Award No. 8687
Docket No. TE-8601

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, 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:

Bu. No.	Station	Date	Order Time	Train No.	No.	Copied By
694	Neverson, N.C.	May 8, 1953	1207p	50	44	Wedding
"	" "	May 22, 1953	1052a	52	X663	May
2087	Appie Siding	May 8, 1953	355p	58	X663	May
701	" "	May 9, 1953	323p	60	"	"
702	Belcross	May 29, 1953	740a	30	X438	Norton
	"	Jun 1, 1953	806a	24	"	"
	"	Jun 2, 1953	824a	26	"	"
	"	Jun 3, 1953	722a	22	"	"
	"	Jun 4, 1953	714a	22	"	"
	"	Jun 5, 1953	724a	26	"	"
	"	Jun 8, 1953	715a	22	"	"
	"	Jun 9, 1953	723a	22	"	"
	"	Jun 10, 1953	717a	22	"	"
	"	Jun 11, 1953	724a	26	"	"
703	Chapanoke	Jun 6, 1953	207p	50	X702	"
719	Wilson Yard	Jun 20, 1953	1014a	52	99	Hough
720	Greenville (New Pass)	May 11, 1953	309p	44	43	Winstead
2088	Neverson	Jun 11, 1953	233p	50	45	Wedding
2089	"	Jul 15, 1953	1021p	60	X1608	Stark
2090	"	Jul 7, 1953	120p	46	45	Mimms
2091	"	Aug 22, 1953	432p	62	X1603	Ormond

Bu. No.	Station	Date	Time	Order Train No.	No.	Copied By
2092	Simpson	Aug 30, 1953	1131a	22	63	Ralph
2167	Gregory	Jul 27, 1953	812a	32	X438	Walker
"	"	Jul 27, 1953	820a	34	"	"
2168	"	Jul 28, 1953	818a	28	"	"
	"	Jul 28, 1953	821a	30	"	"
2169	Neverson	Sep 6, 1953	552p	46	X1502	Dayton
2170	Simpson	Aug 18, 1953	804p	58	64	Pleasants
2171	Elizabeth City (ML)	Jun 24, 1953	555p	50	X703	Morgan
	" "	Jun 24, 1953	601p	52	"	Morgan
	" "	Jun 24, 1953	605p	54	"	"
2172	Greenville (New Pass)	Jun 13, 1953	1012a	28	63	Lundy
2173	" (Old Pass)	Jul 18, 1953	921a	36	63	Stocks
2057	Snowden	Jul 29, 1953	828a	28	X438	Walker
2058	"	Sep 24, 1953	814a	34	"	Stephenson
2059	"	Sep 25, 1953	808a	32	"	"
2060	"	Sep 28, 1953	803a	22	"	"
2061	Gregory	Jul 17, 1953	813a	36	"	Walker
2062	Elizabeth City (ML)	Jul 11, 1953	130a	22	64	Stephens
2093	Cumnock	Aug 10, 1953	1239p	47	X1601	Cox
	"	Aug 11, 1953	817a	31	"	"
	"	"	823a	45	"	"
	"	"	830a	47	"	"
	"	"	1221p	57	"	"
	"	"	1225p	63	"	"
	"	Aug 12, 1953	807a	33	X1509	"
	"	"	809a	41	"	"
	"	"	812a	43	"	"
	"	"	814a	45	"	"
	"	"	1230p	65	"	"
	"	"	1233p	67	"	"
	"	Aug 13, 1953	809a	33	"	"
	"	"	811a	41	"	"
	"	"	814a	43	"	"
	"	"	817a	45	"	"
	"	"	1226p	47	"	"
	"	Aug 14, 1953	818a	31	X1604	"
	"	"	820a	45	"	"
	"	"	823a	47	"	"
	"	"	1240p	73	"	"
	"	"	1244p	75	"	"
	"	"	315p	81	"	"
	"	Aug 31, 1953	157p	57	X663	Freeman
	"	Sep 1, 1953	806a	31	"	"
	"	"	812a	45	"	"
	"	"	817a	49	"	"

Bu. No.	Station	Date	Time	Order Train No.	No.	Copied By
2093	Cumnock	Sep 2, 1953	806a	31	X663	Freeman
	"	"	810a	43	"	"
	"	"	814a	45	"	"
	"	"	1244p	75	"	"
	"	Sep 3, 1953	816a	45	"	"
	"	"	819a	47	"	"
	"	"	1236p	71	"	"
	"	Sep 4, 1953	811a	29	"	"
	"	"	814a	41	"	"
	"	"	816a	43	"	"
947	Solite	Oct 20, 1953	1242p	63	X1509	"
	"	Oct 21, 1953	1145p	65	"	"
	"	Oct 22, 1953	239p	77	"	"
2068	Neverson	Oct 14, 1953	1051p	68	X1507	May
2069	"	Oct 19, 1953	826p	46	X1602	"
2070	"	Oct 27, 1953	856p	68	X1607	"
2071	"	Nov 3, 1953	217p	60	45	Wedding
2072	"	Nov 6, 1953	115p	80	44	"
2073	"	Nov 12, 1953	144p	50	45	Morgan
2074	"	Nov 18, 1953	142p	52	44	Wedding
2075	Plankroad	Sep 21, 1953	536a	35	99	Hunt
2076	Mile Post 154	Nov 20, 1953	344p	62	43	Winstead
2077	Neverson	Dec 12, 1953	943a	44	X1601	Roberts
2078	Greenville (Old Pass)	Aug 14, 1953	814p	54	64	Hough
2079	Hinson	Sep 17, 1953	432p	80	X662	Pinner
2080	Yort	Oct 5, 1953	511a	37	X1502	Freeman
2081	Plankroad	Oct 2, 1953	659p	79	49	Corbett
2082	Overgrade	Sep 4, 1953	938a	42	X1603	Flowers
2083	Mile Post 354	Oct 16, 1953	1208p	49	X438	Corbett
	"	"	1212p	61	"	"
2084	Allen	Oct 17, 1953	223p	61	51	Bradshaw
2085	Aquadale	Oct 19, 1953	1146a	41	X1509	Freeman
2063	Knightdale	Mar 5, 1954	516p	62	X1503	Ormond
2064	"	Apr 22, 1954	745p	56	45	Wedding
2065	"	May 22, 1954	455p	46	X1601	Wedding
2066	Stanfield	Apr 12, 1954	745p	31	99	Corbett
2067	Hallison	May 21, 1954	440p	77	X1501	Dunn
2024	Waddill	Mar 2, 1954	550p	58	X1613	Gregg
"	"	"	553p	60	"	"
2025	Neverson	Mar 8, 1954	316p	44	X1603	May
2026	Alligoods	Mar 14, 1954	722a	26	98	Gibson
2027	Pyrax	Mar 19, 1954	455p	69	65	Lilly
2028	Carbonton	Apr 8, 1954	938p	87	63	Williamson
2029	Plankroad	Apr 14, 1954	434p	77	49	Styres
2030	Allen	Apr 23, 1954	445p	95	98	Cox

Bu. No.	Station	Date	Time	Order No.	Train No.	Copied By
2031	Sylvaola	Apr 26, 1954	932a	45	X132	Medlin
2032	Winfall	May 10, 1954	809a	32	X438	Spruill
2033	"	May 11, 1954	712a	26	"	"
2034	Neverson	May 13, 1954	321p	64	X1508	Hough
2035	Putnam	Jun 8, 1954	701p	63	63	Barringer
2036	Neverson	Jun 14, 1954	1212a	24	98	Massey
2037	Pyrax	Jun 18, 1954	651p	87	X1612	Johnson
2038	Mt. Herman	Jun 21, 1954	458p	68	X1602	Morgan
"	"	"	501p	60	"	"
2039	Putnam	Jul 10, 1954	453p	75	63	Styres
2040	Cumnock	Jul 26, 1954	815a	35	X438	Watson
"	"	"	153p	49	"	"
2041	"	Jul 27, 1954	818a	47	"	"
2042	"	Jul 28, 1954	816a	45	"	"
2043	"	Jul 29, 1954	817a	45	"	"
2044	"	Jul 30, 1954	814a	45	"	Woodcock
2045	Eagle Rock	Aug 3, 1954	646p	50	X1610	Watson
2046	Neverson	Aug 4, 1954	1242p	52	44	May
2047	Balm	Aug 8, 1954	543a	35	99	Lilly
2048	McCullers	Aug 5, 1954	347p	87	X1506	Johnson
2049	Moyock	Aug 9, 1954	805a	38	X438	Barnes
	"	"	812a	40	"	"
2050	Cumnock	"	249p	65	X1505	Watson
2051	Neverson	Aug 24, 1954	1057a	38	X1612	Roberts
2052	McCullers	Oct 6, 1954	1036a	61	64	Williamson
2053	Snowden	Oct 9, 1954	338a	34	63	Bobbitt
2054	Alligoods	Nov 14, 1954	715a	34	63	White
2055	Burns	Oct 28, 1954	345p	73	49	King
"	Simpson	Oct 29, 1954	737p	68	X1606	Sumner
"	Belcross	Dec 18, 1954	201a	22	63	Honeycut
"	Carbonton	Jan 13, 1955	319p	79	X1601	Lewis
"	Neverson	Jan 15, 1955	239p	56	X1608	May
"	Chapanoke	Jan 27, 1955	225p	54	X1613	Gregg
2056	Neverson	Feb 15, 1955	258p	54	X1506	Roberts
"	Alligoods	Feb 17, 1955	805a	34	98	Oglesby
"	Knightdale	Feb 17, 1955	252p	64	X663	Ormond
"	Simpson	Feb 19, 1955	743p	54	X1601	Dayton
"	Plankroad	Mar 10, 1955	801a	39	64	Barringer
"	Neverson	Mar 21, 1955	1201a	24	98	Davis
2227	Knightdale	Apr 25, 1955	1028a	38	44	Perry
2228	Elizabeth City (Psgr Sta)	May 3, 1955	124a	22	64	Jones
2229	Corinth	May 3, 1955	406p	79	X1508	Byrd
2230	Carolina Yard (RH)	May 21, 1955	257a	26	63	Stephenson
2231	Elizabeth City (Psgr Sta)	May 28, 1955	114p	48	98	Oglesby

Bu. No.	Station	Date	Order Time	Train No.	No.	Copied By
2232	Eliz. City (Suffolk Jct)	May 22, 1955	1219p	26	98	Miller
2233	Moyock	Jun 8, 1955	654a	26	X438	Gregg
2234	Elizabeth City (Psgr Sta)	May 24, 1955	135a	22	64	Morgan
2295	Northwest	Jun 20, 1955	750a	22	63	Stephenson
2296	Elizabeth City (ML)	Jul 27, 1955	145a	22	64	"
2297	Brickdale	May 31, 1955	635p	70	X1615	Morgan
2298	"	Jun 1, 1955	701p	74	"	"
2299	Moyock	Jun 9, 1955	754a	24	X438	Gregg
2300	Eliz. City (Old Main)	Jun 18, 1955	149a	22	64	Gibson

2. As a conseqence 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 train orders were so handled at each of the points specified.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties bearing effective date of August 1, 1937, a copy of which, as amended, is on file with the Board and, by this reference, is placed in evidence as a part of this submission. Its provisions as to working conditions and rates of pay apply to such employes as are engaged by the Carrier to perform work of the several classes set forth in Article 1 of the Agreement, viz., telegraphers, telephoners (except switchboard operators), agent-telegraphers, agent-telephoners, clerk-telegraphers, levermen, towermen, operators of mechanical telegraph machines, block operators; such station agents (freight or ticket) and assistant agents listed in the Wage Scale; and such additional positions as may be created or established within the scope of the Agreement.

As reflected by the Statement of Claim, the Carrier permitted and/or required employes not covered by the Agreement to copy and handle train orders by the use of telephones situated at the points shown, on the dates enumerated in the Statement of Claim. No emergencies prevailed. In the absence of an emergency such work is delegated entirely to employes of the class and craft set out in Article 1, Scope.

Article 2 as to the Basic Day for employes covered by the Agreement, stipulates that:

"Eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work, except that where two or more shifts are worked, eight (8) consecutive hours with no allowance for meals shall constitute a day's work . . ."

Article 23 (b) provides that:

"All positions covered by this agreement will be filled by employes holding seniority, except in case of emergency."

Article 24 (c) states that:

"Temporary positions or vacancies known to be of less than ninety (90) days duration will be filled by the senior competent available extra employe."

make any valid claim or grievance by reason thereof. Conversely, the agreement provides that at points where an agent or operator is regularly employed, such employe will be used to perform work, and that if such occurrence is during the hours such agent or operator is not on duty but is available, and such agent or operator is not called to perform the work, he will be allowed a call payment therefor.

Respondent submits that the facts and position as set forth in the aforementioned Dockets TE-6724 and 7504, and the additional information contained in Exhibit "A", fully support the respondent's position that the work forming the bases for the claim herein asserted by the petitioners is without merit or contractual foundation, and that same should be denied, and urges that your honorable Board should so hold.

All data contained herein, and in the dockets herein referred to, have been discussed with the petitioners either in conference or by correspondence, and/or is known and available to them.

(Exhibits not reproduced.)

OPINION OF BOARD: The record in this case has assumed monumental proportions. In addition to the docket itself we have received the master files in TE-6724, covered by Award 6779 (Donaldson) and TE-7504, Award 7976 (Elkouri) comprising 541 pages, plus 101 pages of argument briefs; numerous reports and statements and 182 prior awards of the Board.

We have carefully reviewed the positions and argument of the respective parties. We shall not attempt to reproduce here all of their contentions.

We shall, however, quote from the first of Carrier Member's two briefs offered in argument:

> "We have shown that this instant claim should be denied for the following reasons:
>
> (1) The identical issue between these same parties, under the same rules and practices thereunder, has been denied by this Division, with the assistance of Referee Elkouri, in denial Award No. 7976, on Docket TE-7504, rendered July 2, 1957; therefore, this claim should be denied on the basis of that Award because—
>
> (a) The Awards of this Board are final and binding;
>
> (b) This Board does not grant rehearings of the same disputes;
>
> (c) This Board does not countenance splitting causes of action; and,
>
> (d) The question here presented is moot.
>
> (2) This record does not furnish any substantive evidence to show Award No. 7976 is wrong and should be overruled.

(3) None of the alleged Agreement violations were handled on the property in accord with applicable Agreement provisions, hence are not properly before this Division for adjudication—

(a) Certain of the alleged violations were not handled on the property up to the highest Carrier officer designated to handle claims;

(b) The balance of the alleged violations were not handled on the property after final declination by the highest Carrier officer designated to handle claims, in accord with the requirements of Schedule Agreement Article 34 (Time Limit Rule).

(4) The claimants are unnamed, hence the claim as presented is vague, indefinite, and impossible of ascertainment."

We shall first consider points (3) a and b, and (4).

The Organization had stated at page 65 of this docket—

"The Employes will not try to reproduce all of the correspondence exchanged between the parties in connection with the 164 violations included in this submission. * * * "

The Labor Member who argued this case noted that the Carrier itself had not raised such procedural objections, and upon investigation, reports in his rebuttal brief that he had secured—

"and have in my possession the entire organization file in each of the 164 claims we are now dealing with. Each of those claims was handled precisely as required by the parties' rules and the Railway Labor Act. There is a letter in every one of those files covering each step of handling, including declination by the highest officer of the Carrier designated to handle such claims. * * * I have copies of the General Chairman's letters in which he unequivocally informs the Carrier's highest officer that his decision—in each of the 164 claims—is not acceptable. * * * At page 135 of the record the carrier says it ". . . subscribes to the information set out in detail in petitioner's statement of claim.', without in any way indicating there was any procedural failure on the part of the Employes. Nowhere in its submission does the Carrier make any such charge, and in the penultimate paragraph of its submission, page 136, indicates full compliance by both parties with all requirements of the agreement and Railway Labor Act."

The Referee did not deem it necessary to accept the Labor Member's invitation to inspect, in the presence of Carrier Members, the files in question.

We will, therefore, reject points (3) and (4) of Carrier Member's argument and hold that this claim is not procedurally defective, that it is not impossible of ascertainment.

We shall proceed to consider points (1) and (2) offered in behalf of Carrier in support of its argument that the claim should be denied. Essentially such argument is that the same claim, with the same parties and agree-

ment rules, was disposed of by this Board in Award 7976 and, under many prior awards of this Board, unless Award 7976 is held palpably wrong, this claim must be denied.

A literal reading of the claim in this docket shows it to be the same agreement transgression that was covered by Award 7976; however, the violations before us now cover the period May 8, 1953 through June 18, 1955, whereas Award 7976 covered the period April 20, 1951 through March 22, 1952.

We had a somewhat similar question before us in Award 8419. However, the claim there was identical in every respect and detail to the claim disposed of by this Board in Award 5432.

We will not accept argument in Carrier's behalf and dismiss this claim on its assertion that it was disposed of by Award 7976. A similar claim was disposed of by Award 7976, but not the same claim as here. To do so would be to say once an Organization charges a Carrier with an agreement violation, and such claim is disposed of by an award of this Board, that Organization is forever estopped from again charging the sime Carrier with violating the same agreement provision on other occasions or under other circumstances. Such reasoning would be absurd.

This is not to say that such would not be a desirable situation. We have in mind a number of industries and major companies which have permanent arbitration machinery with a permanent arbitrator. Once an agreement provision is there determined by the arbitrator, it is seldom that a second case may ensue to test such provision, unless, of course, the facts may be so different as to require separate consideration.

There is a crying need for such stability in determining agreement interpretation in the railroad industry. Under the prevailing machinery, such ideals are impossible of attainment. The industry and the parties here are most certainly mature enough in the field of collective bargaining to permit of such an accomplishment. It is not, however, in our province to determine the obstacle to such idealism.

This case must turn, then, on claim in Carrier's behalf that—

> "this record does not furnish any substantial evidence to show Award 7976 is wrong and should be overruled."

The claim in Award 7976 first came to the Board in Docket TE-6724. Award 6779 found—

> "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."

The Opinion of the Board there noted:

> "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."

The dispute subsequently was resubmitted as Docket TE-7504 and decided by Award 7976. Both dockets were cited by Carrier Member arguing this case as part of the evidence before us in this dispute.

Award 6779 was adopted by this Board October 13, 1954. The "evidence" which prompted the Board to remand the dispute to the parties consisted of a letter, dated February 26, 1941, from Carrier Superintendent L. P. Kennedy to John W. Graham, LaGrange, N.C., described by the Organization as a former General Chairman on this carrier from 1930 until March 19, 1935, when he resigned.

This letter consists of Mr. Kennedy's version as to what transpired at a conference between the parties held December 13, 1934—more than six years before such letter was written. It was attested to by Mr. Kennedy's affidavit, and an affidavit on Mr. Graham's part, reading:

> "The best I can remember the statements below are correct as to the agreements reached."

It was presented to the Referee handling Docket TE-6724 almost twenty years after the conference is alleged to have been held. And, as Referee Donaldson noted in Award 6779, it was presented "after arguments were closed" in Docket TE-6724.

Award 6779 did not, however, decide the claim on its merits.

Upon its resubmission as Docket TE-7504, the Organization attacks the manner in which such "new evidence," which we will hereafter refer to as the Graham-Kennedy letter, was presented to the Board; it asserts it was presented and received long after "the parties had rested their case," and was, therefore, inadmissible under the Board's consistent admonition to the parties in all disputes that it—

> "is not disposed to admit known evidence at an oral hearing which has not theretofore been presented for consideration by the interested parties during negotiations between them in their undertaking to adjust the dispute without petition to the Adjustment Board."

This Board used such language in advising the parties of the time and place for oral hearing on that dispute, which was then handed as TE-6724.

In its submission to this Board in TE-7504, Organization states:

"The Employes do not think it is necessary to discuss the contents of the Graham-Kennedy letter. The very manner in which it was brought into being is sufficient to remove it from the realm of consideration. The letter is neither an agreement nor an interpretation of the agreement between the parties. It represents an attempt to create a record of something that never transpired at Norfolk on the day in question even though assuming that the original letter is in existence in the form disclosed. * * * The Organization representatives on the property have never laid eyes on it although apparently existing for approximately fourteen years it has never, at any stage, been disclosed as documentary to the collective bargaining agreement. The General Chairman of the Telegraphers on the Norfolk Southern on February 26, 1941 was H. M. Harris. If there were to be any oral understandings, letters, memoranda or other documents bearing on the Telegraphers' Agreement, then Messrs. Kennedy and Poe should have addressed themselves to General Chairman Harris whom they well knew was the authorized representative of the employes at that time. Certainly Graham had no standing in such matters, any more than some retired officer of the Carrier would have had in a similar proceeding with Harris. * * *"

It is not for us here to decide if this Board should have accepted the Graham-Kennedy letter in TE-6724.

But we will not consider it in the dispute now before us because we agree, with the Organization, that it "is neither an agreement nor an interpretation of an agreement between the parties."

We must and will decide this case on the basis of the duly negotiated agreements between the parties. The Graham-Kennedy letter does not fall within that category.

The Agreement rules (Scope and Train Orders) reads:

"Article 1—Scope:

The following rules, working conditions, and rates of pay will apply to all telegraphers, telephoners (except switchboard-operators), agent-telegraphers, agent-telephoners, clerk-telegraphers, levermen, towermen, operators of mechanical telegraph machines, block operators, such station agents (freight or ticket), and assistant agents as are herein listed, hereinafter referred to as employes, and such additional positions as may be hereafter created or established within this scope."

"Article 15:

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."

Argument presented in behalf of Carrier observes that—

"It is readily notable that the Employes did not then consider their Scope Rule as an all-inclusive rule, because if they had there would have been no necessity to negotiate and adopt a Train Order rule.

"It is equally notable that the Train Order rule, by reason of its restrictive language, only reserves to Telegraphers (or Dispatchers) *the handling of train orders at points where an operator is employed*, and permits the continuance of the practice on this property for other than Telegraphers to handle train orders at points where Telegraphers are not employed * * *."

In addition to its reliance on the Scope rule, the Organization relies heavily on what is referred to as a "letter agreement" adopted August 14, 1922" as interpretive of that (Scope) rule." It is a letter written on that date to Carrier Superintendents J. M. Shea and J. S. Cox and signed by Carrier *General Manager F. P. Pelter with copies to J. J. Demody, Vice President*, Order of Railroad Telegraphers; F. H. Nemitz, Vice President, Order of Railway Conductors and W. R. Griggs, General Chairman. It reads as follows:

"On August 14th, conferences were had with the representatives Order of Railway Conductors and Order of Railroad Telegraphers, who objected to the present practice of relying upon conductors to handle train orders.

We have agreed with the representatives of these two organizations that it is not our purpose to require conductors to handle train orders, excepting under conditions of an emergency nature, such as accidents, personal injury, wash-outs, fires, engine failure, or such other similar causes.

Please see that this understanding is respected by all concerned and strictly complied with, acknowledging receipt."

There is also in this record copy of a similar letter dated August 14, 1922 addressed to "All Conductors" from V. M. Townsend, General Chairman, Order of Railway Conductors, reading as follows:

"At a meeting of the O.R.C. and O.R.T. General Committees jointly, with their Vice Presidents Nemitz and Dermody, which was held with the General Manager of the Norfolk-Southern Railway August 13, 1922, on the matter of the requirements of Conductors to use telephones, I beg to quote you below letter addressed to Superintendents Shea and Cox, signed by General Manager Pelter August 14th, which were the results of our conference: (the Pelter letter, referred to above, is then quoted)

"Therefore, you are advised that it is not the intent of the management to require the Conductors to use 'phones other than for for the above purposes; and at any time in the future you are required to do so by a dispatcher, request of him for a message to do so and promptly forward that to the Local Chairman in the proper way, who will handle with the Superintendents."

Organization also quotes from "Position of Carrier" as submitted by the Carrier here involved in a dispute decided by First Division Award 5295, a sustaining award dated December 12, 1940, as follows:

"Conductors, trainmen and yard service employes 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. * * * "

Organization argues:

"The first agreement in effect on this property was established during Federal control of railroads. Rules with respect to working conditions for telegraph service employes were fairly uniform throughout the nation. Orders, regulations, supplements and decisions rendered by the Administration applied to all carriers. Among these was Interpretation No. 4 to Supplement No. 13, excerpts of which are set forth at Page 13 hereof. By referring to that Interpretation we find the Administration stating that the work of handling train orders either by telegraph or telephone falls to the employes covered by Supplement No. 13 (telegraphers). There was never any question but what the handling of train orders by telegraph was telegraphers' work. The orders were dispatched by telegraph and it followed that they were copied by telegraphers only. * * * There was no dispute, and there could be none, that the entire field of communication service on railroads as to train orders, messages or reports of record was reserved to telegraphers. With the advent of the telephone, telegraphers' agreements were modified to include the telephoner class in case any work formerly handled by telegraph was diverted to the newer medium. * * * "

Organization argues further that this Board—

" * * * has stated many times in substance that Scope Rules generally fall within one of two classifications—those which are very general in character and include all work traditionally performed by the contracting craft, and those which specifically spell out the work included. Scope rules of this Organization purposely do not spell out, in so many words, the work which is embraced within the terms of the agreement, but it is an accepted and well established fact that they do cover work. They are within the category of Scope Rules 'general in character' where tradition, historical practice and custom define the work covered; hence they cover all of the work traditionally, historically and customarily performed by the classes of employes therein specified. Awards 3003, 3004, 3999, 4516, 5038, 5133. They identify the employes by classes who possess the contractual right to perform all of the work encompassed by the agreement, an integral and unquestioned part of which is the transmission and reception of communications by telegraph or telephone such as the train orders here involved. They have not only the fitness and ability, but also the contractual right to perform such work. Award 3881.

"Your Board from its inception has consistently held to the pattern set by similar tribunals to the effect that work of a class covered by the scope of an agreement, and not within an exception contained therein, belongs to the employes in whose behalf the agreement was made, and cannot be delegated to others without violating the agreement, and rightly so. See Awards 2858, 3684, 3901, 3902 and 3955. Many other awards of your Board are just as conclusive and emphatic. It is not the Employes' desire to unduly burden the record, however, we think it is proper to direct particular attention to a few additional awards which are directly in point. * * * "

There followed quotations from Awards 16, 217, 323, 521, 602, 1169, 1284 and 4458.

So far as this docket is concerned, the Carrier has made no defense. It elected to advise this Board that—

> "The facts in relation to the subject matter of the instant claim, and the position of the carrier with relation to such matter, are most thoroughly and sufficiently stated in Carrier's Ex-Parte Submission. Briefs and Rebuttals in an identical dispute, involving many of the same stations as are involved in the instant claim, which has been docketed by your Division as **Docket TE-6724,** on which **Award 6779** was rendered, which award remanded the dispute back to the property to attempt to reach settlement, and instructing that in the event settlement was not so reached the dispute be re-submitted. The dispute was re-submitted to your Division and is now pending adjudication under **Docket TE-7504.** (Decided by Award 7976.)
>
> "To avoid burdening the record in the instant claim by lengthy and unnecessary repetition with respect to the respondent carrier's position on the subject matter of the instant claim, reference is here made to **Dockets TE-6724 and TE-7504,** and those dockets are here, by reference, made a part of this submission."

We have examined the record here with great care. We have likewise carefully considered the many prior awards, pro and con, cited and offered.

Organization makes this statement:

> "After termination of Federal control of railroads, the United States Railroad Labor Board, an agency created by Federal Statutes, in its decision No. 757, dated March 3, 1922, adopted the pattern cut by the United States Railroad Administration, in that the classification included in the Scope Rules promulgated by the Director General of Railroads in Supplement No. 13 to General Order No. 27 and its directives and interpretations, were reaffirmed and continued in agreements with this Organization. This question—application of the scope rules—was further dealt with by the United States Railroad Labor Board in its decisions 2025, 2455, 3278 and Interpretation No. 1 to Decisions Nos. 757 and 2025, dated April 15, 1924. No change was made in the previous holdings that communication service—messages, orders and reports of record, transmitted or received. whether handled by Morse telegraph or by telephone (synonymous terms)—came within the scope of the agreement here in question and must be confined to employes covered thereby."

Organization argues:

> "Most certainly these official declarations concerning the Scope Rule coverage and classifications of positions, make it clear that none other than those included in the craft or class of telegraphers, telephoners, block operators, etc., may properly be assigned to perform service of the classes specified."

There is a long line of decisions of this Board, so consistent it is not necessary to be specific, which have held that the handling of train orders comes within the Scope of the Telegraphers' Agreement. The Organization here is predicating its case primarily on the Scope Rule.

However, we must analyze the confronting claim against the entire agreement; specifically, the train order rule, Article 15:

> "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."

Among the sustaining awards cited by or in behalf of the Organization are four in which an identical or similar train order rule obtained: Awards 5086 (Carter), 5992 (Jasper), 6321 (Elkouri) and 6322 (Elkouri).

We also have Award 5872 (Yeager) which was a sustaining award. However, the agreement there applicable contained no train order rule. In that award we said:

> " * * * the Scope Rule in and of itself is a grant of rights to the employes covered by the Agreement which rights are secured to them so long as the Agreement is in force, and any infringement amounts to a violation. This as a general attitude towards the Scope Rule is supported by numerous Awards. It appears to be a correct analysis.
>
> "The so-called train order rule is not a grant of work to the employes covered by the Agreement but is a specific restriction and limitation upon the right of the carrier to allow work covered by the Scope Rule to be performed by those not covered. It simply under named conditions permits work covered to be performed by others."

On the other hand there are other awards of this Board which denied somewhat similar claims. These awards, and the type of train order rule involved, are:

Award 5866 (Douglas)—Train order rule the same as here, but asked that abolished position be restored.

Award 6863 (Parker)—Here the train order rule is in three parts:

> "'(a) No employe other than covered by this Agreement and train dispatchers will be permitted to handle train orders except in cases of emergency.
>
> "'(b) If train orders are handled at stations or locations where an employe covered by this Agreement is employed but not on duty, the employe, if available or can be promptly located, will be called to perform such duties and paid under the provisions of Article 7; if available and not called, the employe will be compensated as if he had been called.'"

Paragraph (c) spelled out "emergencies" in detail.

Award 7400 (Larkin) had no train order rule.

Awards 7953 (Cluster), 7967 (Elkouri) and 8207 (McCoy), involved train order rules identical to that here, but the issues were not the same in all cases.

We have also reviewed Award 7976 upon which Carrier relies heavily. It observed:

> " * * * At none of the stations was there regular and continuing day by day, week after week, handling of train orders by non-telegraphers. It would appear, then, that the more or less scattered instances herein constitute only 'occasional' or 'irregular' handling of train orders by non-telegraphers at stations where no telegrapher is stationed. The Record leaves little doubt that train orders have been so handled on this property for many years, starting about 1910 and continuing at least to the time of the incidents involved in the present dispute. This past practice is of paramount importance in determining the coverage of a Scope Rule of the general character involved herein."

While Award 7976 said "these (Scope and Train Order) rules were retained unchanged in each successive Collective Agreement * * * in the setting of the aforesaid practice" the record before us shows the Organization protesting Carrier's action from August, 1922, when General Manager Pelter agreed with the Organization on this question, forward. Award 7976 predicated its denial of the claim mainly on Awards 6863 and 7953.

There is also Award 8327 (McCoy). While this is a denial award, denial was made on the grounds that "no human hand intervened between the telegrapher and the train crew to whom the order was addressed."

This award was also cited on behalf of the Organization, but with specific reference to this portion of the award:

> " * * * 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." (Emphasis supplied.)

It must be noted, however, that the train order rule there involved, so far as material, provides:

> "No employe other than covered by this Agreement and Train Dispatchers will be permitted to handle train orders * * *."

It makes no reference, as does the rule here before us, to "telegraph or telephone offices where an operator is employed and is available, or can be promptly located * * *."

We must determine, then, the extent, if any, to which the train order rule here modifies the Scope Rule.

The Organization argues that the train order rule—

> " * * * deals specifically with train orders which may be required in emergencies where an operator is employed. The operator is to be paid a call. On the other hand, if a train order is handled **in an emergency only,** at a point where no operator is employed, then no one is

paid. The condition precedent in both instances is that **an emergency shall exist**, leaving no alternative than to resort to such handling. All of the train orders involved in these claims were copied when no emergency situation prevailed. * * * " (Emphasis theirs.)

Organization also offers this argument:

"The Carrier attempts to read more into Article 15 than ever was intended by the United States Railroad Labor Board who fathered the rule. The intent of that Board is expressed in the language of the rule. The indiscriminate handling of train orders at unmanned stations where telephones were already installed or subsequently installed was never meant to be legalized by this rule. If the Labor Board had considered for a moment that the handling of train orders resided in any other class or could be delegated to any other employes, such as train service employes, it would not have specified payment of a call to the telegraphers when an emergency prevailed. The fact that the Board drafted a rule authorizing payment to the telegrapher is indicative it held to the fact that the scope rule covered the handling of all train orders. If any other reasoning were to be adopted it would mean that the Carrier would be free to abolish any or all telegraphers' positions and divert the handling of all orders to another class or craft of employes so long as it failed or refused to maintain a telegrapher's position where the work was performed. The Agreement was not so drawn.

"The Employes have never acquiesced in conductors or others handling train orders. It was not an agreed upon practice either before or after the first agreement. What happened before the first agreement is irrelevant. The first agreement came with the United States Railroad Administration. Under its supplements and interpretations it held that the handling of train orders by telephone was work coming within the purview of telegraphers. After Federal control, encroachment was halted by the letter agreement of August 14, 1922. Certainly these authorities gave no recognition to any practice of allowing train crew employes to handle train orders. It did just the opposite, as did Article 20, paragraph 2, of the Conductors' and Trainmen's Agreement also adopted in 1922. And then we have the further evidence right out of the Carrier's mouth in Award 5295 of the First Division where it stated in its submission in that dispute:

> 'Conductors, trainmen and yard employes are not now and have not been in the past required to copy train orders, except in cases of emergencies . . .'

"These Employes have never condoned a practice which would be adverse to themselves and contrary to every principle they have sought to maintain with respect to handling train orders. * * * "

In addition to the Pelter letter agreement relied upon here, this record contains copies of correspondence exchanged by the parties concerning Carrier's alleged "encroachment" upon the train order situation, beginning on July 25, 1933.

A sampling of Carrier's replies to such protests follows:

Date	Carrier Signature	Comment
7/29/33	J. S. Cox, Supt.	"Perhaps, with the necessity for economizing in every way possible, this practice has grown, however, I am instructing the Dispatchers to, so far as possible, send train orders to Operators instead of Conductors."
2/22/34	L. P. Kennedy, Supt.	"So far as I know we are not requiring anyone to handle train orders except in case of emergency."
3/9/34	L. P. Kennedy, Supt.	"My position was clearly stated to you in my letter of the 22nd. I am perfectly willing to carry out the terms of the agreement and in fact I am going to insist that they be carried out on the part of everyone. * * * At the most I feel there have only been slight infractions here and there, and there has not been according to my understanding any general disregard for your agreement. * * * "
8/4/34	C. P. Dugan, Gen'l Supt.	"I am trying to run this down and statement has been made to me there is less of this being done now than ever before, and I would appreciate it if you would give me some specific cases to enable me to be in a position to investigate and intelligently discuss the matter when we have a conference."

"Not a single other agreement of the many," Organization argument continues, "which this carrier has with its different classes of employes proposes to allocate the handling of train orders to other persons. The agreements of the conductors and trainmen prohibit such work being thrust upon them except in emergencies. The train order form even anticipates that such work will be performed by a telegraph or telephone operator * * *."

We think the train order rule here is ambiguous to the extent that the respective interpretations placed upon it by the parties can be read into it.

In summary, then:

1. We have in this record the Pelter agreement, reached 8 months after the rule was adopted and, according to the Organization, as a result of its protests aganst violations of the rule.

2. Mr. Pelter removed any ambiguity which may have existed when he stated—

> "we have agreed with representatives of these two organizations (Conductors and Telegraphers) that it is not our purpose to require conductors to handle train orders, excepting under conditions of an emergency nature, such as accidents, personal injury, washouts, fires, engine failure or such other similar causes."

3. Several quotations, hereinbefore noted, from Carrier officials confirming the Pelter agreement.

4. This additional letter, dated July 18, 1935, to J. M. Larisey, Vice President of the Conductors, and S. E. Bryant, Vice President of the Telegraphers, from General Superintendent Dugan, reading:

> "Article 18 of the agreement with the Telegraphers provides as follows:
>
> > '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 and is available or can be promptly located, except in emergency conductors or engineers will be permitted to do so, in which case the telegraphers will be paid for the call.'
>
> Likewise, Article 20 of the agreement with the conductors-trainmen provides in part:
>
> > 'Conductors or trainmen will not be required to copy train orders over the wires, excepting under conditions of an emergency nature such as accidents, personal injuries, washouts, fires, engine failures or other similar causes.'
>
> With exceptions that have been in effect on this railroad prior to agreement entered into in 1922, which I will give you as a result of my investigation into this matter, these rules will be carried out."

The "exceptions," Organization argues, "in effect prior to 1922 were those having to do with emergencies only, the same exception pin-pointed by General Manager Pelter."

Argument in Carrier's behalf that it was a past practice for this Carrier to handle train orders in the manner complained of loses weight in the light of the parties' first agreement, containing both scope and train order rules, dated January 16, 1922. Yet Carrier's General Manager Pelter felt it necessary just 8 months later to advise his subordinates that—

> "It is not our purpose to require conductors to handle train orders, excepting under conditions of an emergency nature, such as accidents, personal injury, washouts, fires, engine failure, or such other similar causes."

If there had been such a past practice on this property, then the Agreement of January 16, 1922 and General Manager Pelter's letter agreement of August 14, 1922, should have ended it, or isolated it to the situation then obtaining. Most certainly the Pelter agreement should have stopped any expansion of such practice.

For us to here sustain argument in behalf of Carrier that—

> "the Train Order rule, by reason of its restrictive language, only reserves to Telegraphers (or Dispatchers) the handling of train orders at points where an operator is employed,"

would be to say to this Carrier that it may eliminate all telegrapher jobs with impunity and, having done so, may assign their work to anyone it chooses without restriction. To do so would completely wipe out the Scope Rule of the Agreement.

Finally we find the Carrier citing the Memorandum Agreement of January 3, 1951 between the parties which, it alleges—

> "provides that at places where neither an agent or operator is regularly employed any person designated by the railway may copy written train lineups or other instructions transmitted over the railway's communication system or otherwise, and that no employee represented by the telegraphers' organization shall have or make any valid claim or grievance by reason thereof. Conversely, the agreement provides that at points where an agent or operator is regularly employed, such employe will be used to perform such work, and that if such occurrence is during the hours such agent or operator is not on duty but is available, and such agent or operator is not called to perform the work, he will be allowed a call payment therefor."

We are here concerned with train orders, not line-ups.

The January 3, 1951 agreement is concerned with the desire of this Carrier—

> "to transmit by its communication system or otherwise, written train line-ups or other instructions to its section and bridge foremen or others whose duties necessitate the operation of track motor cars or other work equipment * * *."

If the confronting agreement rules were intended as Carrier argues in the instant case, there would have been no necessity for it to negotiate a special agreement with the Organization to cover the transmission of written train line-ups or other instructions to its section and bridge foremen.

It is not, therefore, illogical to assume that the Agreement itself was a bar to the handling of such information in the manner desired.

While the January 3, 1951 agreement offers us nothing to follow here, the manner in which it proved to be a solution to a problem in which both parties were vitally concerned is of interest, because there the Carrier chose what we believe was the proper course of action: negotiation with the Telegraphers' Organization.

We have every appreciation of the problems facing this nation's railroads. They must and should take advantage of every opportunity available to permit of safe, efficient and economical operation of their properties within the legal and agreement limitations within which they must function. This includes the practical use of the products of the modern age in which we live.

But where a Carrier binds itself by agreement, as this Carrier has here, to assign certain work it wishes to have performed to those qualified workmen coming within such class, it must negotiate with the Organization representing such class if it wishes to have such work performed in a manner other than provided by such agreement. It is likewise the duty of the Organization

involved to meet such problems in a realistic manner, mindful of the fact that the eventual outcome will injure or benefit Carriers and Organizations equally.

For the reasons herein set forth we will sustain part (1) of the claim.

With respect to part (2) of the claim, we note Organization argument that the Carrier action complained of deprived "many employes from full-time work. We ask only that the Carrier shall pay for the days that these several points functioned as train order offices. There is no question but what the Carrier would be required to compensate an idle conductor or trainman for a day's pay if a telegrapher had been substituted to perform any of their work."

We are not, however, concerned here with the conductors' or trainmen's agreements. We will sustain part (2) of the claim only to the extent of allowing—as the Train Order Rule itself does in cases of emergency—payment of a call to each claimant for each of the violations charged and here sustained.

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 hearing thereon;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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

Part (1) of the claim sustained.

Part (2) sustained only to extent of payment of a call, in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January, 1959.

DISSENT TO AWARD NO. 8687, DOCKET NO. TE-8601

Award 8687 covers the identical issue between the same parties—whether Telegraphers have the exclusive right to handle train orders at points where Telegraphers are not employed—that was heretofore resolved by denial **Award 7976.**

Award 8687 is in gross error for the following reasons, among others:

(1). By finding that the practice on the property both before and after adoption of the currently applicable, and previously similar, Scope and Train Order Rules, upon which **Award 7976** was based, was in error, and this in face of the fact that the Telegraphers' submissions are replete with statements to the effect that the subject

matter of the dispute before this Referee has been in controversy ever since the first Agreement was negotiated between the parties effective January 16, 1922. There certainly can be no better evidence of the existence of the long practice relied upon in **Award 7976** than the admission thereof by the Telegraphers in making the subject matter one of controversy throughout the long period the practice is demonstrated by Carrier to have existed.

(2). By usurping the function of negotiation stipulated to be that of the parties (Carrier and Organization) by the Railway Labor Act, when—

(a) it attempts to grant the Telegraphers the new rule which the record discloses they had long sought—the exclusive right to handle train orders at points where Telegraphers are not employed. The fact that the Telegraphers had long sought a rule is controlling evidence that their negotiated Agreement did not grant them that right; and

(b) by granting compensation to the "senior idle employe, extra in preference" on a call basis under the Train Order Rule "for each day train orders were so handled at each of the points specified" (in Item 1 of Statement of Claim). By so doing, the Award ignores the plain language of the Train Order Rule, which restricts its application to points where Telegraphers are regularly assigned and available when train orders are handled by others at such points. The Train Order Rule contains no reference, either expressly or impliedly, to handling of train orders at points where Telegraphers are not employed, hence it cannot possibly provide a pay basis therefor. Further, the Call Rule clearly has application only to regularly assigned Telegraphers called to perform service outside hours of regular assignment, hence it cannot have application to extra Telegraphers.

In numerous Awards, this Division has held it to be contrary to our proper function to place a meaning upon language of rules other than that which is clearly and unambiguously expressed therein, for to do so would be contrary to our proper function—apply rules as they have been written by the parties and not to look beyond the language of a rule plainly and unambiguously expressed. **(Award 7718.)**

The Award is in further error:

(1). By accepting as fact the handling of the claims on the property, as asserted by Employes, without any substantive showing in the record in support thereof, and this despite the fact that it was pointed out that this Board has long held that disputes can only be resolved from the record before it. See **Third Division Awards 5726, 6299, 6424; First Division Award 15921,** and **Interpretation to First Division Award 15162.** By acceptance of this Employes' mere assertion without substantive evidence in the record, this Award goes to the opposite extreme of the position taken by the same Referee in his **Awards 7851, 8091, and 8234,** wherein he held evidence actually submitted to be unacceptable;

(2). In failing to follow denial **Award 7976,** involving the same issue, the same Agreement, and the same parties. In such situations

our Awards universally hold that the prior Award, unless palpably wrong, should govern, and prior **Award 7976** has not been shown to be palpably wrong.

(3). By asserting that the Carrier had made no defense to this claim, when it did properly rely, for its defense thereto, upon the records in the two prior cases handled by this Division on the same identical issue between these same parties. The individual points and time claims in this particular case are of no moment when the issue admittedly is the same—whether Telegraphers have the exclusive right to handle train orders at points where Telegraphers are not employed. See **Awards 3130, 6228, 8008, 8105, 8106, 8107, 8119, 8215, and 8300** cited.

The Railway Labor Act, under which this Referee was appointed to act as referee in this case, stipulates its General Purposes, in part, to be:

"(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Clearly, this Referee, to have complied with that quoted stipulation, was obligated under the legal principle of res adjudicata, and especially in the absence of new evidence or evidence that had not been taken into account before, to follow the conclusions arrived at in **Award 7976,** in order that there be a finality in the litigation of the same issue (see **Third Division Award 6935,** and **Fourth Division Awards 793, 990, 993**), and to give substance to the stipulated requirement of Section 3, First (m), of the Act:

"* * * the awards shall be final and binding upon both parties to the dispute, * * *."

The record in this dispute discloses it covers a period from May 8, 1953, to and including June 18, 1955, a total of 772 days, and involves 41 points where no Telegraphers are employed. During this entire period the Train Dispatchers issued a grand total of 164 train orders, or approximately one-fifth of a train order, on an average, per day. Certainly, it cannot be said in the absence of any contractual obligation to that effect, as here, that any Carrier had negotiated to, or can be required to, maintain full-time positions for the handling of a fraction of a train order per day, as set forth above. Such a requirement is contrary to public interest.

This Award attempts to write into the Agreement between the parties that which the Employes failed to obtain in direct negotiations, and, further, attempts to add to the Train Order Rule something not contained therein.

For the foregoing reasons, among others, **Award 8687** is palpably wrong and we dissent thereto.

/s/ C. P. Dugan
/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp