Award No. 9445

Docket No. TE-8406

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GEORGIA RAILROAD

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

1. Carrier violated the terms of the agreement when on August 30, 1952, it issued train order No. 36 at Crawfordville, Georgia, addressed to Train No. 22, in care of Train No. 2, which carried train order No. 36 to Barnett, Georgia, closed station, and at the direction of the Carrier attached train order No. 36 to the register book at Barnett, to be picked up by train No. 22.

2. Carrier shall pay the senior idle telegrapher 8 hours at straight time rate for August 30, 1952, for the work which he was entitled to perform at Barnett.

EMPLOYES' STATEMENT OF FACTS: There is an agreement with effective date of September 1, 1949, on file with your Board and by this reference is made a part of this submission.

Until 1950, Barnett, Georgia, was an agency with a telegraph office. Under the agreement, Article 19, Page 22, there is shown a negotiated position of Agent-Telegrapher. Following the order of Georgia Public Service Commission closing the agency, the position at Barnett was abolished.

On August 30, 1952, the following train order (No. 36) was issued at Crawfordville, Georgia:

GEORGIA RAILROAD

Train Order No. 36

August 30, 1952

To C & E No. 22 c/o No. 2- Crawfordville, Ga.

No. 1 Engine 1002 wait at CAMAK until
Two Ten 210 PM—for No. 22 Engine 1027

A.T.M.

All data contained herein has been made available to claimant.

(Exhibits not reproduced.)

OPINION OF BOARD: The Employes' Position is stated as follows:

"The issue in this claim is the violation of the agreement when the Carrier requires or permits train service employes not covered by the agreement to carry a train order received at an open telegraph office to another location with instructions to either deliver the train order to the crew of another train or to fasten the train order to the train register at that location so the crew to which the train order is addressed may take it off the register.

"The Scope Rule of this agreement reserves and protects the rights of the employes covered thereby to perform the work of their craft and class. The work of handling, including the delivery of train orders, has been reserved to the Telegraphers by the scope of their agreement.

"Train order No. 36 was addressed to Train No. 22. The train order was not handled and delivered to train No. 22 by telegraphers in accordance with the agreement. Formerly there was an open telegraph office at Barnett but on the date of this violation there were no employes covered by the Telegraphers' Agreement assigned to Barnett. The Carrier required or permitted Train Order No. 36 to be carried and delivered by the crew of Train No. 2 from Crawfordville, Georgia, to Barnett, Georgia. * * *"

The Carrier's Position is shown by its original denial of the claim on the property, which stated:

"We do not find any support for the claim you make in behalf of idle telegraphers for one day's pay for this service. Barnett is a non-telegraph station. Claim is denied."

There is no doubt that the handling of train orders belongs to the Telegraphers to the extent included within the Agreement, as interpreted in the light of past practice, since its Scope is stated in terms of positions and not of work.

The record in this case does not show that the handling of train orders on Carrier's property has been reserved exclusively to the Telegraphers by agreement, tradition, historical practice or custom. On the contrary, the record shows that since at least July 1, 1900, an Operating Rule, now known as Rule 217, has provided for this method of handling train orders (designated as "in care of" train orders) for points where no telegrapher is assigned, and that the practice has been followed on the property for at least that period, during which there have been six revisions of the Agreement. As was said by this Division in Award 8146:

"* * * the applicable Agreement was executed with said practice and Operating Rule * * * in the background."

In view of these facts it is interesting to note that no rule of the Agreement forbids the practice. On the contrary, Article 3 (d) provides:

"No employe, other than covered by this Agreement, and Train Dispatchers will be permitted to handle train orders at Telegraph and Telephone offices where an Operator is employed and is available or can be promptly located, except in an emergency. * * *"

Since the Agreement overrules the operating rules and practices only insofar as the latter are inconsistent with it (Awards 7922, 7343, 4640, 6466), we cannot here find that the Agreement has been violated by the Carrier. (Award 6032.) Certainly we cannot strike from the rule the words "at Telegraph and Telephone offices where an operator is employed", etc., so as to hold that the rule applies to offices such as this, where no operator is employed. The claim must therefore be denied.

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 Employe involved in this dispute are respectively Carrier and Employe 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May, 1960.

DISSENT TO AWARD 9445, DOCKET TE-8406

In this completely erroneous award the majority displays little inclination to observe either the facts or the controlling contractual provisions of the *affective agreement.*

To begin with, the quotation cited by the majority to describe relative positions of the parties are grossly misleading. Both parties elaborated on their respective positions to the point where the issue could plainly be said to ask this question: May the Carrier, under the agreement and in view of past practices that are pertinent, abolish an established telegraphers' position at a junction point and thereafter require work formerly performed by the incumbent of the abolished position to be performed by train service employes through the expedient of having them carry a train order from another station and leave it on the register book for members of the train crew addressed to find?

Bearing directly upon this issue were a number of pertinent facts and the rules of the Telegraphers' Agreement. Among the most pertinent factors were these:

Barnett, a junction point where the Washington branch diverges from the main line, was a telegraph office for many years, and was such at the time the currently effective agreement was negotiated.

All train order work, including delivery, required at Barnett belonged to the telegrapher stationed there by virtue of Article 3(d) of the Agreement, as such rules have many times been interpreted by this Board.

Because of its conflict with the established intent of Article 3(d) the Carrier's operating rule 217 had to yield at Barnett, and was therefore not effective at that point. (The record contains no reference to any attempt by the Carrier in the past to utilize rule 217 at Barnett for any purpose.)

Early in the life of the current agreement the Carrier abolished the one telegrapher's position at Barnett, thereby placing itself under the restriction of the rule, stated in Award 5431 to be so well established, and:

> " . . . so uniformly adhered to that it needs no citation of awards to support it, **is that a position established pursuant to the provisions of an existing agreement cannot be abolished and its work assigned to employes belonging to another craft."** (Emphasis supplied.)

Operating rule 217, even if it could properly be applied at Barnett, does not contemplate the actions complained of in this case. That this is true is borne out by the fact that the Carrier found it necessary to issue special instructions to the carrying crew in order to accomplish its purpose.

With all these matters, and others, before it the majority chose to ignore those — and they were practically the entire record — which interferred with with its apparent determination to place its stamp of approval upon anything the carriers may choose to do.

The record does not show that there ever was a practice of sending train orders in care of one train crew for delivery — by any method — to the crew of another train at any of the four branch line junction points on this railroad. Such a showing could not be made because it is a fact, either known to the majority or easily ascertained, that telegraph offices, subject to Article 3(d), have been maintained at all four of these locations for the entire life of contractual relations between these parties — until the Carrier unilaterally abolish the position at Barnett.

Furthermore, Article 16 of the Agreement perpetuated practices as they existed on the date of the Agreement. And it must be kept in mind that Barnett was then a telegraph office.

It certainly must be apparent to anyone who has even a touch of objectivity that "past practices", so far as applicable to the factual situation heavily supported the position of the Employes.

The majority closes its Opinion with a paragraph relative to Article 3(d). This inverse view of the rule, adopted by only one or two mistaken referees during the whole history of the Adjustment Board, not only is con-

trary to its plain language, and this majority's view of the scope rule, but was made with the full knowledge of our holdings in awards such as 5872, where, after reviewing a large number of awards on the subject of handling train orders, we said:

> "The clear indication of these observations is that 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 toward 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."

Such a radical departure from established principles as that indulged in by the majority in Award 9445 can properly be viewed only as a disservice to the railroad industry, contrary to the very purposes sought to be achieved by Congress when it adopted the Railway Labor Act.

I hereby register my most emphatic dissent to this erroneous award.

J. W. Whitehouse,
Labor Member.

THE BOARD'S COMMENT ON THE DISSENT, AWARD NO. 9445, DOCKET TE-8406

The dissent unfairly charges that the Award misstates the issues and that the arguments were expanded by both parties to present the question whether the carrier improperly abolished the Operator's position at Barnett in 1950, two years before the 1952 incident complained of.

On the contrary, the dissenting member began his brief as follows:

> "This claim poses the question of whether the Carrier's requiring a train service employe to carry a train order to **a closed station** and there leave it on the register book for another train crew to pick up violated the right of its telegraphers to handle train orders.
>
> * * * * *
>
> "The Employes considered such a method of handling to be violative to their right to handle any train orders necessary to be handled **at a station such as Barnett, and filed claim accordingly.**
>
> "The Carrier declined the claim and the resulting dispute failed of adjustment during handling on the property in the usual manner." (Emphasis added)

The record shows an entire absence of any contention on the property that the abolishment of the Agent-Telegrapher's position at Barnett some two years before the claimed violation in 1952 constituted a violation also.

In fact, the Employes' Ex Parte Submission made no such contention. It stated the claim exactly as stated on the property, namely the carrying of the train order on August 30, 1952, to "Barnett, Georgia, **a closed station**", and attaching it "to the register book at Barnett, to be picked up by train No. 22". (Emphasis added)

In the Employes' Statement of Facts in their Ex Parte Submission they said:

> "Until 1950, Barnett, Georgia, was an agency with a telegraph office. Under the agreement, Article 19, Page 22, there is shown a negotiated position of Agent-Telegrapher. Following the order of Georgia Public Service Commission closing the agency, the position at Barnett was abolished."

But there is no argument, or even suggestion, that the closing of the station under the Georgia Public Service Commission's order or the discontinuance of the position violated the Rules, or that the Rules require the continuance of an Agent-Telegrapher at a closed station.

Not even in the Employes' Statement at Hearing was any such argument or suggestion raised. The contentions there were that established practices and operating rules were immaterial, that "the handling of train orders at any station, no matter where, is telegraphers' work", except only in emergencies.

The first suggestion that the closing of the Barnett station and the consequent discontinuance of the Agent-Telegrapher's position in 1950 constituted a violation of the Rules appears on the third page of the dissenting member's brief. It nowhere appears in the record made by the parties, either on the property or before this Board.

It is too well settled for argument that only the issues presented on the property are properly before this Board on an appeal. And certainly the Board cannot properly be criticized for failing to rule upon an issue not presented by the parties even here, but raised only by a Board member.

The contention that "the handling of train orders at any station, no matter where, is telegraphers' work", except only in emergencies, was not raised on the property, or upon the appeal to this Board until the Employes' Statement at Hearing. In any event it is not sustained by the Rules.

While Article 3 (d) is entitled "Emergency Train Orders", it does not apply to emergencies. It provides that **except in an emergency** "No employe, other than covered by this Agreement, and Train Dispatchers will be permitted to handle train orders at Telegraph and Telephone offices where an Operator is employed and is available or can be promptly located." (Emphasis added) Thus Article 3 (d) clearly relates to situations other than emergencies.

It is not necessary to consider here what handling is permissible in emergencies, but certainly it should be no more restrictive than Article 3 (d).

Since this Board is bound by the Rules as negotiated by the parties and by the record as made on the property, the dissenting member's criticism of this Award is doubly unwarranted.

Howard A. Johnson,
Referee

LABOR MEMBER'S REPLY TO THE REFEREES COMMENT ON THE DISSENT TO AWARD NO. 9445, DOCKET TE-8406

I have neither the time nor inclination to enter into a writing contest with the Referee. However, his reiteration of a mistaken notion about the essential elements of the case and characterization of my dissent as "unfair", as well as a charge that I injected a new issue into the dispute, leave me no alternative to making a reply.

First of all, I did not "charge", as the Referee puts it, "that the arguments were expanded by both parties to present the question whether the carrier improperly abolished the operator's position at Barnett in 1950, two years before the 1952 incident complained of."

The second paragraph of the dissent may not be a perfect example of elegant English, but it certainly is not susceptible of the narrow interpretation which the Referee seeks to place upon it. I was complaining of the inadequacy of the quotations in the Referee's "Opinion of Board" to fully portray the parties' respective positions, and pointed out that the parties made further statements, elaborating their contentions to a point where the disputed issue could be stated as a question.

I made a general observation at Page 3 of my brief (referred to by the Referee as a new issue) as follows:

> "The employes' position is based upon two well established principles: (1) The work of handling train orders includes delivery to the crew addressed and is reserved exclusively to telegraphers; (2) A carrier violates the rights of its employes when it abolishes a position covered by their agreement and thereafter requires some or all of the work of the abolished position to be performed by employes outside the coverage of the agreement."

It seems to me that anyone who reads into that statement, or the second paragraph of the dissent, a "charge" that the parties "expanded" their positions; or a contention that abolishment of the agent-telegrapher position at Barnett constituted a violation of the Agreement, has not exercised that degree of care or understanding necessary to properly consider matter such as this.

Let us be more careful now, in reviewing the question in controversy. I did not say that the employes' position is thus and so. I said that their position is **based** upon "two well established principles". I did not state those principles as contentions — of my own, or of anyone else. I stated them as facts. The employes cited a large number of awards, exemplified by Awards 5122 and 5871, in support of the first payable. In support of the second I cited Award 5431, and quoted the following language from its "Opinion of Board":

> "One of the elementary principles early established by decisions of this Division of the Board and so uniformly adhered to that it needs no citation of awards to support it, is that a position established pursuant to the provisions of an existing agreement cannot be abolished and its work assigned to employes belonging to another craft."

I believed, and argued, that this **principle** applies to the present case because the position of agent-telegrapher at Barnett was "established pursuant to the provisions of an existing agreement", and that the work of delivering train orders addressed to crews at Barnett was an inherent component of that position. Application of this principle certainly requires a finding that the carrier, once it had abolished the agent-telegrapher position, could not thereafter assign work which was formerly a part of the position to employes of another craft without violating the Telegraphers' Agreement.

When the Referee construed my brief and argument to mean that I was injecting a new contention that the abolishment itself of the position constituted a violation of the agreement he demonstrated either carelessness in considering my statements, or an unforgivable misunderstanding of plain words.

In either event the result necessarily was a misconception of the essential elements of the dispute, and an erroneous award. It was for these reasons that I felt it necessary to dissent. The Referee's comments have strengthened my conviction that he was mistaken in his approach to decision of the case.

J. W. Whitehouse,
Labor Member.

REFEREE'S COMMENT ON REPLY TO AWARD 9445, DOCKET TE-8406

The referee saw no harm in pointing out that the issue raised by the parties on the property had been decided, and that the award was not fairly open to criticism for not going into additional or "expanded" issues.

But certainly he made no "charge" against anyone, and had no idea that his remarks might arouse resentment. That they did is regrettable and completely unintentional.

Howard A. Johnson,
Referee