NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20127

THIRD DIVISION

Docket Number CL-20049

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7197) that:

1. Carrier violated the Telegraphers' Agreement(TCU) and in particular, Paragraph 2 of the May 20, 1970 Memorandum Agreement, when, on January 5, 1971, it required the Conductor of Extra 201 North, an employe who is not covered by the Telegraphers' Agreement (TCU) to receive and copy Train Order No. 33, on line, at Salter, Texas, a location and/or point where no Telegrapher is employed, and then failed and refused to compensate claimant W. M. Nittsche, as required by Paragraph 2 of the May 20, 1970 Memorandum Agreement.

2. Carrier shall now be required to compensate Mr. W. M. Nittsche, Telegrapher, three hours at pro rata rate, as required by the May 20, 1970 Memorandum Agreement.

OPINION OF BOARD: On January 5, 1971, Extra 201 North and Extra 830 South had orders to meet at Salter, Texas. However, while enroute to Salter, Extra 830 South was observed to have sticking brakes and the train had to be stopped to determine the cause. Because of the delay resulting from the stop, and in order to avoid additional delay to Extra 201 North at Salter, Train Order 533 was issued to the conductor of Extra 201 North to permit his train to move from Salter to Martin, Texas. The conductor received and copied the order at Salter, which is a location at which no telegrapher is employed. The delay to the Extra South was thirty minutes; without the train order, the Extra North would have been delayed an hour or more at Salter.

Because the conductor who received and copied Train Order #33 is not covered by the Telegraphers' Agreement, the Organization (T-C Division, BRAC Agreement) made claim for payment of a call under the Agreement of the Parties dated May 20, 1970. The Carrier refused to make such payment and, for that reason, the Organization asserts the Carrier violated the 2970 Agreement.

In pertinent part, the initial claim, dated February 4, 1971, stated:

> "There was no emergency involved, therefore, I hereby designate Telegrapher W. M. Nittsche to receive a call payment at the applicable rate for this violation as provided for by Memorandum of Agreement between the Carrier and this Organization."

Carrier's Superintendent Kerlee denied the claim for payment of a call in a March 18, 1971 letter which states:

> "Investigation develops that it was necessary to issue this order to move Extra 201 North from Salter to Marlin against #143 as result of #143 being delayed approximately 30" at Mile Post 804 due to brakes sticking."

In appealing to the General Manager from the Superintendent's denial, the General Chairman wrote as follows in a letter dated April 14, 1971:

> "It is noted that Mr. Kerlee has again taken the position that sticking brakes are emergencies but I must remind him and you that there are no emergency conditions that exist as far as the Agreement is concerned when a delay is caused by sticking brakes. This can be seen by applying the Rule as it is written and not as one would like to interpret."

The claim was further denied and appealed to the Director of Labor Relations, 0. B. Sayers, who, in an April 22, 1971 letter, stated that:

> "As you have been advised, Extra 830 South was delayed 30 minutes because of brakes sticking at Mile Post 804. Such occurrences have always been considered as emergency conditions on this property and because of the emergency conditions the exception to the Memorandum Agreement dated May 20, 1970 applies."

On the basis of the foregoing, and the whole record, the parties have joined issue on the questions of: (1) does the General Chairman's failure to deny Mr. Sayers' statement of April 22 constitute an admission which defeats the claim; and (2) does the delay of a train from sticking brakes come within the applicable emergency definition even though not expressly mentioned therein.

In regard to the first question, the record shows that a strong, broad challenge to Carrier's defense of emergency was made in the General Chairman's letter of April 14, 1971. This challenge quite clearly covered all facets of Mr. Sayers' statement of April 22, and no further challenge or denial was necessary. Accordingly, we do not believe an admission is reflected by the record before us.

The second question calls for an examination of the emergency exception to the 1970 Agreement, because the Carrier is not obligated to pay a call when the exception applies. The emergency exception, found in Rule 2(c) of the Agreement dated March 1, 1952, reads as follows:

"Emergency is defined as follows:

Casualty or accident, engine failure, wreck, obstructions on track through collision, failure of block signals, washouts, tornadoes, slides or unusual delay due to hot box or break-in-two that could not have been anticipated by dispatcher when train was at previous telegraph office, which would result in serious delay to traffic."

The Petitioner argues that the above rule does not include delay due to sticking brakes and that the rule must be applied as written. Notwithstanding the rule's omission of sticking brakes, which the Carrier concedes, the Carrier says the rule should be read as including such omission. In support of this position, the Carrier, in its Submission, argues that:

"The parties have never applied Rule 2(c) as restrictive as the Employes are now contending in the instant dispute. Emergency has been applied in the 'general' not the 'limited' construction the Employes are here contending is applicable."

In appraising the opposing positions, our starting point is that there is no ambiguity in the text of the rule agreed to by the parties and, hence, it follows that the Carrier has the burden of showing by probative evidence that the rule covers a condition not mentioned therein. The evidence offered by Carrier on this point consists of several instances in which claims filed under the rule have allegedly been abandoned by the Employees. One claim involved a broken rail; one involved a sun kink in a rail; and two involved sticking brakes. The record shows, however, that Carrier made payment for two calls involving a broken rail and, in addition, that the sun kink claim is pending before Public Law Board No. 465. This leaves, as the only instances of abandonment, the sticking brakes claims, which, according to the record, expired due to time limits. Obviously, these claims have no significance to the herein issue, because the very claim before us involves sticking brakes. Thus, the Carrier's evidence is not sufficient to show that Rule 2(c) should be deemed to cover unusual delay due to sticking brakes. As we stated in Award 10501 (Hall), "... The Board is required to take the Agreement as it is written. It cannot rewrite the Agreement by interpretations putting into it that which the parties left out."

In conclusion we note that we have carefully studied the Awards cited by the Carrier, but find them not apropos. For example, in Award 13731 (Mesigh), the contested action did not involve a train order; it involved a message to a PBX operator by a clerk who had observed an engine without headlights. In Awards 14009 (Dorsey), and 16482, 16483, and lb484 (Perelson), the conditions involved, such as engine failure, break-in-two, and a wreck, were found by this Board to be within the express provisions of the emergency definition.

In view of the foregoing, and on the whole record, we shall sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the pox-ties waived orol 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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1974.