Award No. 15357
Docket No. TE-12526

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

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

PANHANDLE AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Panhandle & Santa Fe Railway, that:

1. The Carrier violated the Agreement between the parties when, on November 24, 1959, it required or permitted an employe at Kingsmill, Texas, not covered by said agreement to perform telegraphic communications work covered thereby; and

2. The Carrier shall now be required to pay J. T. Winters the equivalent of a "call" payment at the established rate of his regularly assigned position.

EMPLOYES' STATEMENT OF FACTS: Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

At approximately 9:15 P. M., November 24, 1959, Conductor Walter on Train No. 55, Extra 2131 West, near Kingsmill, Texas by use of the telephone (radio) copied the following message from the Operator at Pampa:

"Pickup off dirt dock Panhandle RI 90546 empty flat car for Amarillo and pickup off house 3 Panhandle UP 183866 empty box for Amarillo."

The Organization's District Chairman filed claim, December 2, 1959 (Employes' Exhibit No. 1), with Carrier's Division Superintendent, for a call payment in behalf of J. T. Winters, regular assigned Agent at Kingsmill, Texas.

The claim was subsequently appealed to the highest officer designated by the Carrier to handle such disputes and was denied.

This dispute has been handled on the property as provided by the Agreement between the parties and in accordance with the Railway Labor Act, as amended.

Your Board has jurisdiction over the parties and the subject matter.

(Exhibits not reproduced.)

J. T. Winters, the claimant named by the Employes, was the incumbent of Agent-Telegrapher Position 2015 at Kings Mill. Except for a position of Telegraph Apprentice, Agent-Telegrapher Position 2015 was the only position on the payroll at Kings Mill. The details of assignment of that position were as follows:

Pos. No.	Occupation	Rate of Pay	Assigned Hours From	To	Rest Days	Rest Day Protection	Meal Period
2015	Agt-Telgr	$2.445	7:30 AM	4:30 PM	Saturday	Accumulate Relief Position 9315	1 hour
					Sunday	None	

OPINION OF BOARD: On November 24, 1959, shortly after 9 P. M., the Amarillo Train Dispatcher called the Pampa Operator and asked him to contact the Conductor on Train 55 (which was near White Deer, about fourteen miles away) and instruct him to pick up two cars at Panhandle. (Panhandle is about fourteen miles from White Deer.) According to Petitioner, the Pampa Operator radioed: "Operator Pampa, Texas, calling Conductor Walters on No. 55 between Pampa and Kings Mill, come in." Walters replied: "This is Conductor Walters on No. 55; go ahead." The Pampa Operator said: "Dispatcher says to get your pencil and paper and write these car numbers down." Walter: "OK, go ahead." The Operator: "Pickup off dirt dock Panhandle RI 90546 empty flat car for Amarillo and pickup off house 3 Panhandle UP 183866 empty box for Amarillo." Walters: "OK, I got it alright."

Carrier asserts in its Ex Parte Statement that any instructions to the Conductor to take pencil and paper and write down car numbers originated with the Operator, not the Dispatcher.

Claimant Winters at the time in question was the regularly assigned Agent-Telegrapher at Kings Mill, about midway between Pampa and White Deer.

Petitioner asserts (and Carrier denies) that the radio-telephone conversation between Conductor Walters and the Pampa Operator constituted a communication or message of record which, under the Agreement, should have been received by a telegrapher employe.

In Award 14416 we summarized and catalogued decisions affecting these parties which have dealt with communications of record. "The general import of these Awards," we noted, "has been that communications which govern or affect the movement of trains over the line, or which affect the safety of persons or property, have been required to be matters of formal record." Each case, of course, has been decided in the light of the particular circumstances involved.

None of the prior cases involving these parties is exactly in point. However, in applying the general standards which have been used in related cases (in the same manner as was done in Award 14416), it is significant to note that the communication in question affected the movement of trains. Train No. 55, the Amarillo-Pampa turn-around local, was not scheduled to pickup the two empty cars at Panhandle. That was to have been done by the

Amarillo-Skellytown turnaround switcher. Therefore, the communication in question constituted, in effect, a new directive to Train 55 concerning the movement of that train between its location and Amarillo, its ultimate destination. Consequently, although the facts here are not on all fours with those in the prior cases on this property, they are sufficiently similar to the facts in the awards defining messages of record (see the listing in Award 14416) to warrant a sustaining award. Article XIII, Section 3 (a) is not controlling in a situation involving a directive of this type, in our judgment.

Claimant Winters was not on duty at the time the communication in question was transmitted. His station (Kings Mill) was about seven miles from the location of Train 55 when the message was transmitted. In our opinion he is entitled to the claimed "call."

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 16th day of February 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15357, DOCKET TE-12526 (Referee Stark)

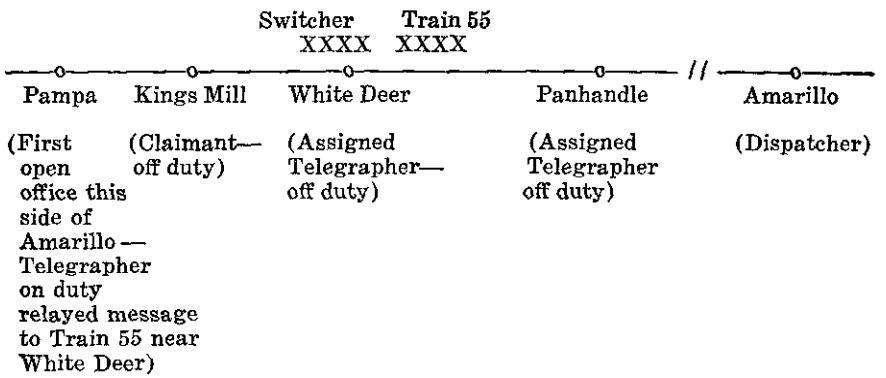
This sustaining Award is fatally defective on at least four different grounds: (1) It is illegally punitive and ignores the Board's obligation to settle disputes in accordance with law and the controlling agreement; (2) The finding of fact concerning past practice, which is indispensable to such an Award, is not supported by any evidence and is, therefore, arbitrary and capricious; (3) A so-called "standard" of decision is arbitrarily used as a substitute for evidence with the result that a clear rule of the agreement is given no effect and a practice which the parties in the record agree did not exist is erroneously found to exist and to be controlling; and (4) The obviously correct finding that the communication was received by the Conductor near White Deer is completely repugnant to the Award and thus renders the Award fatally inconsistent on its face.

I.

This Award is unlawfully punitive and its adoption constitutes a serious breach of the Board's clear statutory duty.

The far-reaching consequences of the penalty that is imposed in this Award are readily apparent when the specific claim that is allowed is considered in the light of the findings of fact. The claim submitted on the property and here sustained concerns the receipt of a message by the Conductor of Train 55 when that train was allegedly en route to Kings Mill, the station where Claimant was assigned, but off duty. The specific claim ". . . for a call payment . . . Mr. Winters [Claimant] was available and should have been called to perform this wire communication of record."

This Award purports to sustain that claim, but in obvious contradiction thereof, it states the true facts to be that the communication took place after the train had passed Kings Mill and was at a location where Claimant had no right to such service, a location where the service could not possibly have been performed by the Morse Code telegraph operator in the past, a location on route where the next station with a telegraph office was a point where the petitioning Employes themselves recognize that under a specific rule of the agreement a Conductor could properly have received the communication over the telephone. To bring these significant facts into sharp focus, we submit this straight-line sketch.



The Award properly rejects the Employes' contention that Train 55 was en route to Kings Mill from Pampa and finds that it was near White Deer, en route to Panhandle and Amarillo, when the communication took place between the Pampa Operator and the Conductor of Train 55. The record shows, without contradiction, that Train 55 was moving ahead of the Switcher.

The Switcher was at White Deer when the Conductor thereof called the Dispatcher by telephone, stated that he was short of time under the Hours of Service Law and requested that certain work (pick-up of two empty cars at Panhandle) which his train was scheduled to perform be assigned to Train 55. The Dispatcher noted that Train 55 was within reach of the radio at Panhandle (the only station in the area where a Telegrapher was on duty and the only station with a radio transmitter); therefore, he called the Pampa Telegrapher over the Dispatcher's phone and directed him to advise Train 55 to pick up the two cars at Panhandle and take them to Amarillo, terminal of Train 55.

Since Train 55 was actually many miles beyond Claimant's station before the Conductor of the Switcher requested assistance, it is obvious that there is no conceivable way in which Claimant could have participated in the transmission of the ensuing message to Train 55 even if he had been on duty. In these circumstances, there is no conceivable way in which Claimant's agreement rights could have been adversely affected by what occurred, and the Employes have not argued to the contrary. They expressly based the claim on the erroneous assumption that the message was given to the Conductor of Train 55 while that train was still en route from Pampa to Kings Mill, Claimant's station. More will be said of this below. The only point we make here is that the claim was submitted on the specific theory that the call to Train 55 occurred while it was en route to Kings Mill, and under the old Morse Code operation such a message could have been sent to the Telegrapher at Kings Mill, and he could have copied it for the Conductor, had he been on duty.

In their submission to the Board the Employes meticulously limit their claim to this theory. Their final statement with reference to the question in the case reads:

> ". . . the question to be resolved is whether employes covered by *the Telegraphers' Agreement have an exclusive right to* ***continue*** to perform work which has been covered by their agreement since the first agreement between the parties hereto was adopted and which the Carrier is here attempting to remove by the substitution of the telephone, wireless or otherwise, for Morse telegraph as a means of communication."

While the claim would have been invalid even if Train 55 had not passed Kings Mill (a point discussed below), the absurdity of the penalty allowed Claimant by this sustaining Award is emphasized by the fact that the claim was submitted to Carrier and this Board on the sole theory that the train was approaching Kings Mill where Claimant was allegedly available *and could have copied the communication, yet the claim is sustained on a* correct finding that the train had passed Kings Mill and was at a point where Claimant could not possibly have been affected.

On the facts established in the record and conceded in the Award, it is obvious that in Morse Code days of which the Employes speak it would not only have been impossible for this Claimant to have taken part in any way in the handling of this communication, but it would have been equally impossible for a Telegrapher at the other stations in the area. This communication simply could not have been handled in those days, for the telegraph offices at White Deer and Panhandle were closed. The case simply would not have been expeditiously handled, and a train might have been tied up under the law.

Even if the facts had been different and Telegraphers had been on duty at all of these stations so that the communication could have been handled by Telegraphers in the Morse Code days, they would have done nothing more than they did in this case. Only one Telegrapher would have handled the message. Had the Panhandle office been open at night in the Morse Code days, then the message could have been sent directly to the Telegrapher at that station; but obviously it would not have been sent to the Operator at Pampa. Only one Telegrapher would have received the message and trans-

mitted it to the Conductor; and in our case one Telegrapher (the Operator at Pampa) received the message and transmitted it to the Conductor. Thus, it is clear that even from a practical standpoint there was no loss of work to the Employes as a class, and what this Award tends to do is simply to create a senseless duplicate handling by two Telegraphers that has never existed.

The conclusion in the Award that Claimant "is entitled to the claimed 'call'" is obviously contrary to the agreement, under the facts found in the Award itself; it exceeds the jurisdiction of the Board and would create a penalty that is not only not provided for in the agreement, but is absurd in its implications. On the point that we have no jurisdiction to change the agreements, see **Brotherhood of Railroad Trainmen** v. **Chicago River and Indiana RR Co.**, 353, U.S. 30. **Awards 7166** (Carter), **12962** (Hall), **13310** (Coburn), **15380** (Ives).

The obvious and only tendencies of such an Award are, first, to unlawfully deter Carrier from complying with the mandate of the Transportation Act to operate efficiently and economically, and, second, to stir up endless claims, in violation of the Board's obligation to settle disputes.

As to Carrier's right and obligation to adopt new, more efficient methods, and the limited rights of the Employes where such methods are adopted, see **Awards 3051**, **4063** (Carter), **6416** (McMahon), **9204** (Stone), **10014** (Weston), **14494** (Rohman), **14969** (Ritter).

We shall hereinafter discuss other matters which further establish that the Referee has allowed this penalty on an arbitrary basis that is inconsistent with the positions taken by all parties in the record and is diametrically opposed to the past practice evidenced by a clear rule in the agreement. The obvious cause of the grave error is that he has purported to resolve the controlling question of fact on the basis of a test that relieves the Claimant of submitting any supporting evidence whatever, ignores provisions of the agreement evidencing a practice that defeats the claim, and proceeds solely on his own private analysis of prior Awards which neither party considered sufficiently relevant to even mention. (Approximately half of the Awards cited by the Referee were rendered many years before this claim was submitted to the Board.) As we said in **Award 12356**:

> "It is beyond question that this Board's jurisdiction is confined to deciding each case before it on evidence of record in that case introduced on the property. Findings and holdings in stranger cases are not evidence."

The purpose and statutory duty of this Board is to settle disputes. The only way this can be accomplished in cases of this kind is for the Board to be governed by lawful standards of proof and resolve questions of fact on the basis of evidence properly placed before us by the parties. This procedure alone puts the parties in a position where they can determine for themselves whether a claim that turns on a question of fact is allowable. With such a lawful test it becomes simply a matter of adducing relevant evidence.

When this Board abandons the lawful standard of admissible relevant evidence as the means for resolving a question of fact and substitutes in lieu thereof a test consisting of each referee's private analysis of assumed standards set up in other cases, we simply create confusion. The professional claim-

ant who thrives on confusion will always have an equal chance under such a test, even though his claim turns on a question of pure fact and the relevant evidence is all against him. Nobody can decide whether or not a particular claim is sustainable, as everything depends on the thinking of a referee who may not know anything about railroading and may never see through the maze of irrelevancies that often appear in a record. This may be good business for referees, but it is a serious violation of this Board's duty under the law.

It is elementary that this Board's jurisdiction to make final and binding decisions does not carry with it jurisdiction to make a decision that is not supported by evidence and is, therefore, arbitrary. **Barnett v. Pennsylvania-Reading Seashore Lines**, DCNJ 1956, 145 F. Supp. 731, affirmed 245 F. 2d 579.

Our decisions must be designed to settle disputes, and where past practices under the agreement are relevant, the Award must be based on admissible evidence of practice. **Transportation Union v. U. P. R. Co.**, 385 U.S. 157, and the cases therein cited.

II.

Indispensable to a valid Award sustaining any part of this claim is a valid finding of fact that there exists a controlling practice whereby Claimant had an agreement right to receive and copy the work instructions for the Conductor.

Having no rule which states that Carrier must assign a Telegrapher to receive such work instructions and copy them for the Conductor, and having a general Scope Rule that merely lists positions, the Employes have necessarily based their claim on the past practice doctrine. In Position of Employes they stated their claim as follows:

> "Employes occupying positions in the classifications listed in Article I, the Scope Rule, **have an exclusive right to perform all work which by custom, tradition and historical practice has been assigned to, and performed by, occupants of such positions.** This principle was long ago firmly established, and your Board has consistently upheld and reaffirmed said principle. . . ." (Emphasis ours.)

Whether the alleged practice exists or does not exist is purely a question of fact, and the obligation of the Employes to prove that fact with relevant evidence has long been recognized in the Awards of this Board. In Award 11592 the same Referee who wrote the instant Award gave us this clear statement of the rule:

> ". . . In a contested case, such as this, the question must be asked: Did Claimants, by tradition, custom and practice on this property, perform the work to the exclusion of others?
>
> * * * * *
>
> . . . we can find no justification for sustaining the claim in the absence of persuasive evidence (or any evidence) that the parties, on this property, have treated lineups such as those involved here as the exclusive property of telegraphers. . . ."

This universal rule on burden of proof has been stated with equal clarity in **Award 13303,** involving these same parties and agreement. This Award states:

> ". . . The settled principle of this Division is that where, as here, the Scope Rule does not describe or define the work to be performed by the employes 'the Petitioner has the burden to show that the transmission of this type of message was by history, custom and tradition reserved exclusively to Telegraphers.' (Award 12607) The Petitioner has not done so, and, therefore, its claim must be denied."

The instant case concerned work instructions to the Conductor of a train instead of lineups, and the Employes had the burden of proving that such work instructions were the "exclusive property of telegraphers", in addition to showing that Claimant was entitled. There is a stark absence of any evidence that tends to show that the Claimant or any other Telegrapher had an agreement right to do anything that the Conductor did. In fact, from a fair reading of the record it must be concluded that the Employes have affirmatively proved there is no evidence whatever of such a practice, for they tell us that they have "long and zealously guarded the exclusive right of employes covered by the Telegraphers' Agreement to perform telegraphic communications work which has ben traditionally performed by them and have filed many claims"; and they say that "Carrier has also paid scores upon scores of claims arising out of the handling of communications work by outsiders by means of telephone. . . ."; yet, they have been unable to cite a single settlement in which a claim based on the receipt of work instructions by a Conductor over the telephone has been treated as work of the Telegrapher. They have not even introduced a single statement of a Telegrapher that Conductors have not been permitted to receive such instructions in a case of this kind. In Position of Employes, where they are required by our rules to give us all relevant evidence, they cite four cases: In two cases messages or telegrams were telephoned by Clerks to other Clerks, in one case a Clerk telephoned a Telegrapher ,and in one case the Dispatcher telephoned a Clerk. The communications in the four cases cited are so completely irrelevant to the question of a Conductor personally receiving work instructions for his train by telephone that their citation as the only evidence of Employes constitutes an admission that they have no relevant evidence.

The only positive evidence in this record concerning the receipt of such work instructions by a Train Conductor over a telephone of any kind is Article XIII (Handling Train Orders), Section 3 (a) of the agreement which expressly recognizes that a Conductor may properly receive such instructions. This section reads:

> "Section 3. It is understood that the following procedures are permissible and not in conflict with this Agreement:
>
> (a) At points where there is no telegrapher or telephoner employed, or where one is employed but not on duty, **a telephone conversation about work performed or to be performed,** about obtaining permission to cross over from one track to another or to flag block, or about the probable arriving time of other trains; . . ." (Emphasis ours.)

It is elementary that this section of the agreement refers to the receipt of work instructions by a train crew with reference to work to be done by their train, since it appears as a section in the article of the agreement dealing with handling of train orders. The Employes themselves do not deny that the instructions received by the Conductor in this case constituted a telephone conversation about work to be performed, as that term is used in this rule. They seek to avoid the application of this rule on a very narrow and untenable basis which is fully discussed in Subdivision III, below.

The point we make here is that the record does not contain a scintilla of evidence tending to prove that this claim is supported by past practice. The only relevant evidence is this rule which is irreconcilable with a practice that would support this claim, would take precedence over such a practice in any event, and must be construed as conclusive evidence that no such practice exists.

The Award is subject to further criticism in that it has cluttered up the simple past practice issue by speaking in terms of whether particular communications "have been required to be matters of formal record" and by purporting to resolve the purely factual issue of controlling practice on the basis of "standards" which the Referee purports to find in his own analysis of other Awards which are not in point and which the parties did not consider to be evidence of practice in this case.

Whether a particular matter has been required to be a "matter of formal record" on Carrier's lines is obviously a question of fact concerning a specific practice, and the fruitless addition of this extra verbiage does not alter the Petitioner's burden of proof. **Awards 11401** (Hall), **10767** (Ables), **9953** (LaDriere), among many others.

III.

Under the arbitrary application given the Referee's "standards" in this case, the Employes are relieved of their burden of proof, a practice is found to exist and to be controlling in spite of the agreement of the parties in the record that such practice does not exist, and a clear rule of the controlling agreement is given no effect.

The "standards" which the Referee has adopted for resolving this case are shocking in that they conflict with a clear rule of the agreement, but even more shocking is the arbitrary manner in which the Referee has applied them in this case. He has attempted to determine the controlling question of fact by reference to these standards instead of from the evidence in the record, and the result is that he has found that a practice of keeping a formal record of the involved communication exists, when the parties have agreed in the record that it does not exist. The Referee gives us this statement of the "standards" he applied in deciding this case:

> "The general import of these Awards . . . has been that communications which govern or **affect the movement of trains** over the line, or which affect the safety of persons or property, **have been required to be matters of formal record.**" (Emphasis ours.)

The controlling question to be decided in each case under these "standards" is obviously one of fact, namely, whether on this Carrier's lines the particular communications involved in any case "have been required to be matters of formal record."

The Referee arbitrarily attempts to answer that question by his alleged analysis of prior Awards which neither party cited as being relevant, and he comes up with an answer which is diametrically opposed to the admissions and contentions of both parties in the record.

On the record before us the Employes have clearly admitted that the involved communication was not required to be a matter of formal record. They have never asserted at any time that a formal record of this communication was required. They have conceded that a formal record was not required and that at most there was only a penciled note as a temporary aid to the memory of the Conductor. In stating its position to the Board, Carrier stated:

> "Since neither the train dispatcher, the operator on duty at Pampa nor the conductor in charge of Train No. 55 was either obligated or required by any law, corporate rule or Company regulation to make and maintain a record thereof, it cannot be successfully contended that the radio conversation involved the transmission and receipt of any message or matter of record."

In their rebuttal the Employes specifically direct our attention to the foregoing statement of Carrier and their sole response thereto is stated as follows:

> "Beginning at page 15, paragraph 1 ending at bottom of page 16, Carrier alleges that the Conductor was not required to write the message down. In this respect, your attention is directed to that part of Award 6693, which is directly in point, wherein Referee Leiserson said:
>
> > 'We can hardly believe that a message like the one quoted above with numbers in it like 211272, 30559, 68917, and the names of different cities to which cars were to go, could be remembered. . . .' "

The Employes do not deny and therefore under the law and our consistent rulings they admit that nobody was here "obligated or required by any law, corporate rule, or Company regulation to make and maintain a record thereof. . . ." Their only response to this assertion of Carrier was Referee Leiserson's statement that he could not believe a person could remember the number, contents, and destinations of the three cars involved in Award 6693. They advanced this same argument on the property. They thus brought the case to us on the admission that there was nothing other than the Conductor's own alleged inability to remember these work instructions that would have prompted him to write them down, and any writing he did was solely as an aid to his own memory in doing the work. Certainly a penciled note of that type is the very antithesis of a "matter of formal record" under any accepted definition, and thus the Employes have conceded that this communication was not a "matter of formal record."

Furthermore, the involved instructions merely concerned the pick-up at Panhandle of two empty cars which were to go to Amarillo, terminal of Train 55; therefore, it is a reflection on the ability of a capable Conductor in local freight service to say that he could not remember such instructions for the short period of time here involved, and we are surprised that the Telegraphers would suggest such an argument, even by the indirect method of imputing it to a Referee in another case. Capable Conductors on locals and switchers and yard engines often review their work for the day in the morning and then work through the day largely from memory. This is their work. Any self-respecting Conductor would be insulted at the suggestion that he could not remember such brief instructions, but even if a memorandum were necessary as an aid to memory in such a case, the Telegrapher would have no right whatever to make that memorandum. The specific provisions in the Train Order Rules for telephone conversations regarding work to be performed are unlimited in scope, and the mere fact that particular instructions may be so extensive as to require memoranda for their proper execution is irrelevant. The rule makes no distinction in that regard.

Turning again to the "standards" which the Referee set up to guide himself in making this decision, attention is directed to the specific standard which he applied in this case and which reads:

". . . affect the movement of trains over the line. . . ."

This particular standard, as applied here, arbitrarily sustains any claim that involves a conversation by a Conductor about work to be performed. Manifestly, telephoning by a Conductor regarding work to be performed by his train will affect the movement of the train in the indirect way that the movements of Train 55 were affected. The only way that a train can work is to move; so if a Conductor cannot receive a telephone conversation that affects any movement of his train, he certainly cannot engage in a telephone conversation about work to be performed by his train.

This particular "standard" ignores the agreement, and if permitted to stand would expunge from the agreement a clear and significant part of Section 3 (a). It has long been settled that this Board lacks jurisdiction to ignore a clear and valid provision of the agreement or to amend the agreement under the guise of interpretation. See the Awards cited in Subdivision I.

IV.

On its face this Award is fatally inconsistent. We have already noted briefly that it purports to sustain a claim that "communications work" was done by the Conductor of Train 55 "at Kings Mill", yet it contains a finding that this "work" was not done at Kings Mill, but was done "near White Deer", a point en route where the Employes themselves have conceded the Conductor could properly receive such a communication.

We will now establish from the record that this inconsistency is fatal and the finding that the train was in fact near White Deer precludes us from properly sustaining any part of the claim. In the first place, this finding brings the case within the Employes' admissions as to the circumstances in which Article XIII, Section 3 (a) are applicable, thereby establishing agreement on all sides that there was no violation at all; and, in the second place,

it establishes that this Claimant is not an eligible claimant and would not have been entitled to the claimed call even if the Conductor had received and copied a communication which should have been received and copied by a Telegrapher.

Concerning Claimant's eligibility, if the Conductor had actually violated the Telegraphers' Agreement by receiving and copying the message en route from White Deer to Panhandle, the resulting claim to a call under the agreement would have necessarily belonged to the Telegrapher at Panhandle, for he would have been the only Telegrapher in a position to receive the message and copy it for the Conductor.

Carrier vigorously raised this point on the property, noting that the Claimant could not possibly have assisted in the handling of this communication and that he was not an eligible claimant because the communication itself and the incident that necessitated the communication both occurred long after Train 55 had passed Claimant's station. In their submission to the Board, the Employes nevertheless based their case solely on the contention that the communication occurred while Train 55 was en route to Kings Mill from Pampa.

The Employes did not attempt to argue in Position of Employes that under the agreement Claimant was nevertheless entitled to a call if the communication was in fact received after the train left Kings Mill; however, in their rebuttal they belatedly seem to suggest that a claim which has necessarily accrued to one man entitled to a call under the agreement may be retroactively and arbitrarily taken away from him and given to another who had no right to the call. While they are not explicit, this is apparently their purpose in citing and quoting from Award 6063, which involved a different situation. The belated suggestion that Claimant should be allowed a call to which he had no right whatever merely because somebody else may have had a right to a call is absurd from a legal standpoint (**Award 13361**) as well as being entirely contrary to the claim submitted to the Board (Circular 1). In this posture of the record, the finding that the communication was received by the Conductor after the train had departed from Kings Mill necessarily eliminates Claimant as an eligible claimant and precludes a correct finding under the agreement that Claimant was "entitled to the claimed 'call'." The finding to that effect in the last paragraph of the Award is obviously arbitrary and capricious.

Let us turn now to the Employes' admission concerning Article XIII, Section 3 (a) which establishes agreement that there was no violation whatever as long as the communication was received when Train 55 was en route to Panhandle from White Deer. In their Statement of Facts and Position of Employes, the Employes blissfully ignored Carrier's assertions that when the communication was received by the Conductor the train had passed White Deer. They did not attempt to prove and they did not argue that there was any basis whatever for a claim if this radio-telephone message concerning work to be done at Panhandle was in fact received by the Conductor while the train was en route from White Deer to Panhandle. The plain fact is that the Employes conceded there was no violation under those circumstances.

In addition to denying that the agreement contains anything which would otherwise reserve to Telegraphers an exclusive right to receive and copy the communication which the Conductor received, Carrier directed the Em-

ployes' attention to the fact that the involved communication was concerned solely with the work to be performed by Train 55 at Panhandle, and, therefore, if it is to be regarded as a telephone communication, as contended by the Employes, it fell squarely within the purview of Article XIII, Section 3 (a) which provides that at points where a Telegrapher is not on duty any "telephone conversation about work performed or to be performed" is permissible and not in conflict with the Telegraphers' Agreement. The Employes' sole response to that defense of Carrier was the following comment which appears in their rebuttal:

> "At the top of page 14, Carrier alleges that Article XIII, Section 3 (a), provides that 'telephone conversation about work performed or to be performed' is permissible and not in conflict with the other rules of the Agreement.
>
> The purpose for which Section 3 (a) and (b) was adopted, and the clear intent of the rule, is to permit members of train or engine crews of trains performing work at points where no telegrapher is employed, ["or where one is employed but not on duty" — which was the situation at Panhandle] to use the telephone for the purpose of obtaining information in connection with work performed or to be performed, or obtaining permission to cross over from one main track to another or obtaining information about the probable arriving time of other trains **at that particular location** solely for the purpose of performing their work at said location." (Emphasis theirs.)

Since this is the Employes' only response to Carrier's entire defense under Article XIII, Section 3 (a), and in view of their emphasizing of the phrase "at that particular location", it constitutes a perfectly frank admission that the provisions of Section 3 (a) are applicable to the conversation here involved, if it actually took place, or must be treated the same as having taken place, at Panhandle, where the work was performed. We have consistently ruled that failure to deny material assertions constitutes an admission thereof, and here the Employes denied the applicability of Section 3 (a) solely on the premise that a communication under that section must be received at the point where the work is to be performed. Section 3 (a) clearly contains no such limitation on the point where telephone conversations referred to therein may take place, but even under this erroneous limitation which the Employes would apply, they necessarily concede that there is no merit to this claim once it is established that the Conductor received the communication after his train had passed White Deer. The precise basis on which they have prosecuted this claim is that a message received over the radio-telephone while Train 55 was en route from Pampa to Kings Mill, the next station en route where a Telegrapher was employed, must be treated the same as a communication received at Kings Mill for the purpose of applying the agreement. After Train 55 passed White Deer Station, the next telegraph station en route was Panhandle, and under the Employes' own theory, any telephoning done by the Conductor en route from White Deer to Panhandle must be treated the same as telephoning done at Panhandle.

It is thus clear that the Employes' own theory and arguments with respect to radio-telephone communications en route and their admissions regarding the application of Article XIII, Section 3 (a) establish that there was no violation in this case as long as the communication was not received by Train 55 until after it had passed White Deer.

The finding in the Award that Train 55 was near White Deer when the Conductor received the communication is unassailable, and it is fatally repugnant to the claim submitted to the Board. The obvious effect of sustaining this claim on the basis of a finding that the communication was received near White Deer is to sustain a claim that was never submitted to us and over which we had no jurisdiction under the Railway Labor Act.

The Award is invalid and we must dissent.

G. L. Naylor
R. E. Black
T. F. Strunck
P. C. Carter
G. C. White

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.