

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas F. McAllister, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY**

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Atchison, Topeka & Santa Fe Railway, that the telegrapher at Glen Frazer, California, be paid a call for each instance in which train orders, governing the return to Richmond from Glen Frazer of helper engines which have helped Richmond to Glen Frazer, are delivered at Richmond before the helping trip begins instead of being handled at Glen Frazer where the return trip originates at a time of day when the telegraph office at Glen Frazer is closed."

EMPLOYES' STATEMENT OF FACTS: "There is in evidence an Agreement as to rules and rates of pay, bearing effective date of December 1, 1938, between the parties to this dispute.

"At Glen Frazer, a main line station, one telegrapher is employed, assigned hours 6:30 P. M. to 3:30 A. M. with a one-hour meal period, providing eight-hour train order and telegraph service.

"Richmond, a main line station, employs three telegraphers, providing twenty-four-hour train order and telegraph service.

"Glen Frazer is sixteen miles to the east of Richmond, there being one open station (Pinole) mid-way between the two and providing eight-hour day telegraph and train order service.

"Effective (date unknown, the Organization filing its protest December 9, 1939), train orders governing the movement of helper engines from Glen Frazer to Richmond, at a time the Glen Frazer telegrapher is not on duty and after helper service has been performed Richmond to Glen Frazer, are transmitted by the train dispatcher to a telegrapher at Richmond, thence transported Richmond to Glen Frazer, and delivered to the addressees, by a train crew other than the one to whom the orders are addressed. Similar train orders, during the assigned hours of the Glen Frazer telegrapher, are transmitted to and delivered by him."

POSITION OF EMPLOYES: "The following rules are contained in the Telegraphers' Schedule Agreement:

'SCOPE—This schedule will govern the employment and compensation of
Agent-Telegraphers,
Agent-Telephoners,

involved taken it out when the telegrapher was on duty, orders for its operation would have come through that employe at an appropriate time, and been delivered by him to the crew'

if such was the reasoning behind the decision in Award 1166, what factor was present in Docket TE-1062 that warranted the sustaining of the claim as was done in Award 1167? What service was performed at Coffeyville outside of the hours of the assignment of the employes at that station who were covered by the Telegraphers' Schedule? The same question is pertinent in the instant dispute, and the Carrier submits that it is clearly evident that **no service is performed at Glen Frazer** outside of the assigned hours of the agent at that point. All necessary duties in connection with the complete handling of the train orders, including the hand-to-hand delivery of them to the train service employes, are performed by the operator on duty at Richmond.

"The employes seek penalties in behalf of the agent at Glen Frazer to the extent of a call or overtime payments provided in Article III, Sections (b) and (c) of the current agreement, each time train orders are delivered to the helper engine crew at Richmond by the operator on duty at that point. Sections (b) and (c) of Article III, reading:

'(b) Except as otherwise provided, time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate.

'(c) For continuous service after regular working hours, employes will be paid time and one-half on the actual minute basis. Employes shall not be required to work more than two (2) hours after completing regularly established working hours without being permitted to take a second meal period, and time so taken will not terminate the continuous service period and will be paid for up to thirty (30) minutes. Employes notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.'

are the respective overtime and call rules of the Telegraphers' Schedule, and obviously come into play only at such time as the agent at Glen Frazer is required to actually perform service in excess of his eight (8) hour assignment or is called to perform work outside of and not continuous with his regular work period. Obviously neither of these conditions exist, and the employes' citation of these rules is therefore without merit. The only condition under which the agent at Glen Frazer might be entitled to a call is when other than an operator or dispatcher would handle a train order at Glen Frazer during the time the operator would not be on duty, but was available or could be promptly located (Article XIII). Train orders are not received at or handled at Glen Frazer during the period when the agent is not on duty. Train orders involved in this dispute are fully and properly handled by the telegraph employes on duty at Richmond.

"Numerous disputes have arisen involving the performance of telegraph employes' work by other than employes covered by the Telegraphers' Schedule, but peculiar to note there is here presented a claim wherein the Organization contends that the Carrier can not require the telegraph employe at one station to perform a function of handling train orders if that function can be handled by a telegraph employe at another station who has already completed his assignment and is no longer on duty. Such a philosophy of make work is not supported by any rule of the Telegraphers' Schedule, which it must be before such a claim can be sustained. The extent to which such a theory might be carried and the economic effect thereof is apparent and obviously need not be discussed by the Carrier."

OPINION OF BOARD: On December 9, 1939, the organization, acting for employes, filed its protest against a practice of the carrier in the matter of handling train orders.

This practice consists of the dispatch of train orders to the telegrapher at Richmond, governing movement of a helper engine on its return trip from Glen Frazer to Richmond. The telegrapher at Richmond delivers the order for the helper engine to the conductor of the train from Richmond which is assisted by the helper engine to Glen Frazer. The train itself continues on beyond Glen Frazer. The conductor delivers the order for the return trip of the helper engine to the crew of such engine. The order, here in question, is in the following form:

"Dec. 7, 1939

"Order No. 26

Engineman Eng. 1231 at Glen Frazer in care C&E Extra 1300
East at Richmond. EHG 447 AM

"Engine 1231 clears Extra 1300 East and run extra Glen Frazer
to Richmond.

GWS"

The organization complains that the above practice is in violation of Article 13 of the Agreement between the organization and the carrier which provides:

"No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

The telegrapher at Glen Frazer is on duty eight hours a day. At the time the helper engine, in this controversy, returned to Richmond, he was not on duty, but was available and could be promptly located. It is claimed that he is entitled to handle the train order for the helper engine, except in case of emergency, and in such a case, he is to be paid for the call.

The carrier maintains that the practice complained of complies with the requirements of Article 13; that the train order is handled by an employe covered by the Agreement; that the language of the rule, relating to handling, means merely, that the train order is to be copied by an employe covered by the Agreement, which, it contends, is done by the telegrapher at Richmond; that under Rule 210 of the operating rules of the carrier, this practice is permitted; and that if there is a conflict between such operating rule and Article 13 of the Agreement, the rule, under the circumstances disclosed by this case, must prevail.

The organization contends that Article 13 requires the physical handling of the train order at Glen Frazer,—the point to which it is addressed—by the telegrapher there employed, or in default thereof, such telegrapher will be paid for the call; and that Article 13 must prevail over any conflicting operating rules of the carrier.

In Award 86 it was held that "handling" train orders was not limited merely to copying them and that the rule (which, in that case, was the same as Article 13 in the present case) was made for the purpose of preventing encroachments upon the work to which telegraphers were entitled. Award 709 held that the handling of a train order involved both the physical process of passing it from hand to hand, and the work involved in its preparation. Award 1096 held that where there was a conflict between the Agreement of the parties and the operating rules of the carrier the provisions of the Agreement must prevail. In that award it was decided that **where there was a telegraph office located at a place, "to which the train orders were directed, and where they were to be executed," the telegrapher there employed was entitled to handle them, although he was not on duty at the time, but was available and could be promptly located.** It was further held that the rule of the agreement (which was the same as Article 13 in this case) prevailed over the conflicting operating rule of the company although the practice of the carrier, there complained of, was of long standing and wide use. It

appeared in that award that even after the execution of the agreement between the carrier and the organization, embodying provisions contrary to the operating rule, the former practice had continued for more than ten years without any claim and protest being made. It was because of this latter consideration that reparations for violations prior to the date of that claim were denied. However, in the above award, it was held that the rule (Article 13 in this case) was clear and unambiguous, and that it was unnecessary to go outside the agreement to discover the intent of the parties. In this lies the distinction between Award 1096 and Award 1145, with the same referee participating. In the latter case, it was held, with reference to a different rule—the scope rule—relating to a dispute arising from the copying of line ups by car operators of motor cars, through use of telephone, that while long continued acquiescence could not alter such rule, such acquiescence was relevant to a determination of the intent of the parties as to the applicability of the rule in such a situation. Where the intent of the agreement is clear from its language, acquiescence would be irrelevant. The intent of Article 13 is clear as held in Award 1096; and the contention here based on acquiescence is not applicable.

It appears that when a helper engine returns from Glen Frazer during the time the telegrapher is on duty there, the train order is handled by the telegrapher. In the carrier's statement of facts it is set forth that the helper service takes place "when there is no operator on duty at Glen Frazer," and that "Helper engine crews out of Richmond, operating at a time when the telegrapher at Glen Frazer is not on duty to handle orders for return movement, are given running orders at Richmond * * *." The purport of the foregoing leads to the conclusion that the train orders would be handled by the telegrapher at Glen Frazer, if he were on duty at the time, and is inconsistent with the claim that they are actually handled in accordance with Article 13, which provides that they are to be handled by the telegrapher if he is available or can be promptly located.

In this controversy it is not necessary to speculate upon or weigh various methods of communicating train orders with regard to safety or certain practical business methods. If the carrier prefers or indulges in practices from such considerations, it cannot prevent applications of the article that the telegrapher is entitled to perform the service, and if he is not given an opportunity he is entitled to payment for the calls. Article 13 prevents the withdrawal of such work from the telegrapher.

The train order in this case is addressed to the helper engine at Glen Frazer. It is to be executed there, and, under the rule, is to be handled there by the telegrapher at Glen Frazer.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the action of the carrier in this case was in violation of the terms of the prevailing Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 3rd day of June, 1941.

Dissent to Award No. 1456, Docket No. TE-1455

This Award is contrary to the meaning of Article XIII as that meaning is established by the intent of the parties who negotiated and agreed upon the Article. Disputes arising from a variety of circumstances have been and are continuing to be presented to this Division which rest upon the generality of phrasing in the Article, and awards have been rendered that ignore both the intent of the parties and the specific limitations of the Article to the existence of an office and the availability of a telegrapher thereat.

The case here presented and the Award rendered thereupon illustrate the reliance upon other awards upon claims of different circumstances, particularly such as represented by Award No. 709 and others, which awards, whatever their merits or faults, should not be permitted to govern in circumstances where as here the handling of train orders resulting in this dispute was so plainly distinguishable from any of the preceding cases. The quite evident normal and practical handling of train orders here involved should have of itself suggested the necessity of original determination of the issue based upon the intent of Article XIII rather than upon any application given it by former awards under the different circumstances there presented.

The history of the original negotiation and adoption of this Article definitely shows its purpose to have arisen from the complaint of the Telegraphers upon the growing tendency of carriers to require train and engine service employees to handle their train orders, instructions, etc., by telephone rather than by the telegraphers, thus transferring telegraphers' work to these other employees not covered by the Telegraphers' Agreement. The main purpose of Article XIII thereupon agreed to was to insure to telegraph employees the work of handling train orders to the extent and under the conditions stated by that Article. It was not intended thereby to transfer to the telegraph employees such work in connection with the handling of train orders as had always been performed and continued thereafter throughout the years to be performed by train and engine service employees, but such has been the effect of former decisions by this Division,—the error of which has been pointed out in dissents to such awards.

Neither was it intended otherwise to expand the meaning of the words "handle train orders" to limit the carrier either as to the form or detail of handling such orders nor the station or stations where they shall be handled except that in such respects it were demonstrated that the prohibition intended when the parties negotiated and agreed upon the Article had been transgressed. It is stated without fear of successful practical contradiction that no such transgression is evident in this instance.

It is not the function of this Board to prescribe the manner in which the carrier shall conduct its practical operations, particularly in respect to handling trains and train orders. Any suggestion by this Division, such as is reflected by this Award, that the form of the train order rather than its handling is determinative of the meaning of the Article in the Agreement (Article XIII), which deals only with its handling, is misrepresentative of the meaning of Article XIII and of the powers of the Board.

This Award upholds a claim in a progressive and continuing series of claims resting upon increasingly expanded alleged purposes and meanings of Article XIII, of which alleged purposes the history of the Article's negotiation, its adoption, and the practices upon which it was based as well as those which thereafter continued are a complete refutation.

/S/ C. P. DUGAN
/S/ C. C. COOK
/S/ R. H. ALLISON
/S/ A. H. JONES
/S/ R. F. RAY