Award No. 10435
Docket No. TE-9146

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

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 Telegraphers' Agreement when on the 28, 29 and 30th days of September, 1955, it caused, required or permitted Conductor B. R. Field, to handle (receive, copy and deliver) clearance cards Form A at Colonie, New York. Telegrapher Stah being ready and available to perform this work but was not called.

2. Carrier will be required to compensate Telegrapher-Clerk Nicholas Stah for one call, under Article 3(d), for each date as above set forth.

3. Carrier will be required to permit joint check of records to determine dates of subsequent violations as set forth in Paragraph 1, at Colonie, New York and to determine name of employe or employes entitled to compensation therefor.

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 Telegrapher or Employes. The Agreement is, by reference, included in this submission as though copied herein word for word.

These disputes were 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.

At Colonie, New York, carrier maintains one position covered by Telegraphers' Agreement. The assigned hours were 8:00 A. M. to 5:00 P. M. (one hour for lunch). The rate of pay was $1.829 per hour.

OPINION OF BOARD: This claim involves the propriety of a conductor obtaining a "Form A" clearance for his train by telephone communication, the necessary information being received by him at Colonie, New York from the RX office at Maiden Lane, Albany, New York.

The claim is similar to claims involving the same parties in other pending dockets: TE-8954, TE-8955, and TE-8956; however, it is distinguishable from them in at least two respects: the alleged contractual violation occurred at a place (Colonie) where there was a telegraph and telephone office and a dully assigned telegrapher; and the communications herein did not involve the more formal type of train order.

There is no disagreement as to the function of these "Form A" clearances, which conferred the right upon the train addressed to use a main track for movement from one designated point to another; however, Carrier Member denies that "Form A" clearances are train orders.

In behalf of the Organization it is contended that the "Form A" issue cannot now be raised by the Carrier, since (allegedly) it was not raised by the Carrier on the property or in its ex parte submissions; and that, irrespective of this, a "Form A" clearance is in fact a train order within the scope of the Agreement.

Article 23 (a) of the applicable Agreement, effective July 1, 1944, reads in pertinent part as follows:

> "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 . . ."

As to the "Form A" issue, whether Circular 1 of the Board has been complied with is a question of the threshold variety; however, it is not necessary to resolve this matter in order to reach a decision herein.

Confronted with the facts of this particular claim and the applicable Agreement, we find that a "Form A" clearance form (as used in the communications with which we are concerned) is a form of train order under the provisions of and within the purview of Article 23 (a).

In Award 6863, the Board considered this matter and, **on the merits, rejected** the following contention of the Carrier: ". . . that Form 54 is not a train order, hence the "Handling Train Order Rule" has no application whatsoever . . ." (This claim was denied on other grounds).

It appears that the Federal Courts have declined to limit the definition of train orders to those of the more formal variety.

Although there appears to be some authority to the contrary, we believe that when a clearance form of this type is used to accomplish the same purpose as a formal train order, it should be regarded and construed as a train order. It seems to be a more sound approach to consider a communication of this type in the light of its functional importance rather than in the perspective of technical nomenclature.

We cannot agree with Carrier's contention that since another telegrapher at another station was a party to the transmitting of these clearances to the conductor at Colonie, no harm was done. The receipt of the "Form A" com-

munication at Colonie was work belonging to the telegrapher employed there, and whether the information that enabled a train to move was transmitted to that point by a telegrapher at another point by a manual delivery system (conductor to conductor), or by direct telephone communication with the conductor of the train requiring information, makes no difference insofar as a contractual violation is concerned.

Argumentation in behalf of Carrier in regard to prior negotiations and past practice must yield to the clear language of the contract itself. In Award 8260, Guthrie, Referee, involving the same parties and the same Agreement, this Board said:

> "... Even if such had been past practice, it would have to yield to the clear and unambiguous terms of Article 23 (a) ... This article is a specific rule excepting only situations where emergencies are involved."

In Award 10063, this Board found the language of Article 23 (a) "clear and unequivocal."

Other issues have been raised in behalf of the Carrier which we are not now entitled to consider for the reason that they were not dealt with on the property or in Carrier's ex parte submissions.

We are in agreement with Carrier that Item (3) of this claim should be denied. It appears to be well-settled on this property that there is no rule in the applicable Agreement that would require the Carrier to search its records in order to develop claims for the Organization (Award 9343).

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 Carrier violated the Agreement in Claims 1 and 2.

That the Carrier did not violate the Agreement in Claim 3.

AWARD

Claims 1 and 2 are sustained. Claim 3 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of March 1962.

DISSENT TO AWARD NO. 10435 — DOCKET NO. TE-9146

Award No. 10435 correctly holds that "there is no rule in the applicable Agreement that would require the Carrier to search its records in order to develop claims for the Organization (Award 9343).", but errs in concluding that a Clearance Form A is a train order.

For this reason we dissent.

/s/ R. A. Carroll
/s/ P. C. Carter
/s/ W. H. Castle
/s/ D. S. Dugan
/s/ T. F. Strunck