Award No. 1223
Docket No. TE-1233

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO.

(Frank O. Lowden, James E. Gorman, Joseph B. Fleming, Trustees)

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers that,

1. The Carrier violated the provisions of the 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 1715 to take a train order at Exum, Texas, by telephone at 12:23 P. M. on April 15, 1939;

2. And, that the Carrier by this violative act having established a telephone office at Exum, 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."

EMPLOYES' STATEMENT OF FACTS: "It is the contention of the General Committee that the Chicago, Rock Island and Pacific-Chicago, Rock Island and Gulf Railway Companies and the Order of Railroad Telegraphers are parties to an agreement covering wages and working conditions of the employes named in the Scope rule thereof, which is dated January 1, 1928, and that, the Chicago, Rock Island and Pacific-Chicago, Rock Island and Gulf Railway Companies, on the one side, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railroad Conductors, the Brotherhood of Railroad Trainmen, the American Train Dispatchers' Association and the Order of Railroad Telegraphers, on the other side, are parties to an agreement covering the taking of train orders and the blocking of trains by train service employes and the transmission of train orders and blocking of train direct with train service employes by train dispatchers, which is dated February 16, 1939, and effective April 1, 1939, copies of which have been furnished to the Board.

"And we further contend that on April 15, 1939, Conductor Huff in charge of extra train 1715 West used the emergency dispatchers telephone at Exum, Texas, a point where no telegrapher is located, and was permitted or required, and did, take train order No. 47 which read:

'Extra 2631 East meet Extra 1715 West at Dalhart.'

"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 that 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 Exum, Texas, therefore, there was no violation of the agreement, and, in addition, the claim was not filed in accordance with Article 6 (h) of the telegraphers' current agreement of January 1, 1928. The claim should be denied."

OPINION OF BOARD: The principles involved in this claim in respect to the application of Mediation Agreement A-560 and the governing agreement of Rules and Rates of Pay are identical with the principles in Docket No. TE-1230, Award No. 1220. For the same reason assigned in that case, the Board holds that the Agreement was violated at the place and time stated in this claim.

But as a secondary defense the Carrier contends that the claim should be denied under Article 6 (h) which is as follows:

> "(h). Other Grievances. Other grievances will be taken up with the proper officials within thirty days; otherwise, redress in such cases will be waived."

The date of the violation of the Agreement was April 15, 1939 at Exum, Texas, and the complaint was made by the Petitioner on June 5, 1939.

Thus more than thirty days elapsed between the date of the violation of the Agreement and date the claim was made. This Division has repeatedly held that claims not presented within the time stated in similar rules will be barred unless the violation of the rules is a continuing one. The Board holds that there is nothing in the record to show a continuing violation of the Agreement. Occasional violations of an agreement are quite different from continuing violations; therefore, the claim for reparation should be denied under Article 6 (h) of the Agreement.

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 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 facts of record disclose a violation of the Agreement, but that the recovery of reparation is barred by Article 6 (h) of the Agreement.

AWARD

Claim as to violation sustained; claim for reparation denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

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