employes with a proper acknowledgment that they did not cover the kind of a situation with which the instant dispute deals, but it concluded, we think in error, also that the twelve instances showed that Article 21 had been "treated and applied by the parties as a binding contractual undertaking like all the other Articles of the agreement." Quite to the contrary the very origination of the twelve contentions, the disposition of six of them by the carrier's representative upon the protest of the employes that at least certain of them constituted violation of Article 21, and the disposition of the remaining six by a System Board of Adjustment upon which the carrier and employes had equal representation, was complete verification of the fact that there was not an inviolable prohibition intended or applied. Had there been there would have been no occasion for origination of the contentions and for their consideration, for so far as the descriptions of each incident were given in practically every one wherein Article 21 was cited, it was transparent to all parties interested that the telephone was being used under circumstances which brought this Article 21 into the question, and demanded under that Article a determination according to its intended non-absolute wording. Under an absolute prohibitory phrasing in the Article, there could have been no reason in denying and pursuing through channels of appeal a claim that trainmen were using the telephone for the purposes stated when the facts clearly showed that the telephone had been used for the purposes stated, and the only mitigation was that it was not done under circumstances contemplated by the wording of the Article.

Also are the six cases, cited by the carrier as having value in interpretation of Article 21, dismissed by the Referee by reason of their alleged recent occurrence, despite the fact that in one of the cases (Childs, Md.), during the past five years trainmen had been doing just what an absolute prohibitory phrasing of Article 21 would have been without question in the minds of any one a definite violation of the Article, and it was not therein even contended that it was unknown to the representatives of the petitioner in this dispute; in fact, during the first three years of that period, it being to the advantage of an employe coming under the telegraphers' agreement, there was evidently admitted

liberality in application of Article 21 in condonance by the representatives of the telegraphers of that situation.

In two other of these instances cited by the carrier, also originating about four years past, trainmen continued to use the telephone for at least some of the purposes enumerated in Article 21 after the telegraphers had raised question and such use was continued after declination of their request without further complaint by their representatives.

These citations are, however, dismissed in the award as not being of any value as an interpretation of Article 21 for the analysis preceding the award proceeds to a consideration of the question on its merits as an original question. This procedure to a consideration for purpose of arriving at an award in neglect of pertinent instances of practice, which at least to certain extent were undeniably condoned, we believe leads to error in conclusion and in award. For though the correct interpretation of the Article may logically be derived from the wording of the Article itself, as we shall now proceed to analyze it, the very existence of contention in respect to its proper interpretation makes necessary the consideration of every pertinent circumstance in the operations of the carrier and in its relation with its employes therein which may be cited to this Adjustment Board.

As in Docket TE–230, the Byers Junction case, the question at issue in the instant case (TE–231) is whether or not Article 21 of the agreement between the parties has been violated by the discontinuance of the telegraph office at Eidenau, and the consequent abolishment of three positions of operators thereat.

Article 21 is a rule of partial restriction in respect to use of telephones for handling train orders or messages and blocking trains by employes other than operators (telegraphers). The last sentence of the Article specifically excludes from any restrictive provisions of the Article those situations where train crews use the telephone at the ends of passing sidings or spur tracks for communication with the operator. The first sentence also is not a statement of absolute prohibition as it admits such use of the telephone by other than telegraphers in bona fide cases of emergency; this sentence discloses the nonabsolute restrictive character and purpose of the Article directly in its opening statement that "It is not the disposition of the Railroad to displace operators by having trainmen or other employes operate the telephone . . . etc." for the purposes stated. Other words such as appear in other agreements stating "No employe other than covered by this agreement will be permitted . . . etc." to use the telephone for the purposes stated, could and doubtlessly would have been used if the absolute restriction suggested by the instant claim were intended.

It, therefore, becomes necessary to examine the record made by the parties during the existence of the agreement containing this Article in order to learn the procedure which had been followed in giving the reasonable application for which the Article was designed.

For that examination we are limited to the evidence in this dispute wherein was cited a total of eighteen allegedly related cases. The provisions of Article 21 are shown to have been included unchanged in agreements between the parties since the year 1917. The first interpretation cited is one submitted by the petitioner being a letter of November 23, 1920, from the carrier's chief operating officer designated to handle disputes of this character, which described the origin of the rule and gave the carrier's interpretation of it under the several circumstances referred to in the letter.

The carrier cited a letter of October 24, 1922, written by the same officer following a general discussion of Article 21 with the employes' general committee, addressed to the carrier's division superintendents again outlining the interpretation placed upon the rule under the circumstance which brought about that discussion. Reference therein is made to a statement by the general committee of their agreeableness to a liberal and reasonable application of the rule under the circumstance occasioning that discussion.

These two letters, whatever may have been the unrecorded opinions of the parties concerning them, are indicative of the fact that it was the intention of the parties that the rule was not one of arbitrary restriction but that it was designed to have a reasonable application to the various situations arising which might bring it into question.

Citations of eighteen former situations bringing Article 21 into question were given; to the degree that they relate to the immediate question in the instant dispute, they provide appropriate evidence of the purpose of the Article and the effect that it has been given on the lines of the carrier.

Twelve of these situations were cited by the petitioner, none of these involved the re-opening of a telegraph office for permanent use and the assignment of telegraphers in regular service therein as is here requested. Five cases covered situations of frequent train movement requiring additional telegraphers for short periods; three related to clerks working regular assignments who were instructed to handle certain work belonging to telegraphers in addition to their own class of work; two related to calls where telegraphers on other tricks were regularly employed and available for call; one related to use by trainmen of a phone for communicating direct with train dispatcher; and one related to an existing three-trick telegraph office wherein the incumbents had been displaced by transfer of three train dispatchers thereto.

These twelve citations are reviewed in the analysis of the award in the former Docket TE–230, therein previously commented upon, which analysis by the Referee concluded that those twelve instances did not cover the kind of a situation with which the instant dispute deals, in which conclusion we concur. However, as before stated, their existence, and very nature, and the handling through successive stages of appeal of the disputes thereupon constitute irrefutable evidence of the nonprohibitory character of Article 21.

Six of these situations were cited by the carrier, two relating to cases deadlocked by a System Adjustment Board and as yet undecided, but still exemplary at least of the non-arbitary intent of the rule; three relate to circumstances, similar to the instant case, in that there is limited though daily train service diverging from the main line as at Eidenau. Train service employes have been handling their own Forms "A" and occasional train orders thereat, without further complaint after the requests for assignment of telegraphers at these points were declined. One situation at Reduction, Pa., was of essential similarity with this case at Eidenau: the offices in each case were closed—services of operators discontinued; train crews secured permission in both instances to occupy main track and to clear main track; the decision of the System Telegraphers' Adjustment Board in the Reduction case supported the carrier in its interpretation of the application of Article 21 and under the like circumstances here at Eidenau it should be governing.

Admitting the proper influence which each of the cited cases should have, it is a fair conclusion that the occasions of their consideration, as well as the continued existence of the situation without pursuit of claim thereupon in certain of the cases cited by the carrier, at least support the non-arbitrary nature of Article 21 and prove the intent of the Article is to provide for reasonable application to such circumstances as may bring it into question.

The citations by the carrier bear pertinently upon the dispute and exemplify the correct and reasonable interpretation of the rule as it had been outlined in the circular letter of October 24, 1922; they constitute evidence that it was not intended to fasten upon the railroad every position, once established, irrespective of the changing volume of business or the improvement in the art of the industry which may render entirely useless or unnecessary the continuance of such position. The instances cited in the records of this case illustrating the conditional application heretofore given to Article 21, clearly show that the imposition of unnecessary forces, requested because it is alleged this rule provides for them, is unwarranted.

This Third Division is on record in a previous case, Award No. 80, Docket CL–113, in denial of a claim for pay by a class of employes whose positions had been abolished account decrease in business, and the small amount of work remaining was handled by other employes in the same class and even by employes not coming under the agreement with that class which had previously held the work when there was a sufficient amount to justify a separate position to handle it. The carrier therein took the position that it had the right to abolish positions when there was not sufficient work to justify the retention of the position in the case then in point. The award of the Third Division, adopted without necessity of calling in a neutral, other than quoting the facts and referring to the rules involved carried a sole and pertinent finding showing the limited amount of work required on the abolished position, which was justification for denial of the claim. In the absence of rule of specific limitation the same rule of reason in application of the terms of the agreement between the parties in the instant dispute should apply.

A correct valuation of the evidence in this record, we are of the opinion, will indicate it not to have been the intention of the parties in negotiating

Article 21 to require employment of operators at locations where their services are not needed. It is apparent that the rule was designed neither to force installation of facilities nor to require the employment of telegraphers whose services were unnecessary in the operation of the railroad. There being ample facilities and forces with adequate opportunity to provide efficient movement of trains through this location, as is the uncontroverted situation at Eidenau, there is no reason for the extra burden of expense involved in this claim other than to provide employment. If the carrier is to be confronted by an award of this character, which in principle demands an unchanging and non-reducible expense despite the extraordinary reduction in operations which occurred in this case, there is most emphatically imposed upon the petitioner the obligation, borne by a claimant in any event, to establish by evidence beyond the shadow of a reasonable doubt that the interpretation of the rule alleged to have been violated had thus been defined and applied under like circumstances and situations theretofore occurring. Neither the records in the preceding Docket TE-230, which also have been included in the records in this case, nor the additional record made in this case, have produced such evidence and proof of the contention advanced in this dispute. There is in fact contrary evidence of most persuasive bearing in these records.

The reduction in traffic through Eidenau, resulting in the near disappearance of any work for a telegrapher at that point as covered by the references in Article 21, demanded the practical and reasonable action of the carrier in discontinuance of the telegraph office; its restoration predicated by the terms of this award, we are of the opinion, is not in compliance with the restrictive but non-prohibitory terms of Article 21.

(s) C. C. COOK.

The undersigned concur in the above dissent:

R. H. ALLISON.
GEO. H. DUGAN.
A. H. JONES.
L. O. MURDOCK.