Award No. 9218
Docket No. TE-8143

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Refeere

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GULF, MOBILE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Gulf, Mobile and Ohio Railroad (Southern Region) that:

1. The Carrier violated and continues to violate the agreement between the parties when on July 16 and 17, 1954, it abolished the positions of first and second shift telegrapher-clerks at Murphysboro without in fact discontinuing the work of the two positions and assigned the work still in existence to employes not covered by the scope of the Telegraphers' Agreement, and that,

2. The Carrier shall now restore the work formerly performed by the first and second shift telegraphers at Murphysboro to employes coming within the scope of the Telegraphers' Agreement, and

3. The employes who were displaced by the action of the Carrier at Murphysboro, Ill., namely, M. K. Spencer, and W. T. Rosson, shall be compensated for all services performed away from Murphysboro in accordance with the provisions of Rule 9 of the Agreement, and

4. Any other employe suffering a monetary loss as a result of the violative act of the Carrier shall be made whole.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties to this dispute are on file with this Division of your Board and by this reference are made a part hereof.

At Murphysboro, Ill., prior to July 16, 1954, the Carrier maintained a Train Dispatchers' office with continuous service located on the second floor of the station building; also in the same building it maintained on the first floor two positions under the Telegraphers' Agreement in the ticket office. The first shift telegrapher had assigned hours of 7:00 A. M. to 3:00 P. M., with rest days Saturday and Sunday, no rest day relief. The second shift

ment of telegraphers at Murphysboro would be an unnecessary waste of manpower and revenues. This Board has consistently held that dispatchers may properly perform all communication service and that the dispatchers performing such communication service does not violate the Telegraphers' agreement.

Carrier urges that the claim be denied.

Carrier reserves the right to make an answer to any further submission of the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts upon which this Award must be resolved are so nearly paralleled by those found in Award No. 6650, this Board, Rader, Referee, as to constitute it a binding precedent, if sound, as we believe it to be.

In the Claim leading up to the Award in No. 6650 the Organization questioned the right of this Carrier to abolish the position of "third shift telegrapher-ticket clerk" at Murphysboro, Illinois. Here, the Claim challenges the abolition of the positions of "first and second shift telegrapher-clerks" at the same station.

The opinion in the cited Award concludes:

> "We are of the opinion that these claims must fail by reason of several factors: (1) Delay in progressing the same on the property. (2) Past practice, and (3) A failure to assume the burden of proof necessary to establish the same for a sustaining award."

It is the second reason assigned which has application in this submission.

Upon the issues of past practice and reduction of volume of business at Murphysboro, the Carrier has offered more supporting facts than is found in the record in the cited Award.

The cited opinion is well written, fully and carefully considers and resolves the contentions here advanced for and against the allowance of the Claim.

We will, however, as briefly as practicable, consider some of the developments in this submission.

Rule 15 of the controlling Agreement specifically authorized the train dispatchers at Murphysboro to "handle train orders" and necessary related work but the services performed by them included other work emanating from that dispatching station.

It is recognized that when a Scope Rule, as found in the Telegraphers' Agreement, is general in terms or silent in defining duties of the designated members of the Craft, whether or not such duties are the exclusive right of the Telegraphers to perform, if questioned, may be determined by custom, tradition or practice in connection with the Rule.

In this submission it is established by undenied statement, by affidavits and by written admission of a former General Chairman of the Organization that the type of work involved had been recognized by the immediate Carrier, and its predecessors, as not within the exclusive right of the Telegraphers to perform.

At Murphysboro during all the years encompassed by the record, dispatchers were on duty around the clock. In 1929 there were but two telegraphers on duty. In 1930 one of these positions was abolished. This one telegrapher was on duty until 1942 when another was employed and later a third. From 1930 to 1942 all the work at the communications station of the Carrier for two thirds of the time was handled by dispatchers.

In 1949 the position of the third telegrapher at Murphysboro was abolished which action was made the subject of the Claim and the Award in No. 6650, supra.

At all times covered by the record the dispatchers handled all of the types of work required and involved in this Claim. When it became necessary, because of increase in business, telegraphers were assigned who assisted in the work to be done and when business decreased to an extent that both telegraphers and dispatchers were not needed the telegraphers were released.

That was the settled and uniform practice.

It appears that business had materially decreased at Murphysboro when the claimant Telegraphers were released and their positions abolished. The Organization denies that the work has decreased to an extent justifying the action taken but there is no showing whatever that the dispatchers retained cannot alone handle all the duties remaining to be performed.

Corroborative of the practice at Murphysboro, the Carrier shows that throughout its system, with few exceptions, it permitted dispatchers at all times to do the kind of work involved in this Claim and for long periods they did all of such work without the assistance of any telegrapher.

We have considered the Awards cited by the Organization.

In Award No. 5256, Boyd, Referee, it was the Claim that the Carrier violated the Agreement in abolishing an "operator-clerk" position at Tuscaloosa, Alabama, a station on the line of this Carrier, and transferring his work to a chief train dispatcher. The Board refused to make an award because of insufficient facts in the record and remanded the claim with this direction:

> "* * * if the work now being done is the same, generally, as was being done in 1929 by dispatchers at Tuscaloosa, the Organization has no claim; but if it is substantially different in character and volume from what it was in 1929, the telegraphers are entitled to it under their Agreement. * * *"

What eventual disposition was made on this remand does not appear.

But, on this record, it is quite clear that the work done in 1929, and until this Claim was asserted, by the telegraphers at Murphysboro, was the same in every particular.

Award No. 4018, Douglas, Referee, involved claims for pay for calls to which it was asserted the telegraphers, under their Agreement, were entitled. The work, subject of the dispute, was the transmission to Section Foremen, directly from Train Dispatchers, of communications respecting movement of trains. It is not helpful in this submission.

Award 6675: Unfortunately, the rationale of the opinion sustaining the second and third paragraphs of the Claim is not well defined. However, it is evident that it was based, in part, at least, on the violation of the Carrier of a written promise "that no train orders will be telephoned to the yards at Tamms when a telegrapher is not on duty."

The opinion and Award in No. 6689, Leiserson, Referee, is most heavily relied upon by claimants, as it might well be. It arose at the same station and the telegrapher for whom the claim was there made held the relief assignment for the telegraphers for whom the Claim is here made. The Claim here considered was then pending but it does not appear that all the facts, as now presented, were then before the Board.

The opinion in Award 6689 follows the theory that when the 40 Hour Week Rule became effective, at which time the relief assignment was abolished, the first and second trick Telegraphers were regularly assigned to seven day positions and their relief was also specifically assigned and that there was still work to be done on this relief.

It is significant that the Referee says "Nowhere in the record * * * does the Carrier present any evidence to show that the rearranged assignments were due to decreased traffic." The opinion concedes that the train dispatchers and agent regularly perform some of the duties as the telegraphers but "It is also true that there was plenty of work to be done on the rest days of the assigned telegraphers * * *."

It is evident that the fact pattern which the Board found to be established and upon which the Award was based differed in some material particulars from that which we find, although it must be conceded that the opinion in the cited Award cannot be completely reconciled with our conclusion.

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 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 not violated.

AWARD

The claim will be denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of February, 1960.

DISSENT TO AWARD 9218, DOCKET TE-8143

The error of this award is pointed up and compounded by the gross inconsistency of the majority.

In recent Award 9107 a majority composed of the Carrier Members and this same referee rejected without comment a prior award which was directly in point and involved the same parties that are involved in this case. That award was 6689 with Opinion by the late Dr. William M. Leiserson.

Dr. Leiserson was long recognized as one of the most accomplished neutrals in the labor relations field. He was formerly a member and chairman of the National Mediation Board. He was chairman of the Presidential Emergency Board which recommended adoption of the forty hour week in the railroad industry. And, in the role of informal arbitrator, he was one of the co-authors of the 40-hour week rules. Those rules were involved in the case decided by Award 6689 and also of course in Award 9107.

The opinion of such a referee should have great weight—particularly in cases involving the same parties, the same rules and identical issues. But in Award 9107, which involved just such circumstances, the majority summarily rejected that opinion, and reached an opposite conclusion.

The present case involved a situation similar to a previous one where an award favorable to the Carrier was rendered. That was Award 6650 with Opinion by Referee Rader. Here, in glaring contrast to its actions in Award 9107, the majority not only points to Award 6650 as a binding precedent, but lauds it in glowing language, as follows:

> "The cited opinion is well written, fully and carefully considers and resolves the contentions here advanced for and against the allowance of the claim."

It is a well known fact that the author of the "cited opinion", Mr. Rader, has been effectively barred from service as a referee by action of carrier representatives who protested his further use in that capacity because of their alleged conviction that he does not possess the necessary qualifications for such service.

Here, we are observing the spectacle of this majority repudiating an award by a nationally recognized authority and gladly embracing one by a referee who has been declared incompetent by some of the very elements constituting a portion of that majority.

Such a spectacle strongly suggests that the majority was more interested in supporting the railroad's actions than in properly applying the parties' agreement and our precedent awards to facts of the disputes.

For these reasons, as well as those set forth in my dissent to Award 9107, I hereby record my dissent to Award 9218.

I want it understood, however, that what I have said is not intended in any way as disrespect for Referee Rader. I have merely referred to a well known action of carrier representatives against him.

J. W. Whitehouse,
Labor Memeber.