

Award No. 1422
Docket No. TE-1492

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

George E. Bushnell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

KANSAS, OKLAHOMA & GULF RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on Kansas, Oklahoma & Gulf Railway that, the handling of train orders is work covered by the Telegraphers' Agreement and under the terms of said Agreement is work which shall be performed by employes under the Agreement and/or train dispatchers; that the Carrier in requiring the telegrapher at the Baxter Springs station to pin train orders and clearance cards received by him to the train register on August 13, 15, 16, 17, 18, 19, 20, 21, and 22, 1939, to be picked up by the conductor and engineman of the train addressed on the following morning, violated the said Agreement; and that the telegrapher at Baxter Springs be paid a call for the morning of each day, August 14, 16, 17, 18, 19, 20, 21, 22 and 23, 1939, the said train orders were thus delivered to the conductor and engineman who are not under the Telegraphers' Agreement."

EMPLOYES' STATEMENT OF FACTS: "An agreement bearing date of May 1, 1929, as to rates of pay and working conditions is in effect between the parties to this dispute.

"The Carrier maintains a telegrapher position at Baxter Springs under the Telegraphers' Agreement with assigned hours 6:00 A. M. to 3:00 P. M. daily, including Sundays, with an hour allowed for meals. Baxter Springs is a train order office and the assigned telegrapher handles train orders.

"On August 13, 15, 16, 17, 18, 19, 20, 21 and 22, 1939, before going off duty, the telegrapher at Baxter Springs received a train order and clearance card by telephone from the dispatcher for delivery to the train addressed on the following morning between the hours 4:30 A. M. and 5:00 A. M., and was instructed to pin such train orders and clearance cards to the train register in the agent's office to be picked up by the conductor and engineman of the train addressed, which instructions he observed."

POSITION OF EMPLOYES: "The following articles of the prevailing Telegraphers' Agreement, which we invoke in this case, provide:

'Article I

Scope

"This schedule will govern the employment and compensation of telegraphers, telephone operators (except switchboard operators), agent-telegraphers, agent-telephoners, towermen and levermen, tower and train directors, block operators, staffmen and such agents as may be listed herein, and will supersede all previous schedules and rulings thereon.

"Award 934 of the Third Division overruled four prior awards, using the following language:

'From what has been said it follows that Awards 825, 829, 830 and 843 must be overruled and Award 792 reaffirmed.'

"Award 3321 of the First Division of the National Railroad Adjustment Board in its findings said:

'We hold that Rule 803 in the respect mentioned to be void and of no effect and consequently that the dismissal of the employe was wrong. To the extent that Awards Nos. 2581 and 2582 are inconsistent herewith they are hereby over-ruled.'

"Award 3411 of the First Division of the National Railroad Adjustment Board said in its findings:

'Award No. 3056 of this Division is inconsistent with the previous construction of the rule and the conclusion reached herein that such previous construction should be adhered to and it accordingly must be overruled. No violation of the rule is shown.'

"The carrier asks that the case now before the Board be decided in accordance with the facts and a proper interpretation of the agreement, and that the claim be denied. As hereinbefore pointed out, the facts and conditions in this case are not the same as in the Santa Fe cases, and there is no warrant for considering the Santa Fe awards as a precedent.

"Following is a list of the documents included in the carrier's exhibits:

CARRIER'S EXHIBITS

"Carrier's Exhibit A—Copy of Train Order No. 47, issued at Baxter Springs 7:07 P. M. August 18, 1939, copied by Operator Thurman.

"Copy of Clearance Card, Form 101.

"Copy of operator's overtime slip, Form 525, for August 18, 1939, showing Operator Thurman called and on duty 5:10 P. M. to 7:10 P. M. August 18, 1939. This overtime was allowed.

"Copy of Operator Thurman's overtime slip, Form 525, dated August 19, 1939, claiming a 2 hour call for Order No. 47 of August 18, 1939. This overtime was not allowed.

"Copy of Train Order No. 54, issued at Baxter Springs 8:21 P. M. August 19, 1939, copied by Operator Thurman.

"Copy of Clearance Card, Form 101.

"Copy of operator's overtime slip, Form 525, for August 19, 1939, showing Operator Thurman called and on duty 6:10 P. M. to 8:25 P. M. August 19, 1939. This overtime was allowed.

"Copy of Operator Thurman's overtime slip, Form 525, dated August 20, 1939, claiming a 2 hour call for Order No. 54 of August 19, 1939. This overtime was not allowed.

"Carrier's Exhibit B—Book of Rules of the Transportation Department.

"Since this is an ex parte case, this submission has been prepared without seeing the employes' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission."

OPINION OF BOARD: At Baxter Springs this carrier maintains a telegraph position which is included in the Telegraphers' Agreement with as-

signed hours 6:00 A. M. to 3:00 P. M., daily, including Sundays with an hour allowed for meals. Baxter Springs is a train order office and the assigned telegrapher handles train orders, and regularly makes delivery of such orders personally to the trains addressed.

On August 13, 15, 16, 17, 18, 19, 20, 21, and 22, 1939, before going off duty, the telegrapher at Baxter Springs received a train order and clearance card by telephone from the dispatcher for delivery to the train addressed on the following morning between the hours 4:30 A. M. and 5:00 A. M., and was instructed to pin such train orders and clearance cards to the train register in the agent's office to be picked up by the conductor and engineman of the train addressed, which instructions he observed.

It is the position of the Organization that:

"Article XVI of the Telegraphers' Agreement relating to the 'Handling of Train Orders,' provides by mutual agreement of the parties, that only employees under the Agreement, 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. Only in an emergency is an employee not under the agreement permitted to handle a train order, and when so done the telegrapher must be paid for a call.

"The words 'handle train orders' as used in this article means the receiving of the train order and its delivery to the person or persons addressed personally by the telegraph operator. This is our contention and is amply supported by Awards 86, 1096, 1166, and 1169 of this Board."

and that:

"The telegraph operator at Baxter Springs is entitled to pay for a call on each day specified in our claim on which he was denied this employment."

Carrier contends:

"There is no provision in the telegraphers' agreement which can possibly be construed as a requirement that an operator be called if he is not needed to perform service. It is no more within the scope of the National Railroad Adjustment Board's authority to rule that the carrier must call an operator when there is no work to be done, than it would be to order the carrier to employ additional persons not needed."

and:

"Since the claimant himself performed all of the telegraph service in connection with the handling of this train order, he is not entitled to claim additional payment therefor."

Articles I and XVI invoked by the employees provide:

"Article I

Scope

"This schedule will govern the employment and compensation of telegraphers, telephone operators (except switchboard operators), agent-telegraphers, agent-telephoners, towermen and levermen, tower and train directors, block operators, staffmen and such agents as may be listed herein, and will supersede all previous schedules and rulings thereon.

"The word 'employee' as used in these rules, will apply to all the foregoing classes."

"Article XVI
Handling Train Orders

"No employe other than 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."

In the instant case it is shown that while the carrier formerly employed additional telegraphers at Baxter Springs that for some time past the services of such additional telegraphers have been dispensed with and that where such additional service has been required the carrier has been calling the remaining telegrapher at this station after his regular assigned tour of duty and compensating him in accord with the overtime and call rules of the prevailing agreement.

While carrier now states that its action in this case was prompted by a desire to avoid a possible violation of the Hours of Service Act, the record does not indicate any reasonable possibility of a violation of such Act had the telegrapher been called to perform this service. However, the carrier cannot escape its obligation to properly compensate its employes under the terms of the prevailing Telegraphers' Agreement because of the Hours of Service Act.

Article XVI provides that:

"No employe other than 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."

It is evident from the record in this case that the telegrapher at Baxter Springs was available to have delivered the train orders and clearance cards to the crews of the train in question in the regular manner between the hours of 4:30 A. M. and 5:00 A. M., and, therefore, it would appear that the action complained of was made effective by the carrier for the purpose of avoiding the payment of overtime to the telegraphers.

The provisions of Article XVI are clear and as stated by this Division in Award 709:

"It would appear that under a fair and reasonable interpretation of this rule, the handling of a train order should include not only the physical process of passing it from hand to hand in the performance of its function but also the work involved in its preparation."

The carrier in the instant case saw fit to limit the service of a telegrapher at Baxter Springs for one trick eight hours of the twenty-four. To limit it so was within the control of the carrier, but the curtailed service made it incumbent on the carrier either to engage in nothing at that station calling for the services of a telegrapher in relation to train orders during the off period, or to arrange for the required service by "calling" its telegrapher as provided in the rule. It is not questioned that had the train crew in charge of the train involved taken it out when telegrapher was on duty orders for its operation would have come through that employe at an appropriate time and been handed personally by him to the crew. Rule 211 of the Carrier's Operating Rules requires that when a train order shall be "complete," the telegrapher shall "personally deliver a copy to each person addressed." Of course, as the carrier maintains, operating rules are not a part of the working agreement obtaining between the parties, but in the matter of the interpretation of Article 16 of the Agreement, we think it legitimate to have recourse to Rule 211. It is reasonable to believe that

when Article 16 was entered into, the parties thereto contemplated that the employes' right "to handle train orders" meant that after the manner stated in Rule 211 they were to make delivery of such orders to the conductor and engineer personally, and that when a telegrapher was available at a telegraph office, as here, he would perform the service in the manner indicated by that rule, in usual course if on duty and pursuant to "call" if off duty.

We have said that "under a fair and reasonable interpretation" of Article XVI there would be involved the "physical process of passing" train orders "from hand to hand." See Award 709.

The carrier contended in Award 86 that the expression "handling train orders" only meant to "copy train orders" and that since a telegrapher had copied the train orders involved there, the carrier had "met all of the requirements set forth in the rule"; but we disregarded that argument as not sound, saying:

"The rule is quite clear and requires no unusual interpretation. Doubtlessly it was made for the purpose of preventing encroachments upon that work to which the employes in that particular craft were entitled."

See also Award No. 1096, which is similar in facts and like of determination with the awards cited. On the whole we are convinced that it was the intention of the parties to make Article XVI of the agreement broad in its application, and to embrace therein recognition of the right of telegraphers employed in the railway service to enjoy whatever of employment that service offered; and that in appraising the scope thereof there was not dearth of knowledge of the carrier's operating rule No. 211. It is not consistent, we think, nor fair, that the carrier should require the observance of its general rule 211 at stations where it has full complement of telegraphic force and where necessarily, no additional compensation burden could attach and then undertake to ignore that practice at stations where it offers the minimum of regular employment and thus nullify the provision of Rule XVI of the agreement for "calls" in instances of need for additional train order service.

Article XVI is clear and requires no unusual interpretation. It was made for the purpose of preventing encroachments upon that work to which the employes in that particular craft were entitled.

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 the action of the carrier in the instant case constitutes a violation of the prevailing agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of May, 1941.

Dissent to Award No. 1422, Docket No. TE-1492

The error of this Award and the faulty and impractical expressions in the Opinion of Board render it necessary to refer thereto by dissenting opinion.

After an introductory quotation of the position of the Organization, including the two rules upon which it relied, the Opinion expresses suspicion of the Carrier's effort to avoid possible violation of the Hours of Service Act in these words:

"* * * the record does not indicate any reasonable possibility of a violation of such Act * * *."

and assigns as the Carrier's motive this expression:

"* * * it would appear that the action complained of was made effective by the carrier for the purpose of avoiding the payment of overtime to the telegraphers."

The first quotation above is a gratuitous expression evidently not intended to have value as an interpretation of the Agreement, but simply is a comment on the motive of the responsible party, the Carrier, in the exercise of its managerial duties. As such it may be left to those who study this case to determine from the record whether unreasonable action is found in the Chief Dispatcher's performance of his duties so as to avoid violation of the Federal Hours of Service Act or in the Opinion's criticism of it.

The second quotation above, assigning further as a motive the Carrier's "purpose of avoiding the payment of overtime," does not alone misjudge the practical situation there faced but also implies that provisions for overtime payments were designed to encourage working of employes overtime. From the period in 1917 when for railroad workers the 8-hour day was instituted, the whole theory of those who spoke for labor was that extra pay for overtime was the logical way to force the standard day of reasonable hours with no work thereafter. Fair hours of rest and recreation were assumed to be the laborees' right. This theory was then embraced and has since prevailed. Throughout the successive negotiations resulting in the agreements which have thereafter succeeded, this well-known and established basis for overtime provisions of these labor agreements has been recognized and understood. The purpose of overtime payments is the discouragement, not the encouragement, of overtime work and pay.

Upon the erratic presumption of a basic purpose of overtime rules, here in this case a violation and subject for penalty is found in this circumstance: A telegrapher completed his regular hours of duty; left a train order lying on the register; there it lay undisturbed and unhandled until the train conductor picked it up in the course of his regular assignment. Both the telegrapher and the conductor were accorded the hours of rest due them; neither was asked to perform work in this matter outside of their regular hours of duty. The simple inertia of material lying on a register book was the only condition remaining to which the declared violation could apply. It is incomprehensible. In reaching such decision both knowledge and reason vanish.

In a paragraph following reference to an impractical dictum from Award 709, the Opinion declares:

"* * * the curtailed service (evidently referring to the normal 8-hour assignment of this telegrapher) made it incumbent on the Carrier either to engage in nothing at that station calling for the services of a telegrapher * * * or to arrange for the required service by 'calling' its telegrapher as provided in the rule. * * *"

This declaration is supported by assertion to the effect that if a telegrapher had been on duty when the train started out (4:30 or 5:00 A. M.) orders would have come through that telegrapher at an appropriate time and would have been handed personally by him to the crew. This paragraph of the Opinion continues by arguing the effect of Rule 211 of the Operating Instructions as giving meaning to Article XVI of the contract between the parties as requiring that a telegrapher hand personally any train order to be delivered to the conductor and engineer.

Thus the unsound deduction from Award 709 of a requirement that the Carrier engage in nothing at that station in relation to train orders is combined with an article from the Operating Instructions to give effect to a contract rule, in the face of another article (Rule 217) from the Operating Instructions which provided that delivery to the conductor and engineer of the train addressed was not required to be personal. Such a combination of extraneous matter, wholly outside of the negotiated contract, proffered as interpretation of the contract is indicative of the strained reasoning representative of the infirmity of this Award.

Reference is now made to dissenting opinion in former Award 1166, from which Award it is apparent that the paragraph above criticized and the succeeding paragraphs of the Opinion to its conclusion (with the exception of the last) have been copied. Reference is made to the dissent in that Award for expression in addition to the above as our complete dissent to the Award in this case.

S/ R. F. RAY
S/ A. H. JONES
S/ C. P. DUGAN
S/ R. H. ALLISON
S/ C. C. COOK