

Award No. 13281

Docket No. TE-12152

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

**THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY
(WHEELING AND LAKE ERIE DISTRICT)**

THE ORDER OF RAILROAD TELEGRAPHERS

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The New York, Chicago and St. Louis Railroad Company (Wheeling and Lake Erie District), that:

1. Carrier violated Telegraphers' Agreement when on December 23, 1958 and January 14, 1959, it required and permitted Conductor Wincki on Work Extra 47 at Oakland, Ohio, a blind siding, to receive, copy and deliver train order No. 229, December 23, 1958, also required and permitted Conductor L. Omicinski on train No. 160 at Portage, Ohio, a blind siding to receive, copy and deliver train order No. 225, January 14, 1959, from the train dispatcher at Brewster, Ohio, by telephone.

2. Carrier shall compensate J. Kovach, senior idle extra employe for two days pay, eight hours each, at the lowest rate shown in the telegraphers agreement at time of violations.

3. Wincki and Omicinski, both trainmen and not covered by the telegraphers agreement.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute, effective as to rates, February 1, 1951, and effective as to rules, February 1, 1952, and as otherwise amended.

On December 23 1958, at or about 9:38 PM, Conductor Wincki, in charge of Work Extra 47 at Oakland, Ohio, a station location at which no employe under the Telegraphers' Agreement is employed, handled (received, copied and delivered) the following train order from the train dispatcher over the telephone from Brewster, Ohio:

"Form 19

Nickle Plate Road
Train Order No. 229
Dec. 23 1958

Form 19

To C&E Work Extra 47 at Oakland
Work Extra 47 Four Seven Meet No 192 One Nine Two Eng 435 at
93rd Street

L E C
Made Complete Time 938 Pm Wincki Opr"

1. The rules, as interpreted by over 45 years of custom and practice do not support the claim.

2. The Employees, during such period, have attempted not only once, but on six different occasions (1933, 1937, 1939, 1947, 1954, and 1957), to secure through negotiation, the adoption of a rule which would support the claim.

3. The Employees, by the institution and progression of this claim, are attempting to secure what they have been unable to secure by negotiation on the property. A sustaining award would have the effect of granting the rule requested by the Employees. The writing of new rules is not a function of this Board.

The Carrier submits that this case is on all fours with Items 1, 2, 3 and 4 in Docket TE-8374 involving the Delaware and Hudson Railroad. The following reasoning of this Board in denying such claims in Award 9204 rendered recently is particularly applicable here:

"Since the exclusive right here sought is not given by any rule of the agreement we must seek for tradition and practice. Traditionally the receipt of train orders was restricted to telegraphers; only they knew the Morse code. The telephone was not only a substitute for the telegraph but it also permitted much more extended communication and at more places than possible with the Morse code. Infrequent calls for train orders at a blind siding arising from unexpected situations are not in substitution for telegraph service but rather they employ an additional means of communication not known before the telephone appeared. We cannot believe it material whether received from a telegrapher or dispatcher. The docket before us shows long continued practice on the property for conductors to handle train orders directly from the dispatcher at blind sidings and the unsuccessful attempts by the Organization to obtain revision of the Train Order Rule to give telegraphers the exclusive right to that service as here contended for."

(Exhibits not reproduced)

OPINION OF BOARD: Carrier initiated the bringing of this claim before the Board for its disposition by announcing its intention, in accordance with our regulations, to submit an unadjusted dispute based on the claim as submitted to Carrier by the Organization.

Claim arises because persons outside the coverage of the Telegraphers' Agreement received, copied and delivered train orders from a train dispatcher on two occasions, once at a blind siding at Oakland, Ohio, and once at a blind siding at Portage, Ohio.

The Organization and the Carrier each take the position in this case which each took in the case decided in Award No. 11667 (Docket No. 10131 and which we shall call the Herricks case). One side urged that, since the facts are fundamentally the same in the Herricks case and in this, the Referee should arrive at the same decision; and the other side, while agreeing that facts are fundamentally the same, asked that the Referee examine the entire docket in the Herricks case, as well as the Award and the Carriers' dissent to it, make a finding that Award No. 11667 was palpably in error, and correct that error in the Award in this case.

We have carefully examined and studied the docket, Award and dissent in the Herricks case. There is a critical difference in fact between the Herricks case and this one, and there is consequently a different issue regarding the alleged violation of the Agreement. In the Herricks case the Board's opinion and Award appear, in part, to be based on the fact that the Board did not find that a passing siding was involved; in this case we find that there is no doubt that passing sidings were the scenes of both alleged violations. The Herricks case opinion and Award dealt, therefore, primarily with the first sentence on Rule 26 together with Rule 1. In this case we must deal with the question of applying the second sentence of Rule 26; that sentence contains an exception to the rule contained in the first sentence.

Rule 26 has as its clear purpose the protection under certain conditions of jobs covered by the Agreement. The exception indicates that the rule does not intend to save for the Organization work of the nature listed when such work is performed at the ends of passing sidings or spur tracks. However, even then, the statement of exception in Rule 26 seems to protect operator's work at the point to which the communication from the passing track or spur is made. This appears to be one effect of the language conditioning the exception on the use of an operator at the other end of the line.

Whatever activity is forbidden by the first sentence of Rule 26 is nevertheless permitted under the special conditions set forth in the second sentence. In addition, to the extent that Rule 1 may reserve to the Organization work of the kind listed in the first sentence of Rule 26, the second sentence of Rule 26 is an exception to such reservation of such work.

The activity complained of in this case fits the exception in every respect except for meeting the condition that the act of communicating involved be with an operator; it was instead, with a dispatcher. The claim, however, was not based on this; nor was there any discussion or negotiation on the property regarding the question raised by this. The remedy sought by the Organization was based on the fact stated in Local Chairman Frederick's letter of February 2, 1959, to Chief Train Dispatcher Counts: "Senior idle extra employe J. Kovach was not called to perform the above work and no attempt was made to call him." The "above work" referred to the telephone communications by the conductors.

Had the claim been to protect the operator's work apparently performed by the dispatcher, or that the exception didn't apply because the last condition wasn't met, the whole case would have been a different one; but those claims were not made and the parties had no opportunity to discuss and negotiate on them. The claim in this case was argued entirely on the basis that the Agreement had been breached by the use of the telephone at the blind sidings by the Conductors to perform work listed in Rule 26 and belonging to the Telegraphers. That the orders were received from the dispatcher is mentioned as a fact in the Organization's description of the claim; but that fact was never used by the Organization in all of the discussion and argument on the property; the Organization indicated in no way that they were claiming a violation of the condition for the exception contained in the last four words of the second sentence of Rule 26.

The Board would not serve the purposes of the Act which created it, if we were to dispose of issues which the parties have had no opportunity to adjust for themselves because they had not been clearly before the parties for adjustment on the property. On the facts and arguments before us we find that the Organization has failed to prove that the Agreement was violated

as the Organization argued. The exception in the second sentence of Rule 26 permitted the conductors to make the communications from the end of the passing sidings involved, even if they were communications forbidden by the first sentence of Rule 26 or by Rule 1. That the conditions referred to above should have been met for the exception to control was not raised on time to be considered by the parties or by us. We will deny 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 Employee involved in this dispute are respectively Carrier and Employee 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 10th day of February 1965.