

Award No. 7343
Docket No. TE-6987

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

NORTHERN PACIFIC RAILWAY COMPANY

THE ORDER OF RAILROAD TELEGRAPHERS

STATEMENT OF CLAIM: Claim of J. E. Taplin, Agent-Telegrapher, Dixon, Montana, for payment of one hour and fifteen minutes at time and one-half rate on May 6, 1953 because of being instructed by the train dispatcher to leave a train order and clearance on the train register to be picked up by the conductor of the train to which addressed after Mr. Taplin had gone off duty.

CARRIER'S STATEMENT OF FACTS: J. E. Taplin is assigned to a position of Agent-Telegrapher at Dixon, Montana, working from 8:00 A. M. to 5:00 P. M., with one hour for meals, Monday through Friday, with Saturday and Sunday as rest days.

On Wednesday, May 6, 1953, Mr. Taplin copied Train Order No. 322 for Extra 1767 West. This train order was completed at 5:15 P. M. and the clearance was issued at that time. Train Order No. 322 and clearance were attached to the train register by Mr. Taplin to be picked up by the conductor of Extra 1767 West when this train arrived at Dixon. Mr. Taplin was released from duty at 5:20 P. M. on May 6, 1953 and went off duty at that time. Mr. Taplin was allowed payment of twenty minutes at time and one-half rate for work performed from 5:00 P. M. to 5:20 P. M. on May 6, 1953.

Extra 1767 West arrived at Dixon at 6:35 P. M. on May 6, 1953. On arrival at Dixon, the conductor of Extra 1767 West picked up Train Order No. 322 and the clearance.

Claim has been presented by Mr. Taplin for payment of one hour and fifteen minutes at time and one-half rate on May 6, 1953 because of not having been held on duty from 5:20 P. M. to 6:35 P. M. on that date to deliver Train Order No. 322 and clearance to the conductor of Extra 1767 West, which claim has been declined.

POSITION OF CARRIER: On May 6, 1953 Agent-Telegrapher J. E. Taplin copied Train Order No. 322 for Extra 1767 West and, pursuant to instructions, then placed this train order on the train register to be picked up by the conductor of Extra 1767 West after Mr. Taplin had gone off duty.

Mr. Taplin performed all functions in connection with the receipt of Train Order No. 322; he copied this train order direct from the train dispatcher; he repeated this train order direct to the train dispatcher; he com-

duty. This practice was recognized by former General Chairman Warren in the withdrawal of a number of claims that arose in October, November and December, 1948.

Mr. Taplin, in placing the train order and clearance on the train register on May 6, 1953 to be picked up by the conductor after Mr. Taplin went off duty, followed the customary practice in effect on this property.

Rules 1 and 88 of the current Telegraphers' Agreement do not preserve the delivery of train orders and clearances to employees covered by the Telegraphers' Agreement. Award No. 5872 of the Third Division referred to by you establishes no precedent for the claim of Mr. Taplin.

I cannot agree that there is any basis under the rules of the current Telegraphers' Agreement for the claim of Mr. Taplin. The claim is therefore declined.

Yours truly,
/s/ H. W. McCauley"

There is no question but what Operator Taplin would have delivered the train order and clearance to the persons addressed in the event that Extra 1767 had arrived at Dixon prior to the time claimant's assignment had terminated. The Carrier would have expected him to follow the rules on that without question, because the duties of his position and classification anticipate that he will deliver train orders and clearances to the persons addressed. If that be so—and it is so—then the same requirement and the same right prevailed at 6:35 P.M. as between the hours of 8:00 A.M. and 5:20 P.M. on the day involved.

The Employees feel that the criterion of this case may be found in the language employed in Award No. 2817 where it was aptly stated that:

"When the activity is such as is ordinarily performed by Telegraphers while employed on Telegraphers' positions, it must be considered in the agreement."

The Employees reiterate that work covered by the agreement was withheld from the claimant in the manner here related, and because he was entitled to perform it he should be indemnified to the extent claimed. An award sustaining the position of the Employees is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: This case is here on Carrier's submission ex parte, and Employees' response, thereby joining issue on claim by J. E. Taplin for payment of one hour and fifteen minutes at time and one-half rate on May 6, 1953.

Claimant is assigned to a position of Agent-Telegrapher at Dixon, Montana, a one man agent-telegrapher station, working 8:00 o'clock A.M. to 5:00 o'clock P.M., one hour for meals, Monday through Friday; Saturday and Sunday as rest days. The locale is western Montana on the Rocky Mountain Division of Carrier's main line. Dixon, seventeen miles east of Paradise, Montana, a terminal, is a register station at a junction point from which extends a branch line to Polson, Montana, approximately thirty-three miles in a northerly direction.

An agreement by and between the parties bearing an effective date of April 1, 1948 is in evidence. The scope rule of that agreement has the

effect of reserving to the persons covered, all work, which, by custom, tradition, and historical practice, has become identified as work of the class belonging to the craft that here holds the contract.

Since the present dispute concerns only the manner and method of handling train orders so as to accomplish delivery to the employees addressed, one may go further, for purposes of this docket, and say that the work of handling train orders on the lines of this Carrier is typical of work reserved to established positions like the one in question.

Claimant is aggrieved because he was not held on duty at the overtime rate for the amount of time claimed, to personally deliver a train order that Carrier's supervisory official directed and instructed be left on the train register to be picked up by the Conductor of the train to which the order was directed.

On May 6, 1953, Extra 1767 was on the Polson Branch. At Dixon, previously identified herein as a junction point and register station, branch line trains entering the main line need train order authority to operate between Dixon and Paradise. The Carrier held claimant on duty until 5:20 P.M. which permitted Train No. 1, "the Mainstreeter", to pass Dixon. After Train No. 1 passed, claimant copied train order No. 322 and complied with instructions to leave the train order and clearance form on the train register book where it was picked up at 6:35 P.M., one hour and fifteen minutes after the Agent-Telegrapher had gone off duty, by the Conductor of Extra 1767 when he checked the train register as required by the operating rules.

The employees do not consider the "handling" of train orders complete unless and until same have been delivered in person to the employees addressed, in this instance, the crew of Extra 1767, and, since claimant was not permitted to remain on duty for the purpose of making personal delivery of the train order and clearance, it is contended he was deprived of work to which the scope rule entitled him and recovery is sought for time lost at the applicable punitive rate.

Essentially the Carrier's position is that claimant performed all functions in connection with the receipt and delivery of Train Order No. 322; he copied the train order direct from the train dispatcher; he repeated the train order direct to the train dispatcher; he completed the train order; and he then placed the train order on the train register as instructed. No detail in connection with the receipt of Train Order No. 322 from the inception of that order until it came into the hands of the Conductor was delegated to or assumed by any other employee, according to the Carrier.

We do not think it admits of serious dispute that Carrier has resorted to a practical means for accomplishing delivery in order to avoid paying overtime, as would have been required had the Agent-Telegrapher been held over for an additional hour and fifteen minutes to personally deliver a train order, at a register station office where the Conductor of Extra 1767 was obliged to come to sign the register book, before his train could enter upon the main track; and, it being a further condition that he needed clearance the train order provided before he could enter upon and operate over the main line.

Nevertheless, employees argue that this mode of delivery is not in keeping with practical railroading, according to a custom, usage and general practice by which the Agent-Telegrapher craft is expected to retain custody of all train orders until actual delivery is made in person to the one addressed, same being an important duty and responsibility of the position to which assigned.

We find no need in this docket to take issue with what the Employees tell us is generally included within the scope of their activities. So far as we are concerned this dispute concerns a local operating condition and the way work is performed along the lines of this Carrier.

As much as we see in the Employees' argument that could lead to a conclusion the Carrier here has deviated from the usual mode and manner of delivery to avoid paying overtime compensation, Carrier's operating officials have that right, in our estimation, if they have done no more than to direct the manner and method for performing work in accordance with their managerial judgment, and nothing in the Rules Schedule preventing. The proof that some right to manage remains vested in those not covered by the Collective Agreement is found not only in the class of work let and positions enumerated, but the host of operating rules that are in effect alongside the Rules Schedule, and which serve to instruct and direct as to performance of work on positions under scope rules. Furthermore, if employees worked as robots, or always according to a set pattern, or according to their idea of the written word, there would be no occasion for having supervision present to oversee the work and to give directions and instructions as to the manner and method of performing the work, as was done in this case.

It is clear in this docket that the railroad management has not divested itself of all direction, instruction, and control over the delivery of train orders. Rule 211 of the Operating Rules and General Instructions, effective December 1, 1945, covering the handling of train orders reads:

"211. When a '19' train order has been transmitted, operators must, unless otherwise directed, repeat it at once from the manifold copy, in the succession in which the several offices have been addressed. Each operator receiving the order should observe whether the others repeat correctly. When the order has been repeated correctly by an operator, the response 'complete,' and the time, with the initials of the superintendent, will be given by the train dispatcher. The operator receiving this response will then write on each copy the word 'complete,' the time, and his last name in full and deliver a copy to each person addressed without taking his signature. But when delivery to engineer will take the operator from the immediate vicinity of his office, the engineer's copy will be delivered by conductor or brakeman."

The same rule, prior to revision provided in part as follows:

"The operator receiving this response will then write on each copy the word 'complete,' the time, and his last name in full and **personally** deliver a copy to each person addressed without taking his signature." (Emphasis ours.)

Carrier tells us that "the word 'personally' contained in the foregoing sentence was eliminated from the rules and instructions effective December 1, 1945 because it had been and is the customary practice to effect delivery of train orders other than by personal delivery by the Telegrapher."

We do not understand the Carrier to say that the Agent-Telegrapher position in question has been relieved of all duty to make delivery of train orders and neither do we think such intent to do so is clearly implied by the rule change. What constitutes delivery is still another question.

A cardinal rule of construction which applies to these collective agreements, the same as other contracts, is that words are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless it can be ascertained that such words have been used by the parties in a technical sense in accordance with a special meaning given to them by usage.

By common usage the word "delivery" means to give up or surrender; give into another's possession or keeping, or a giving up or handing over. Delivery may be actual or constructive. No particular form of delivery is necessarily required so long as it divests one party of possession and dominion over the thing to be delivered. A delivery of an article may consist in handing the article to the person to whom the delivery is to be made but actual manual delivery and change of possession are not always required

in order to constitute an effectual delivery. In a strict legal sense the word is used to denote transfer of title, but "delivery" signifies, as a popular word, mere transition.

The employees attempt to prove in this docket that the word "delivery" should be construed in a technical sense in accordance with a special meaning given to it by usage so as to require personal delivery. We are not impressed with usch proof as they have been able to bring forward and it does not serve to overcome the showing that is made in this record that Carrier does not always expect manual delivery and change of possession in connection with its train orders.

The Carrier's proof of what was intended by it is in the elimination of the word "personally" from the operating rules, and a clearly published intent not to relinquish all control over delivery of train orders as circumstances require and dictate, as its operating rules show. We have looked closely to see if there is anything by rule, custom, or established practice that clearly runs counter to Rule 211, of the current Operating Rules, and, finding none, the change in the rule and the published intent must be respected.

It will be noted that express provision is made by the current operating rule for the Conductor or Brakeman to obtain the train order in the immediate vicinity of the office and either one can there take possession of the Engineer's copy when delivery to the Engineer will take the operator from the immediate vicinity of his office.

In the instant case the Conductor obtained the train order and clearance for the crew from the register at the office where and when his attendance was required; and at a place where the Agent-Telegrapher had been instructed to make delivery. The only thing that does not make delivery complete from the Employees' standpoint is that the Agent-Telegrapher was not present to hand the train order to the Conductor.

This case can be easily distinguished from those where Carriers have resorted to artifice, sharp practice and subterfuge to escape the force of rules or established practice. The record before us is clear that delivery was made at a customary place and in an authorized manner. The Agent-Telegrapher was divested of dominion over and possession of the thing to be delivered, and surrender was complete when, as instructed by proper authority, he placed the train order on the register to be picked up by the Conductor. Thereupon, he was relived of any further responsibility for custody or safe keeping of the train order and as to him delivery was complete.

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 Employee involved in this dispute are respectively Carrier and Employee 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June, 1956.