

Award No. 6967
Docket No. TE-5929

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Baltimore and Ohio Railroad, that:

(1) The Carrier, commencing on or before September 12, 1945, violated and continues to violate the provisions of the agreement between the parties, when it required or permitted and continues to require or permit individuals not coming within the scope of said agreement to block trains and perform communications service of record at East Side Yard, Philadelphia, Pennsylvania.

(2) The senior idle employees covered by the Agreement on the seniority district, who could have been used to perform such work at East Side Yard, Philadelphia, since September 12, 1945, during the hours of the day or night such work was performed by employees not under said agreement, shall be compensated for this work of which they have been improperly deprived; and

(3) If the Carrier elects to continue the performance of such work at East Side Yard, Philadelphia, the necessary number of positions under proper classification required to meet the need of the service shall be established and filled under the governing rules of the Agreement.

EMPLOYEES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of July 1, 1928, (reprinted July 1, 1948) is in evidence, hereinafter referred to as the Telegraphers' Agreement. The agreement on the various dates that it was revised by the parties, carried the following information as to the positions at East Side Yard Office, Philadelphia:

| Date of Agreement | | Operator-Clerk | |
|--------------------------|---------------------|-----------------------|-------------------|
| January 1, 1903 | Two Positions | | \$60.00 per month |
| April 1, 1904 | " " | " " | 60.00 " " |
| March 1, 1906 | " " (Day and night) | " " | 62.50 " " |
| January 1, 1907 | " " " " | " " | 67.00 " " |
| March 1, 1910 | " " " " | " " | 70.00 " " |
| November 1, 1911 | " " " " | " " | 72.00 " " |
| March 1, 1914 | " " " " | " " | 75.00 " " |
| August 1, 1916 | " " " " | " " | 78.00 " " |
| December 11, 1917 | " " " " | " " | 85.00 " " |
| October 1, 1918 | " " " " | " " | .62-3/4 per hour |
| May 16, 1923 | " " " " | " " | .64-1/2 " " |
| October 1, 1925 | One Position | " " | .65-1/2 " " |
| July 1, 1928 | " " | " " | .68-1/2 " " |

the operator for such positions shall not be less than the Morse telegraph rate of pay which existed in such offices immediately prior to the suspension of Morse telegraph positions in such offices, adjusted so as to reflect general wage increase or adjustments which have become effective subsequent to such suspension."

* * *

"NOTE—This Article does not apply to intra-city communication by direct keyboard teletype machines in offices where the Morse telegraph has never been in use and the communication service prior to the installation of teletype was being handled by telephone or messenger.

Where intra-city communication by machines referred to in this Article is performed by other than employes coming within the scope of the Telegraphers' Agreement, the business so handled, except wheel reports, shall not be transmitted by re-perforator tape to inter-city points."

The Carrier submits that the record itself evidences the observance by this Carrier of the provisions of Article 31 quoted hereinabove.

The Carrier directs the Division's attention to the second paragraph of the NOTE to this article, specifically that portion reading "* * * the business so handled, **except wheel reports**, shall not be transmitted by re-perforator tape to inter-city points." The Carrier further submits that the data contained in the wheel reports transmitted by the single line teletype machines at the East Side yard office are transmitted to another point, "D" office, also situated in the City of Philadelphia, Pa. This being a fact, the Carrier submits that the Employes' contention that the Carrier has violated the applicable provisions of this Article are not in accord with the facts.

Based on the facts of record in this case and all that has been set forth hereinabove, the Carrier respectfully requests this Division to hold the instant claim as being one without merit and to deny it accordingly.

The Carrier submits that all data in support of the Carrier's position in this case has been presented to, or is known by, the other party to this dispute.

OPINION OF BOARD: The Organization contends that the Carrier, commencing on September 12, 1945, violated and continues to violate the current Agreement by permitting persons not under the scope of the Telegraphers' Agreement at East Side Yard Office, Philadelphia, Pennsylvania, to block trains moving over the Delaware Branch and to transmit communications of record by telephone and teletype machines. Delaware Branch is a single track line about seven miles long and appears to be used primarily in performing industrial switching and making deliveries to industries located on the branch. All trains operate over the branch in yard movements by yard engines at a maximum speed of 15 miles per hour. Carrier asserts that these movements have always been under the direction of yardmasters and that train dispatchers have no jurisdiction over Delaware Branch. Prior to this dispute all movements on Delaware Branch were directed by telephone between the yardmaster and yard crews and that prior to 1930 when an operator-clerk position existed at East Side Yard, the occupant had nothing to do with operations on Delaware Branch.

The record shows that there is no telegraph line into East Side Yard Office. This office is located between two continuously operated telegraph offices; "RG" Tower being 3500 feet west and Swanson Street about three miles east. The main telegraph office in Philadelphia, "D" office, is also about three miles from East Side Yard. There is messenger service between "D" office and East Side Yard Office at 10:00 A. M. and 3:00 P. M. each

day. Emergency messages are telephoned to East Side Yard Office. There are two one-way teletype machines at East Side Yard Office which, according to the Carrier, are used only to send wheel reports to "D" office.

The first issue to be resolved is whether telegraphers have the exclusive right to handle instructions governing the intra-yard movements of yard engines on Delaware Branch under the circumstances of this case. Prior to September 12, 1945, these movements were handled by the yardmaster with train crews by telephone. But on the latter date, instructions were issued for the handling of all movements on the Delaware Branch in a somewhat different manner. It is the Carrier's contention that the yardmaster continued to handle all movements as before and that the operator at Swanson Street was merely required to make a record of such movements which necessarily required that such operator get required information from the yardmaster for this purpose. The Organization contends that the instructions issued on September 12, 1945, required the yardmaster or train crews at the east end of Delaware Branch to block trains and handle communications of record in violation of the Telegraphers' Agreement.

A joint check was made on August 21, 22 and 23, 1946, in connection with the request of the Organization that block-operators be assigned at East Side. We feel obliged to accept the results of the joint check insofar as they apply in resolving disputed issues of fact.

All movements on Delaware Branch were in yard service. Prior to September 12, 1945, such movements were handled by the yardmaster with train crews by telephone. Since train orders are not required for engine and train movements in yard service, this method of operation was entirely proper. The Terminal Trainmaster issued certain instructions effective September 12, 1945, which are important in determining if blocking was required at the East Side end of Delaware Branch. They provided in part: The Operator at Swanson Street will keep careful and complete records of all movements and orders issued on Delaware Branch. Yardmaster at East Side will issue all orders for movements in conjunction with operator and Swanson Street, who will check train sheet and advise last movement and condition of block, after which the yardmaster will give complete time and the operator will record the order on the train sheet. No orders were to be issued unless the block was clear of opposing movements. The yardmaster was to make a file copy and a copy for the engineer and conductor on movements from East Side. On other movements, the conductor and engineer were to get orders on the telephone and make their own copies, the operator at Swanson Street to be on the telephone and give his part of the orders direct to the persons receiving them. Trains were to be reported "clear" to the operator promptly upon clearing Delaware Branch at various points including East Side, after which another order was required to enter Delaware Branch. The orders issued were to be consecutively numbered and all movements of Baltimore & Ohio and Pennsylvania trains were to be handled in accordance with these instructions. In 1947, the Carrier issued supplemental instructions: "In order to eliminate the complaint in regard to yardmasters delivering to yard crews a special form of order to occupy this branch, it has been arranged for the operators at Swanson Street to issue orders direct to the crews." While it is true that these subsequent instructions eliminated complaints concerning the delivery of a special written form of order to occupy the branch, we find nothing in them that related to the question of the blocking of trains.

While the blocking of trains is not ordinarily required in yard service, where the Carrier requires it to be done it is work that belongs to telegraphers. Any blocking at East Side was a manual operation. The Organization contends that Delaware Branch could not be blocked at both ends by one operator at Swanson Street and, necessarily, if blocking was required it was performed by employes other than telegraphers. The claim that the operator at Swanson Street was merely recording train movements directed by the yardmaster cannot be sustained. The instructions of September 12, 1945,

as amended in 1947, required clearances and orders permitting the occupation of Delaware Branch before engines or trains could enter from either end. They were required, also, to be recorded of record. We think, under the record here made that blocking was necessarily performed at East Side in order to comply with the instructions issued by the terminal trainmaster.

It is provided by Article 35, current Agreement, as follows:

"It is not the disposition of the Railroad to displace operators by having trainmen or other employes operate the telephone for the purpose of blocking trains, handling train orders or messages, except in bona fide case 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."

The foregoing rule precludes the Carrier from giving new work belonging to telegraphers to others not within the scope of that agreement. Award 5901. The question to be resolved is whether there was blocking to be performed at East Side. If so, it belonged to telegraphers, if not, this phase of the case must be resolved in favor of the Carrier.

In Award 4287, we said:

"The work performed by the Conductor of the Rutland Milk Extra consists of notifying the operator at Copake Falls when his train is on the siding and the main track switches properly lined, advising the operator at Copake Falls when the superior train has passed and in gaining permission from the same source for his train to again occupy the main track for the purpose of continuing its trip. This work is performed by the Agent-Telegrapher when he is on duty. The question posed is whether this is work which the Telegraphers are entitled to perform.

"The Scope Rule of the Agreement includes many designated positions including block operators. The use of a telephone in facilitating such work is consequently Telegraphers' work. Is the work performed by train service men in the present case blocking work? We think it is."

In Award 4575, in dealing with the subject of the blocking of trains, we said:

"The reporting of information relating to the blocking of trains, the 'OS' and other train reports, are reports of record and constitute telegrapher's work. The use of the telephone in reporting such information is in lieu of the telegraph as it was historically and traditionally used, and, as such, is work reserved to the telegraphers."

The Carrier insists that these awards relate to road service and they can have no application where yard work is involved. This is ordinarily true, but, as we have heretofore said, where Carrier's instructions require blocking work on a designated yard track, it is telegraphers' work just the same as it is in road service. It is the nature of the work to be performed and not the place where it is done that controls the result.

We are cited by the Carrier to Award 5023. This award is clearly distinguishable. If we understand that award correctly, switchtenders were doing work in ordinary yard operations formerly performed by trainmen or others. They were not operating under special instructions, as here, to block trains and make written orders of record with reference thereto. The switchtenders in that case were doing work that employes other than telegraphers had a right to do.

We necessarily conclude that the Agreement was violated when the yardmaster, train crews or someone in their stead other than a telegrapher,

engaged in the blocking of trains at the East Side end of Delaware Branch. The argument advanced that the operator at Swanson Street was merely recording train movements properly ordered by the yardmaster is not sustained by the record. The instructions of September 12, 1945, as amended in May, 1947, required clearances and orders permitting the occupation of Delaware Branch before engines or trains could enter from either end and the reporting of same to the operator at Swanson Street. This calls for blocking and the recording of messages relating to train and engine movements on the branch.

It is contended, secondly, that employes other than telegraphers have been required or permitted to perform communications service of record at East Side Yard. There are two teletype machines in East Side Yard Office which are connected with "D" office. They are sending machines only and at the time of the joint check they had been used only in sending wheel reports. It is evident from the record, however, that the use of these teletype machines was materially expanded after that date. Many reports, other than wheel reports, were sent on the days on which spot checks were made. It is shown also that many communications of record were sent by telephone by others than telegraphers. The claim is valid on this phase of the case on each day that a violation occurred.

The Organization contends that the operation of teletype machines at East Side Yard Office was telegraphers' work under Rule 31 (e) except in emergency cases. The portion of the rule relied on provides:

"Note—This Article does not apply to intra-city communication by direct keyboard teletype machines in offices where the Morse telegraph has never been in use and the communication service prior to the installation of teletype was being handled by telephone or messenger."

East Side Yard Office was evidently a Morse code telegraph office some time prior to 1930. It is apparent, therefore, that the rule calls for a telegrapher to operate the teletype if this be true. The Telegraphers appear, however, to have acquiesced in the use of employes other than telegraphers to operate the teletype machines for a long period of time. The record does not disclose when they first complained about the operation of teletype machines at East Side Yard Office by other persons than telegraphers. Even if their claim on this issue should be a valid one, they are estopped from collecting reparations prior to the date when the violation under the note to Rule 31 was first called to the attention of the Carrier.

Carrier urges that Delaware Branch is a passing siding or spur track as those terms are used in Article 35, current Agreement. It is clear that it has no resemblance whatever to a passing siding. Nor is it a spur track. A spur track is a track diverging from a main or branch line over which timetable service is not maintained. Delaware Branch is open at both ends which, we think, places it outside the exclusionary provision of Rule 35. In any event, the instructions of September 12, 1945, and the amendments thereto, with reference to its operation, made it more than an ordinary spur track insofar as train and engine operations over it were concerned.

Carrier also asserts that a valid award cannot be issued without service of notice on other Organizations alleged to be affected by the claims of the Telegraphers. The question of third party notice is not a matter which is referable to a referee under recent court decisions. *Illinois Central Railroad Co. v. Whitehouse et al*; 212 F. 2d 22.

Claims (1) and (2) must therefore be sustained to the extent shown by this Opinion and the Findings made. Claim (3) is denied. It is not the function of this Board to establish positions. It is the prerogative of Management to determine the manner in which the work shall be performed.

So long as violations continue, the Carrier subjects itself to penalty for the violation of the Agreement. It may use any method it sees fit to correct violations without any restraining directives by this Board.

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 Agreement was violated.

AWARD

Claims (1) and (2) sustained per Opinion and Findings.

Claim (3) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of April, 1955.

DISSENT TO AWARD NO. 6967 DOCKET NO. TE-5929

This is an unenforceable Award. The Referee was apprised of the application of Section 3, First (j) of the Amended Railway Labor Act, to this case but he has erroneously waived aside the "due notice" question by making reference to dicta found in the Illinois Central case to which he refers in his Opinion. That question cannot be thus summarily disposed of by any Referee who is sitting with the Board for the purpose of making an Award in the light of the dispute unless he dismisses the claim on jurisdictional grounds. This has been formally enunciated in *Kirby et al v. Pennsylvania R. Co.*, 188 F. 2d 793, 799, wherein the Court said, speaking of this Board, that it "has no more standing to produce legally effective orders than any voluntary group of citizens" until the statutory requirements are met. Such dismissals have been ordered by Referees sitting with this Board since the Illinois Central case in Awards 6680, 6681, 6682, 6683, 6696, 6799, 6812, 6813.

Furthermore, insofar as the alleged blocking of trains is concerned, the instant Award is in error first because it is based upon partial quotations from Awards 4287 and 4575 which have been held to be inapplicable in the circumstances present in the instant case, and secondly because it attempts to distinguish Award 5023 upon a misunderstanding that therein "They are not operating under special instructions, as here, to block trains and make written orders of record with reference thereto." The record in the case covered by this latter Award shows that towermen and switchtenders were, in fact, so operating under General Order No. 46 issued by the Division Superintendent in that case, which provided in part as follows:

"The towerman and switchtender must keep in close contact with two yardmasters of the Rock Island, Milwaukee and Illinois Central, also, with Rock Island dispatchers in order to give trains and engines the necessary proper handling and must keep a line-up when movements are to be made."

In Award 4287, in addition to the excerpt quoted therefrom in the instant Award, the present Referee also said—"This rule (reserving work to Telegraphers) is not intended to apply to the use of a telephone in intra-yard operations or points subordinated to a yard or office for operational purposes." (parenthetical interpolation added.) The instant Award recognizes "All movements on the Delaware Branch were in yard service."

Award 4575 evidences that the excerpt quoted therefrom in the instant Award was based upon Award 4516. It is noteworthy that, in the case covered by Award 4516, the present Referee denied the claim therein at the East Side end of the Delaware Branch in the instant case.

The instant Award also is in error because it is based on the erroneous premise that the use of teletype machines in the yard office was materially expanded after the date of the joint check in 1946 and that "many reports, other than wheel reports, were sent on the days on which spot checks were made." This premise is in error because it in turn is based upon the Organization's allegation that, on two days in 1947, messages and communications of record were sent by other than telegraph service employees. The Carrier stated that there was nothing to confirm the accuracy or validity of that allegation.

The instant Award also is in error because it is based on the allegation that communications of record were sent by telephone by others than Telegraphers. Even if this were true, the rules governing the operation of teletype machines would not be applicable thereto, and, in any event, such telephone communications would be in lieu of messenger service or personal trips, which work the present Referee in Award 4516 said was not work exclusively reserved to Telegraphers.

For the above reasons, we dissent.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ E. T. Horsley
/s/ C. P. Dugan
/s/ J. E. Kemp