

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

1. Carrier violated the agreement between the parties hereto when on December 10, 14, 15, 16, 17, 1954, and continuing thereafter, it required Agent-telegrapher (J. M. Parkis) at North Creek, New York, to place train orders and clearance cards in waybill box, located outside station building, where such train orders and clearance cards were picked up by conductors of trains to which addressed, on mornings of December 13, 15, 16, 17 and 20 (1954), respectively, at a time prior to regular assigned hours of Agent-telegrapher J. M. Parkis.
2. Violations, as set forth above, continued on other dates subsequent to December 17, 1954. Carrier should be required to permit joint check of records to ascertain dates when such subsequent violations occurred.
3. Carrier shall be required to compensate Agent-telegrapher J. M. Parkis an amount equal to one call under the agreement, for each and every date, as set forth above, and all subsequent dates when, in violation of the agreement, he was deprived of work to which he was entitled, in handling such train orders and clearance cards.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect an agreement, effective July 1, 1944, entered into by and between The Delaware and Hudson Railroad Corporation, hereinafter referred to as Carrier or Company and The Order of Railroad Telegraphers, hereinafter referred to as Telegraphers or Employees. The Agreement is, by reference, included in this submission as though copied herein word for word.

This dispute was handled on the property in the usual manner to the highest officer designated by Carrier to handle such claims. The claims were denied and the dispute failed of adjustment. Such handling was in accordance with the provisions of the Railway Labor Act, as amended. The dispute, not having been settled by management of Carrier in accordance with the agreement, is submitted to Third Division, National Railroad Adjustment Board, for award. This Board has jurisdiction of the parties and the subject matter.

"(b) All employes herein specified shall be paid on the hourly basis, except as shown in the wage scale or as may otherwise be agreed upon."

"Article No. 2—Preservation Rates and Classification

"(a) The entering of employes in the positions occupied in the service or changing their classification or work shall not operate to establish a less favorable rate of pay or condition of employment than is herein established.

"(b) Where existing payroll classification does not conform to Article No. 1, employes performing service in the classes specified therein shall be classified in accordance therewith."

"Article No. 23—Handling Train Orders

"(a) The handling of train orders at telegraph or telephone offices is restricted to employes under the scope of this agreement and Train Dispatchers, except in emergency. In emergency, if an employe under the scope of this agreement is available or can be promptly located he must be called to handle train orders and if not so called will be paid as provided by the call rule.

"(b) Emergencies as herein specified shall include casualties or accidents, engine failures, wrecks, obstruction of tracks, washouts, tornadoes, storms, slides or unusual delays due to hotbox or break-in-two that could not have been anticipated by the Train Dispatcher when train was at last previous telegraph office, which would result in serious delay to traffic."

These rules were not violated in the instant case. The train orders were issued by the train dispatcher and received, copied, and delivered by the agent-telegrapher who is making this claim. The train orders were not "handled" by any employe not subject to the scope of the Telegraphers' Agreement or any other person between the time they were placed in the box by the agent-telegrapher and the time they were picked up by the members of the crew to whom they were addressed.

In order to support claim for a call for work not performed, it is incumbent upon the employes to show that employes outside the scope of the Telegraphers' Agreement performed work which was properly under the scope of the agreement. No such showing can be made because there was no such work performed.

The train orders in question were handled in accordance with an established practice that has existed without protest or claim for many years. Claim is not supported by agreement rules and carrier respectfully requests that it be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: In this docket we have a claim asserted which is quite similar to the one in Docket TE-7828. The agreement rule involved is the same, but the facts are somewhat different. Whereas in Docket TE-7828,

train service employees were required to deliver train orders to crews at a distant point, in the instant case the Agent-Telegrapher was required to place train orders in a waybill box from which train crews at a later time would pick them up when the Agent-Telegrapher was not on duty.

The basic principle involved in the instant case is essentially the same as that involved in Docket TE-7828. Petitioner contends that the Respondent Carrier violated the Agreement when it required the Claimant at North Creek, N. Y., to place train orders in a waybill box for pickup by train crews.

This is a question which has been before the Division many times. Therefore, a substantial number of awards have been made dealing with similar situations. The Agreement involved here has a specific provision regarding the handling of train orders. It is provided in Article 23(a) as follows:

"The handling of train orders at telegraph or telephone offices is restricted to employees under the scope of this agreement and Train Dispatchers, except in emergency. In emergency, if an employee under the scope of this agreement is available or can be promptly located he must be called to handle train orders and if not so called will be paid as provided by the call rule."

It is conceded that in the instant situation no emergency was involved. Thus, the question to be determined goes to the application of the cited rule to the facts of record.

It is unnecessary to review in detail the many awards made by the Third Division which have dealt with this question of handling train orders. However, a review of such awards indicates that where the facts were essentially the same as here, and where the applicable rules of the Agreement were essentially the same, the Division had generally sustained the claims. No considerations have been brought to our attention in the instant case which would justify a reversal of this long line of Awards by the Division. Therefore, on the authority of Awards 86, 709, 1166, 1169, 1170, 1422, 1680, 1878, 2926, 5087, 5122, 5872, and others the claim will be sustained.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 12th day of January, 1959.

DISSENT TO AWARD NO. 8657, DOCKET NO. TE-7745

In Award 8657, the Referee sustained the claim on the erroneous premise—

"The basic principle involved in the instant case is essentially the same as that involved in Docket TE-7828."

on authority of Awards 86, 709, 1166, 1169, 1170, 1422, 1680, 1878, 2926, 5087, 5122 and 5872, and on the further erroneous premise—

"No considerations have been brought to our attention in the instant case which would justify a reversal of this long line of Awards by the Division."

The record in the instant case shows, and it was brought to the Referee's attention, that in Docket TE-7828, and in the other Awards cited with the exception of Awards 1166, 1169, 1170, 1422, 1680 and 5872, the facts differed from those in the instant case in the very material respect that, in each of those cases, an employe other than a telegrapher did some act of "handling" a train order—a yardmaster, the conductor of another train than the one addressed, or someone else not covered by the Scope Rule of the Telegraphers' Agreement. In the case before us, however, no human hand intervened between the telegrapher and train crew to whom the order was addressed. No one but a telegrapher "handled" the train order. He put it in the waybill box and the crew to whom it was addressed picked it up.

In respect of the facts in the instant case and in the cases covered by Awards 1166, 1169, 1170, 1422, 1680 and 5872, *supra*, the Referee's attention was directed in the case before us to Award 8327, in which we held as follows:

"Now there is a line of cases involving such facts, but before considering them it may be best first to discuss the case on principle. It is a fundamental principle that whether to have work done or not is in the Carrier's sole discretion. I know of no decision, apart from those to be discussed, which have held a carrier obligated to have certain work performed. It is only when a carrier decides to have work performed that the rights of employes to perform that work arises. If the wrong employe performs it, a violation of the Agreement has occurred. That is the extent to which our decisions in general have gone. The Scope Rule protects telegraphers from having their work taken by others. The Train Order Rule here is written in just such terms. It prohibits employes 'other than covered' from handling train orders.

"Since no employe, 'other than covered' handled the train orders in question, it seems too clear for argument that the Train Order Rule has not been violated. To hold that the Rule requires the Carrier to permit a telegrapher to do work that the carrier does not want done, is not only to twist and distort the plain words of the Train Order Rule but also to ignore the fundamental principle that it is for the carrier alone to decide that work will be done. If we should so hold, then I suppose it would follow that where a telegrapher has in the past made 6 copies of each train order he is entitled in the future to make 6 copies even though the carrier only requires 4 copies.

"So much for principle, and we turn now to precedents. There is a long line of decisions upholding the Organization's contention in this case. Contrary as they are to principle, and wrongly decided according to Award No. 1821 as well as according to the many dissents,

we have sought to find the basis for the erroneous departure from principle. That basis is to be found in a careless expression, not necessary to the decision, in Award No. 709. That case involved the copying of train orders by one not covered by the agreement, and correctly held the carrier in violation. But the referee said, 'the handling of a train order should include not only the physical process of passing it from hand to hand in the performance of its function but also the work involved in its preparation.' It was 'the work involved in its preparation' that was involved in that case, and the reference to 'passing it from hand to hand' was merely an unstudied reference to the fact that manual delivery was customary on the property and was not in issue.

"In Award No. 1166, the first case in point, the Referee picked up that obiter dictum of Award 709, and made it the basis of the decision, along with an operating rule which required personal delivery, but which was not part of the agreement between the parties, and Award No. 1096 which was not in point. That decision (Award No. 1166) was clearly wrong.

"It may not be inappropriate to insert a word here as to the propriety of considering operating rules. An operating rule, since it is promulgated by the Carrier unilaterally, confers no rights on the employees. It may be voided or amended unilaterally. The rights of the employees are to be found in the Agreement alone. But where a provision of the Agreement is ambiguous, requiring a consideration of practice to determine its meaning, it is entirely proper to consider operating rules for the light they may throw on practice. We have done this many times. But where the provision of the Agreement is clear and unambiguous, it needs no interpretation. No evidence of any sort, operating rule or otherwise, is admissible to vary the terms of a clear provision of the Agreement. Such was the situation in Award No. 1166 and it is the situation here. The train order rule here is quite clear and it has not been violated. No one other than a Telegrapher handled the train orders in question.

"Other decisions took the easy path of following the precedent of Award 1166, some of them relying also on operating rules, and some even relying on decisions not in point, namely decisions where an employe other than a telegrapher had copied a train order or had carried it to the train crew addressed—decisions obviously correct but not in point.

"As case followed case, some of the referees followed the precedents with obvious reluctance. An example of this is Award No. 4057, where the decision states that the Referee in Award No. 3670 was 'less than enthusiastic' in following the precedents. Referee Lloyd Garrison, in following the precedent set by Award No. 1166, was so disturbed by it that he wrote a very lengthy memorandum justifying the following of erroneous decisions in certain circumstances (Award No. 1680). The circumstances here, where there are decisions both ways, do not require the blind following of either line of cases to the disregard of principle.

"Until recently only one case had intervened in this unbroken line of cases to state a contrary conclusion. Referee Yeager, in Award

No. 1821, expressly held the precedents wrongly decided. In so holding he said: 'No single detail . . . was entrusted to anyone not covered by the rule in question.'

"The latest decision to which my attention has been called is that of Referee Langley Coffey, in Award No. 7343, decided in 1956. In that case, as in the one before us, the telegrapher left the train order on the train register book, and claimed a call. There was no train order rule, but the Referee held that 'the work of handling train orders on the lines of this Carrier is typical of work reserved' under the Scope Rule. So, as pointed out earlier in this Opinion, the absence of a train order rule was immaterial to the case: the Scope Rule gave the same rights as a train order rule could have given. The claim was denied on principle, without any reference being made to the precedents.

"So we have a situation where we must decide either on the basis of a long line of precedents which we think unsound and contrary to principle, or on the basis of principle supported by two Awards, Nos. 1821 and 7343. We must either repudiate our latest decision supported by one earlier decision and principle, or confirm our latest decision and repudiate the earlier decisions as erroneous. We have no question as to our duty. It is to confirm Award Nos. 1821 and 7343, and thus confirm sound and long-established general principles. No one is entitled to perform work that the carrier does not want performed by anyone. Neither the Scope Rule nor the Train Order Rule is violated except when some employe other than a telegrapher performs telegrapher's work. For these reasons the claim will be denied."

In the instant case, the Referee should have avoided the "easy path" repudiated in Award 8327, viz., of following as precedent a line of Awards shown and held to be unsound and contrary to principle; he should have chosen to confirm Awards 1821, 7343 and 8327, and thus confirm sound and long-established general principles. As a precedent, an Award is no better than the reasoning on which it is based. An Award such as 8657 creates chaos and increases the difficulties confronting Carriers in their struggle for survival.

For the foregoing reasons, among others, Award 8657 is in error and we dissent.

/s/ W. H. Castle

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 8657

DOCKET NO. TE-7745

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: The Delaware and Hudson Railroad Company.

Upon application of the representatives of the Employees involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

In this case the Third Division held that the Carrier had violated the Agreement. The Award of the Division was "Claim Sustained". Thus the Claim as submitted to the Division was sustained in full, including Item 2 about which the parties now find themselves in disagreement. Said Item 2 of the Claim reads:

"Violations, as set forth above, continued on other dates subsequent to December 17, 1954. Carrier should be required to permit joint check of records to ascertain when such subsequent violations occurred."

The Carrier contends that the matter of checking the records was never handled on the property prior to submission to the Division; that the Award only requires the Carrier to pay the named Claimant for the dates specified in Item 1 of the Claim and any others where Claimant had filed as a matter of record with the Carrier with supporting evidence.

This matter is presently before the Division for an interpretation and not as a reconsideration. Therefore, we have no authority to change the award by way of interpretation. As pointed out by Referee Carter in Interpretation No. 1 to Award No. 4967: "An interpretation of an award may not properly be treated as a rehearing or a new trial of the merits of the case."

To make the interpretation the Carrier requests in its submission would amount to a reconsideration of the merits. All questions presently raised were either raised in the original submissions prior to the Award, or there was adequate opportunity to do so.

There is no ambiguity in the language of the Award. It is clear from its terms that the Carrier was required to permit a joint check of records to determine if there were subsequent dates when Claimant J. M. Parkis was deprived of work in the same way in contravention of the Agreement.

The basic holding of the Award was that the Agreement had been violated. Item 2 of the claim and the application of the Award thereto was for the purpose of making effective the basic decision made in the Award.

The terms of the Award are clear and unambiguous. No further interpretation is required.

Referee Paul N. Guthrie who sat with the Division, as a member, when Award No. 8657 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 11th day of May, 1961.

**DISSENT TO INTERPRETATION NO. 1 TO AWARD NO. 8657,
DOCKET NO. TE-7745, SERIAL NO. 189.**

This interpretation not only endorses a pernicious error of Award 8657 itself, but reflects an unexplained contempt for numerous Awards cited to the Referee, including one involving the same parties, agreement and rules as here, which confine decisions of this Board within the framework of the Railway Labor Act and Circular No. 1 to claims handled by the parties on the property. Consequently, we dissent.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ J. F. Mullen