Award No. 5013
Docket No. TE-4941

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on Texas & Pacific Railway Company, that J. M. Jenkins, regularly assigned operator at Bonham, Texas, hours 8:00 A.M. to 5:00 P.M., with one hour allowed for meals, shall be paid for a call under Article 20 (d) of the Telegraphers' Agreement for each day since August 13, 1946, on which he has been required by the Carrier to pin train orders and clearance cards, received by him, to the train register at his office upon being released from duty at the end of regular tour of duty, to be picked up by the conductor and/or engineman o fthe trains addressed on the following morning at a time the telegraph office is closed and no operator on duty or called to complete the handling of the train orders and clearance cards involved.

JOINT STATEMENT OF FACTS: An agreement bearing date May 1, 1939, as to rates of pay and rules of working conditions is in effect between the parties to this dispute.

Bonham is a freight terminal where, under the Telegraphers' Agreement, there is employed an Agent-Yardmaster and one Telegraph Operator.

Prior to August 14, 1946, the eastward Bonham-Texarkana local way freight normally departed from Bonham after 8:00 A.M. daily except Sundays.

Effective August 14, 1946, the departure of this local way freight from Bonham was changed to leave at 6:30 A.M. or as soon thereafter as possible, dependent upon connections from the west, and was operated as an extra which required the issuance of a train order each day authorizing it to run extra Bonham to Texarkana. Effective with this change these train orders were transmitted by the train dispatcher to the operator at Bonham in the afternoon of the day before who was instructed to pin them to the train register at his station to be picked up by the train crew addressed, if the train departed before the operator came on duty.

Claims promptly made for the payment of a call to the operator at Bonham under Article 20 (d) of the Telegarphers' Agreement and declined by the Carrier.

POSITION OF EMPLOYES: Article 20 (d) of the telegraphers' agreement is invoked in this dispute, which provides as follows:

"No employe other than covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph or

6.) In the twenty-third paragraph of that letter, General Chairman Canafax's attention was called to your Board's Award 1821 denying an identical case to the one now before the Board. It is agreed that no single detail of handling train orders from the inception of orders to the time they came into the hands of the train crew was entrusted to anyone not covered by Article 20 (d) of Telegraphers Agreement.

Your Board in Award 1821, last paragraph under Opinion of Board, in passing on the same rule as our 20 (d), states:

> "The plain and simple fact here is that no single detail of handling train orders from inception of orders to the time they came into the hands of train crews was entrusted to any one not covered by the rule in question. The fact that a customary detail was dispensed with by the practice adopted and followed could not make of the practice a violation of the rule."

7.) It is an agreed to fact, as we have shown, that both parties were in agreement as to the interpretation of Article 20 (d) at the time it was negotiated in 1924, and thereafter for a period of more than 22 years, or until this case came up in August, 1946, and that the handling as in this case at Bonham was not in violation of Article 20 (d).

8.) It is an agreed to fact, as we have shown and which is undisputed, that the practice of telegraphers copying train orders, before going off duty and leaving them on train register or in waybill box to be picked up by the conductor of the train leaving during the night or before the operator came on duty the following morning, was in effect when the rule was first negotiated in 1924, and no objection nor complaint has been made as to such practice which has continued since that time. See your Board's Award 900 where, under Opinion of Board, it is stated:

> "It is admitted that the practice was known to the employes and it appears to have been acquiesced in. No objections to the practice were made when the first agreement between the parties was entered into in 1924.
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> "Considering all the circumstances—the fact that the practice had been established for many years before the first agreement was made, instead of being introduced afterwards; the fact that a rule was later sought by the employes permitting that practice but with pay rates unacceptable to the carrier; the fact that subsequently another agreement between the parties was made without reference to the practice one way or the other; and the fact that the first protest was not made until 1938; we think that while the case is a very close one the evidence is sufficient to establish a definite acquience, amounting to an understanding . . ."

Attention is also directed to your Board's Awards 1489 and 1651, as well as to First Division Awards 8145, 8169, 10084, 10252, and 10326, as mentioned in letter to General Chairman Canafax of November 9, 1946, hereinabove quoted.

(Exhibit not reproduced).

OPINION OF BOARD: This is a joint submission in which the decisive facts are not in serious conflict. For the moment it suffices to say both parties are agreed that on certain dates since August 13, 1946, the telegraph operator at Bonham, Texas, a one-shift office, received train orders and clearance cards from the train dispatcher and, on orders from the Carrier, pinned such orders and clearance cards on the conductor's train register for delivery after the expiration of his regularly assigned hours of duty.

The claim is based on Article 20 (d) of the current Agreement effective May 1, 1939, commonly known as the Train Order Rule, which, so far as pertinent to the issues here involved, reads:

> "No employe other than covered by this 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, except in an emergency, in which case the telegrapher will be paid for the call. The employe entitled to call will be notified."

The Order of Railroad Telegraphers takes the position the handling of train orders and clearance cards in the manner heretofore described is a violation of such Article and entitles the telegrapher at Bonham to pay for a call on all dates violations occurred. The Carrier takes a contrary view and seeks to sustain it upon two propositions. The first of these is that the phrase "to handle train orders" as used in the rule does not contemplate or require the personal or hand to hand delivery of such orders and cards. The second is that such term has never been construed to mean anything other than the copying of train orders or clearance cards on its property, hence, even if its first position is not sustained, its long established practice of handling such items by pinning them on the conductor's train register for delivery has superseded the requirements of the rule and is enforceable to the same extent as if it was a part of the contract itself.

We are not disposed to labor long on the Carrier's first point. This Division of the Board, after extended and spirited debate on the subject, is now definitely committed to the view that a Train Order Rule containing language of the kind to be found in the one now under consideration is clear and unambiguous and that its terms, particularly the phrase "to handle train orders", are to be construed as contemplating the receiving, the copying, and the delivering of train orders to the train crews which are to execute them. See Awards 86, 709, 1166, 1422, 1680, 1713, 1878, 1879, 2087, 2926, 2928, 3611, 3612, 3670 and 4057. Also see Award 4770, where, although the claim was denied on the ground it was based on the Scope Rule only, the foregoing interpretation was again approved and it was definitely indicated that had the Agreement contained a Train Order Rule similar to the instant one a sustaining award would have been required.

Thus under our decisions, it appears that unless Carrier's second contention is sustained, its action in requiring the telegrapher at Bonham to pin train orders and clearance cards on the conductor's train register for delivery violated the Agreement.

Before giving consideration to that point we turn again to the record. The situation there disclosed can be summarized in the following manner.

The Carrier and the Employes have entered into three collective Agreements. The first was executed in 1924, the second in 1928 and the third, as has been indicated, was negotiated and signed in 1939. Article 20 (d) in its present form was incorporated into and made a part of each of such contracts. The fact is that prior to the negotiation of the first contract in 1924 the Carrier was requiring telegraphers at its smaller offices to do the very thing now complained of as a violation at its Bonham office and that it continued to do so thereafter even after negotiation of the succeeding Agreements. However, it appears that for some reason the requirement was not put into force and effect at Bonham until about seventeen years ago. No complaint was made by the Employes until September 7, 1946 at which time the instant claim was presented to the Carrier on behalf of Telegrapher Jenkins at its Bonham office. This it should be added was the first claim of its kind the employes had ever made under any of the Agreements. The claim was denied by the Carrier on November 9, 1946. Some four months later, on February 4, 1947, the Organization's General Chairman inquired if the Carrier's representative was agreeable to joining in a joint statement of facts preparatory to the filing of a

joint submission on the claim. An affirmative answer was given. The claim, however, was not progressed to this Board until December 12, 1949. We pause here to add that fairness, and at least a portion of our decision, requires the statement that so far as the record discloses the responsibility for the greater portion, if not all, of this delay of considerably more than two and one-half years cannot be laid at the Carrier's door but must be attributed to the Employes' representative who was handling the claim.

The sum and substance of the first argument advanced by the Carrier in support of its second point is the record establishes that throughout all the years since the negotiation of the first contract there had been an express understanding and agreement between it and the Organization representing the employes to the effect, the Agreements notwithstanding, it could require the telegrapher at Bonham, and like offices, to make delivery, after assigned hours, of train orders and clearance cards received from the train dispatcher by pinning them on the conductor's train register. We do not agree. Neither do we concur with the Organization's contention it did not know of what was going on. The very most that can be said for the record from the standpoint of either of them is that while the Organization knew the practice existed it stood by and merely acquiesced therein without complaint. Nor do we subscribe to the Carrier's view that the practice must be regarded as having been established and in force and effect for anywhere near as long as it contends. Where a new contract is negotiated and existing practices are abrogated or changed by its terms the practice falls as of the effective date of the contract. Here both the 1928 contract and the 1939 (current) Agreement as negotiated contained a Train Order Rule (Article 20 (d)) providing in clear and concise language that no employe other than covered by such Agreements would be permitted to handle train orders at telegraph or telephone offices, etc. Thus, under our decisions interpreting the phrase "to handle train orders" as used in the rule, it must be held that since May 1, 1939, the effective date of the last Agreement, whatever practices existed prior thereto, were expressly abrogated. They may have continued since, through acquiescence on the part of the employes, but that does not effect the fact they ceased to exist for all contractual purposes as of that date. The point is only important to demonstrate that under the existing situation the employes are not chargeable with the long continued acquiescence relied on by the Carrier.

Under the conditions and circumstances reflected by the record we are convinced the Carrier's final contention on its second point to the effect the practice supersedes the Agreement cannot be upheld. Under our decisions, except where an agreement is ambiguous or indefinite, past practices do not affect enforcement of and compliance with its applicable provisions. See Awards 1671 and 2626. Article 20 (d), as we have seen is clear and unambiguous. In other words with such a contract in existence and governing the rights of the parties neither long continued acquiescence in a practice nor mutual continuance thereof after it has become effective bar its enforcement for the simple reason its provisions supersede any and all practices incompatible therewith. They may have the effect of precluding the parties from collecting penalties because of the violation but they do not preclude them from insisting upon compliance with its terms (See Awards 3521, 3979, and 4926).

The claim is for payment of a call for each day claimant has complied with the Carrier's requirement respecting the matter here in question, since August 13, 1946. In view of the following facts: (1) that the involved practice has long been acquiesced in by the Employes; (2) that despite unrefuted evidence of its existence since the effective date of the last Agreement, with knowledge on the part of the Employes, this is the first claim which has been submitted to the Carrier under Rule 20 (d); and (3) that delay in the prosecution of the claim for more than three years after it was first presented, for which it was not to blame, gave the Carrier some reason to believe the Employes were given to abandon the claim and continue to acquiesce in the practice, we feel the equities of the existing situation will be fully met if,

within twenty days following the date of this Award, the interpretation herein placed upon Rule 20 (d) will be controlling, without reparation for violations prior to such date. It is so ordered.

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 Carrier violated the provisions of Rule 20 (d) of the current Agreement, but that the existing facts and circumstances do not warrant a reparation Award.

AWARD

Sustained in part and denied in part, all in conformity with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of August, 1950.