Award No. 14186
Docket No. TE-13832

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYES UNION (FORMERLY THE ORDER OF RAILROAD TELEGRAPHERS)

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Kentucky & Indiana Terminal Railroad, that:

1. The Carrier violated the terms of the Telegraphers' Agreement, including the Memorandum of Understanding dated September 15, 1947, when it declared abolished the positions of first, second and third tricks at 16th and Canal Block Office, and Relief Position No. 7, without in fact discontinuing the work of such positions.

2. The Carrier further violated, and continues to violate each day the terms of the Telegraphers' Agreement, including the Memorandum of Understanding dated September 15, 1947, when, commencing at 3.01 P. M., August 3, 1961, it requires train service employes, who are not covered by the Telegraphers' Agreement, to secure authority for use of the main tracks at and in the vicinity of 16th and Canal, by means of telephones, from the Operator at DI Tower, a separate and distinct location.

3. The Carrier shall restore the positions of first, second and third tricks at 16th and Canal, and Relief Position No. 7, as if they had never been discontinued.

4. The Carrier shall restore G. K. Longest to his rightful position of first trick; P. J. Felker to second trick; J. D. Wilson to third trick, and B. I. Oster to Relief Position No. 7.

5. The Carrier shall pay each of the employes named in 4 under the provisions of Rule 20, as amended by the Memorandum of Understanding dated July 12, 1949, for each day, commencing August 3, 1961, until they are restored to their position as set out in 4 above.

6. The Carrier shall restore each of the following employes to the position he held prior to being displaced as a result of the abolishments set out in 1 above, and that each of those employes be compen-

sated under the provisions of Rule 20, as amended, for each day until restored to his position:

C. C. Waddle, M. F. Hellinger, Jr., C. Johnson, A. B. Lykins, Mrs. A. U. Purkhiser, D. R. McGill.

7. The Carrier shall pay each of the following employes one day's pay for each day he would have worked if the positions enumerated in 1 above had not been declared abolished:

R. L. Stayton, J. A. McLin, J. P. McGill, P. R. Barden, G. W. Wooldridge, L. V. Epperson, J. T. Fischer, K R. Arnett.

EMPLOYES' STATEMENT OF FACTS: The facts relative to this dispute are so comprehensively covered in the record of the case handling on the property so that, for avoidance of superfluity of words, the case record is related following. On date of July 31, 1961, Mr. R. B. Emch, Superintendent, issued a Bulletin Notice reading as follows:

"OFFICE OF SUPERINTENDENT
BULLETIN.....#642

Louisville, Ky.
July 31, 1961.

All concerned:

Effective 3:01 P. M. August 3, 1961, all rules and special instructions pertaining to main track movement of trains and engines on that portion of double track between Di Tower, 30th St., and Short Route Junction, Louisville, are abolished. Movement through this territory will be governed as follows:

Either track in the above named territory may be used in either direction in switching movements such as running around cars or delivering cuts of cars to and from Panama Yard. Other movements such as between Sand Company, Panama Yard, and Owner Line Freight Houses to Youngtown Yard must be authorized through permission from Operator located at Di Tower. Telephones installed at the following locations will be used for this purpose:

(1) Box on pole across north bound main at 13th and Canal.

(2) Panama Yard Office.

(3) North Side of track opposite Pennsylvania office described in Time Table #59 as 15th and Portland Ave.

(4) I.C. office at 11th and Canal for movements from 11th St. to Panama or beyond.

Movements of all trains and engines in the territory named above must be made at not exceeding YARD SPEED.

R. B. Emch
Superintendent

decreased to such an extent that when the few remaining duties were transferred to the operator-leverman at DI Tower the tower itself was dismantled. The claims are not, therefore, comparable and have no precedent foundation. The claims of the Organization should be denied.

(Exhibits not Reproduced)

OPINION OF BOARD: Carrier discontinued the relay electric interlocking at the 16th and Canal Block Office at Louisville, Kentucky called "Panama", abolished all of the positions in the tower, and subsequently dismantled the tower housing the block office. Operator-Levermen at DI Tower perform the remaining duties. Engine crews operating in the vicinity of Panama were directed to get the necessary authority to move trains on the main tracks to and from Panama Yard, freight stations and adjacent industries by telephoning the Operator at the DI Tower.

Petitioner contends that the Carrier violated the Scope Rule and Rule 2 which reserves the handling of train orders to employes covered by the Telegraphers' Agreement. In addition, the Memorandum of Understanding dated September 15, 1947 defines "train orders" and "telephone practices" as follows:

> "2. (a) That the words 'train orders' as used in this Memorandum of Understanding in Rule 2 of the Telegraphers' Agreement shall mean the communication of block signal outhorization or other instructions, oral or written, necessary for the use of the main tracks by trains or engines, or the recission of such instructions.
>
> (b) It is further understood that:
>
> (1) telephone conversations with dispatcher about work; and
>
> (2) telephone conversations with dispatcher about probable arriving time of trains
>
> will not be construed as a violation of this agreement.
>
> 3. That employes as defined in Rule 1 of the Telegraphers' Agreement may continue the present practice of relaying, by telephone or otherwise, 'train orders', including Form 72, to train service at points where block signals are not now located."

It is Petitioner's position that under this Memorandum of Understanding the practice of the crews using the telephone to receive communications for the movement of trains was confined to the movement of trains in the vicinity where block towers were not located on September 15, 1947.

Carrier argues (1) that there are no rules prohibiting the right to abolish jobs and transfer the remaining work to other employes covered by the Telegraphers' Agreement, (2) that train service employes are not performing work covered by the Telegraphers' Agreement, and (3) that the "Memorandum of Understanding of September 15, 1947, provides no guarantee or freeze of jobs at Panama."

The order of the Interstate Commerce Commission permitting the Carrier to discontinue all relay electric interlocking at Panama is not controlling in the consideration of the merits of this dispute. Only the relevant provisions of the valid and existing agreements entered into and executed by the parties are applicable.

In a letter dated January 9, 1962, Carrier's Director of Personnel wrote to the General Chairman, in part, as follows:

> "For years the foreman of the yard engines moving to and from the freight stations, and the PRR and I.C.R.R. Co. called the operator at Panama for authority and to report arrival. The operator in turn handled this with the dispatcher by telephone. Since the interlocking and the operators have been removed from Panama this authority and reports are handled in the same manner by the operator; leverman at 'DI' Tower who, in turn gets the authority and gives the reports to the dispatcher in the same office. The work still being handled by employes covered by the ORT contract, I do not agree with your position that the Agreement has been violated. Your claims, are, therefore, respectfully declined."

All of the relevant and probative evidence in the record which was presented on the property is convincing that Rules 1 and 2 of the Agreement reserve to employes covered thereunder at Panama Yard and vicinity the right to relay train movement orders to train crews. Further, the Memorandum of Understanding dated September 15, 1947, preserves that right to such employes at Panama.

The language of paragraph 3 of that Memorandum of Understanding clearly means that the practice of relaying by telephone train orders to train crew employes is confined to those locations where no block signals were located on September 15, 1947. It is admitted that block signals were located at Panama. Therefore, the relaying of such train orders by telephone from Panama by employes not covered by the Telegraphers' Agreement is a clear violation.

The remaining question is whether it is also a violation of said Agreement and the Memorandum of Understanding because train crew service employes now receive authority to use the main tracks at or in the vicinity of Panama from the Operator at the DI Tower? In this regard the language of paragraph 3 is not completely clear and unambiguous.

A careful examination of all the relevant facts in the record, persuades us to conclude that the purpose and intent of the Memorandum of Understanding was to preserve work belonging to Telegraphers at those locations that were equipped with block signals. Any other interpretation would be contrary to the full import of this undertaking. To hold otherwise would be to give unlimited license to Carrier to issue train movement orders by telephone to train crews perhaps as far away as a hundred or more miles from the operator's location. Whether or not such orders were issued from a location where a block tower was located on September 15, 1947, becomes irrelevant. The clear and definite purpose of this Memornadum of Understanding is to prohibit Carrier from transferring Telegrapher work to another location unless the first location did not have block signals on the date said Memorandum of Understanding was executed.

At Panama the train service crews now handle the movement of trains. They communicate directly with the Leverman at the DI Tower, who receives the information from the dispatcher and then relays it back to the train service men. Heretofore, said train service crew men received their orders from the operator at Panama. Such orders may be received only from operators at Panama and not from Telegraphers at other locations.

It is a firmly established principle of this Division that we have no right to order the Carrier to restore positions which have been abolished. The request that the named Claimants be restored to their positions must, therefore, be denied.

There is also no evidence in the record from which an amount in loss of

earnings may be determined, because Carrier's violation of the Agreement. The claim does ask for compensation for the named Claimants resulting from such violation. This is a request for loss of actual earnings and not for liquidated damages or for penalties. The amounts due, if any, can be ascertained from the Carrier's records. The Carrier shall make such records available to the Petitioner and shall pay to Claimants such amounts as may be due to them for work which they would have been entitled to perform had Carrier not violated the Agreement as herein stated.

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 Carrier violated the Agreement.

AWARD

Claim remanded with instructions as set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.

CARRIER MEMBER'S DISSENT TO AWARD 14186, DOCKET TE-13832

(Referee Dolnick)

We need not burden this Dissent with endless (and unnecessary) citations—it is too well established that an Organization coming before this Board for relief on the allegation that certain of its members have been deprived of work must in some fashion and with a measure of proof establish their right to the work in question.

Of necessity, in the instant proceeding, the provisions relied upon for the required measure of proof are Rule 2 (Handling of Train Orders) of the basic Agreement and, secondly, the Memorandum of Understanding of September 15, 1947. (The Scope Rule is not involved—it merely lists positions and therefore, standing alone and without a showing of exclusive custom and practice, vests no rights. Furthermore, neither it nor any other rule freezes jobs or guarantees the continuance of a position or a specified number of positions.)

Both Rule 2 and the Memorandum of Understanding relate to "train orders." Specifically, Rule 2 reserves to the employes involved herein the right "to handle **train orders** by whatever means transmitted." **(Emphasis ours.)** Admittedly, the Memorandum of Understanding reaffirms that right but it then limits "the word 'train orders' as used in this Memorandum of Understanding and in Rule 2 * * * [to] mean the communication of block signal authorization on other instructions, oral or written, **necessary for the use of the main tracks** by trains or engines or the recision of such instruction." **(Emphasis ours.)** Thereafter the Memorandum of Understanding specifically recognizes that telephone conversations with dispatcher about work and the probably arriving time of trains "will not be construed as a violation of this Agreement."

Interestingly enough, Section 3 of the Memorandum of Understanding per-

mits these employes to relay " 'train orders,' including Form 72, to train service employes at points where block signals are not now located." Noting that the reservation of work is that of relaying train orders to train service employes at points where block signals are not now located, the rationale by which the majority finds a violation in "the relaying of such train orders by telephone from Panama" escapes us, not to speak of the fact that the Carrier denied and the Organization failed to prove the need for any "train orders" covering main track movements at Panama—there no longer being any main tracks at that point. Furthermore, the Record establishes that train service employes received messages at Panama but it certainly contains no evidence of "train orders" being relayed from Panama. That was the significance of the I.C.C. proceeding—it permitted abandonment of the Panama interlock based on the findings that movements in the vicinity of Panama thereafter would be yard moves. (Emphasis ours.)

Thus, insofar as this proceeding is concerned, the Organization may lay claim only to communications of block signal authorization or other instructions, oral or written, necessary for the use of main tracks or the recision of such instructions. It follows, then, that no matter what the majority award purports to conclude, it exceeds the statutory authority of this Board, and, therefore, has no legally binding effect, to the extent that it might be seized upon to support a claim for work involving other than "train orders" as defined in the Memorandum of Understanding. If the Organization wishes an extension of the term "train order" it is in the wrong forum. If the majority award is designed to extend the term, it has usurped to itself a function not premitted us by the statutes and in fact specifically denied us by competent authority.

It is apparent that the majority completely disregarded the fact that the Carrier crews were authorized to operate under yard rules at Panama (the interlocking plant having been eliminated) and that movement under yard rules in these instances required no "train orders." The majority also overlooked the fact that the only "work" remaining at Panama was conversations with dispatchers and/or DI Tower relating to work, probable arrival times of trains, and/or permission for use of the DI Interlocking Plant (not Panama, since Panama Interlocking Plant no longer exists.)

We believe that the majority would have properly served its statutory function had it responded to the facts of record and to the rules involved and held (1) that the handling of train orders was reserved to the Employes and that its use of the term "train orders" was in the context of the Memorandum of Understanding, i.e., instructions "necessary for the use of the main tracks by trains or engines, or the recision of such instructions," noting specifically the type of telephone conversations excluded by the Memorandum of Understanding. It could then have put this grievance in proper perspective by noting that "train orders" to train service employes at points where block signals had been located on September 15, 1947, should be relayed and received by the Employes. Finally, it could have taken cognizance of the Record, that train orders are not necessary for the movement of trains or engines at Panama, and, finally, that train orders for movement through DI Interlocking Plant (which by the very reasoning of the majority award should be relayed by the Operator at DI Tower) could be relayed to train service employes at points where block signals were not in existence on September 15, 1947.

CARRIER MEMBERS
R. A. DeRossett
G. L. Naylor
W. M. Roberts