Award No. 3670
Docket No. TE-3567

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph L. Miller, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN R. R. CO.

STATEMENT OF CLAIM: Claim of the General Committee of the Order of Railroad Telegraphers on the Delaware, Lackawanna & Western Railroad Company that W. A. Kling, 1st trick clerk-operator, Utica Yard, N. Y., be compensated under the provisions of Rule 5 (Call Rule) of the telegraphers' agreement, on each day December 14, 1944, and January 6, 1945, when he was not called to complete the handling of train orders which had been partially handled by the second trick clerk-operator before going off duty at 11:00 P.M. on December 13, 1944, and January 5, 1945.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of May 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

At page 29 of the above-mentioned agreement, hereinafter referred to as the telegraphers' agreement, there are listed the following positions at Utica Yard:

Clerk-operator, 1st trick,	.71½ per hour.
Clerk-operator, 2nd trick,	.71½ per hour.

These rates of pay were increased in the amounts involved in the national wage increases of 1941, 1943 and 1946.

On the dates in question the first trick clerk-operator position was regularly held by W. A. Kling, assigned hours 6:00 A.M. to 2:00 P.M.; the second trick by D. M. Roberts, assigned hours 3:00 P.M. to 11:00 P.M.

Wednesday, December 13, 1944, a work extra (545) was scheduled to be called at Utica Yard for 3:30 A.M., Thursday, December 14th, to handle a snow plow over the Richfield Springs Branch thence to Norwich and Oxford. At 8:42 P.M., December 13th, Form 19 Train Order No. 119, to be acted upon the following day, was transmitted to Utica Yard addressed to C&E Engine 545, with a positive meet at Richfield Junction with Extra 1258 North December 14th. This Train Order, No. 119, for Extra 545, was cleared by the train dispatcher to the second trick-clerk-operator at 10:55 P.M., December 13th with instructions that it, and clearance card Form "A", be left on the train register by said second trick clerk-operator to be picked up by the train crew of Extra 545 when reporting for duty at 3:30 A.M., December 14th, prior to the first trick clerk-operator's regular starting time. These instructions were complied with.

2. The claim was not handled on the Property in accordance with the Railway Labor Act and the law of the land. (45 USCA-Sec. 153 (i)) and E. J. & E. vs. Burley, 325 US 711).

Accordingly, the claim should be denied or remanded to the Property for handling in compliance with the applicable law.

OPINION OF BOARD: The facts in this case are simple. The second trick operator at Utica Yard, New York, during the evening of December 13, 1944, received a "19" train order addressed to conductor and engineer—Engine 545. Knowing that the addressees would not come to work until long after his trick ended at 11 P.M., the operator placed the order on the train register book to be picked up by the conductor when registering for duty. No operator was on duty between 11 P.M. and 6 A.M. The same sequence of event occurred again January 5, 1945.

The organization claims a violation of the "Scope Rule" and Rule 12-a of their agreement, and asks that a "call" (Rule 5) be paid the first trick operator for each of the alleged violations. The organization cites also the alleged violation of the Carrier's operating rule (211) which provides in part that an operator, after verifying a "19" order will personally deliver copies to the engineman and/or conductor. This alleged violation was cited not to indicate that the organization was attempting to police the Carrier's operating rules but to show the scope of the work covered by the agreement. The operating rule was in effect at the time the agreement was negotiated.

The "handling of train orders" rule common to many agreements between the organization and other carriers is not included in the agreement before us. We do not think that is of any material importance in this case. "As we see it, because the train order rule is not in the present agreement does not mean that the Carrier can, without violating the agreement, delegate work of the character here involved to employes not covered. . . . It has been held in numerous awards of this and other divisions that work of a class covered by the scope rule of an agreement belongs to the employes upon whose behalf it was made and cannot be delegated to others without violating the agreement." Award 3114. In the instant case, as we see it, there is no question of the delegation of work properly belonging to an operator to another or others. The question here is whether the Carrier deprived an operator of the opportunity to work coming within the agreement's scope.

We pause at this point to discuss the matter of precedent as it may govern this Board's awards. At first blush this may appear to be an irrelevant digression. However, it will govern the Board's opinion in this case.

The referee is not a lawyer. He holds no brief for so-called "legal" processes when they do obvious injustices to any of the parties who become involved in their toils. And as one who deals with human relationships, he believes he should be far more concerned with today and tomorrow than with yesterday. And so should this Board.

However, the past cannot be totally disregarded in dealing with today's and tomorrow's problems. We come to depend more than we think on what has gone before in governing our actions of the present. For instance: Red means stop; green means proceed. What if Chicago's mayor should issue an order tonight that red meant proceed and green meant stop? No matter how far and wide he broadcast his order we venture to say that half the motorists in the city next morning would disregard it on the basis of precedent. And what judge would fine a driver for running though a green light? We further venture to say that the mayor would run into such a storm of protest that he would rescind his order within a matter of hours. People are too dependent on precedent to permit such a radical change. It would be too upsetting to their way of life. They depend upon it for stabiltiy in the conduct of their lives.

Cases with facts exactly corresponding to those in the matter before us have come before this Board many times. All save one of them have resulted in awards in favor of the organization. Awards 1166 et al. The one dissent came from a referee who felt so strongly that the precedents were predicated on the "fallacious premise" that "handling" of train orders included the actual handing of the orders to the crew that he denied the claim. Award 1821. Even in so doing, he indicated a degree of reluctance to break away from precedent. Since that award the Board, with two different referees, has returned to the well-beaten path. Awards 2928 and 3612.

Both the carriers and the members of the organizations which do business with this Board must come to depend on such long series of awards to govern their own interpretations of agreements and to give stability to their day-to-day relationships. In fact, the referee has no doubt that Congress contemplated this when, in enacting the Railway Labor Act, it centered the final disposition of grievances on all carriers throughout the country in a single Board.

We wish to emphasize again how well the pattern for settlement of this type of dispute has been established. Were there only one or two awards one way and one or two the other, this referee would feel free to disregard them. Or were there only one or two one way, this referee would feel that precedent should receive little weight. The same would hold if there were a great many about evenly divided.

In the matter at hand, however, there is no such situation. The facts have been the same; the agreements about the same. We must, therefore, give this well-established pattern of awards preponderant weight in arriving at this one. Note (1).

This referee agrees, then, with all his predecessors save one who have considered cases with corresponding facts. Personal delivery of the orders to addressees was work for the operators within the meaning of the agreement and the Carrier violated the agreement in failing to provide that work to an operator in this case. The Carrier's remedy, if it feels such is necessary, lies in collective bargaining with the organization.

The Carrier raised two other points which should be disposed of:

(1) That the dispute has not been handled to a conclusion on the property, as required by Title I, Sec. 3 (i) of the Railway Labor Act.

(2) That, citing 325 U. S. 711, the organization was without authority to prosecute a claim in behalf of Kling, the first trick operator.

(1) The organization brought this matter to the Board after correspondence with General Manager Shoemaker said, in his last letter, that he would review the claim (indicating he was already familiar with it) if Kling would file a time slip. We see nothing in the Railway Labor Act which stipulates just what, in detail, each party to a dispute should do before the dispute is forwarded to the Board, so long as it has been before the "chief operating officer. . . ."

(2) If the Carrier believes it has been legally wronged it can go to court for its remedy.

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:

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(1) For a comprehensive discussion of this matter in layman's language see Max Radin, "The Law and Mr. Smith," Chapters IV and XV. (The Bobbs Merrill Company, Indianapolis, 1938.)

That the Carrier and the Employes involved in this dispute are respectively carrier and employes 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 Carrier violated Rule 1 of the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 9th day of October, 1947.

DISSENT TO AWARD 3670, DOCKET TE-3567

This award relies on Award 1166, et al, for sustainment of this claim. Our dissent as there stated is by reference here repeated. Irrespective of the meaning of the term "handling train orders" as discussed in that award (1166), no such situation here exists. There is no rule in the agreement between the parties here involved covering the "handling of train orders."

The Board not only erred but exceeded its jurisdiction in holding that, because preponderant weight of other awards placed certain interpretations on the term "handling train orders," the action here involved was in violation of the agreement.

/s/ C. P. Dugan
/s/ R. F. Ray
/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. C. Cook