Award No. 1220
Docket No. TE-1230

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHICAGO, ROCK ISLAND & PACIFIC
THE CHICAGO, ROCK ISLAND & GULF RYS.

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Rock Island & Pacific Railway that,

1. The Carrier violated the provisions of Mediation Agreement, A-560, of February 16, 1939, as agreed it shall be applied, when the Carrier required or permitted the train dispatcher at Dalhart, Texas, to transmit to, and required or permitted the conductor of extra west 5059 to take a train order at Chamberlin, Texas by telephone at 2:41 P. M. on May 11, 1939:

2. And, that, the Carrier by this violative act having established a telephone office at Chamberlin, Texas, under Telegraphers' Agreement, did also violate the terms of the Telegraphers' Agreement by requiring or permitting an employe not under said agreement to perform work covered by the agreement, thereby depriving the senior, extra, idle employe of a day's pay he would have earned had the violation not taken place and for whom such compensation is claimed."

EMPLOYE'S STATEMENT OF FACTS: "It is the contention of the General Committee that there is in existence an agreement between the Chicago, Rock Island and Pacific Railway Company and The Order of Railroad Telegraphers, dated January 1, 1928, covering wages and working conditions of employes set out in the Scope Rule thereof as:

"Telegraphers telephone operators (excepting switchboard operators) agents, agent-telegraphers, agent-telephoners, towermen, levermen, tower and train directors, block operators and staff men, employed on the railway, who are all to be known as 'Telegraphers' for brevity sake when referred to in the agreement, copies of which have been supplied to the Board. It is the further contention of the Committee that there is in existence an agreement between the Chicago, Rock Island and Pacific Railway Company, the Order of Railroad Telegraphers, The Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railroad Conductors, the Brotherhood of Railroad Trainmen and the American Train Dispatchers' Association, dated February 16, 1939, and effective April 1, 1939, known and identified as Mediation Agreement, which emanated from Mediation Case A-560 and appended thereto is what is designated as 'Memorandum of Understanding,' copies of which are furnished herewith.

a telegrapher, and that there were no penalties provided for in their contracts; that the only schedule which provided for a penalty when a train order was taken by an engineman, conductor or brakeman was the telegraphers' agreement and the telegraphers definitely stated that they desired to rely wholly upon their Article 1 (b) as above quoted. That is the only rule which provides for pay for work not performed and there is no provision for pay unless there is a telegrapher employed at the point where a train order is taken by an engineman or trainman, and no penalty is provided in that rule for the taking of a train order at a blind siding. Since the proposal submitted by Mediator Thompson added nothing to the rights conferred by Article 1 (b), the proposal was dropped.

"If the employes intended to provide for payment where a train order was secured at a blind siding by a conductor, engineman or brakeman, it would have been easy to have inserted a clause to that effect in the Mediation Agreement effective April 1, 1939.

"Attention is here called to Award 109 of the Third Division of the Adjustment Board where Referee Samuell stated:

> 'Had the framers of the contract intended that the handling of train orders or blocking of trains or work of any character connected with the regularly assigned work of the employe at stations where an employe as per this rule is employed, etc., should be the agreement between the parties, they could have easily expressed it.'

This same principle is enunciated in the Opinion of the Board in Award 901. The same principle would certainly apply in the instant case where no telegrapher is employed and if it was intended to redraft the rules to provide for further penalties we would have done so in the Mediation Agreement of April 1, 1939.

"In conclusion there is no penalty provided in the Mediation Agreement effective April 1, 1939, nor in the telegraphers' agreement of January 1, 1928, and none should be applied as to do so would, in fact, be writing a new rule.

"There is no provision in the telegraphers' agreement to the effect that a new office is opened when a conductor spends a few minutes' time taking a train order and it is absurd to say the taking of a train order by a conductor at a blind siding created a new telegraph office and established a position of a telegrapher. Such a contention is actually denied in Article 1 (b) of the telegraphers' agreement of January 1, 1928, herein quoted, as that article definitely provides for the payment of a call at a station where a telegrapher is employed but not located, and it, therefore, does not create a new office or a new position, but gives a payment of a call to a telegrapher who is employed at that point. This principle is applied even though a train order is taken by a conductor over the telephone at the signal at the end of the siding at that station, which is usually several hundred feet from the station itself. No contention has ever been raised that the handling of a train order at the signal rather than at the station creates a new telegraph office at the signal or switch protecting the sidings at that station. Payment of a call in such cases has always been made to the telegrapher employed at the station.

"In the instant case there was no telegraph or telephone office in existence and no operator employed or available at Chamberlin, Texas, therefore, there was no violation of the agreement and the claim should be denied."

OPINION OF BOARD: This case grows out of action of the carrier in sending train order No. 54 direct to conductor extra 5059 at Chamberlin, Texas, a point where no telegrapher or telephoner under the Telegraphers' Agreement is located, on May 11, 1939.

Claim is made that the carrier by this violative act having established a telephone office at Chamberlin, Texas, under Telegraphers' Agreement, did also violate the terms of the Telegraphers' Agreement by requiring or per-

mitting an employe not under said agreement to perform work covered by the agreement, thereby depriving the senior, extra, idle employe of a day's pay he would have earned had the violation not taken place and for whom such compensation is claimed. The employes cite the existing schedule agreement and Mediation Agreement A-560 in support of their claim.

The Carrier while admitting that such handling of the train order in question did not come under the emergency provision of Mediation Agreement A-560, and therefore, was contrary to provisions of said agreement, contend that there is no penalty provided in this Mediation Agreement, nor in the Telegraphers' Agreement.

Under the scope and other rules of the Telegraphers' Agreement it is definitely established that work in connection with the rececipt and delivery of train orders belongs to employes coming within the jurisdiction of the Telegraphers' Agreement, and this is further evidenced by the supplemental agreement entered into between the parties, effective as of April 1, 1939, known as the Mediation Agreement A-560.

Since the carrier admits that at the place and time mentioned in the claim, it violated the provisions of the current agreement as amended by Mediation Agreement A-560, it follows that senior, extra, idle employe was entitled to perform that work. By the terms of the agreement, the senior, extra, idle employe has acquired seniority rights; these rights entitle him to perform the work in question on that day. He should be compensated for his availability the same as though he had performed the work; it is not a question of a penalty but merely the carrying out of the contract. He is, therefore, entitled to a day's pay under Article 4 (a).

The carrier endeavors to place the blame upon the conductor and the dispatcher whom they state took the action without request or approval of the carrier's Management. Of course, the carrier's business can only be performed by its agents and servants, and as they were performing work in furtherance of their master's business the master is liable.

Moreover Mediation Agreement A-560 says that train and engine service employes will not be "required or permitted to take train orders." The carrier is responsible for its execution of this agreement. The carrier's contention on this point is unsound.

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 employe involved in this dispute are respectively carrier and employe 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

There was a violation of the existing agreement and the senior, extra idle employe should be paid a day's pay.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois this 31st day of October, 1940.