

Award No. 14283
Docket No. TE-13831

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Harr, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

SOUTHERN RAILWAY COMPANY

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

1. Carrier violated the Telegraphers' Agreement when on Saturday, February 25, 1961, Saturday, March 4, 1961, Saturday, March 11, 1961, Saturday, March 18, 1961, and Saturday, March 25, 1961, it required or permitted one of the members of train crew, train No. 69, employes not covered by the Telegraphers' Agreement, to call the dispatcher on radio telephone from Alston, S. C., or a point nearby within the limits of Alston, S. C., and handle (receive and deliver) a verbal train order that Train No. 51 had passed Alston, S. C., further violated the Telegraphers' Agreement, when on Saturday, April 1, 1961, Saturday, April 8, 1961, and Saturday, April 15, 1961, it required or permitted one of the members of train crew train Work Extra 2032, to call the dispatcher on radio telephone from Alston, or a nearby point within the limits of Alston, S. C. and handle (receive and deliver) a verbal train order that train No. 51 had passed Alston, S. C. This is a continuous violation, therefore a continuous claim for all subsequent violations as set forth herein.

2. Carrier shall compensate claimant M. H. Sternenberg, Agent-Telegrapher, Alston,, S. C. by paying him one call as is provided for in Rule 31 of the Telegraphers' Agreement, for Saturday, March 11, 1961, Saturday, March 18, 1961, Saturday, March 25, 1961, Saturday, April 1, 1961, Saturday, April 8, 1961, and Saturday, April 15, 1961, and for all subsequent dates that violations continue.

EMPLOYEES' STATEMENT OF FACTS: M. H. Sternenberg is the regular assigned agent-telegrapher at Alston, South Carolina, and has assigned hours of 7:30 A. M. to 4:30 P. M., with one hour off for lunch. His assigned work week is Monday through Sunday, with assigned rest days of Saturday

In addition, carrier's book of "Operating Rules" contains the following:

"99. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must drop lighted fusees at proper intervals and take such other action as may be necessary to insure full protection.

When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes on rail 100 feet apart and, when necessary, in addition, displaying lighted fusees.

When a train stops under circumstances in which it may be overtaken by another train, the engineman will immediately signal the flagman to protect the rear.

When ready to proceed the engineman will recall the flagman and, when safety to the train will permit, he may return, leaving the torpedoes and a lighted fusee.

The front of the train must be protected immediately in the same way when necessary by the forward trainman, fireman, or other competent employee.

Within signalled territory, protection against following trains on the same track will have been complied with when flagman goes back a sufficient distance to insure full protection against trains moving at restricted speed.

When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used.

Conductors and enginemen are responsible for the protection of their trains."

(Exhibits not reproduced.)

OPINION OF BOARD: The claim alleges a violation of the Telegraphers' Agreement when the conductor of train No. 69 called the dispatcher on radio telephone to ascertain the whereabouts of train No. 51. This information was necessary for train No. 69 to enter upon the tracks that train No. 51 operates on.

On the dates involved in this dispute Claimant was the regularly assigned agent-telegrapher at Alston, with assigned hours of 7:30 A. M. to 4:30 P. M. Monday through Friday, and rest days of Saturday and Sunday. Monday through Friday of each week train No. 51 was registered by the telegrapher at Alston. On Saturdays there was no telegrapher on duty to register train No. 51.

The employees ask that the Claimant be allowed a minimum call for each Saturday commencing February 25, 1961, and all subsequent dates that the alleged violation continues. The employees rely on Rule 1 (Scope) and Rule 31 (Handling Train Orders) of their effective Agreement.

The sole question to be decided is whether the communication in question constituted a "train order" within the meaning of Rule 31.

We have held previously that a "train order" can be in oral form. Award 12702 (Yagoda) states:

"The debate between the parties as to whether the communication in question constituted a 'train order' within the meaning of Rule 31, must be decided in favor of the Petitioner. Carrier's Exhibit A (timetable instructions) treats such communications as a variant of train order, saying explicitly that 'authority by telephone from operator in charge of block . . . will take the place of train order.' The explanatory letter of October 19, 1929, accompanying Rule 31 in the Agreement, makes it clear that the conductor's role in the interchange of request and response in such situations is encompassed by the concept of a train order and that it is thereby barred to conductors 'except in emergency' or via phone to 'the nearest telegraph station.' The first of these situations was not shown to have here existed; the second was not complied with.

"Under these circumstances, it is not determinative that the message was handled in oral form."

In 12702 the train conductor used the telephone to ask for verbal permission to move the train. In the instant case the conductor did not ask for permission to enter upon the track but only asked the location of train No. 51. However, train No. 69 could not enter upon the track until it had been determined that train No. 51 had passed Alston. We feel that this implies permission and that the facts justify the finding that the communication was a verbal "train order".

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 Employees involved in this dispute are respectively Carrier and Employees 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 31st day of March 1966.

**CARRIER MEMBER'S DISSENT TO AWARD 14283 — DOCKET TE-13831
REFEREE DON HARR**

Petitioner's Statement of Claim alleged that carrier violated the effective agreement and that claimant be allowed a call payment "as provided for in Rule 31" on the dates specified.

After stating that "The sole question to be decided is whether the communication in question constituted a 'train order' within the meaning of Rule 31," the majority made the following irreconcilable and erroneous conclusion:

"* * * In the instant case the conductor did not ask for permission to enter upon the track but only asked the location of train No. 51. However, train No. 69 could not enter upon the track until it had been determined that train No. 51 had passed Alston. We feel that this implies permission and that the facts justify the finding that the communication was a verbal 'train order'."

Rule 31 applies only to handling train orders. The undisputed evidence of record shows that the conductor of Train 69 used the company telephone at Alston merely to obtain the location of Train 51. The Train Dispatcher did not issue, nor did the Conductor receive, any train orders whatsoever, or for that matter, any "verbal" or "implied" orders. Moreover, under Carrier's Operating Rules, Train 69 did **not** require any orders or permission to enter or occupy the track at Alston. This fact was brought out by carrier in the handling on the property as well as in its submissions to the Board.

Petitioner failed to prove that the conductor handled train orders within the meaning of Rule 31 or that the telephone communication constituted the performance of work reserved exclusively to telegraphers through historical custom, practice and tradition on the property. That petitioner could not meet the required burden of proof is evident from the record and numerous prior Third Division Awards between these same parties — see Awards 11812 (Christian), 12150-71 (O'Gallagher), 12699 through 12711, 12935 (Yagoda), and 14244 (Perelson).

For the reasons stated, Award 14283 disregards the plain terms and provisions of Rule 31, and we respectfully dissent.

/s/ R. A. DeRossett

/s/ C. H. Manoogian

/s/ G. L. Naylor

/s/ W. M. Roberts