Award No. 1878
Docket No. TE-1904

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

ORDER OF RAILROAD TELEGRAPHERS

THE ALTON RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Alton Railroad, that the Carrier violated the second paragraph of Rule 1 of the Telegraphers' Agreement on July 22, 1940, when it required the conductor of Extra 4388 to handle train orders Nos. 5, 6 and 7 by carrying them from Bloomington, Ill., to Tallula, Ill., a distance of 68 miles, and place them in the waybill box on the outside of the station at Tallula to be picked up there by a weed burner to whom addressed; and that the agent-operator at Tallula who was available and for whom a call is provided to perform this work, shall be paid a call for this work of which he was thus improperly deprived.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date February 16, 1929, as to rules of working conditions, and August 1, 1937, as to rates of pay, is in effect between the parties to this dispute. The position of agent-operator at Tallula, Ill., is covered by said agreement.

The second paragraph of Rule No. 1 of the Telegraphers' Agreement, provides:

> "No employes 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."

The Operating Rules of the Carrier relating to the handling of train orders by telegraphers direct that train orders received by them shall be personally delivered by the telegraphers in such office direct to the train crews addressed.

On July 22, 1940, train orders Nos. 5, 6 and 7 intended for a weed burner at Tallula, Ill., were issued at the Bloomington telegraph office and the conductor of Extra 4388 at Bloomington was directed to handle these train orders by carrying them from Bloomington to Tallula, a distance of 68 miles, and place them in the waybill box on the outside of the station at Tallula where they were picked up by the crew of the weed burner before the agent-operator came on duty on his regular assigned hours.

CARRIER'S STATEMENT OF FACTS: On July 22, 1940, the weed burner in charge of a conductor-pilot was operating in the vicinity of Tallula, Illinois, on the Jacksonville Line. The agent at Tallula was assigned working hours of 8:00 A. M. to 5:00 P. M., with one hour off for lunch. At 9:39 A. M. the agent at Tallula copied work order for the weed burner reading as follows:

The Carrier has shown that the practice upon which the instant claim is based has been in effect without objection or protest for many years, long antedating any agreement with the Employes, and that it is not in violation of any of the specific provisions of the agreement rule referred to. The "Opinion" of your Board in Award No. 1636, Docket CL-1595, with Bruce Blake, Referee, sitting as member of the Board, is particularly pertinent to this case and is quoted below:

> "In final analysis this dispute resolves itself into an effort by the Organization to require the Carrier to abandon a long existing practice * * * *. That the practice had been of long standing when the first agreement between the Organization and the Carrier was executed is admitted. That there is no specific stipulation in the agreement prohibiting continuation of the practice is admitted—or at least is perfectly clear."

Upon the basis of this "Opinion" the claim of the Employes was denied. The Carrier believes that the "Opinion of Board" quoted in this award exactly describes the situation existing in the instant case and believes that upon the same reasoning this claim is without merit and should be denied.

OPINION OF BOARD: The facts that give rise to this dispute and the positions of both sides have been sufficiently set forth; so no necessity exists for further recitation.

If there is one thing that has been stressed above all others by the Carriers in their arguments before this Referee, it is respect for and adherence to principles long established by the awards of this Division. Any one trained in the legal profession knows that this is a sound and abiding principle, and is entitled to great respect, although we must admit that the principle is not exclusively controlling in all cases.

But, so far as the present dispute is concerned, no sound reason appears why there should be a departure from the definitely established principle that has been adopted in relationship to the interpretation of the rule involved which interpretation has been concurred in and approved by practically every referee which has sat with this Division.

In addition to the long list set out in Award No. 1713, we have Awards 1719, 1791, and 1820.

The inescapable deduction from this impressive list is that the business of handling train orders, at a station where there is an employe covered by this agreement, belongs exclusively to that employe and may not be performed by employes belonging to another craft or class, nor may resort be had to the use of inanimate devices, such as waybill boxes or train registers in or at the respective stations to circumvent or obviate the use of the telegrapher at the station. There have been some refinements of this statement of the rule, but only in detail, which most of the referees have ignored, as have also the carriers as indicated by their consistant and largely repetitious dissents in many of these cases.

We attach no significance in the instant dispute to the fact that Alton Railroad was not specifically named in Decision No. 757 of the United States Railroad Labor Board. The rule therein is identical with the one in this dispute and we see no reason why there should be a distinction as to this Carrier. The obvious reason for the attempt to make the point is that reliance might then be had upon the recognized principle that, if there is serious ambiguity in the wording of a rule, recourse may be had to an interpretation agreed upon by the parties as evidenced by their conduct over a period of years. The answer to that in this case is that there is no ambiguity in the language of this rule as is indicated by specific statements to that effect in several of the awards above listed.

The Carrier sees faint hope in its position in Award No. 1489 but that was a dispute as "between two employes of the same class," certainly not true in this case where the orders were handled by a conductor.

Nothing else the Carrier has said needs attention. Every argument has been made and answered time and time again.

The Carrier violated the rule and the claim should be sustained.

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 Carrier has violated Rule No. 1 of the Agreement and the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 14th day of July, 1942.

DISSENT TO AWARD NO. 1878, DOCKET TE-1904

There is here an Award which openly asserts that decisions in former Awards, assumed by the instant Opinion to have adopted "definitely established principle," was the sole reason for the Award in this case.

Such basis for an Opinion of course makes it obligatory upon anyone interested in the question involved in this case, and all the other preceding Awards to which reference is made in this Opinion, to study in detail the record in each of those cases and in this case in order to determine if there was any principle established under the circumstances of any one or any combination of all preceding cases that warranted the issuance here of a sustaining Award on those bases without regard to the circumstances and the evidence of meaning of the involved rule in the instant case, which were of essential distinguishment.

The fallacy of this Award is expressed in the fifth paragraph of the Opinion where, in relating this assumed principle to the instant case, it declares it to be the inescapable deduction from the preceding Awards "that the business of handling train orders, at a station where there is an employe covered by this agreement, belongs exclusively to that employe and may not be performed by employes belonging to another craft etc." Such declaration, which ignores without comment the distinguishing facts in the instant case, undeniable in the record, exhibits the unsoundness of its expression and of the Award as a whole. These distinguishing facts, in relation to that statement in the fifth paragraph, are:

(1) The three involved train orders, of general information and distribution to all offices, delivery of which to the crew of the work

train at Tallula was not required at any particular time before or after the agent-operator there came on duty, except at the time most convenient to the issuing Dispatcher according to customary and well understood methods, here were handled, i. e., copied and delivered, at the Bloomington office, the point of their receipt, by a telegrapher, an employe coming within the craft covered by the Agreement here involved.

(2) These three train orders, being orders of annulment of schedules or time orders, addressed to all concerned, were issued at 1:25 A. M. and the copies for the work train crew who would require the information at some time before occupying main tracks that day, were carried and deposited in the waybill box at Tallula, one of the offices to which it was necessary to deliver them. This occurred prior to the hour that the agent-operator at that station went on duty—8:00 A. M.

(3) At 9:39 A. M., 1 hour and 39 minutes after this agent-operator at Tallula came on duty, he copied a work train order which governed the movement of that work train, the crew of which also had received the three train orders which had been previously delivered wholly in consonance with the procedures effective on this property and, by this record unrefuted, known to the parties to have been a method of operation to which the Agreement applied when it was executed.

(4) This record also without question shows that the three train orders which the crew received from the waybill box could and doubtlessly would have been handled by the agent-operator at Tallula at 9:39 A. M. coincident with the work train order which he at that hour received during his regular tour of duty, if the Carrier had any conception that there was a possibility of an arbitrary decision such as this one, contrary to all that this record shows previously to have been the recognized understanding by these parties of the meaning and proper application of the involved rule of their Agreement.

(5) This Award requires the Carrier to pay this agent-operator a call because presumably he should have been called out of bed at 1:25 A. M., or some time thereafter, as an alternate for the delivery of the three train orders addressed to all concerned, as it otherwise and properly had been made. Certainly this agent-operator, who could and would have been used 1 hour and 39 minutes after his tour of duty started at 8:00 A. M. for receipt of the orders if this eccentric Award had been anticipated, would not in any event either have been subjected to an arousing from his rest or entitled to compensation for work which otherwise would have been done during his regular tour of duty. The unreasonableness of such an Award is apparent to any who will read.

These are circumstances, distinguished from those of all other Awards, and as to preceding paragraph (1) distinguished in the Opinion of at least one (Award No. 1489) of those Awards, from the results of which this instant Award makes an assumption that there has been an adoption of "definitely established principle." These distinguished circumstances are ignored in the rendition of the instant Award and of themselves exhibit the fallacy of an assumption of "definitely established principle."

In justification of this decision the sixth paragraph of the Opinion next proceeds to waive aside the other fundamental and basic distinctions in contract-making prevailing in this case when therein it refers to the element of non-inclusion of the Alton Railroad as one of the 71 railroads constituting parties to Decision No. 757 issued by the United States Railroad Labor Board, March 3, 1922. This record, with unassailable clarity, and no refutation, discloses that the parties to this Agreement had negotiated, agreed upon, and lived under the rule in their Agreement for 4 years before the rule, by Decision No. 757, was made part of the Agreements of those 71 other railroads.

Further, this record shows, equally as undeniably, that not until the institution of this first claim, 23 years after the rule first was placed in their Agreement, was the manner of its application, as given in the instant case, even contested by the Employes on the Alton Railroad.

Yet this sixth paragraph waives that all aside in its evident purpose to give effect to assumed "definitely established principle" taken from Awards which related to other railroads and to different circumstances under Agreements, the involved rule in all of which stemmed from the agreement upon the rule resulting from U. S. R. L. B. Decision No. 757 and such understandings as the 71 railroads had in respect thereto, if they had any at all relating to a circumstance which paralleled that which is here presented. We suggest that such construction of contracts and Agreements will find no support anywhere, and without fear we leave the review of all those cases, the records therein, and the contrasting record in the instant case, for such review.

Furthermore, following upon the neglect of this Opinion to contrast the detail of a single preceding Award relied upon, together with the total disregard of the herein listed distinguishing circumstances, the lack of justice in the instant Award is disclosed by contrast with at least one of the preceding Awards (No. 1096), previously referred to by one of the other cited Awards as being most typical of these cases. In Award No. 1096, lacking the evidence of existing circumstances and practices known to the parties to which the involved rule applied upon its negotiation (which here was evident in the record), the Award (No. 1096) as to those parties recognized the originality of its interpretation and denied any penalty prior to the date of its issuance.

But in the present case, with all the practical evidence of the clear possibility in the immediate circumstances that the handling decreed by this Award could have been accomplished by the Claimant during his regular tour of duty without the imposition of a night call or without penalty upon the Carrier, whose dispatcher could readily have repeated the three involved train orders to the Claimant an hour and 39 minutes after he came on duty, this Award imposes penalty upon the Carrier for additional payment to the Claimant for services not performed and never previously considered to be required of him, which services it would have been possible for him to perform during his regular tour of duty without one cent of additional compensation, or of additional cost to or penalty upon the Carrier.

The recognition of waived penalty in Awards 1096 and 1680 is cited in contrast with its imposition in the instant Award 1878.

Further lack of discriminating analysis is evident in the seventh paragraph of the Opinion where reference is made to Award No. 1489. This paragraph grasps at a single extracted quotation from the Opinion in that Award "between two employes of the same class" declaring that not to be the case here. That which follows in the Opinion of Award No. 1489, concluding in the final paragraphs of that Opinion denying the claim, which acknowledged the obvious practical condition in respect to handling train orders necessarily involving two crafts of railroad employes before such an operation could be completed, viz., the telegraphers and the train crew, has been ignored.

Whatever agreement or disagreement there may be with the treatment given in Opinions of preceding Awards, as they dealt in detail with the Awards which in turn had preceded them, a comparison of the instant Opinion with each and all of those which have preceded this Award will show that they respectively did at least in part, and in some cases in whole, deal independently and in their own distinguishment in detail of the circumstances of the other Awards to which they made reference. Contrast particularly those preceding Awards, which dealt in whole with the Awards in turn preceding them, with the generality of expression, the omission of any distinguishment of any individual preceding case, and the arbitrary declaration of conclusion in the instant Opinion.

Justice is not difficult to find in these cases when complete recognition is given to the disclosed meaning of the immediately involved Agreement, instead of generality of inferences from extraneous agreements, circumstances and decisions thereupon. But if a decision exhibits inapprehension, or utter disregard of the distinguished conditions of contract negotiations, circumstance of case, and analysis of preceding Awards, such omissions and disregard can and doubtlessly will result, as they have in the instant case, in that which does not represent sound decision and consequent justice.

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