

Award No. 6779
Docket No. TE-6724

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk Southern Railway that:

1. The Carrier violated the agreement between the parties when and because it permitted and/or required employes not covered by said agreement to handle the following train orders when no emergency existed:

	Station	Date	Time	Order Number	Train Number	Copied by Conductor
(a)	Burns, N. C.	12-19-51	943pm	91	98	Ashworth
	Carbonton	12-19-51	943pm	91	63	Cox
(b)	Alligoods	9- 6-51	1045am	40	63	Pearce
	"	9- 6-51	1047am	42	63	Pearce
(c)	Boushell	6- 5-51	319pm	90	45	Straughn
(d)	Chapanoke	8-25-51	1157am	60	1	Massey
	"	9- 8-51	201pm	80	X-215 Nth.	Sutton
(e)	Bellcross	11-21-51	208pm	74	X-215 Sth.	Crumpler
	Grimesland	5-23-51	307pm	82	X-216 Sth.	Taylor
	Hinson	9-28-51	236pm	90	1	Oglesby
	"	9-14-51	457pm	122	X-544 Nth.	Fuller
	McCullers	1-17-52	949pm	97	48	Lilly
	Northwest, Va.	4-20-51	1126am	64	1	Oglesby
	Snowden, N. C.	6- 6-51	214am	26	63	Crumpler
	"	11-21-51	324pm	88	99	Morgan
	"	2- 5-52	957am	76	X-703 Nth.	White
	Elizabeth City	6-23-51	250pm	32	X-541 Nth.	Norton
	"	6-23-51	252am	22	X-541 Nth.	Norton
	"	6-24-51	232am	38	64	Pearce
	"	6-25-51	1248am	22	X-541 Nth.	Norton

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Station	Date	Time	Order Number	Train Number	Copied by Conductor
Elizabeth City	6-25-51	1250am	24	X-541 Nth.	Norton
"	6-27-51	125am	32	X-541 Nth.	Norton
"	6-29-51	134am	26	X-541 Nth.	Norton
"	6-29-51	141am	32	X-541 Nth.	Norton
"	6-29-51	143am	34	X-541 Nth.	Norton
"	7- 3-51	1236am	26	X-541 Nth.	Norton
"	7- 5-51	630pm	74	Eng. 215	Morgan (TM)
"	9- 6-51	238am	30	63	Morgan
"	11- 6-51	152am	94	X-703 Sth.	Alderson
Winfall	9- 5-51	959am	50	X-701 Sth.	Scott
Wadeville	2-15-52	559am	33	99	Hunt
Neverson	3-22-52	516pm	92	64	Massey
(f) Neverson	5-23-51	433pm	90	44	Straughn
"	6-22-51	440pm	98	44	Straughn
"	8-16-51	1247pm	50	45	Bray
"	9-11-51	237pm	70	45	Straughn
"	9-15-51	127am	26	X-529 Sth.	Davis
"	9-20-51	125pm	82	45	Straughn
"	9-21-51	210pm	86	44	Morgan (TM)
"	9-26-51	232pm	92	45	Straughn
"	9-27-51	230pm	90	45	Straughn
"	9-27-51	232pm	92	45	Straughn
"	10- 3-51	336pm	100	44	Morgan (TM)
"	10- 4-51	107pm	68	45	Straughn
"	10-16-51	135pm	72	45	Straughn
"	10-18-51	122pm	100	45	Straughn
"	10-22-51	303pm	82	44	Straughn
"	10-22-51	438pm	88	44	Straughn
"	11-21-51	122pm	70	44	Straughn
"	1- 8-52	100pm	68	45	Wedding
"	1-17-52	1221pm	74	45	Mimms
(g) Waddill	6-18-51	810am	34	PD-438	Walker
"	6-19-51	807am	36	PD-438	Walker
"	6-20-51	908am	76	PD-438	Walker
"	6-21-51	702am	44	PD-438	Walker
"	6-22-51	845am	46	PD-438	Walker
"	6-25-51	813am	32	PD-438	Sandifer
"	6-26-51	815am	42	PD-438	Sandifer
"	6-27-51	806am	48	PD-438	Sandifer
"	6-28-51	940am	46	PD-438	Sandifer
"	6-29-51	845am	72	PD-438	Sandifer
"	7- 2-51	811am	34	PD-438	Sandifer

2. As a consequence of said violations the Carrier shall now be required to compensate the senior idle employe, extra in preference, for a minimum of a day's pay of eight (8) hours for each day that train orders were so handled at each of the points specified.

IN CONCLUSION, Respondent Carrier desires to state:

(1). It has historically and traditionally been the practice for many years of telephonic communication on this property for conductors and other telegraphers to copy train orders at points where no regularly assigned telegrapher and/or telephoner is employed; also at points where there is employed a regularly assigned telegrapher and/or telephoner if the occasion for the copying of such order occurred during the hours such employe was not on duty or could not be located promptly, and in such event the regularly assigned telegrapher has been paid for a "call."

(2). At certain of the points enumerated in employes' statement of claim there has never been any regularly established telegraph office; at other points there were at one time regularly assigned telegraph operators, but the status of such stations has long since been changed, due to business conditions and other economic factors, such stations having been either re-classified to star agency, non-telegraph stations, or closed entirely and made prepay points. The status of these stations is set forth in detail on pages 4 and 5 of this submission.

(3). The claims, except in five cases as noted (pages 7 and 8) are barred from consideration because of the application of Article 34—Time Limit on Claims Rule.

(4). The statement of claim is vague, improper and impossible of determination as to who is the aggrieved individual employe and/or employes, and the employe representative has thus far been unable to produce the specific claimant and/or claimants allegedly entitled to the monetary consideration claimed.

(5). Carrier's Exhibit "B" sets forth the rule which the four train and engine service brotherhoods, cooperatively with the telegraphers, sought to negotiate with management in 1935, and we hold that such action is indicative that from 1922 (when the train order rule was adopted in the schedule agreement) until such action in 1935, the petitioners themselves did not construe the rule as having the intentment and application they are now seeking to give it.

(6). For the reasons set forth above, respondent carrier holds that the claim is not only invalid on its merits, but that with the exception of the five individual claims designated in the table appearing on pages 7 and 8 of this submission, such claims are barred under the time limit on claims rule, Article 34.

All data submitted in support of the Carrier's position has been presented to the duly authorized representative of the employes, and is made a part of the particular issue here in dispute.

(Exhibits not reproduced).

OPINION OF BOARD: The within claims involve the handling of train orders by conductors at non-telegraphic stations where no telegraphers are employed. At some of the points, telegraphers were once stationed. At other points, telegraphers have never been assigned.

The first labor Agreement with the Telegraphers on this Railroad became effective January 16, 1922. The Carrier makes a showing that train dispatchers' telephone circuits were established during the years 1910-1913. The Carrier asserts that train orders have been handled and copied by em-

ployes not covered by the Telegraphers' Agreement at non-agency stations, caretaker points and blind sidings (all of which were equipped with booth telephones) since the years above noted. The contention is supported by three affidavits.

Article 15, together with the tersely-stated Scope Rule, are given special attention by the parties, although other rules are cited. Article 15, provides:

"No employes 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 emergency, conductors or engineers will be permitted to do so, in which case the telegrapher will be paid for the call."

This Division has considered the question posed here on a number of past occasions with varying conclusions being expressed. Without burdening this Opinion with a detailed analysis of the Awards made by this Division concerning train order rules, we find justification for going beyond bare construction of the language of the rule which is not free from ambiguity even though at first blush it may so appear. In short, to determine the intended meaning of the rule on a particular property, past conduct of the parties is of paramount importance. First, we consider what may have been the historical setting for the rule in the first instance. To this end, we have scanned the submissions in a number of Awards cited by the parties."

Award 1220 concerned a Mediation Agreement and arose on the Rock Island Railroad. This Agreement provided, in part, that train and engine service employes will not be "required or permitted to take train orders." Claim for one day's pay was based upon violation of the Mediation Agreement by virtue of a conductor taking a train order by telephone at a blind siding where no telegrapher was located. The Carrier defended on the grounds that no penalty was provided for the taking of a train order at a blind siding, but on the contrary, only at a point where a telegrapher was stationed. In short, it contended, no telegraph office, no violation. A rule similar to our Rule 15 had been early adopted. After setting forth said rule, the submission of the Organization set forth the following description of the evolution of that rule:

"The telegraphers on this property have been negotiating agreements with the Management since early in 1903, and from the date of the first schedule, November 1, 1903, the above rule has not appeared in any succeeding contract until the one consummated and signed November 1, 1913. There is a reason for this, of course; the best reason we could desire—train service employes could not telegraph and telephones were not in use over the system. However, before the 1913 agreement was negotiated, it was discovered that there were a few train service men scattered over the railway who were able to telegraph and who were making use of that talent to move their trains over the line without the assistance of a telegrapher when they found an office closed, also the telephone for dispatching trains was installed on one or two divisions, which in some cases was being used. At this period railway companies were very strict as to just how station employes should handle a station, and the manner in which the train service employe would enter an office for the purpose of taking a train order was becoming rather annoying to the organization because of complaints from our agents; hence, Article 1-(c) was agreed to and it read:

'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, can be promptly located and is available.'

"The phrase '. . . at telegraph or telephone offices where an operator is employed . . .' was placed in this rule, because, at the time there were no telegraph or dispatching telephone instruments located at points where no telegrapher was employed. However, since train service employes have started using the telephone to transmit and receive matter pertaining to the operation of their trains, our committee has made serious objections many and varied times. At every succeeding schedule negotiations an attempt has been made to incorporate in the agreement a rule prohibiting the use of the telegraph or telephone by train service employes for the purpose of receiving and or transmitting matter pertaining to the progress of their trains over the division, except in case of emergency. But up to the time of our negotiations leading up to the agreement under Mediation Case A-560, we have been successful.

" * * *

"Since we have been unable in late years, due to the spread of the dispatchers' telephone for handling trains, because of the menacing expansion of these violations, to make any headway in negotiations with the Management for rules that would put a stop to the gradual elimination of our jobs and our work handed over to other employes not protected by our agreement in constantly increasing amounts, we appealed to the four transportation brotherhoods and the Train Dispatchers' Association to join us in a presentation to the Management an understanding that would afford us some relief from the constant loss of our jobs and take an increased burden of responsibility off of the employes represented by the other organizations. Mediation Agreement A-560 is the result.

"This Mediation Agreement A-560 is but a subsidiary or adjunct to our parent agreement of January 1, 1928, and does nothing more than to modify and strengthen Article 1-(b) in the manner outlined. Because it will be readily discerned that A-560 stipulates nothing but handling train orders and blocking trains by telegraph and/or telephone as is mentioned in Article 1-(b) of the agreement of 1928."

The above, while concerning the development of the rule upon the lines of another Carrier, is general in tenor, concerns a large operation and undoubtedly is reflective of conditions generally prevalent in the industry at the time. The recital demonstrates that the initial scope of the rule was limited to stations where telegraphers were located and that to control the work at other points, negotiation or mediation was deemed necessary by the Organization in that instance.

Looking for practice as it is shown to exist on this property, we find the following. The train order rule was first negotiated in 1922. In July, 1935, the Telegraphers and the four train and engine service Brotherhoods, submitted a proposed Memorandum Agreement providing that train and engine service employes would not thereafter be required or permitted to transmit or receive direct by telephone train orders, clearances or messages in connection with the movement of their train, or report (OS) trains. The Carrier refused to sign the proposed Memorandum. By so doing, Carrier submits, the Petitioners admit that they did not construe the rule as having the intentment and application they are now seeking to give it. On the other hand, it may be that the proposal was made simply to clarify and avoid further dispute so the showing is of debatable value.

The Organization calls our attention to the submission in Award 5295, First Division. There involved was a claim of the Conductors and Trainmen on the instant property to be relieved of the requirement of copying train orders over the wires in alleged violation of their Agreements except in cases of emergencies. The Claimants disclaimed responsibility for such work which, they asserted, belonged to another class of employes. They contended

that they had been protesting these requirements since 1919 and in 1922 negotiated an Agreement, Article 20 (2) of which provided:

"Conductors and Trainmen will not be required to copy train orders over the wires, excepting under conditions of an emergency nature * * *."

That the objection was directed to practice of taking train orders at non-telegraphic points is clearly inferred from their contention "that the enormous amount of these requirements to copy and execute train orders is for the sole purpose of advancing the train and is caused by the closing of many telegraph and agency offices on the property, * * *". Claimants advise that the Telegraphers were submitting a case simultaneously to the Third Division. If this was done we are not aware of it becoming the subject of an Award.

The Carrier, in the above submission, called attention to the proposed Memorandum Agreement discussed in the second paragraph above stating that it had declined to execute the Memorandum because the Rules (Art. 20(2)) fully covered the subject. Carrier continued:

"Conductors, trainmen and yard service employees are not now and have not been in the past required to copy train orders, except in cases of emergencies, and the Respondent does not believe that there is any foundation or basis for the filing of the instant claim with the Board."

The First Division, assisted by Referee Carter, on December 12, 1940, issued a declaratory Award favorable to the Brotherhoods there involved. The case had been submitted to the Division in 1937.

A Carrier Member of the Division, after arguments were closed, submits, what he terms, newly discovered evidence. This evidence consists of correspondence relating to a Telegraphers' submission in 1937 mentioned in First Division Award 5295, of which this Division has no record. The correspondence explains the reason therefor. Second, the newly submitted evidence contains what appears to be a letter ratification of an oral agreement relating to the very point at issue.

In the interests of the expeditious handling of disputes, we would generally look with disfavor upon unilateral, supplemental submissions. However, in resolving disputes, we assume that the entire Agreement of the parties is before us. From the late showing made, the entire Agreement was neither before us nor the parties when they considered this controversy upon the property. Accordingly, we are remanding the dispute to the parties for further consideration in light of the new evidence and the opinions expressed herein. If negotiations do not result in settlement of this dispute within ninety days, the dispute may be resubmitted with appropriate comment on the evidence before mentioned.

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 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

That the entire Agreement was not before the parties during consideration of the within dispute and accordingly the same is remanded, with privilege to resubmit if not resolved as stated in the Opinion.

AWARD

Remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 13th day of October, 1954.

**SPECIAL CONCURRING OPINION IN AWARD NO. 6779,
DOCKET NO. TE-6724**

The remanding of this dispute to the parties, for the reasons set forth in the Award, is concurred in by the Carrier Members of the Third Division of the National Railroad Adjustment Board, because:

The Organization introduced into this dispute Award No. 5295 of the First Division involving the Order of Railway Conductors and the Brotherhood of Railroad Trainmen vs. the Norfolk Southern Railroad Company, on an alleged violation of Article 20(2) of the Agreement between those parties, which rule reads:

"Conductors and Trainmen will not be required to copy train orders over the wires, excepting under conditions of an emergency * * *."

The dispute involved in Case 4336 was docketed March 30, 1937, and on December 12, 1940, the First Division, assisted by Referee Carter, issued a declaratory Award reading:

"If claimants' charges be in all respects true, we hold that there is a violation of the provisions of Article 20, Paragraph 2, of the current agreement." (Emphasis added).

The Petitioners in their position in Docket 4336, Award 5295 (First Division) stated:

"This case was originally submitted to the Presidents of the O. R. T., O. R. C. and the B. of R. T. jointly. Through advice from them, the O. R. T. is submitting a similar case to Division No. 3, simultaneously with our submission of this case to Division No 1, they having record of several hundred copies of train orders and messages, constituting only a few of the total actually copied and executed by conductors." (Emphasis added.)

The position of the organizations involved in First Division Award 5295 indicated a concerted action on the part of The Order of Railroad Telegraphers, the Order of Railway Conductors, and the Brotherhood of Railroad Trainmen.

As a result thereof, a search of Third Division Awards failed to produce any Award on the subject matter involved in Award 5295 (First Division). In fact, the confronting dispute is the first case filed with this Division alleging that the copying of train orders by employes not covered by the Agreement, at points where no telegraphers are employed, is in violation thereof,

notwithstanding that such has been the practice on this property for years, even antedating the first Agreement between the parties.

A further search developed that:

On **April 2, 1937**, President Manion of the Telegraphers' Organization served notice on the Third Division of intention to file such a claim on or before May 1, 1937 (a copy of which letter was sent to the Carrier).

On **April 3, 1937**, the Division requested the Carrier to submit its ex parte within thirty days from April 3, 1937 (with a copy of this letter sent to the Organization).

The Carrier, within the thirty-day period, filed its ex parte submission with the Division.

Nothing further was heard from the Organization for some two years and three months. On **June 28, 1939**, President Gardner, in a letter to the Division, referred to President Manion's letter of **April 2, 1939**, and requested that the claim then submitted be dismissed without prejudice (a copy of which letter was sent to the Carrier). Then on **June 29, 1939**, President Gardner followed up his letter of June 28, 1939, directing attention to and correcting an error in his reference to President Manion's letter of **April 2, 1939**, to read "**April 2, 1937.**"

On July 5, 1939, the Third Division in a letter (with copy to Carrier) advised Mr. Gardner, "* * * the records of the Third Division in the above matter have been closed without the case being docketed."

The ex parte submitted by the Carrier referred to an Agreement reached by the parties on December 16, 1926, and confirmed as to understanding in an exchange of correspondence between the former General Superintendent and Vice President Bryant of the Organization—the letter of Vice President Bryant to the former General Superintendent being dated July 20, 1935.

We also concur in the Opinion of the Referee dealing with Award 1220, involving another Carrier, wherein he states:

"* * * The recital demonstrates that the initial scope of the rule was limited to stations where telegraphers were located * * *."

Our Special Concurrence, as aforesaid, in voting for Award No. 6779 is without prejudice to our objections to the Organization's contentions in this case.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp