Award No. 1680
Docket No. TE-1535

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific Company, Pacific Lines, that Agent-Telegrapher C. W. Collins be paid one call for each of the following dates in September, 1935 on account of train orders copied by Agent-Telegrapher Collins at Weed, Sacramento Division and placed by him in the waybill box at that point for the crew of train No. 640 to pick up the following morning prior to the assigned hours of Agent-Telegrapher Collins. The dates in September are—4th, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 17th, 18th, 19th, 21st, 22nd, 24th, 25th, 26th, 27th, and 28th, 1935.

EMPLOYES' STATEMENT OF FACTS: Agent-Telegrapher C. W. Collins, hours of assignment 8:00 A. M. to 5:00 P. M., is employed at Weed, California, on the Carrier's Sacramento Division. He was required by the Carrier to copy train orders and place them in a waybill box on the dates named in the Statement of Claim, for crew of train No. 640 to pick up the following morning prior to the assigned hours of Agent-Telegrapher Collins.

Claim was presented in behalf of Agent-Telegrapher Collins (see Employes' EXHIBIT "A"), for 21 special calls on the dates in question under provisions of Rule 29 of Telegraphers' current Agreement. Claim was declined by the Carrier (see Employes' EXHIBIT "B").

There is in existence an agreement between the Carrier and the Organization, parties to this dispute, bearing an effective date as to rules, September 1st, 1927 and as to rates of pay, May 1st, 1927, revised as of July 1st, 1930 by agreement and revised by Mediation as of August 1st, 1937.

POSITION OF EMPLOYES: EXHIBITS "A" to "G" inclusive are attached to and made a part of this submission.

Rule 29 of Telegraphers' current Agreement, reads as follows:

"RULE 29

"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 emergency, in which case the telegrapher will be paid for the call."

It is the position of the Employes that Rule 29 was violated in the instant case inasmuch as train orders were placed in waybill box by Telegrapher

and the purpose that is sought to be achieved by its use. The fact that it appears in an agreement between an organization, the name and distinguishing characteristics of which are a communication concept, it follows that the service of communicating train orders by telegraph or telephone is the sole objective sought to be achieved.

CONCLUSION: Carrier avers that it has been conclusively shown that the alleged claim is not valid under any rule or provision of the Telegraphers' Agreement and that the alleged claim should be either dismissed or denied, and moves that the Board make an award accordingly.

OPINION OF BOARD: The question is whether, when the carrier requires a telegrapher to place a train order, which he has copied, in a waybill box for the designated train crew to pick up while he is not on duty, Rule 29 has been violated. Rule 29, a standard rule handed down by Decision 757 of the U. S. Railroad Labor Board, effective March 16, 1922, is as follows:

> "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 emergency in which case the telegrapher will be paid for the call."

The identical question was presented, and decided in favor of the employes, in Award 1166 by this Division with Referee Hilliard participating. At the same time, in Awards 1169 and 1170, with the same Referee participating, it was decided that the Rule was similarly violated when a telegrapher was required to leave a train order on the train register book to be picked up by the conductor while the telegrapher was not on duty. There can be no distinction in principle between Awards 1169 and 1170, and Award 1166; the difference between leaving a train order on the register book and leaving it in a waybill box is one of detail only. The same situation as in Awards 1169 and 1170, involving the same rule, was presented and disposed of in the same way, with Referee Bushnell participating, in Award 1422.

We are now asked by the carrier to overrule these awards.

The carrier's principal contentions may be summarized as follows:

1. The word "handle" in the rule was intended to refer only to the act of transmitting and copying train orders, and not to their delivery.

2. The argument of the employes before the U. S. Railroad Labor Board, in the proceedings which led to the promulgation of the rule, showed that the employes were concerned with stopping the assignment to other classes of employes of the work of copying train orders over the telephone, and that the question of the manner of dealing with such orders after they had been copied, was not thought of or in issue.

3. In Decision T-469 handed down January 16, 1920 by Board of Adjustment No. 3, U. S. Railroad Administration, the Board, composed equally of carrier and employe representatives, denied a claim by a telegrapher under a similar rule for a call on account of being required to leave a train order on the register book for the conductor to pick up while the telegrapher was off duty during his lunch hour. This decision, jointly arrived at, is squarely in point here.

4. The challenged practice is of long standing, antedating the promulgation of the rule here in question; and the interpretation contended for by the employes was first advanced in recent years following Awards 86, 709 and 1096, on which the Awards referred to above relied.

5. The principle laid down in Awards 86, 709 and 1096 (and still later in Awards 1167, 1168, and 1456) was erroneous, for the reasons stated in

the series of dissenting opinions; in any event, the facts can be distinguished, because in these cases employes not covered by the telegraphers' agreement handled the train orders between the time of their receipt by the particular telegrapher and their receipt by the train crew to which they were directed, whereas here there has been no such intervention by non-telegraphers.

An examination of the Dockets in Award 1166 (the waybill box case) and in Awards 1169 and 1170 (leaving on train registers) shows that each of these five contentions was pressed upon the referee then sitting with the Division, notwithstanding which the employes' claims were sustained. Similar contentions were advanced in the course of the proceedings leading to Award 1422 (train register case), in addition to which the referee had before him the dissenting opinion in Award 1166 and a critical analysis of the prevailing opinion, the principle of which he was urged to overrule as we are now urged to overrule it. Again the employes' claim was sustained.

Under these circumstances, and the facts here being indistinguishable in their essentials from those in Awards 1166, 1169, 1170, and 1422, the question of interpretation involved in this case must be deemed to have been settled in favor of the employes. A memorandum by the referee relating to the question of overruling prior Awards, is appended hereto.

The claim in this case is for payment of a call on each of a number of dates in September, 1935. In view of the non-prosecution of the claim for over three years after it was first discussed in conference, and the long-established practice, we conclude, in the language of Award 1096 involving the same parties, that "the equities of the situation will be fully met if, subsequent to the date of this award, the interpretation herein placed upon Rule 29 will be controlling, without reparation for violations prior to that date." The interpretation placed upon Rule 29 in that Award forbade the delivery of train orders by one train crew to another, in line with Award 86, et al.; the question now before us had not then arisen, and the carrier cannot be charged with fault in not foreseeing that the question, when it did arise, would be decided the way it was decided.

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 Rule 29 is applicable to the practice here involved, but that the evidence of record does not justify an award of reparation.

AWARD

Claim as to applicability of Rule 29 sustained, and claim for reparation denied, both in conformity with the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of January, 1942.

MEMORANDUM TO ACCOMPANY AWARD 1680.

Since the facts in this case were indistinguishable, in essence, from those in Awards 1166, 1169, 1170 and 1422, the question was squarely posed

whether those Awards should be regarded as binding and conclusive, or whether they should be re-examined on the merits and, if deemed unsound, be reversed. After finding that every contention against the claim which was presented to me had been urged upon the referees who had sat with the Division in the above Awards, so that I was being asked not to consider new facts or arguments but simply to substitute my own personal judgment for that of the other referees, it seemed to me that both my official duty and the past practice of the Board required me to bow to the precedents, and that this was sufficiently clear to need no extended discussion in the opinion.

At the same time, in the course of considering the whole case, I arrived at certain conclusions regarding the proper role of precedent in a Board of this sort; and these conclusions I thought it worth while, for purposes of future discussion, to set forth, but in memorandum form only, since the pros and cons were not discussed by the parties and the conclusions themselves were not essential to a disposition of the case.

1. It may sometimes happen that, through inadvertence, an Award may be handed down which upon subsequent study turns out to be clearly contrary to earlier Awards, though at the time this was not perceived. It would seem proper in such circumstances to overrule the conflicting Award.

2. But if the inadvertently conflicting Award in the example just put is followed without question by other Awards before the fact of conflict is discovered, two opposing lines of authority will then have been created, and it will be necessary to follow one and reject the other. Which to follow and which to reject will depend partly upon the relative extent of the two lines and partly upon their intrinsic merits, in degrees varying with the circumstances.

3. It may sometimes happen that through an incomplete job of presentation, an Award may be handed down which later may be regarded as clearly erroneous in the light of material facts or supporting arguments of a decisive nature which should have been, but were not, presented for consideration in the prior Award. It would seem proper in such circumstances to overrule the prior Award.

4. But if the erroneous Award in the example just given is followed without question by other Awards before the discovery is made that material facts or supporting arguments of a decisive nature should have been, and were not, presented for consideration in these Awards, the question of whether or not to overrule these Awards after the discovery has been made cannot be answered by any formula. The decision will involve balancing the need for stability and predictability against the need for correcting error where error has demonstratably been found; it will turn upon such questions as the number and age of the Awards, the importance and extent of adoption of the rule which is in issue, the seriousness of the error, and the significance of the overlooked material which should have gone into the making of the Award.

5. If a case is presented involving the same controlling facts and the same rule as were involved in a previous Award, and the same data and material arguments are presented as were presented in the previous case, the Award in the previous case should be followed (unless it is clearly contrary to earlier Awards, in which case it will fall under example No. 1 above). For in such a situation there is nothing new which has not been passed upon and taken into account before, and the only question is whether the personal judgment of the later referee (assuming the cases to have been decided with referees participating) should be substituted for that of the former referee.

In Docket TE-1535 the carrier cited the example of the Supreme Court of the United States reversing some of its own precedents, but the analogy to a court is not exact. When a court overrules one of its own decisions it does two things: first, it disposes of the particular litigation in a new way; secondly, it says in effect that for the future it will dispose of similar cases

in the new way and not in the old. It can say this with assurance, and its statement can be relied upon by people concerned as a prognosis of the future for at least some time to come, because the composition of courts normally changes slowly and no court is likely to **reverse a reversal** within the life-time of the sitting judges.

But in the case of this Board the composition of the referees is not stable; one goes and another comes. If referee A reverses referee B upon the same set of facts, the same rule, and the same presented data, he is simply substituting his own personal judgment for that of B. If he does so, the identical question, arising between other parties, will inevitably be presented to referee C, who will then have to choose between the opinions of B and A. His choice will not determine the matter, for the question will again come up before D, and thus the matter may never end.

It might, however, be argued that before long, in such a series of cases, one view would soon emerge as dominant, winning through by virtue of its superior logic and persuasiveness and that the initial uncertainty occasioned by the reversal or reversals would be worth the price in the ultimate triumph of justice. But in view of the closeness of most of the cases presented to the referees, no such final consummation could ever be counted on; and the probable consequences of establishing the principle that one referee should feel free to reverse another in matters of personal judgment would, it seems to me, be as follows:

(a) The tendency to deadlock cases, even after a particular question had been decided, would be stimulated, which would impede the effectiveness of the Board's work, delay the disposition of cases, and run counter to the intent of Congress in creating the Board.

(b) Compliance with the Board's orders would be discouraged. A decision against a particular carrier might not only be disregarded by other carriers where the interpreted rule was a standard one, but by the very same carrier since the question could always be re-litigated before another referee by merely denying some later claim. The process of re-litigation could be similarly engaged in by the employes in cases where claims were denied.

(c) All semblance of predictability and uniformity of treatment in the interpretation and application of the rules would disappear.

It must be remembered that the requirements of justice are not limited to the making of "right" decisions; essential also are expedition, compliance, predictability, and uniformity of treatment. These ingredients would, in my view, tend to be destroyed if each referee were to consider himself as, in effect, a court of appeal from every other.

It might, on the other hand, be argued that the referees could usefully, and with avoidance of the dangers mentioned above, exercise an appellate control over one another not as a general proposition, but only in extreme cases where an error made by one of them, perhaps through haste or some want of clarity in the presentation by the parties, was so palpable as to disturb the conscience of a referee approaching the matter freshly from the outside and reconsidering the whole problem anew. For some time it seemed to me that this test of palpable error, to be determined in the last analysis by one's own conscience, might be the way out; but upon further reflection I concluded (1) that if B could set aside, because his conscience hurt him, what A had honestly decided, there would be no reasonable assurance that in a later case C's conscience would be akin to B's and not to A's, and (2) that in any event the losing side would always hope to find a C (or a D, or an E) who would go back to A's position.

No one who has served as a referee can fail to be aware of the likelihood of his—or of any referee's—falling into error from time to time; but the question of whether or not any further appellate means for the correction of errors should be provided than is now provided by statute is essen-

tially a legislative question, and I do not believe that the problem can be solved internally by making each referee an appellate judge over every other, save in the exceptional class of cases described above in paragraphs (1), (2), (3) and (4), which do not involve the issue presented in the case now before us.

As I indicated at the beginning, the views expressed in this memorandum are personal, tentative and almost certainly incomplete, and they are not to be regarded as anything more than a basis for discussion in future cases where the problem of overruling established precedent may again arise.

L. K. Garrison

Dissent to Award 1680 (Docket TE-1535)

We dissent from the basis of this award as premised upon assumption that a settled question of interpretation of the involved rule now exists solely because of prior awards of the Division and by discarding the recognized long established practice of the parties under the rule as evidencing its proper interpretation.

Further we find inadequate the admitted tentative and incomplete views expressed by the Referee in the Memorandum appended to this award.

See also our dissents to Awards 1166, 1169, 1170, and 1422.

/S/ R. H. Allison
/S/ C. C. Cook
/S/ A. H. Jones
/S/ C. P. Dugan
/S/ R. F. Ray