Award No. 12667
Docket No. TE-10995

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Pere Marquette District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake and Ohio Railway (Pere Marquette District) that:

1. Carrier violated the agreement between the parties when it required or permitted employes not covered by the agreement to handle work permit orders (Form CC-4) at Leamington, Ontario on December 9, 1957, at Kingsville, Ontario on December 9, 1957, and at Harrow, Ontario on December 10, 1957.

2. Carrier shall be required to compensate the Agent-Operator at each station in the amount of a minimum call payment:

B. N. Brad, Agent-Operator, Leamington, on December 9, 1957,
G. W. Hall, Agent-Operator, Kingsville, on December 9, 1957,
H. V. Meek, Agent-Operator, Harrow, on December 10, 1957.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

At Leamington, Ontario there is one position covered by the Agreement, that of Agent-Operator with assigned hours of 9:00 A. M. to 6:00 P. M. (one hour meal period). At the time cause for this claim arose B. N. Brad was the regularly assigned incumbent of the position. At 6:59 P. M. on December 9, 1957 the conductor of train Extra 5734 received and copied direct from the train dispatcher the following work order:

"WORK PERMIT CARD FORM CC-4

December 9, 1957

TO C&E Eng 5734 at Leamington

You may work between Stop 3 west and Leamington and Stop 3 east end Wheatley until 7:55 P. M.

(signed) HBM."

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rights over all trains between specified points and for specified periods of time. Automatic block signals do this, and as a precaution the controller has frozen signals to protect the extra and will keep these signals frozen until the extra has reported clear of working limits. The conductor of the work extra simply notes on form CC-4 pertinent information for his use, which constitutes specific time and place information concerning the "right to occupy main track" which he has secured from the dispatcher.

Other trains in the territory affected by a work extra holding the track are governed by signals. They receive no copy of Canadian uniform code operating form H (5) order, (United States form S-H (4), when a work extra is given exclusive right over all trains). Up to this time the employes have recognized that the main purpose of the CC-4 is to insure that the work extra will report into clear promptly and thus avoid delay to other trains, it being assumed the controller will thereupon promptly remove blocks.

Up to the present time our employes have recognized CTC as:

> ". . . a system of railway operation by means of which the movement of trains over routes and through blocks on a designated section of track or tracks is directed by signals controlled from a designated point, superseding time table superiority of trains, **and without requiring the use of train orders.**" (Emphasis ours.)

and it is pointed out your Board in its Award 4452 recognizes the above quoted.

In summary, Carrier submits that as previously pointed out this Carrier has been advised by an award of the National Railroad Adjustment Board on the specific question of whether the National Railroad Adjustment Board has jurisdiction in the matter of a labor-management dispute incident to the operations of this Carrier in Canada, and occurring in that country. The previous decision given this Carrier by the National Railroad Adjustment Board, in response to the argument of this Carrier that said Adjustment Board was without jurisdiction, was made by the First Division of this Adjustment Board in its Award 11151, without referee. This decision was that the Board did not have jurisdiction.

Carrier submits that in such circumstances the following language of your Board, sitting with Referee Coffey, in your Award 6935 appears apropos:

> "If, as we maintain, our awards are final and binding, there must be an end sometime to one and the same dispute or we settle nothing, and invite endless controversy instead."

Data submitted by the Carrier in this case in support of its argument that your Board does not have jurisdiction have not been placed before the Employes in handling this case on the property. This carrier had no indication of any kind this dispute would be progressed to your Board by the Employes until receipt of notice from the Secretary of your Board, herein referred to.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier has submitted what is in effect a motion to dismiss for lack of jurisdiction. The stated grounds are:

1. The employes named in the claim are resident of and employed in Canada. They, **in personam**, are not within the Board's jurisdiction. They are indispensable parties to the proceedings; and

2. The alleged violations of the Agreement occurred within the Dominion of Canada; therefore, beyond the jurisdiction of this Board.

I.

JURISDICTION

A. The Indispensable Party Issue.

1. The Elgin Case.

In support of its contention that the employes named in the claim are indispensable parties, Carrier relies upon **Elgin, Joliet and Eastern Railway Company** vs. **G. W. Burley, et al.**, 325 U.S. 711 (1945); reargued and affirmed, 327 U.S. 661 (1946).

In the first opinion in the **Elgin** case, the Supreme Court considered the question of the power of a collective bargaining representative to conclude agreements for settlement of employes' grievances and to represent aggrieved employes in proceedings before the Board. The Court ruled that the representative is not authorized, simply in the nature of the case, to settle employes' grievances. The Court went on to say, however, that express authorization by employes involved is not necessary.

In the second opinion, after reargument, the Court held that an employe who has notice of settlement negotiations conducted by the representative concerning the employes' grievances is required to take affirmative steps with regard to his right to have a voice in the settlement, or he may lose that right.

In his dissent to the second opinion, Mr. Justice Frankfurter, with the concurrence of the Chief Justice and Mr. Justice Burton, said the Court erected "a series of hurdles which will be, and we assume were intended to be, almost impossible for an employe to clear." He characterized the employe's right to challenge the agency of the collective representative as "largely illusory (327 U. S. at p. 668). Subsequent opinions of the courts and quasijudicial bodies engaged in the field of labor relations have supported these characterizations.

The issue resolved in the **Elgin** case, concerned only the authority of the representative to act for the employe. It does not support Carrier's argument in this case that an employe named in a petition filed with this Board by his collective bargaining representative is an indispensable **in personam** party to the proceedings.

The record in the case before us raises no issue as to the representative's authority to act. It does prove that historically, alleged violations of the Agreement have been handled on the property in conferences between the employes' collective bargaining representative and representatives designated by the Carrier. In the absence of any showing to the contrary, we must conclude that the Petitioner in this case had and has the authority to act for the employes named in the petition.

2. General Duties of the Collective Bargaining Representative

The duties of a collective bargaining representative are found in general terms in the Act.

Sec. 2. First. imposes the statutory duty upon "employes" and "carriers" not only to make but to **maintain** agreements; Sec. 2. Fourth. permits the employes to discharge this duty "through representatives of their own choosing"; and, Sec. 2. Second. mandates that all disputes as to maintaining the agreement "shall be considered, and, if possible, decided, with all expedition in conferences between representatives designated and authorized to so confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

In Sec. 2. First through Tenth. Congress defined the rights and duties of the parties and prescribed in general terms the accommodation of those rights and duties.

3. The Representative's Right to File a Petition

Twenty-two years ago, Mr. Justice Jackson, speaking of the Railway Labor Act, said:

> "Collective bargaining was not defined by the statute, which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as **worked out in the labor movement in the United States.**" (Emphasis ours.)

The philosophy of bargaining that has been "worked out" is disclosed, for the most part, by extensive litigation involving Section 8(5) of the National Labor Relations Act, which was subsequently designated 8(a)(5) of the Act as amended. The following selected cases, however, serve to demonstrate the evolving philosophy: **Elgin** case, **supra; Ford Motor Co.** vs. **Huffman,** 345 U. S. 330; **Association of Westinghouse Salaried Employes** vs. **Westinghouse Electric Corp.,** 348 U.S. 437; **Peerless Tool & Engineering Co.,** 111 NLRB 853, enforced 231 F. 2d 298 (C.A. 7), cert. den. 352 U. S. 893; **Smith** vs. **Evening News Association,** 371 U. S. 195.

The **Westinghouse** and **Smith** cases deal with the relative statutory rights of an individual employe and of a collective bargaining representative to bring suit, by authority of Section 301 of the Labor Management Relations Act, against an employer for violation of a collective bargaining agreement. In the **Smith** case, the Court expressly overruled its opinion in the **Westinghouse** case. The prevailing opinion holds that either individual employes or their collective bargaining representative have standing to sue an employer for violation of a collective bargaining agreement.

In overruling the **Westinghouse** case, the Court in effect, endorsed the philosophy of collective bargaining spelled out, by Mr. Justice Douglas, in the dissenting opinion in the **Westinghouse** case. He said:

> "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the construction and enforcement of the collective bargaining agreement. Individual contracts of employment result from each collective bargaining agreement. But those

contracts are the resultant of the collective bargaining system, a system that continues to function and operate after the contracts are made."

While the issue in the **Westinghouse** case arose out of the interpretation and application of Section 301 of the National Labor Relations Act, as amended by the Taft-Hartley Act and the Labor Management Relations Act, we can paraphrase Mr. Justice Douglas' opinion to make it equally applicable to The Railway Labor Act. This we can do without transgression since the legislative history of the National Labor Relations Act discloses that its collective bargaining provisions were patterned by the Congress similar to the statutory scheme of The Railway Labor Act.

The concept of collective bargaining contained in The Railway Labor Act, includes of course, the negotiation of the collective agreement and the settling of the terms of individual contracts of employment which result from the collective agreement. But the collective bargaining relationship does not end there. There remains the statutory duty to "maintain agreements", and this duty is imposed upon carriers, employes and their collective bargaining representatives alike. We know that collective bargaining in the railroad industry has produced a permanent, organized relationship between the "representative" and the "carrier", involving a day-to-day administration of the collective agreement. It involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and **the protection of employe rights already secured by contract.** The representative not only has the duty to negotiate collective agreements, but also the statutory obligation to police and administer the existing agreements. The administration of the collective agreement is its life and meaning.

It is now well established that the processing of disputes, in the railroad industry and industry generally, growing out of interpretation and application of agreements is a part of the collective bargaining process; and recourse to this Board to resolve and settle such disputes, in the railroad industry, is by statute the exclusive ultimate step in the process (Sec 3. First (i) et seq.). What the representative obtains in the collective agreement it should be entitled to enforce or defend in this forum. Were we to disallow it that standing, we would destroy the statutory scheme of the Act.

We can visualize situations where an individual employe affected by a violation of an agreement, for reasons of his own, would not initiate or join in processing a violation of an agreement; or, a situation where no employe is singularly involved. Under such circumstances, the only way in which the integrity of the agreement can be maintained is by recognizing the standing of the representative to process the alleged violation on the property and, if necessary, petition this Board as provided for in Sec. First. (i). That this is the legislative intent is made clear in Sec. 3. First. (p) which makes clear that the "petitioner" and the person [employe] aggrieved may be different parties.

Notwithstanding that a petition has been filed by the representative, an employe involved may elect to join, **in personam**, in the proceedings; and, should a representative fail or refuse to file a petition in a case, initiated and properly processed on the property, which an employe feels is meritorious, the employe may, of course, file with us, on his own, a petition.

The question whether the representative has authority to petition this Board does not turn on technical agency rules. We are dealing here with

specialized problems in a specialized field, with a long background of custom and practice in the railroad world. The aim of the Act is a permanent conference and negotiation between the carriers on the one hand, and the employes through their statutory representatives on the other.

A carrier is under a legal duty to treat with the representative for the purposes of The Railway Labor Act. See, **Virginian Ry. vs. Federation,** 300 U.S. 515. Our consistent recognition of a representative as a petitioner **sole,** until now unchallenged, is nothing more than an emanation of the duty.

CONCLUSION

For the foregoing reasons, we find that: (1) a representative is a proper party, sole, to petition this Board; and (2) an employe adversely affected by a violation of the collective agreement is not an indispensable **in personam** party to proceedings, initiated by his authorized statutory representative, before this Board.

B. The Issue Re: Situs of Violation

Carrier's second ground, asserted in its motion to dismiss the petition for lack of jurisdiction, is that the alleged violations occurred in Canada — therefore, outside the Board's jurisdiction. For the most part, in support, it has advanced the same arguments, citing the same cases and authorities, as were presented in Award No. 11639.

In Award No. 11639, as here: (1) the Agreement was executed in the United States; (2) employes working in Canada were included in a single collective bargaining unit with employes in the United States, without governmental edict; (3) within the United States, Petitioner is a "representative" and Carrier is a "carrier" within the meaning of those terms as defined in Section 1. First and Sixth of the Act and both are subject to and within the jurisdiction of the Act; and (4) the employe allegedly damaged, by violation of the Agreement, worked in Canada. The facts in the instant case differ in only one material respect, which we consider, **infra.**

We affirm Part II of our opinion — THE JURISDICTIONAL ISSUE — in Award No. 11639 and incorporate it herein by reference thereto.

It is to be borne in mind that a motion to dismiss for lack of jurisdiction is and must be addressed to the petition; not to the claim.

1. The Material Difference

In Award No. 11639, the Agreement vested holders of positions in Canada with seniority rights to positions in the United States.

The Agreement in this case, Rule 13, divides the system into two seniority districts; one covering employes in the United States, the other employes in Canada, seniority "not [to] extend between Districts . . ."

2. Carrier's Contention

Carrier contends that since the holders of positions in Canada have no seniority rights to positions in the United States, this Board is without jurisdiction to entertain a claim involving an alleged violation of the Agreements

with respect to the holder of a position in Canada. To do so, Carrier argues, would be to extend the law of the United States extraterritorially.

Carrier places the emphasis on the claim of an employe to be made whole for damages resulting from an alleged violation of the Agreement — not on the dispute as to interpretation of the Agreement.

3. The Extraterritorial Issue

We agree with Carrier that the laws of the United States may not invade the sovereignity of another nation. See the **Airline** cases cited in Award No. 11639. But, for reasons hereinafter set forth, we do not agree that our interpreting the Agreement before us would be such an invasion.

4. Resolution

Carrier insists that there is no relation between a claim for money resulting from alleged violation of a collective agreement and a petition for the interpretation of a collective agreement. But surely this is to sever what is organic. It wholly disregards the nature of such a collective agreement, its implications and its ramifications.

Carrier would have us consider the Agreement not as a whole, but as two separate agreements — one for employes in Canada; the other for those in the United States. This, where the parties have agreed to a collective bargaining unit, would be destructive, obviously, of the unit; thus, an antithesis.

The gravamen of the case before us, made certain by the Act, is the settling of a dispute as to the interpretation and application of the Agreement [Sec. 3. First. (i)]. The passing on the claim for money damages is incident thereto.

Theoretically, the Act seeks to dispel the economic forces that could be brought to bear at the expense of the public's interest. It not only seeks to avoid ills from a present dispute; but, to avoid disputes of the same nature **in future,** quite apart from the technical questions of **res judicata.**

All employes in the unit to which an aggrieved employe belongs, regardless of their respective work locations, have a real and legitimate interest in a dispute as to the interpretation of the collective agreement. Each of them employed in the United States, at some later time, may be involved in a similar dispute. We cannot deny them their day in court before this Board without offending the intent of the Congress.

It is not the locale where the incident giving rise to the dispute occurred that is governing. It is, instead, the unit-wide disputes as to interpretation of the Agreement. Such boundaries encompass, within the Agreement, Carrier's employes within the United States.

The Congress has ordained that where "minor disputes" arise between "employe", acting through his "representative" and a "carrier" — as to interpretation and application of an existing collective agreement — this Board is the exclusive ultimate forum to which parties to the dispute have recourse. **Chicago River** case, 353 U.S. 30 (1957).

We repeat, for emphasis, Carrier's employes in the collective bargaining unit employed within the United States, through their "representative", Peti-

tioner herein, are **de jure** parties to the dispute as to interpretation and application of the Agreement. To deny them this status would be contrary to the statutory scheme in that it would give rise to the ills which the Act was designed to prevent.

As to all employes being **de jure** parties, see **The Wallace Corp. vs. NLRB,** 323 U.S. 248, in which the Court, defining the duty of a bargaining agent, said, at page 255:

> "By its selection as bargaining representative, it [the representative] has become the agent of all the employes, charged with the responsibility of representing their interests fairly and impartially."

CONCLUSION

We find and hold that this Board has jurisdiction. We, accordingly, deny Carrier's motion to dismiss the petition for lack of jurisdiction.

II.

THE MERITS

A. The Facts

1. The Advent of CTC.

The collective bargaining unit consists of two seniority districts — "No. 1 seniority district shall include all stations in the United States; No. 2 seniority district all stations in Canada . . ." (Rule 13).

In 1928 Carrier installed Centralized Traffic Control (CTC), an automation, on its system within No. 1 seniority district and thereupon promulgated Operating Rule 412, which reads:

> "When obtaining authority from train controller to work upon main track, conductor must fill in blank spaces on work permit card, form CC-4, as authorized by train controller and give copy to engineer. Conductors must supply themselves with blank form CC-4 to be used for this purpose."

In 1957, shortly before the dates of violation alleged in the claim, it installed CTC on its system within No. 2 seniority district and promulgated a similar operating rule, applicable to that district, providing for the use of Form CC-4.

CTC is:

> ". . . a system of railway operation by means of which the movement of trains over routes and through blocks on a designated section of track or tracks is directed by signals controlled from a designated point, superseding time table superiority of trains, **and without requiring the use of train orders.**" (Emphasis ours.)

After promulgation of the aforesaid operating rules, Form CC-4 was furnished to all conductors operating in CTC territory and they proceeded to employe the procedure and form prescribed in the operating rules.

The following is a reproduction of an executed Form CC-4, the emphasized portions of which were filled in by a conductor with information received, via telephone, from the dispatcher; and, then, delivered, by the conductor, to the designated engineer:

"WORK PERMIT CARD FORM CC-4

December 9, 1957, 6:01 P. M.

To C&E Eng. 5734 at Kingsville

You may work between S. Signal M-31-3 and S. Signal N-29 until 6:15 P. M.

(signed) HBM."

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2. Collective Bargaining History

At the time CTC was introduced, on No. 1 seniority district, the rights of the parties were memorialized in a basic agreement which had been executed in 1927. It included Rule XVII — Train Order Rule — which is identical to Rule 25 of the Agreement, now before us. The Rule reads:

"RULE 25 — HANDLING OF TRAIN ORDERS

No employes other than those covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available, except in emergency, in which case the telegrapher will be paid for the call. (See memorandum of understanding effective May 15, 1943 — Addendum No. 1)."

As shown, within the parenthesis of Rule 25, the parties entered into a Memorandum of Understanding, in 1943, which insofar as is pertinent, reads:

"1. It is agreed that effective May 15, 1943, train and engine service employes **will not,** except in case of emergency, be required or permitted to copy, or train dispatchers or operators be required or permitted to telephone direct to train and engine service employes, train orders (Forms 19 and 31), clearances (Form A), **or written messages,** nor to block or report trains.

2. It is further understood and agreed that **direct telephone conversation** between train dispatcher or operator and train and engine service employes about work, reporting train or engine clear of main track, permission to occupy main track, or permission to cross from one main track to another, will not be construed as a violation of this agreement." (Emphasis ours.)

This Memorandum was executed about 15 years after the advent of CTC in the United States part of the system; and, 14 years before CTC was installed on the Canadian part of the system.

On June 6, 1947, Carrier acquired by merger, that part of its system, in Canada, which is now No. 2 seniority district.

The 1927 Agreement was renegotiated in its entirety in 1949. The 1943 Memorandum of Agreement was incorporated therein as Addendum 1; and, the train order rule was unchanged.

The 1949 Agreement is that which is now before us. It was the existing Agreement at the time of the occurrences specified in the claim and antedated the installation of CTC within No. 2 seniority district by approximately eight years.

3. Occurrences Giving Rise to the Claim.

Each of the Claimants is the holder of the only position of Agent-Operator, at a station in Canada (see Rule 25 of the 1949 Agreement), which positions are covered by the Agreement. The alleged violations all occurred outside the regular hours of each Claimant.

In each instance of alleged violation, the conductor of a train Extra received and copied direct from the train dispatcher orders which he wrote on Form CC-4, repeated to the dispatcher and then delivered a copy of the filled in Form to the engineer of his train. One of these Forms, as filled in, which was actually used in one of the instances of alleged violation — and differs only from the others in detail — is set forth in II A(1), above.

4. Petitioner's Contentions.

Petitioner contends that: (1) the communication accomplished by Form CC-4 from the dispatcher to the engineer through the conductor is a train order within the contemplation of Rule 25 of the Agreement; (2) said type of communication is a written message and a message, order or report of record; (3) communications of record and train orders have been historically recognized as work reserved to Telegraphers; (4) Carrier's employment of Form CC-4 in communications from dispatcher through conductor to engineer invades the doing of work contractually reserved to Telegraphers; (5) the communication of the train order, written messages, and/or message of record are contractually required to be performed at each station through the lone Agent-Operator even though required during hours when the Agent-Operator is not regularly on duty; (6) Carrier, having failed to have the Agent-Operator communicate the train order and/or message of record or written message, violated the Agreement; and (7) Carrier having violated the Agreement, Claimants can be made whole, in their contractual rights, and the Agreement "maintained", only by Carrier being ordered to pay each of them for a call, as provided for in Rules 6 and 25 of the Agreement.

5. Carrier's Contentions.

Carrier contends:

(a) The Scope Rule of the Agreement is general in nature. It is an established principle that where this is so, Telegraphers, to prevail, must prove that the work involved has been historically, traditionally and exclusively performed by employes within the collective bargaining unit. Therefore, since the facts in this case prove that the procedure of communicating between dispatcher-conductor-engineer, using Form CC-4, has been employed since 1928, the claim must be denied;

(b) The 1927 Basic Agreement, with reference to the Train Order Rule, was amended by Memorandum of Understanding in 1943. In 1945, the

parties negotiated a Rest Day Agreement. In 1949, the parties renegotiated the Basic Agreement in its entirety. The 1949 Agreement did not change the Train Orders Rule and continued in force and effect the 1943 Memorandum of Understanding which was incorporated as Addendum 1. It is an established principle that where the parties renegotiate a rule, without change, it must be conclusively presumed that it was their intent to endorse long existing unquestioned practices. Therefore, since no issue was raised by Petitioner as to the past practice in the use of Form CC-4, Petitioner is estopped from claiming that the practice violates the Agreement;

(c) Paragraph 1 of the 1943 Memorandum of Understanding contractually restrains Carrier, as far as Train Orders are concerned, only from communicating, in the manner prescribed therein: "train order (Forms 19 and 31)." Since, therefore, Form CC-4 is not expressly referred to, the restraints of paragraph 1 are not applicable to its use.

III.

THE ULTIMATE ISSUES

The ultimate issues are whether:

(a) The communication effected through use of Form CC-4 is a train order — a communication of record — a written message;

(b) The communicating is work reserved, by the Agreement, to Telegraphers; or, work which by the terms of the Agreement, and practice, has been excluded from its scope.

IV.

RESOLUTION

A. The Scope Rule

The Scope Rule of the Agreement is the same, substantially, as that in Telegraphers' Agreements throughout the railroad industry. On its face, it is general in nature. But, in the specialized field of labor relations in the industry, which the Congress by enactment of the Act recognized, we must read the Rule in the light of the long history of bargaining between Telegraphers and carriers with reflection of commonly understood meaning.

The work of communicating train orders, messages of record and written messages, has been historically recognized as belonging to Telegraphers. While the advent of CTC made substantial inroads on the volume of the work, that which has remained after automation, whether accomplished by telephone or written messages, has been zealously protected and retained by Telegraphers. The same is true as to communications of record.

Interpreting the Scope Rule in the light of its history, industry wide, and the common understanding of the parties — Telegraphers and carriers — as to its meaning, we find that it specifically embraces Telegraphers' exclusive right to the work of communicating train orders and messages of record.

B. The Train Order Rule.

Rule 25 of the Agreement makes certain that the communication of Train Orders is reserved to Telegraphers except to the extent qualified by Addendum 1, which is the 1943 Memorandum of Understanding.

Addendum 1 prohibits employes of a craft or class of employes, other than Telegraphers, "to telephone direct to train and engine service employes, train orders (Forms 19 and 31) . . . or written messages . . ." Carrier argues that "train orders (Forms 19 and 31)" means that the prohibition is limited only to the forms identified in the parenthesis. We do not agree. As written, the forms designated are examples and not inclusive. It is not the make-up of the forms or their identifying numbers which control. It is instead the substance of the message. If it is in substance a train order, its communication, by the means prescribed in paragraph 1 of Addendum 1, is reserved to Telegraphers.

It is generally accepted that train orders are messages which govern the movement of trains. The messages here involved, communicated through the use of Form CC-4, are within this definition. Therefore, the work of communicating them is, by interpretation and application of the Agreement, reserved to Telegraphers. In transmitting by the method complained of, Carrier violated the Agreement.

C. Written Messages

Paragraph 1 of the 1943 Memorandum of Understanding also prohibits other than Telegraphers from communicating written messages. Since a dispatcher must record the information which he transmits to the conductor for filling in Form CC-4 and then delivered by the conductor to the designated engineer, the procedure constitutes communicating both a message of record and a written message. In transmitting by the method complained of, Carrier violated the Agreement.

D. The Weight of Past Practice

Carrier asserts that because Telegraphers made no complaint, in the 1949 negotiations, as to the past practice of using Form CC-4, it, by its silence, agreed to the continuation of the practice and is now estopped from claiming it violates the Agreement. We are cognizant that many of our Awards are predicated upon such a principle. This principle is in seeming conflict with other of our Awards; for example, Award No. 7195, in which we held:

> ". . . evidence of practice cannot abrogate the Rule, although it may bar past violations. Either party may at any time require that the practice be stopped and the Rule applied according to its terms (Awards Nos. 5872, 5979, 6144)."

In this case, we have found that the action complained of violated the Scope Rule, the Train Order Rule and paragraph 1 of the 1943 Memorandum of Understanding. We believe that the principle enunciated in Award No. 7195 is sound and appropriate in the disposition of this case.

CONCLUSION

For the foregoing reasons, we find that the Carrier violated the Agreement as alleged; and, the monetary remedy prayed for is as provided for in the Agreement. We will sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 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 26th day of June 1964.

CARRIER MEMBERS' DISSENT TO AWARD No. 12667 DOCKET No. TE-10995

The Majority has committed serious error and gone far afield in an effort to find that this Board had jurisdiction over the parties and the dispute. The Railway Labor Act, and not some other statute, is the sole source of this Board's authority and the parties over whom the Board has jurisdiction are plainly set forth in Section 3, First (i) of the Act, viz., "an employe or group of employes and a carrier or carriers". The claimants in this case are foreign nationals employed exclusively outside the territorial limits of the United States and the consistent and only judicial authority interpreting the Railway Labor Act in this respect is that foreign nationals exclusively employed outside the territorial limits of the United States are not "employes" under the Railway Labor Act[1]; hence, the Board lacked jurisdiction over no less than one of the parties. The Board also lacked jurisdiction over the Carrier insofar as this case is concerned because the Railway Labor Act only covers carriers subject to the Interstate Commerce Act (Section 1, First) and the Interstate Commerce Act only covers transportation insofar as it takes place within the United States. (49 U.S.C.A., Chap. 1, Sec. 1 (1)c and (2).) In sum, the Carrier here, insofar as it operated in the Dominion of Canada, was not a carrier subject to the Interstate Commerce Act and, hence, not a carrier within the meaning of the Railway Labor Act. As concerns the dispute, it arose wholly outside the territorial limits of the United States. The same prevailing judicial authority is that the Railway Labor Act has no extra-territorial application and since this Board is a creature of the Act, it is without authority to entertain disputes arising outside the territorial limits of the United States. The niceties of definition of collective bargaining, etc., have no bearing on the jurisdiction of this Board in the respects herein noted.

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[1]**Air Line Dispatchers Ass'n. vs. National Mediation Board,** 189 F. 2d 685, cert. den. 342 U.S. 849; **Air Line Stewards and Stewardesses Ass'n. vs. Northwest Airlines, Inc.,** 162 F. Supp. 684, 267 F. 2d 170, cert. den. 361 U.S. 901; **Air Line Stewards and Stewardesses Ass'n. vs. Trans World Airlines,** 173 F. Supp, 369, 273 F. 2d 69, cert. den. 362 U.S. 988.

On the merits of the dispute the Majority is equally in error. The Award, in part, correctly holds that the Scope Rule was general in nature in conformity with the consistent line of Awards, e.g., **Awards 11506 and 12356** by the present Referee, but departs therefrom when it attempts to establish industry wide work allegedly reserved to telegraphers because there is no "industry wide reservation of the work to telegraphers". **(Award 12356** — Dorsey.) The only practice, custom and tradition that can be considered is that existing on this Carrier's property **(Award 12356** — Dorsey and on that basis the claim should have been denied. The Majority also errs in its consideration of Addendum 1 because the practice prevailed without change through the negotiation of Addendum 1 in 1943 and revision of the Agreement in 1949, thereby indicating the intent of the parties. **(Award 12460** — Dorsey.) Thus, what was here involved was never considered to be in violation of the Agreement and the Majority's conclusion to the contrary lacks substance.

For these and other reasons this Award is wholly erroneous and we dissent.

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