



Award Number 17231

Docket Number TE-16401

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
NORTHERN PACIFIC RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Northern Pacific Railway Company, that:

1. Carrier violated the Agreement on June 17, 1965, when it required the crew on extra 7003 A West to "OS" their train.
2. Carrier shall compensate the senior idle extra telegrapher, or if none available, the senior regular assigned telegrapher on rest day nearest point of violation, for one days pay (8 hours) pro rata rate.

EMPLOYEES' STATEMENT OF FACTS: The Agreement between the parties, effective April 1, 1956, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

At 1:55 A.M., June 17, 1965, the Dispatcher instructed the Telegrapher at Miles City to contact Extra 7003A West by radio to determine their location. The Conductor on Extra 7003A West advised: "We are going over the East Switch at Tusler at 1:56 A.M." The Telegrapher at Miles City relayed this information to the Dispatcher. The Dispatcher then called Extra 6002 D East on the radio and asked them where they were. The Conductor on Extra 6002D East replied they were heading in at Rosebud. The Dispatcher told the Conductor to have someone come to the telephone as soon as possible for an order. The Conductor replied that the Engineer would come to the telephone as soon as they stopped. At 2:03 A.M., Engineer Nielson got on the phone at Rosebud and received the following train order:

"Order No. 108

To C&E Extra 6002D East at Rosebud
To C&E Extra 7003A West at Miles City

Extra 6002D East instead of Extra 7003A West take siding meeting at Hathaway.

(Signed) S.A.A."

Engineer Nielson repeated this order and it was made complete to him at 2:06 A.M.

Claim was filed and handled in the usual manner, including conference, up to and including the highest designated officer of the Carrier, and has been declined.

Correspondence reflecting this handling on the property is attached hereto as T.C.U. Exhibits 1 through 11.

(Exhibits not reproduced)

CARRIER'S STATEMENT OF FACTS: The territory involved in this dispute is located on the Yellowstone Division. Following is a sketch of the territory involved:

Rosebud	Miles City	Tusler	Glendive
*	*	*	*

The division headquarters are located at Glendive where train dispatchers are employed. Tusler is a blind siding, there being no employees employed at this location. Telegraphers are employed at Miles City.

On June 17, 1965, Extra 7003 A West was scheduled to enter the siding at Rosebud and await the arrival of Extra 6002 D East.

At 1:55 A.M. on June 17, 1965, the train dispatcher requested the telegrapher at Miles City to call Extra 7003 A West on the radio and secure its location. Extra 7003 A West replied on the radio stating:

"We are going over east switch at Tusler, 1:56 A.M."

The telegrapher at Miles City relayed this information to the train dispatcher.

On receipt of the information concerning the location of Extra 7003 A West, the train dispatcher issued a train order instructing Extra 6002 D East to enter the siding at Rosebud and await the arrival of Extra 7003 A West.

Claim has been presented in behalf of the senior idle extra telegrapher, or if none available, in behalf of the senior regular assigned telegrapher on rest day nearest Tusler, for payment of eight hours at straight time rate on June 17, 1965, which claim has been declined.

(Exhibits not reproduced)

OPINION OF BOARD: On June 17, 1965, the train dispatcher requested the telegrapher at Miles City, Montana to call extra 7003A West on the radio to ascertain said train's location. After the telegrapher contacted said train by radio, the train crew replied "we are going over East Switch at Tusler, 1:56 A.M." The question is did Carrier violate the Agreement, in particular 1(b) and 3(a) of the Agreement, when it permitted the train crew of said extra 7003A to make said radio report?

The Organization's is that the use of radio by persons other than telegraphers to make train reports is in violation of the Agreement; that telegrapher duties have always been to "OS" trains; that an "OS" is a train report; that Rule 3(a) of the joint train order Agreement of August 1, 1941 does not permit such a transmission as here in question because "OS" of trains was involved; that by past practice Carrier has considered this work

as belonging to telegraphers; that the dispatcher used this report and issued train order No. 108.

Carrier's defense to this claim rests on the premise that (a) the conversation between extra 7003A West and the telegrapher at Miles City did not constitute a bona fide train report or an "OS" of trains within the generally accepted meaning of that term; (b) that there isn't a rule or agreement that bars a conductor of a moving train from communicating with a telegrapher by radio; (c) that Rule 1, Scope Rule of the Agreement, does not bar a conductor on a moving train from communicating with a telegrapher by radio; (d) that in regard to the question of damages, no rule or agreement provides for payment of eight hours for such a violation, if the Board does find that Carrier violated the Agreement in this instance.

In the oral panel discussion of this dispute before this Board, the Organization strenuously argued that Carrier did not contend on the property (a) that there was not a rule or agreement which prohibits the conductor of a moving train from communicating with a telegrapher by radio and (b) that no rule or agreement actually or constructively confers a payment of eight hours upon a telegrapher when a conductor of a moving train communicates with a telegrapher by radio, and cites in support of same that Carrier, in its answer to Employees' Statement of facts, record p. 62, stated:

"The basic issue in this dispute is not whether it has always been the duty of telegraphers to "OS" trains but rather whether the communication between the conductor of extra 7003A West and the telegrapher at Miles City on June 17, 1965 constituted an "OS" of a train. This is the issue created by the exchange of correspondence in this dispute (Carrier's Exhibit "A"), and the Employees were confronted with this basic issue during the entire handling of this dispute on the property." (Emphasis ours)

This Board has repeatedly ruled that contentions or charges not made during the handling on the property, cannot be considered by this Board in the determination of a dispute. Therefore, the sole issue that can be determined by this Board herein is whether or not the communication's by a train crew member to a telegrapher at the request of a dispatcher constituted an "OS" of a train. If the answer of the Board is in the affirmative, then the entire claim must be sustained, and vice versa if the decision is in the negative.

The rules relied upon by the Organization are: 1(b) of the Scope Rule, 1 and 3(a) of the joint train order Agreement of August 1, 1941, and they read as follows:

"1(b) Changes in the method of performing the work covered by this agreement shall not operate to remove the work from coverage of this agreement."

"1. It is hereby agreed that train and engine service employees will not be required to call the dispatcher for the purpose of receiving orders governing the movement of trains and that train and engine service employees will neither be required nor permitted to copy train orders governing the movement of trains, other than in emergencies as herein defined."

"3(a) When no emergency exists, as above defined, an inquiry by train or enginemen as to the time or location of another train

or in connection with their work, will not be considered a violation of this agreement when it does not involve the transmission of train orders, messages of record, reports or O S of trains."

A Special Board of Adjustment No. 506, Award No. 22 was confronted with a similar set of facts and issue involving a similar rule as in this dispute. The Referee in said Award No. 22 stated:

"As to the use of radio, we take the view that its use by persons other than telegraphers to transmit train reports violate the Agreement just as much as the use of the telegraph or telephone. Was this a train report? We think so. The conversation took place at 11:28 P.M. and the information given by the train service employee was that No. 362 was then passing Ennice. . . ." (Emphasis ours)

In view of Referee Ray's aforesaid decision in said Award No. 22 of Special Board of Adjustment No. 506, we are constrained to conclude that Carrier violated the Agreement in this instance and the claim must be sustained.

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 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.

A W A R D

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 June 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17231, DOCKET TE-16401

Referee Paul C. Dugan

In this award the Referee compounds errors.

First, he declines to consider a proper interpretation of the Memorandum of Agreement on the basis contentions not raised on the property cannot be considered. The Memorandum of Agreement was at issue at all times during handling of the claim on the property and the interpretation of a rule or agreement in issue is not a new issue. See Award 10494 (F. J. Dugan) and 15151 (Hall).

Secondly, a mere reading of the Memorandum of Agreement readily discloses that it prohibits train and engine personnel from communicating with train dispatchers except as therein provided. It does not, however, prohibit communication between train and engine personnel and telegraphers. Compare Awards 10535 (Ables), 10872 (Hall), 15618 (McGovern).

Thirdly, the Referee blindly follows Award 22 of Special Board of Adjustment No. 506. This notwithstanding the rule there involved was erroneously interpreted and this Division so found in Award 15740 (Kenan) involving that same Carrier.

For these and other reasons we dissent.

/s/ J. R. MATHIEU
J. R. Mathieu

/s/ R. A. DEROSSETT
R. A. DeRossett

/s/ C. H. MANOOGIAN
C. H. Manoogian

/s/ C. L. MELBERG
C. L. Melberg

/s/ HARRY S. TANSLEY
H. S. Tansley