Award No. 12371
Docket No. TE-10352

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, 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 November 22, 1956, it issued Train Order No. 20 at Madison, Georgia, addressed to Train No. 25 in care of Train No. 2, which carried Train Order No. 20 to Carey, Georgia, a closed station, and at the direction of the Carrier delivered Train Order No. 20 to the crew of Train No. 25.

2. Carrier shall pay the senior idle telegrapher eight hours at straight time rate for November 22, 1956 for the work which he was entitled to perform at Carey.

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

Article 1 provides as follows:

"DATE EFFECTIVE — SCOPE

(a) Effective September 1, 1949, the following rules and regulations will apply to all Telegraphers, Telephone Operators (except Switch Board Operators), Agent-Telegraphers, Agent-Telephoners, Towermen, Levermen, Tower and Train Directors, Block Operators and Staffmen, also such Station Agents, Assistant Agents, Ticket Agents and Ticket Sellers as are listed herein, and shall be hereinafter referred to as employes.

MINIMUM RATE OF PAY

(b) The minimum rate of pay of employes covered by this Agreement shall be $1.45 per hour for all employes paid on the hourly basis."

Carey, Georgia, was formerly an open agency in charge of an Agent-Telephoner, but has been closed for several years. On November 22, 1956,

exclusively reserved by the scope rule to persons covered by the agreement."

In Award No. 6032, involving the Atlantic Coast Line Railroad, the same statement was made. Thus, we must look to custom. Although the Georgia Railroad has maintained agreements with its telegraph service employes since 1916, the scope rule has never contained a classification of work rule.

In the instant case carrier has shown that for more than 57 years "in care of" train orders have been issued in accordance with the rules of its operating department. We have shown that a working agreement between carrier and its telegraph employes has been in effect for more than forty years. The rule covering the handling of "in care of" train orders was in effect many years before negotiation of the first agreement with employes and has been in effect continuously from 1900 to the present time. A total of six agreements have been negotiated between the parties within the last forty years, none of which contained a prohibition against the handling of "in care of" train orders as provided in Rules 217. In progressing this claim, the employes are attempting, through the medium of a favorable award, to broaden the scope rule of the agreement far beyond its intent and purpose.

This case is on all fours with Docket TE-6985, Award No. 7153, and your attention is respectfully directed to the finding in that award.

The carrier contends that the handling of the train order involved in this claim was in accordance with the rules of the operating department which have been in effect for many years, and that such handling was not in contravention of the terms of the current agreement with its employes. Carrier requests that this claim be denied.

OPINION OF BOARD: Carey, Georgia, is a blind siding located about seven miles from the open agency station at Madison. Carey had been an open agency in charge of an Agent-Telephoner, but it was closed some years prior to the date which gave rise to the dispute now before this Division.

On November 22, 1954, a train order was placed through the Agent-Operator at Madison, addressed to Train No. 25 in care of Train No. 2. It was copied by the Agent-Telegrapher at Madison and delivered to Train No. 2, which carried it to Carey where it was delivered to Train No. 25.

Petitioner contends that the delivery of the train order to Train No. 25 was work which belongs to Telegraphers. Since it was delivered by employes not covered by the Telegraphers' Agreement, Carrier violated that Agreement. The claim is for eight hours' pay at the straight time rate for the senior idle telegrapher.

Carrier initially contends that the claim should be dismissed because it is "for an unnamed or unknown claimant" in violation of the Time Limit Rule as set out in the record. It is a well established principle of this Division that a claim is valid if the identity of the Claimant can be easily ascertained and readily identifiable. We hold that the "senior idle telegrapher" can be so ascertained and identified.

The simple issue is whether the delivery of the train order by a crew member of Train No. 2, who was not covered by the Telegraphers' Agreement, is work which is reserved to telegraphers. This Division has adopted many awards involving this question. Unfortunately, there is no unanimity in their

findings. On the contrary, they are in considerable conflict. It is, therefore, our duty and responsibility to review them and to adopt principles which will establish guide lines for stability. For this purpose, it is essential that we review those awards which are most pertinent and which are of primary importance.

Award 5122 (Carter) is one of the earlier and better considered decisions of this Division. Four claims were involved. In each a train order was copied by a telegrapher and handed to a train crew member for delivery at a distant point to a crew member of another train to whom the train order was addressed. The train crew members were not covered by the Telegraphers' Agreement. On the subject of work which is reserved to Telegraphers under the Agreement, we said:

> "It has long been the rule that the work of a class of employes reserved to them in a collective agreement cannot be delegated to others without violating the agreement. The Telegraphers' Agreement reserves the sending, receiving, copying and delivering of train orders to the telegraphers. It is also well established that the receiving of such communications includes copying and delivering to the train crews which are to execute them. Award 1713. The handling of train orders at a station where there is an employe covered by the Telegraphers' Agreement is work belonging to that employe. His right to the work cannot be circumvented by devices such as depositing the train orders in waybill boxes or attaching them to train registers. Award 1878. Nor may they be entrusted for delivery to someone not included within the class covered by the Agreement. Award 2087. **Consequently, they may not be handed to one train crew for delivery to another.** Award 2936." (Emphasis ours.)

In that case Carrier urged (1) that the rule is different where no telegrapher is maintained at the point where delivery is made to the crew that is to execute it, and (2) that this method of delivery has been used for many years and is a practice generally followed. Carrier's position in the claim now before us is the same. On this point, we said in Award 5122:

> "Assuming that it did become a general method of handling under situations such as we have here, it is not controlling for the reason that the work of sending, receiving, copying and delivering train orders is reserved to telegraphers by their agreement. The delivery of train orders to a train crew by one outside the Telegraphers' Agreement is a violation of the Telegraphers' Agreement."

In Award 5122, Carrier also urged that there is no other practical way to deliver train orders under such circumstances. On this we said:

> "This is undoubtedly true upon occasion. But, on the other hand, the presence of a penalty for such violation restrains the indiscriminate delivery of train orders by those outside the scope of the Telegraphers' Agreement. While the payment of a penalty which the Carrier is unable to avoid may occasionally be required, it is more economical than the maintenance of additional telegraph stations and at the same time it safeguards the work reserved to telegraphers by their agreement with the Carrier."

In Award 5871 (Yeager) the facts considered were similar to those in Award 5122 and to those of the instant dispute. Carrier there, as here, con-

tended that the train order was properly handled under its Operating Rule 217. We held that in the light of the many cited awards that "there was a conflict between the rights of the employes under the Scope Rule and Rule 217 and that the rights under the Scope Rule must prevail, unless past practice, as the carrier contends, is controlling." Further, we said:

> "On the question of past practice the Division has taken the position that where there is a conflict between the collective agreement and the Operating Rules of the Carrier the provisions of the Agreement must prevail, and this even though the conflicting Operating Rule of the carrier and the practice previously employed were of long standing and of wide use. . . . This is adopted as controlling here, in consequence of which the claim must be sustained."

Another is Award 6678. There, a yardmaster delivered train orders to a place where no telegrapher was employed. The train orders were sent by yard engine to the west end of the Yard and in some instances telephoned, where the yardmaster delivered them to the trains addressed. The distance between the location of the telegraph office and west end of the Yard where the train orders were delivered was about 2.1 miles. We held that Operating Rule 217 was in conflict with the Agreement, and that, therefore, the Agreement must prevail. The claim was sustained.

Award 7967 (Elkouri) affirms the ruling in Award 6678. We said:

> "Regarding the first noted activity, the case involves the handling (delivery) of train orders by a person or persons not covered by the Telegrapher Agreement out of a point (Catlettsburg) where a telegrapher was stationed, to a point (Leach) where no telegrapher was stationed. . . . In the case covered by Award 6678, as in the present case, the Carrier relied in part upon its Operating Rule 217. But that Rule clearly should not be held to govern over Rule 58 of the Telegrapher Agreement at a point where a Telegrapher is stationed, for Rule 58 has clear and specific application to the handling of train orders at such points."

The foregoing are the primary awards relied on by Petitioner. It is not necessary to consider those urged by Carrier.

The first, in terms of time, is Award 7153 (Larkin). Train orders, addressed to a pile driver crew at Remini, South Carolina, were received and copied by a telegrapher at Sumter, South Carolina, some twenty miles away. Remini was a blind siding. The train orders were delivered to the crew at Remini by crews of trains running between the two points. They were sent "in care of" employes not covered by the Telegraphers' Agreement. The claim was denied. We said:

> "We are urged to conclude that the Scope Rule, together with Article 20, requires that the Carrier restore the Telegrapher (or the Clerk-Telegrapher) position at Remini for the dates in question, and that the Scope Rule overrides the Operating Rule (217). Since the Operating Rule has long been in existence; since it was common practice when the Scope Rule was adopted; and since there is nothing specifically in the Scope Rule which nullifies this ancient rule and practice under it, we are left with little in the way of sound reasoning to support such a claim.

> Article 20, obviously, does not apply. By its very language it is applicable only to situations where 'an operator is employed and is available or can be promptly located.' Since no operator had been stationed at Remini for some fifteen years, we cannot conclude that this rule applies. Also Article 20 was designed to apply in emergencies. We do not think that the situation at Remini could be classed as such an emergency."

Article 20 above referred to in the Opinion is a train order rule similar to Article 3(d) of the Agreement involved in the dispute here considered.

Award 9445 (Johnson) involves the same parties, the identical Agreement and comparable facts. The claim was denied. We said:

> "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."

We also held that Operating Rule 217 is not inconsistent with the provisions of Article 3(d) because no operator was employed at Barnett, Georgia.

Award 10675 (Ables) also involves the same parties and the same Agreement, but the facts are not exactly similar. The facts as stated by the Carrier in that case were as follows:

> "Conductor Coursey on February 27, 1956, left Atlanta on local freight train No. 24. He pulled in siding at Stone Mountain, a non-agency station, 15 miles from Atlanta, to clear freight train No. 211. No. 211 had broken down east of Stone Mountain and in order to save excessive delay to train No. 24, Conductor Coursey was called to telephone and given order No. 8, advancing his train."

The Employes contended "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." In denying the claim, we said:

> ". . . we agree with those decisions which hold that the work of handling train orders does not belong exclusively to the telegraphers. . . . 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."

It is apparent that the conflicting awards revolve around two issues. One is the interpretation of the Scope Rule and the other is the applicability of Operating Rule 217. We shall first consider the application of Operating Rule 217. That rule reads:

"A train order to be delivered to a train at a point not a train order station, or at one at which the train order office is closed, must be addressed to 'C. and E. ..... (at .....), care of .....,' and forwarded and delivered by the conductor or other person in whose care it is addressed. When form 31 is used 'complete' will be given upon the signature of the person by whom the order is to be delivered, who must be supplied with copies for the conductor and enginemen addressed, and a copy upon which he shall take their signatures. This copy he must first deliver to the first operator accessible, who must first preserve it, and at once transmit the signatures of the conductor and enginemen to the train dispatcher. Orders so delivered must be acted on as if 'complete' had been given in the usual way.

Orders must not be sent in the manner herein provided to a train, the superiority of which is thereby restricted."

Article 3(d) of the Agreement provides as follows:

"EMERGENCY TRAIN ORDERS

(d) 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. Train orders taken over telephone at offices where Telegraphers are employed, Operators will be called or allowed for the call."

First, it is necessary to determine if an emergency existed. It did not exist in the present dispute.

Second, Carrier urges that Article 3(d) is not applicable because it applies "only at offices where employes covered by the Telegraphers' Agreement are employed." No telegrapher was employed at Carey. It was a blind siding.

The train order was received and copied by the Telegrapher at Madison. That Telegrapher at Madison was not only vested with the right and duty of receiving and copying of the train order, but he or another telegrapher had the further right and duty of delivering it to the train crew which was to execute it.

The very title of Article 3(d) shows that its use is restricted to emergencies. It is not intended to circumvent the work reserved to telegraphers under the Scope Rule. Except for emergencies, only Train Dispatchers and Telegraphers are permitted to handle train orders, and then only at stations where an Operator is employed. An Operator was employed at Madison. An Operator had been employed at Carey. Operating Rule 217 is in conflict with Article 3(d) of the Agreement. Under such circumstances, the principle of historical, traditional and customary practice is applicable. The record shows that a telegraph agency existed in Madison, Georgia; that the telegrapher at that station received and copied the train order addressed to Train No. 25. The delivery of that train order to Train No. 25 was an integral part of the work of that Telegrapher. The fact that the train order was to be delivered seven miles away does not permit the Carrier to assign an employe not covered by the Telegraphers' Agreement to make the delivery. In that respect, Operating Rule 217 is also in conflict with the Scope Rule and may not supersede it. By tradition, custom and practice the delivery of the train order was work which belonged to telegraphers at Madison, Georgia.

Carrier had every right to close the Agency at Carey and to abolish the Telegrapher positions covered by the Agreement. This does not authorize Carrier to have train orders delivered to Carey by an employe not covered by the Telegraphers' Agreement. To permit this would violate the long standing custom, practice and tradition that the delivery of train orders belongs to employes who received and copied them.

Feasibility and efficiency, while necessary for the successful and profitable operation of a railroad, may not be substituted for the terms of a written agreement voluntarily entered into by the parties. The occasional payment of a penalty, as we held in Award 5122, may be more economical than the maintenance of the telegraph station at Carey. It is more important to safeguard the work which by custom, practice and tradition has been reserved to telegraphers by their agreement with the Carrier.

We are mindful that we should not deliberately repudiate recent awards of this Division involving the same parties, the same issue and the same Agreement. Stability is necessary in the administration of collective bargaining agreements. Uniform awards are not only desirable, but necessary, to stabilize this administrative process. But we are confronted with conflicting awards holding diametrically opposite views. This is unfortunate. It imposes upon us the added responsibility of analyzing and selecting those principles which, in our opinion, give the better and the most logical interpretation of the Agreement on the basis of the facts in the record. As indicated in this Opinion, Awards 5122, 5871, 6678 and 7967 are the better considered awards on this issue; they are more persuasive and we here affirm their conclusions and findings.

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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1964.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 12371, DOCKET NO. TE-10352

Award 12371 is clearly erroneous, is not supported by the record, and we must register our dissent thereto.

Article 3(d) of the Agreement, quoted in the Award, is, by its own terms, applicable "at Telegraph and Telephone offices where an Operator is employed" and has no application whatsoever to locations such as Carey, Georgia, which is properly described as a blind siding.

The Scope Rule of the applicable Agreement, which is the rule relied upon by the Petitioner, is of the general type which does not define or describe work, but simply lists, by title, the classes of employes who are covered by the terms and provisions of the Agreement. In interpreting such general type Scope Rules, this Division has consistently applied the principle of determining whether or not the work in dispute has been performed exclusively by Claimants through practice, custom and tradition on the property of the Carrier involved, and that the burden rests with Petitioner to prove exclusive right to the work through practice, custom and tradition.

The record does not show that the handling of train orders on this Carrier's property has been reserved exclusively to telegraphers by agreement, tradition, historical practice or custom. On the contrary, the record shows that since at least July 1, 1900, an Operating Rule, known as Rule 217, has provided for the method of handling train orders as used herein (designated as "in care of" train orders) for points where no telegrapher is assigned, and that this 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 80 in the background. * * *"

The Petitioner did not prove that, historically, it has been the custom and practice on this property to reserve the delivery of train orders exclusively to employes covered by the Agreement. In its submissions the Petitioner did not even assert that employes covered by the Agreement had in the past handled "in care of" train orders to non-telegraph points, much less prove that through tradition, custom and practice such work has been reserved exclusively to such employes. The Agreement can properly be interpreted only by considering how the parties thereto have placed themselves, and not how some other Carriers and their employes may have placed themselves under their Agreements.

Operating Rule 217 is not in conflict with Article 3(d) or the Scope Rule of the Agreement. The operator at Madison effected delivery of the train order when he delivered the order to the crew of Train No. 2 in accordance with the provisions of the Operating Rules. No provision of any rule gave that telegrapher or any telegrapher the right to effect further delivery of the order.

Award 9445, involving the same parties, the identical Agreement, and a similar factual situation, should have been followed and the claim herein denied.

The Award is in further error in sustaining claim in behalf of some unnamed employe not identifiable from the record before the Division.

P. C. Carter
D. S. Dugan
W. H. Castle
T. F. Strunck
G. C. White