Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27096
THIRD DIVISION Docket No. CL-26732
88-3-85-3-484

The Third Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

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-10030) that:

1. Carrier violated the Agreement between the parties, in particular Rule 48 (d), when, on August 14, 1984, it required an employe not covered by the Agreement (Train Crew) to receive and handle a radio communication which served the purpose of a train order at a location where no employe covered by the Agreement is employed, and then, failed and refused to compensate Clerk C. W. Swarens as required by the rule.

2. Carrier shall now be required to compensate Clerk C. W. Swarens three (3) hours' pay as required by Rule 48 (d) of the Agreement."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute, but chose not to intervene.

At the outset, the Board observes that the parties, in their submissions to this body, have raised a number of new matters which were not brought forward for consideration on the property. These issues and assertions are not properly before this Board and, therefore, they will not be considered in our deliberations.

The essential thrust of the dispute at hand is that a train dispatcher issued verbal instructions to a conductor concerning the condition of a roadside hot box and dragging equipment detector. The Organization asserts that these were communications that served the purpose of train orders and, therefore, they were violative of Rule 48(d) which reads:

> "When train orders, or communications which serve the purpose of train orders, are handled by persons other than covered by this Agreement and train dispatchers at locations where no employe covered by this Agreement is employed, other than under the exceptions set forth in paragraph (b) above, an employee covered by this agreement as designated by the General Chairman and/or his designee will be paid a call - three hours at the minimum operator pro rata rate applicable on the seniority district."

The initial declination of the claim by the Carrier on September 18, 1984, in part stated:

> "The information given to work Extra 4530 regarding the hot box and dragging equipment was an emergency situation, therefore would fall in line with Rule 48(d) and claim is not payable."

The Board notes that this statement by the Carrier at that point in time did not deny that the verbal communication was a train order. The Carrier, however, did assert that an emergency situation existed and, therefore, that the claim was not payable.

The Organization on September 25, 1984, asserted that: "Taking a hot box detector out of service is not an emergency condition." The Organization observed that Rule 48(d) does not mention such an event.

On November 16, 1984, the Carrier summarized the conference between parties which had been held on this matter on October 18 and 19, 1984. The Carrier stated as follows:

> "DECISION: It was discussed in conference and this claim was declined, in that under Item 16.5, Time Table # 20 states that 'hot box and dragging equipment detectors may be removed from service by train dispatcher and when so informed, crew will be relieved of requirements of special instructions for making walking inspections of their train.'"

Here, the Board notes, it is clearly evident that a second defense was brought forward with no mention made of any emergency.

On January 3, 1985, the Organization, in a detailed analysis, appealed to the Carrier's Director of Labor Relations. That official, on February 7, 1985, denied the claim. There, he mainly asserted that there was no Agreement requirement that "...such information be transmitted in train order form." He also contended that, even though such information may have been furnished train crews in train order form in the past, this did not mean that a practice had been established which had to be carried on...into infinity." Therefore, at this stage, the earlier emergency defense advanced by the Carrier had been abandoned and it asserted that the information furnished was "...strictly informative...."

Past decisional authority in this industry has held that the main criterion as to whether a communication in fact is a train order is whether that communication affected train movement. Clearly, each case must be evaluated on its own merits, which we have done here. In this respect, based upon what the parties submitted on the property, we find for the Organization.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1988.