

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**CHICAGO, INDIANAPOLIS & LOUISVILLE
RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Indianapolis and Louisville Railway that:

(1) The Carrier, in violation of Memorandum of Agreement dated July 15, 1944, required or permitted the conductor in charge of Work Extra 231 to copy, by telephone direct from the dispatcher, train order No. 53 at Murdock, Indiana, 3:47 P. M., May 25, 1948, when no emergency existed; and,

(2) That the Carrier by this violative action established in fact a telephone office at Murdock, Indiana, under the Telegraphers' Agreement, and violated the terms of the Telegraphers' Agreement by requiring or permitting and employe not covered by said agreement to there perform work covered by the agreement, thereby depriving the senior idle telegrapher of a day's pay; and

(3) That the senior idle telegrapher on May 25, 1948, be compensated for the day's work of which he was thus deprived.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of July 1, 1929, was in effect between the parties to this dispute at the time the dispute arose. Memorandum of Agreement dated July 15, 1944, between the Carrier and its employes represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen, and The Order of Railroad Telegraphers is also in effect between the parties.

At 3:57 P. M., May 25, 1948, conductor Henderson, in charge of Work Extra 231, copied, by telephone direct from the dispatcher, train order No. 53 while at Murdock, Indiana, a point where no Telegraph or Telephone Operator under the Telegraphers' Agreement is located, which train order reads as follows:

"Order No. 30 is annulled. Eng 231 run extra Murdock to Bedford. This order is annulled at 501 P. M."

This train order was made complete by the dispatcher at 3:57 P. M., signed "Henderson" in the space provided for the operator's signature; and the authority thereby conferred was used by the crew to change the designation of the train addressed from "Work Extra" to "Extra", and to move the train from Murdock to Bedford, a distance of 4.4 miles, on the main track, at a time when no emergency existed.

absence of a specific rule, of the intent of the parties. The practice which is the source of this complaint, has existed for many years with the full knowledge of the officials of the employees' organization and no exception has ever before been taken to this practice.

In his letter of June 16, 1948, (Carrier's Exhibit E) the General Chairman says:

"We contend that when this violative action took place a train order office was in fact established at Murdock. The telegraphers' agreement provides that when new positions are created the provisions of the agreement will apply and the wages will be fixed to conform to positions of similar class. Rule 3A. When the conductor performed work covered by our agreement a telegrapher was deprived of the work to which his seniority entitled him. A day's work consists of eight hours as provided by Rule 7A."

Rule 3A has no bearing in the case because a train order office was not established at Murdock. Nor does Rule 7A have any bearing for this rule only establishes that eight hours shall constitute a day's work on an established position.

These rules and the Memorandum of Agreement do not mean that all telegraph and telephone work is covered by the agreement. Merely incidental telegraphic and telephonic operations and those occasioned by emergencies and unforeseen contingencies may not be regarded as within the scope of the agreement. The instant case concerns a situation that was unforeseen when the order was given at Bedford. It involves no telegraph or telephone office where an operator is employed.

This is not a case of "evasion" of a rule.

In view of the character and development of the relevant rules and the established practice in the handling of stone trains, there has been no violation of the agreement.

Were the Board to render an award in favor of the organization it would mean that under the contention of the organization the Carrier would be required to open a telegraph office at Murdock for the sole purpose of enabling the occupant of the position, the telegrapher, to occasionally take a train order for the stone train when it happened to become "dead", which would require about ten minutes time per day for approximately twenty days in the year.

The Carrier holds that:

1. The Memorandum of Agreement dated July 15, 1944 was not violated.
2. Rules 3A and 7A have no bearing in the case.
3. There was no violation of the agreement due to the stone train conductor taking the order.
4. The handling was in accordance with past practice, which has existed over a long period of time.
5. This is not a case of "evasion" of a rule.

(Exhibits not reproduced.)

OPINION OF BOARD: On May 25, 1948, Extra 231 was operating in the Bedford switching district performing service for the stone quarries and mills in that territory. The train is required to operate on the main line and, while so doing, is handled on work orders issued prior to its departure from Bedford. On May 25, 1948, Extra 231 left Bedford for Murdock with orders permitting it to work between those two points from 10:15 A. M. to 4:01 P. M. When its work was completed, there was not time to return to Bedford under the order under which it was working and the train was tied up until permission to

make the movement back to Bedford could be obtained. The dispatcher issued train order No. 53 authorizing the movement. The train conductor copied the train order sent by telephone and moved Extra 231 back to Bedford in compliance therewith. The Organization contends that this was a violation of the Telegraphers' Agreement, particularly paragraph 1 of the Memorandum of Agreement effective July 15, 1944, which provides:

"It is agreed that, effective July 15, 1944, train and engine service employees will not, except in case of emergency, be required or permitted to copy, or train dispatchers or operators be required or permitted to telephone direct to train and engine service employees, train orders (Forms 19 and 31) Clearances (Form A), or verbal instructions in lieu thereof, or take messages of record over the telephone."

The Carrier concedes that the message delivered to the train conductor was a train order. Carrier contends, however, that it has been the practice before and after the negotiation of the Memorandum of Agreement effective July 15, 1944, to handle similar situations in the manner here employed. If such a practice existed, it could not have the effect of nullifying the plain words of the quoted agreement. The Memorandum of Agreement effective July 15, 1944, nullified any practice in conflict with its terms. If the practice was continued after the effective date with the acquiescence of the Employees, it might bar a claim for reparations but it does not bar a claim to put the agreement into effect. Where the language of a contract is free from ambiguity, a continued practice, which conflicts with its terms, does not have the effect of changing its meaning or staying its enforcement. We are obliged to say, therefore, that the copying of the train order by the train conductor was violative of the quoted portion of the Memorandum of Agreement effective July 15, 1944.

The Carrier contends that the agreement provides no penalty for its violation in a situation such as we have here. This question appears to have been determined by Award 1220. Under that award, the employee entitled to the work is entitled to one day's pay. We adhere to that award.

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

That both parties to this dispute waived oral hearing thereon;

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;

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

The Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 12th day of July, 1949.