Award No. 10675
Docket No. TE-9385

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, 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 Agreement when, on February 27, 1956, it caused, required or permitted Mr. M. H. Coursey, a conductor, not covered by the Telegraphers' Agreement, to handle (receive, copy and deliver) train order No. 8 at Stone Mountain, Georgia;

(2) Carrier shall compensate oldest idle telegrapher, preferably the senior idle extra telegrapher, but in the absence of such employe, then Clerk-Telegrapher J. L. Wilson, regular occupant of Relief Position No. 8, who was idle on that date by reason of it being one of the rest days of the position, for one day (8 hours) at the rate of $2.042 per hour for the violation aforesaid.

EMPLOYES' STATEMENT OF FACTS: At Stone Mountain, until January 1, 1956, Carrier maintained an open agency and there was one position covered by Telegraphers' Agreement, with classification of Agent-Telegrapher. When the station was closed and the position abolished, the hours of service were 8:30 A. M. to 5:30 P. M., Monday through Friday, with one hour for lunch. During the many years prior thereto when this position was in existence, the occupant thereof performed all communication work in handling messages, orders and reports of record (and all station work) at that station during his assigned hours, and sometimes outside his assigned hours on call or overtime basis.

On February 27, 1956, at 8:33 A. M., Conductor Coursey of train No. 24 handled the following train order at Stone Mountain:

FORM 19 FORM 19

GEORGIA RAILROAD

Train Order No. 8

February 27, 1956

To C&E No. 24 Stone Mountain

Order No. 7 is annulled

We have conclusively shown there is no merit to this claim under the scope rule and that no claim exists under Article 3 (d). Further, that during the intervening 36 years, acquiesced in by the employes, the carrier and the employes have placed their own interpretation on this rule.

TO SUM UP, WE HAVE SHOWN:

(1) That the claim should be dismissed for the reason (a) that claimant did not follow procedures of Railway Labor Act or the rules of the Board in handling the claim and (b) that the time limit on claims rule does not permit claims for unknown claimants.

(2) On the merits, that there was no violation of the agreement, the rules of the agreement and interpretation placed on same by the parties permit the issuing of orders at blind sidings and non-agency stations.

The claim as filed is without merit and we request it be declined.

To the extent possible, as no conferences were held on the claim, the data contained herein has been made available to Petitioner.

OPINION OF BOARD: The facts are not in dispute.

On February 27, 1956, a local freight train was pulled in to the siding at Stone Mountain, Georgia, a non-agency station, to clear the way for a priority freight train. This priority freight train had become disabled short of Stone Mountain; therefore, in order to avoid excessive delay to the local freight train, the conductor was called to the telephone and was given a train order to advance his train. An agent-telegrapher had been employed at Stone Mountain for many years but the position was abolished when the Carrier closed the station on January 1, 1956.

The Employes contend that such use of the conductor was in violation of their Agreement because the handling of train orders is work belonging exclusively to the telegraphers.

The Carrier gives three main reasons why the claim should be denied. First, it attacks the jurisdiction of this Division to consider the dispute because no conference was held on the property as said to be required by the Railway Labor Act and the Rules of Procedure of this Board, Second, Employes failed to satisfy the applicable time limit rule when it did not name the employe entitled to the claim. Third, on the merits of the dispute, the Carrier contends that under the facts involved the work was not exclusively reserved to employes covered by the Telegraphers' Agreement.

We do not agree with the Carrier in its assertions that this Division does not have jurisdiction of the claim or that Employes failed to satisfy the time limit rule by not naming a proper claimant. However, we do agree with the Carrier that under the facts the Telegraphers' Agreement was not violated. Accordingly, the claim should be denied.

Jurisdiction: The Carriers have held the view for many years that this Board does not have jurisdiction of a claim where a conference was not held on the property prior to submission of the dispute to the Board, or where the

dispute was not handled in the usual manner. They continue to hold this view strongly, as evidenced in the dissents to Awards 10139 and 10567, decided in recent months, and by pursuing the point further in this proceeding. This view has merit; although on balance it is not held to be the best view.

The Employes say that the Carriers' view has been rejected so many times that the point ought to be considered as having been settled. This is a matter of opinion. The weight of authority is with the Employes but there is respectable authority to the contrary and there is reason to think that the majority view has not been articulated clearly or on the best grounds.

The principal thrust of the Carrier's case on the point is that the plain language of the Railway Labor Act (Sec. 2 Second: "All disputes . . . shall be considered . . . in conference . . .") requires that such a conference take place before this Board may assume jurisdiction of the dispute. This position is strengthened, the Carrier maintains, by the provision in Section 3, First (i) of the Act, which requires that disputes be handled on the property "in the usual manner" (including a conference before coming to this Board).

Without question, the Congress intended for the parties to meet face to face in conference before progressing a dispute to this Board. The Railway Labor Act is bottomed on the principle that direct personal confrontation of representatives of both sides is the best way to get agreement. This is the essence of collective bargaining and of settling disputes.

It is also without question that the parties do confer regularly to settle disputes. The only question is whether they must confer for this Board to have jurisdiction.

The decisions which have rejected the Carriers' argument that such conferences are required have not answered this question. Instead, jurisdiction has been assumed on what seem to be equitable grounds rather than an interpretation of the statutory requirements. Thus, in Award 2786 (Mitchell) it was held to "be a useless thing to hold a conference" after the claim was declined in writing by the Carrier; and in Award 3269 (Carter), that a conference would be a "vain" thing after the appropriate official "did pass upon and deny the claim by letter;" and in Award 7403 (Larkin), that the parties elected to "waive" the oral discussion by not requesting a conference.

A more recent case also decided on an equitable basis in Award 10030 (Webster). There, a conference had just been held on an identical claim by the same parties. A conference was found to be unnecessary in the companion case because "The law has never required a party to do a futile thing."

Deviating from the rationale followed in this line of cases was the decision in Award 10139 (Daly) that the Carrier's argument against jurisdiction could not be sustained because the issue of the need for a conference had not been raised on the property. This novel reason did little to settle the law on the point as the Carrier members were quick to point out in their strong dissent.

Still based on equitable grounds but speaking more in terms of obligations of the parties was the decision in Award 10567 (LaBelle). There it was held:

> "We feel that the Railway Labor Act and the Rules of Procedure of the National Railroad Adjustment Board give to the parties certain rights, but by the same token, impose certain duties and obligations upon each of them. We are of the opinion that in order to

assert a violation of such guaranteed right, that the party seeking such ruling must first bring itself within the statute by making a request for a conference. If a conference is requested and denied, then and only then, can such a charge of noncompliance with the Act be successfully raised.

Thus we hold that the Carrier, not having requested a conference cannot now defeat consideration of this claim."

Carrier's continued insistence that the Railway Labor Act requires a conference to be held prior to submission of the dispute to the Board, indicates that the broad equitable reasons given in the cases rejecting Carrier's view are not persuasive — at least to the Carriers.

Perhaps an examination of the applicable statutes in the Railway Labor Act will be helpful in this regard.

As the Carrier contends, Section 2, Second of the Act expressly requires all disputes to be considered in conference before being considered by the Board. Without more, an almost unimpeachable argument could be made that such a conference is a condition precedent to review by the Adjustment Board. Especially is this true because Congress intended it to be this way.

We say almost unimpeachable because statutes of this kind seemingly always have exceptions. This is particularly true before administrative type boards such as this one. Certainly it would be difficult to fault the Board if it refused to dismiss a claim for want of jurisdiction under the circumstances in Award 10030 where it clearly would have been futile to ask for a conference to discuss the same issue between the same parties as had just been discussed in another claim.

Thus, even if the only statutory guide were Section 2, Second it is probable that under some circumstances the failure to have a conference would be regarded merely as a technical irregularity and the claim would be considered on its merits.

However, this is not the only provision dealing with the need for conferences. Section 2, Sixth is also directly in point, although it must be conceded it serves to muddy rather than clear the picture. In pertinent part this section reads:

"Sixth. In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employes, **within ten days after receipt of notice of a desire on the part of either party to confer** in respect to such dispute. . . ."
(Emphasis ours.)

As will be seen, Section 2, Sixth deals specifically with disputes considered by this Board. On the other hand, Section 2, Second is more general. It involves "all disputes" including (perhaps primarily) disputes concerning intended changes in agreements under collective bargaining procedures.

Truly, it cannot be argued sensibly that the provisions of Section 2, Sixth, which clearly imply that either party must **want** a conference and **request** it,

do not condition the more unqualified terms of Section 2, Second. It follows from this that the Board is not without jurisdiction if a conference has not been held on the property prior to submission of the claim to the Board.

Whether the Board will consider a claim depends on its administrative judgment that the claim has been progressed on the property in the usual manner, as provided in Section 3, First (i) of the Act. In construing the term "usual manner," however, it must be recognized that it does not at all times and under all conditions require that a conference actually be held on the property. So long as common, accepted, ordinary procedures were observed on the property, including the opportunity for a conference, the Board may conclude that the claim was handled in the usual manner and proceed to consider the claim presented to it. This is the conclusion we adopt in this case.

Unnamed Claimant: The Carrier also contends that the claim should be dismissed because it does not name the claimant, as required by the time limit rule of the Agreement.

Conflicting awards have been cited by the parties on the point. Those awards favoring the Carriers held generally that the claim was defective because the claimant was neither named nor readily identifiable. Those awards favoring the Employes held generally that the claim should not be dismissed if the claimant was readily identifiable, even though not named. Thus, precedent seems to establish that the answer turns on a matter of fact.

Claim here is for payment to the "oldest idle telegrapher, preferably the senior idle extra telegrapher, but in the absence of such employe, then Clerk-Telegrapher J. L. Wilson."

The Organization contends that the Carrier is in possession of the extra board roster and should know who was the "oldest idle" telegrapher on the date in question. The Carrier argues, however, that the oldest idle telegrapher may not "necessarily" be the senior extra telegrapher. Further, it contends that it is under no duty to perfect a claim for the Organization.

The Carrier correctly points out that the senior idle extra telegrapher may not necessarily be the oldest idle telegrapher. However, this need not be of concern since the phrase in the claim "preferably the senior idle extra telegrapher" is meaningless as a modifier of the phrase "oldest idle telegrapher" if they are not one and the same persons.

Although the claim is less than precise in naming a claimant, the oldest idle telegrapher is readily identifiable. In line with other authority, we believe that the claim should not be dismissed where such claimant can be so identified. Awards: 8526; 9205; 9248; 9333 and 9553, among others.

On The Merits: The question whether the work of handling train orders is reserved exclusively to the telegraphers is certainly not new. Countless awards exist on both sides of the question. The issue between the parties here may be compared to an evenly matched, high scoring, basket-ball game where the only uncertainty after a score is how soon the other team will do likewise.

There is no intention to treat this very difficult and important problem lightly. But it should be clear by now that this Board will not be able to settle the underlying causes prompting the disputes referred to it. Through the years all that has been produced is a box-score of yeas and nays in a contest which

apparently has no time limit. Unless new rules are added the chances are that the see-saw contest will continue as in the past.

All that is meaningful has been said in the awards cited in support of the respective contentions. The only thing useful we can do here is to pick the side which to us seems best and cast our supporting vote.

In this perspective, we agree with those decisions which hold that the work of handling train orders does not belong exclusively to the telegraphers. Awards 6071, 6959, 7953, 7976, 10442, and 10604, (among others). More specifically, we hold: that the Scope Rule does not define work; that history, tradition, practice and custom establish the content of the work; that it is the duty of the Employes to show that by such criteria the work performed by the conductor in this case was work reserved exclusively to telegraphers; that this duty was not met; that, on the contrary, the Carrier showed persuasively that the practice over a number of years on this property included the kind of work performed here by the conductor; and that this practice existed with the knowledge of the Employes.

Accordingly, the claim should 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 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

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1962.