Award No. 1400
Docket No. TE-1449

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Royal A. Stone, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Louisville & Nashville Railroad, that the Carrier is violating the terms of the telegraphers' agreement by permitting and/or requiring employes not under said agreement at No. 12 north end DeCoursey Yard, to handle train orders pertaining to or affecting train movements and to block trains by the use of the telephone, and that so long as the Carrier elects to have work of this character performed at this point it shall be performed by employes under the telegraphers' agreement."

EMPLOYES' STATEMENT OF FACTS: "An agreement bearing date October 1, 1927 as to rules and working conditions, and August 1, 1937 as to rates of pay, is in effect between the parties to this dispute.

"At a telephone office designated as No. 12, located at the north end of DeCoursey Yard, within the Cincinnati Terminals district of the Cincinnati Division, employes not under the telegraphers' agreement are permitted and/or required by the Carrier to handle orders and instructions pertaining to and affecting train movements between No. 12 and the Grant Court telephone office over the double main tracks and to block trains between No. 12 and Cabin No. 22 at the south end of DeCoursey Yard on the southward main track, all by the use of the telephone, and are required to operate a block signal on the southward main track and to keep a daily record of the passing of all northward and southward scheduled and extra trains, light engines and cuts on the double main tracks for use in connection with this work."

POSITION OF EMPLOYES: "The scope Rule 1 of the prevailing telegraphers' agreement provides:

> 'The following rules and rates of pay shall apply to all wire chiefs, telegraphers, telephoners (except switchboard operators) agent-telegraphers, agent-telephoners, towermen, levermen, tower and train directors, block operators, operators of mechanical telegraph machines, staffmen, and such freight and ticket agents as are listed herein.'

"Rule 16 of said agreement provides:

> 'No employe other than those covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call, and so advised by the Chief Train Dispatcher.'

"Rule 1 covers all positions of telephoner, the work of which is generally recognized to include the reception and transmission of train orders, messages

from Station 12, use the main track under yard Rules and on authority of the yardmaster or the switchtender who acts for him.

"The foregoing is the situation complained of by the telegraphers in 1928 and again in 1931, a situation that has existed, unchanged, since the year 1917. However, on October 28, 1939, after 22 years, they injected a new feature into the question by claiming not only that:

> 'Switchtenders operate a crossing gate to hold trains in connection with reverse movements on the southward main track.' (The original complaint.)

but they now claim:

> 'and who handle train orders in moving trains against the current of traffic on the double track main line between their office and Grant Court office.'

"The switchtenders do not handle train orders, have never been examined on the rules pertaining to train orders and have no occasion to use them. In the event the yardmaster finds it necessary to move a switch engine or train against the current of traffic, he arranges as he sees fit, using the operators at Grant Court, switchtenders or switching crews as may be practicable. All employes in the yard are subject to his instructions and are employed for the purpose of implementing his actions and supervision, and it follows that only by the use of the intra-terminal telephone is he able to do so. All yard movements are made on his instructions by the use of the telephone or orally and to term such practices as 'train orders' in the sense used in the telegraphers' agreement is simply an absurdity. To claim that switchtenders, switchmen or yardmen cannot control movements within a yard, and that operators must do so, would deny the very purpose of yard employes. The work of protecting switching movements within yard limits, whether that be necessary, due to movements made against the current of traffic, rear-end protection or any other movement, is as much the work of yardmen as handling switches, coupling or uncoupling cars or giving signals. Such work is done by yardmen, except where there are interlocking towers or operators stationed for the purpose of handling train orders or messages of record, in which event they may also be used for this purpose.

"The Carrier asks that this claim be dismissed not only because of lack of jurisdiction of the Board, but if need be, because the claim is wholly without merit."

OPINION OF BOARD: This is not a case, as in Award 2736, First Division, of "abolishing established positions, or . . . removing work from positions or employes covered by one agreement and assigning such work to positions or employes covered by another agreement" without negotiation.

All of the involved operations are ordinary yard work—all such as are customarily and necessarily done by switchmen and trainmen as an incidental and essential part of their own work. The manually operated gate at No. 12 is not a device of the use of which telegraphers may properly claim a monopoly. It is not in its ordinary use a crossing gate. It is rather and only a stop signal. A flagman stationed at this same point to protect the track in question would serve precisely the same purpose as the gate.

On the question of jurisdiction raised by the carrier, the Referee respectfully submits the following: Because of the prospective operation of the Railway Labor Act, jurisdiction, the right to hear and decide, seems plain. But the controlling issue is really one between telegraphers on the one hand, and switchmen on the other. The Division is asked to decide which of the two crafts is entitled as matter of contract right to do the work. In a controversy which might result in a denial to them of a valuable right, the switchmen have not been heard; they have been given no opportunity to present their side of the case.

That is not right morally or legally. It offends the basic principle and thwarts a main objective of due process of law.

So, as matter of propriety rather than jurisdiction, as matter of just plain fairness between craft and craft, to say nothing of due process, it is respectfully submitted that, in such a case as this, no such claim should be sustained without granting a hearing to the craft which will lose as well as the one which will gain by the wanted decision.

The foregoing is subject to this: Such a question, if it is to be made at all, should be raised as soon as it appears that an additional party or craft should be joined in the interest of fair play and due process. That will ordinarily be when the claim is first presented or not long thereafter. If not seasonably made, the argument that it has been waived may defy convincing answer. Ordinarily, if not always, the point of non-joinder of an omitted but interested craft should be made on the property if it is to be urged at all.

If there is an objection under the law and because of the organization of the several Divisions of the Adjustment Board to the bringing in of omitted, additional parties, vitally interested in the issue and its result, it is one that should be removed. Condemning, that is, pronouncing adverse judgment against anyone without hearing him, and without even affording him by fair notice an opportunity to be heard, is too plain a violation of fundamental and long established concepts of our democracy and its law to be debatable.

Surely, the wisdom and resourcefulness of the experienced gentlemen of the several Divisions of the Adjustment Board are equal to the task of avoiding such violation. As a practice, it is one which simply cannot stand the test of dispassionate and enlightened American examination and judgment.

Furthermore, in the field of collective bargaining, where the law requires that the agreements not only be made but also **maintained** (Railway Labor Act, Sec. 2), nothing is more important than to assure workable application for decisions as to the meaning of a contract affecting so many. Putting the interest of the carrier altogether and momentarily out of consideration, it is certainly essential to avoid decisions which will award any given work to two crafts simultaneously, where in the very nature of the thing it can be done by one only. So incongruous and unworkable a result, one so calculated to make the operation of collective bargaining difficult, and to encourage any who may want to see it made difficult, is not desirable to say the least.

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 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 for the reasons stated, no violation of the Agreement has been found.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of April, 1941.