Award No. 13314

Docket No. TE-12430

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Pennsylvania Railroad, that:

V. I. Crouso, regular Block Operator at Tyndall Tower, with tour of duty 7:00 A. M. to 3:00 P. M. and rest days of Saturday and Sunday is entitled to eight (8) hours as claimed, for Conductor Compton copying 19 Order No. 409 at Licking on November 30, 1958. Licking Block Station has been closed since the enactment of the 1938 Agreement and, therefore, the copying of 19 Order at Licking is a violation of our Agreement and also of Award 153 and numerous other awards.

EMPLOYES' STATEMENT OF FACTS: Licking station (Ohio) is located on that part of Carrier's main line between Pittsburgh, Pa., and Columbus, Ohio, approximately 190 miles in distance. Time table listing of Licking and other stations in immediate area occur in the following sequence:

Stations	Distance from Pittsburgh	
Bricker	142.8	
Black Run	144.8	
Hanover	149.6	
Licking	155.1	
First Street	157.5	
Newark	157.6)	
ND Cabin	158.0)	
Heath	161.9)	
Kylesburg	164.5)	B. & O. RR trackage
Outville	169.2)	
Pataskala	173.3)	
Columbia Center	174.6)	
Summit	177.0)	

For many years there existed at Licking three positions of block operator, each assigned 8 hours to furnish 24 hour service around the clock. These three positions were abolished October 12, 1949.

At approximately 11:55 A. M., Sunday, November 30, 1958, train SWC-1 was derailed at Summit station on the B. & O. RR, some 22 miles west of

eastward siding at Licking it passed the location of former Licking Block Station and the engine was stopped at the west end of the siding approximately two miles beyond Licking Block Station. At the time Extra 9731 passed Bricker Block Station, the last open block station before taking the siding and when it passed the former block station at Licking, further details of its movement were not known and it was impossible for further orders to be delivered to the train at either Bricker or Licking. Consequently, when Extra 9731 was to proceed several hours later it was necessary that the Conductor receive same by telephone. This he did in contact with Bricker Block Station and would have received such order by telephone from Licking if that Block Station had been open. Extra 9731 proceeded westward when it departed from the siding at Licking and did not again pass either former Licking Block Station or Bricker Block Station.

Thus the fact that there was, prior to December 12, 1949, an open Block Station at Licking has no bearing on the use by the Conductor of the telephone in this case. In other words the conductor did not use the telephone to copy an order because Licking Block Station had been closed.

Attention is also called to the fact that the claim in this case asks for eight hours pay. Even if Claimant had a right to be used to deliver the train order here involved, he would not have been used except on a call basis and would not have been entitled to more than the minimum call under Rule 4-F-1 (e). The work performed by the Conductor of the extra train did not involve more than a few moments work. There is no basis under the Agreement for the payment of eight hours.

The Carrier respectfully submits that for the reasons set forth in the Awards referred to above, and for the reasons set forth throughout the Carrier's Submission, even if your Honorable Board did have jurisdiction over this matter, it would be compelled to deny the claim in its entirety.

(Exhibits not reproduced).

OPINION OF BOARD: The block station at Licking was closed on October 12, 1949. Arbitration Award 153 says in part:

> "2. It awards a rule in the language following, to become effective on February 15, 1952, and to continue in effect until it is changed or modified in accordance with the provisions of the Railway Labor Act, as amended:
>
> > 'Except in emergencies, Train and Engine Service Employes shall not be required to copy train orders at points where, and during the hours when, Block or Telegraph or Telephone Operators are scheduled to be on duty, or at block stations which have been closed or abolished since May 1, 1938, or at block limit stations which have been established since May 1, 1938 or which may hereafter be established.' "

On November 30, 1958, Conductor Compton copied 19 Order No. 409 at the wayside telephone located at the west end of the westbound siding, two miles from the location of the former block station. V. I. Crouso, the regular Block Operator at Tyndall Tower, claims eight hours compensation.

The Carrier initially challenges the jurisdiction of the National Railroad Adjustment Board to consider this dispute. We will discuss this aspect of the case first.

Basically, it is the contention of the Carrier that the agreement to arbitrate which led to the creation of Arbitration Board 153, prevents this dispute from being considered by this Board. In other words the Carrier feels that the Arbitration Board has exclusive, continuing jurisdiction in matters arising under the same general propositions embodied in the original dispute. They quote the agreement to arbitrate as follows:

> "Any difference arising as to the meaning, or the application of the provisions of the award made by the Board shall be referred back for a ruling to the Board . . . and such ruling, when acknowledged in the same manner and filed in the same District Court Clerk's office, as the original award, shall be a part of and shall have the same force and effect as the original award."

They further cite Order of Railroad Telegraphers vs New York Central Railroad Company, 181 F. 2nd 113, certiorari denied 71 S. Ct. 48, 340 U.S. 818, 95 L. Ed 601, wherein the United States Court of Appeals for the Second Circuit held that an Arbitration Board retained jurisdiction to interpret the meaning and application of rules formulated by it, even where the parties had incorporated the award into the collective bargaining agreement.

As precedent for this position, Carrier cites Award 8039. In that case Referee Elkouri dismissed the claim, saying,

> "It follows that the Board of Arbitration that rendered the Award in Arbitration No. 153 is the tribunal vested by law and agreement of the Parties with jurisdiction to hear and determine the present dispute."

The Organization contends that Award 8421 rejected the theory advanced in Award 8039. In that case, the same argument was raised by the Carrier, but Referee Lynch did not comment on it during his opinion. However, as a part of the Findings of the Board, it was held that the Division had jurisdiction over the dispute involved. This would tend to indicate that the Referee either decided that the argument was without foundation and chose to ignore it completely, or that he felt the findings would accurately reflect his decision as to the merits of the jurisdictional argument. In any event, there does not appear to be a clear cut, established body of precedent on this question.

The Organization contends:

> "The question of jurisdiction of the Adjustment Board to decide disputes involving application of agreements arrived at through mediation or arbitration has arisen several times in the past, and appears to have been settled on the basis that general or abstract interpretations of rule content is the province of the Mediation or Arbitration Board, but that application to specific factual situations is a matter for the Adjustment Board just as when the agreements have been negotiated by the parties without outside assistance."

This view has been affirmed in several distinct instances, involving Mediation cases. However, we do not feel that the rule would be substantially different in cases involving arbitration. Award 854 disposed of several cases involving the interpretation of a portion of a Mediation Agreement. The Board held:

> "The disposition of these disputes does not involve an interpreta-

tion of Item 2 of said Mediation Agreement but a determination of whether the parties have complied with its requirements as interpreted by the Mediation Board. Many agreements in effect between Railroad Brotherhoods and Carriers and many rules in other such agreements have come into being as the result of Mediation, and surely, it would not be seriously contended that this Board is without authority to decide disputes arising under such agreement or rules. The Board has disposed of many such disputes and holds that it has jurisdiction of the disputes in these Dockets."

We are of the opinion that the language of the agreement to arbitrate and the language in the Order of Railroad Telegraphers vs. New York Central Railroad Company, supra, applies only to instances where the subsequent case seeks an interpretation of the language of the Arbitration Award. This is to be distinguished from those cases which seek an application of the award.

We are of the opinion that matters of interest are the proper subject of negotiation, mediation and arbitration. The product of these processes determines matters of interest, which then become matters of right. There is no doubt that matters of right are properly referable to this Board.

In the instant case the Arbitration Board decided as a matter of interest that the Carrier would be permitted to require train and engine service employes to use the telephone to copy train orders except:

"(1) at points where, and during the hours when, Block or Telegraph or Telephone Operators are scheduled to be on duty:

"(2) at block stations which have been closed or abolished since May 1, 1938; and

"(3) at block limit stations which have been established since May 1, 1938, or which may hereafter be established."

The three exceptions listed supra created in the employes a matter of right, in the event one of the provisions was violated. That right is manifested in a grievance, properly appealed to this Board.

Exception number two is alleged to have been violated by the Carrier in the instant claim. Therefore, this appeal is not for an interpretation of the language used by the Arbitration Board, but for an application of that language to a specific set of circumstances peculiar to the instant case.

We are of the opinion that this is the very purpose of this Board. We therefore find that we have jurisdiction to determine if a violation of the Arbitration Award has occurred, the same as we would determine a violation of any portion of the Agreement.

The instant claim has been reduced to a determination of whether the west end of the siding is to be considered a part of the Licking Block Station which has been closed or abolished since May 1, 1938. The physical location where the telegrapher office was formerly located, is two miles from the place where the train order was copied. Carrier agrees that if the train order had been copied at the exact location of the former telegraph office, the claim would be valid. They argue however, that since the wayside telephone was located at the west end of the westbound siding, two miles distant from the physical location of the former block station, the claim should be denied.

The purpose of the rule enunciated by the Arbitration Board is to, protect telegraphers from being displaced by the use of train crews to copy orders, which work ordinarily would have been performed by telegraphers.

In this respect, the language of the exception could hardly be construed to mean the physical location of the building surrounding the telegrapher. In this case the train order was issued from the siding. It does not seem proper to argue that this siding is not part and parcel of the block station. We will not attempt to fix the boundaries of a block station in feet and inches. On the other hand, we do not feel that an otherwise valid claim should be denied, when common knowledge would tell us that this order was indeed copied at what a reasonably prudent person would categorize as "Licking Block Station".

We are of the opinion that the intent, purpose and application of the exception granted in the Arbitration Award has been violated in the instant case.

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February, 1965.

CARRIER MEMBERS' DISSENT TO AWARD NO. 13314, DOCKET NO. TE-12430

The holdings of the majority that the Board has jurisdiction and that the claim should be sustained on the merits are erroneous and contrary to both logic and precedent.

On the jurisdictional question the majority commits several errors. First, it fails to follow the clear precedent established by this Board in Award 8039, where the Board found it had no jurisdiction over a dispute of this type. One justification for this action by the majority is found in their discussion of Award 8421 (Referee Lynch). The majority erroneously says that Referee Lynch did not comment on the jurisdictional question in his opinion, and then concludes that, because he dealt with the claim in that case on the merits, he decided that the Carrier's present jurisdictional position was without founda-

tion, and by implication decided that he had jurisdiction over a dispute involving the use of the telephone by train service employes.

An examination of Award 8421 will show that the majority's statements and conclusions are wholly erroneous. Award 8421 involved a claim that a fireman was improperly required to handle a ground switch, a matter of dispute under the schedule agreement which did not in any way involve Arbitration Award No. 153. Certain contentions concerning the use of the telephone by train service employes were injected into that case in the Employes' Ex Parte Submission and the Carrier made a jurisdictional argument addressed to those contentions, but not to the dispute concerning the handling of ground switches. Contrary to the assumption of the majority here, Referee Lynch was fully aware of both disputes and specifically refused to pass on the question of the use of the telephone. In his opinion he quoted the Employes' contentions concerning the use of the telephone. However, he then pointed out that the **only** claim in the Statement of Claim or in the Joint Submission on the property was confined to the handling of ground switches. He said:

> "We will consider this claim to be what its language indicates: an allegation that the agreement was violated when an engine crew member threw the switch or switches for the crossover for helper engine 8436 on February 23, 1954. **We have no authority to do otherwise." (Emphasis ours.)**

This language clearly indicates that Referee Lynch considered either that he had no authority to decide the merits of the Employes' contentions as to the use of the telephone or that that question was not properly before him. To distort Award 8421 into a holding that the Board has reversed or thrown doubt on its jurisdictional ruling in Award 8039 is completely untenable.

Secondly, the majority sustains its jurisdiction on the basis of an analogy with the practice of the National Mediation Board in deciding dsputes under mediation agreements. However, the situation of a mediation agreement is wholly different from that of an arbitration award. A mediation agreement generally constitutes an addition to or a revision of an existing collective agreement. In exercising its jurisdiction under Section 5, Second of the Act, the National Mediation Board has refused to take jurisdiction of disputes involving the application of mediation agreements to some detailed factual situations, holding that such disputes are for the Adjustment Board. However, arbitration awards generally are in a different category, and the present one especially is unique in that the Employes specifically refused to incorporate it into an agreement. As the record shows, both as required by the Railway Labor Act and by agreement the parties to the arbitration award agreed that "any difference arising as to the meaning or application of the provisions of the award" shall be referred back to the Arbitration Board. The words "any difference" could not be more comprehensive and include all disputes arising under the award. The majority suggests that this case only involves an "application of the award" and does not involve an interpretation of the language of the arbitration award. In reality no such distinction is possible. It is obvious that an "application" of the award is involved here, and it is also obvious that the statute and the arbitration agreement provide that differences as to the "application" of the award shall be referred back to the Arbitration Board. To say that this Board has jurisdiction because merely "an application" of the award is involved is in direct conflict with the very words used in the statute and arbitration agreement.

Third, the majority assumes jurisdiction on the theory that the claim involves a "matter of right" as opposed to a "matter of interest." The theory seems to be that the Board has jurisdiction of any asserted right. Such gen-

eralizations are mere rationalization. The jurisdiction of the National Railroad Adjustment Board is limited to disputes involving grievances or the interpretation or application of agreements in situations where the parties have not agreed to some other method to handle such disputes. System Boards of Adjustment under Section 3, Second, when agreed upon, deprive this Board of jurisdiction. Special Boards of Adjustment, when agreed upon, deprive this Board of jurisdiction. Likewise, an arbitration agreement such as that involved here, providing another forum, deprives this Board of jurisdiction. All of these alternative provisions involve "matters of right" but that does not give this Division jurisdiction of them.

On the merits the decision of the majority is wholly erroneous. First, the Board's holding that a wayside telephone located at a switch two miles from the site of a closed block station is "a part and parcel" of the block station wholly ignores the facts of the record. It was undisputed in the record that the wayside 'phone two miles from the site of the closed block station would have been in service and would have been used in the same way by train and engine employes under the Carrier's operating practices whether or not Licking Block Station were open. The record shows that the Arbitration Board considered at length and specifically refused to restrict the use of the telephone at such points.

The majority states that the purpose of the arbitration award is to "protect telegraphers from being displaced by the use of train crews to copy orders, which work ordinarily would have been performed by telegraphers." This conclusion ignores the undisputed fact that the train crew would have done exactly the same work as they did even had the block station been open and a telegrapher on duty. The work at the west end of the siding would not ordinarily have been performed by telegraphers unless the majority assumes that a telegrapher on duty at Licking would have left the tower and walked two miles to hand the order to the train crew instead of having them copy it over the telephone. Furthermore, this broad statement as to the intent of the award cannot be supported in the face of the record, which shows that at no time in the history of the Pennsylvania Railroad has the work of copying train orders been work "ordinarily" performed by telegraphers at points such as that involved here. The opinion accompanying the arbitration award and the award itself show beyond question that it was intended to impose restrictions on the copying of train orders only at strictly defined and limited points and not elsewhere, and had no general intention as expressed by the majority.

Second, on the merits, the majority completely ignores and does not even discuss the interpretations and applications of the arbitration award made by agreement of the parties before Special Board No. 310 by Referee Lynch. Awards Nos. 3, 7 and 17 of that Board are in the record. They clearly show that no violation occurred when train crews copied train orders at points ranging in distance from one mile to five miles from the location of closed block stations. These awards were final and binding by agreement of the parties and should have been considered as controlling by the majority.

In view of the above, this award must be considered wholly void for lack of jurisdiction and completely erroneous on the merits.

/s/ G. C. White
/s/ D. S. Dugan
/s/ R. E. Black
/s/ P. C. Carter
/s/ T. F. Strunck