Award No. 5871
Docket No. TE-5780

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the St. Louis San Francisco Railway; St. Louis, San Francisco and Texas Railway; that,

(1) The Carrier violated the terms of the agreement between the parties, particularly Article 1, when on April 29, 1950, it permitted and/or required the engineer of Train No. 37, an employe having no rights under said agreement, to transport (handle) train order No. 88 and clearance card form A, from Madill, Oklahoma, to Kingston, Oklahoma, and there make delivery to the crew of Train No. 547, at a time when the agent-telegrapher at Kingston was not assigned to duty.

(2) The Carrier shall compensate the agent-telegrapher at Kingston, Oklahoma, in accordance with the provisions of Article 2-(7) (Call and Overtime Rule) because he was not called to perform the work of handling and making personal delivery of order No. 88 at his station on April 29, 1950.

EMPLOYES' STATEMENT OF FACTS: There is an agreement bearing date of May 16, 1928, as to rates of pay and rules of working conditions, in effect between the parties to this dispute. Rates of pay have been increased subsequent to the effective date of the agreement hereinafter referred to as the Telegraphers' Agreement.

Mr. A. Zumwalt is the agent-telegrapher at Kingston, Oklahoma, with assigned hours 8:30 A. M. to 5:30 P. M., daily except Saturdays and Sundays, with one hour meal period, at which station he performs all duties pertaining to the operation of a one-man station, including the handling of train orders and other telegraphic and telephonic service.

On Saturday, April 29, 1950, at 2:34 P. M., a day and at a time he was not assigned to duty, and the office was purported to be closed, Train Order No. 88 was transmitted by the train dispatcher to a telegrapher at Madill, Oklahoma, addressed to "No. 547 Kingston, care Engineer No. 37", then forwarded by and delivered by train engineer of No. 37 to the train crew of No. 547 at Kingston.

POSITION OF EMPLOYES: The rules of the agreement relied upon by the Committee are:

Furthermore the Book of Rules does not provide that train orders will be delivered or handled in any manner by engine watchmen and the Telegraphers' Agreement fully comprehends that the handling of train orders is work of the employes covered by the Telegraphers' Agreement and we again renew our request relative to this incident which occurred on July 19, 1945 as well as that one of July 12, 1945.

Yours very truly,

(Signed) W. I. Christopher,
General Chairman."

The evidence submitted shows that carrier has handled train orders in the manner prescribed by Rule No. 217 ever since 1902—almost 50 years—and the carrier does not recall time claim having been allowed by reason of train orders having been handled in compliance with this rule.

In Award 2436, Third Division, NRAB, the Board said:

"The conduct of the parties to a contract is often just as expressive of intention as the written word and when uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with reference thereto, offers a safe guide in determining what the parties themselves had in mind when the contract was made."

The organization may rely to a large extent upon prior awards of this Board relating to the meaning of "handling train orders". The carrier wishes to respectfully call the Board's attention to the fact that the rule involved in the prior awards, for the greater part, is the so-called "Standard Rule" pertaining to the handling of train orders, which is Rule 16, of Decision No. 757 of the United States Railroad Labor Board. Neither of the parties here involved was a party to that decision and in negotiating the 1922 schedule agreement, it was agreed to keep the scope rule then in effect. The carrier submits that awards based upon a different set of facts and circumstances and different agreement rules are not applicable on this property.

The carrier asserts that the record shows that train orders have been handled in the manner provided by Rule 217 at least as far back as the year 1902 before there was ever an agreement on this property with the Order of Railroad Telegraphers. The custom and practice of handling train orders in the manner prescribed by that rule has not until recently been questioned by the Order of Railroad Telegraphers. The evidence of record shows that as late as the year 1945 the Order of Railroad Telegraphers recognized that the handling of train orders in compliance with transportation rule 217 did not constitute a violation of the Telegraphers' Schedule. The organization is attempting to secure by Board award a new rule. There is no basis under agreement rules and the custom and practice that has prevailed on this property for a period of almost fifty years for a sustaining award and the Board is respectfully requested to so find.

All data submitted in support of Carrier's submission have been presented to the employes and made a part of the particular question in dispute.

OPINION OF BOARD: A. Zumwalt on whose behalf the claim is made was agent-telegrapher at Kingston, Oklahoma. His rest days were Saturday and Sunday. On Saturday, April 29, 1950, the Train Dispatcher at Tulsa, Oklahoma issued a Train Order to Train No. 547 at Kingston in care of engineer on Train No. 37 at Madill, Oklahoma. The Train Order was delivered to the train crew of No. 547 at Kingston by the engineer of No. 37. The organization contends that this handling of the Train Order by the

engineer was a violation of the Agreement and in consequence Zumwalt is entitled to compensation therefor under the Call and Overtime Rule.

The handling about which complaint is made was work covered by the Scope Rule of the Agreement. The organization contends that this work not only belongs to the employes but also that it cannot be delegated to others without violating the Agreement.

The carrier on the other hand insists that the handling was proper under its Operating Rule 217, which, without question, permitted this kind of handling at a point which was not a train order office or at an office which was closed. This Operating Rule, with slight changes not of importance here, had been in effect on the property for nearly a half century.

This Rule received the attention of this Division in an award on a claim coming from another property. Award 1096. There it was said:

> "It must be concluded, therefore, that in so far as Rule 217 of the Rules and Regulations of the Transportation Department, or the practice thereunder upon which the carrier relies, applies to points which are not telegraph or telephone offices, it is not in conflict with the Agreement; but that in so far as it applies to points at which telegraph or telephone offices are closed, without regard to the availability of the operators, there is such a conflict and the express provisions of the Agreement must prevail."

The claim there was not generally for allowing work to be done by one not covered by the Scope Rule of the Agreement. It was for specifically prohibited work under named conditions. The quotation, however, makes the point that where an Operating Rule conflicts with an Agreement, the Agreement and not the Operating Rule must prevail. This is the viewpoint taken in many Awards, including Awards 1167, 1168, 1302, 1304, 1456, 1489, 1713, 1719, 1820, 2087, 3114, 4281, 5087 and 5122.

In all of these awards claims were sustained for acts of the carrier similar to the one complained of in this docket. It is true that in most, if not all of them, the charge was a violation of a specific prohibitory provision of the particular Agreement, as in Award 1096. In the opinions where the matter was exhaustively considered, however, the true basis of the Awards was the removal of work from the Scope of the Agrements and causing it to be performed by those not covered, and not the fact that in the instances there was a prohibitory provision.

In the light of these Awards, it must be said that there was a conflict between the rights of the employes under the Scope Rule and Rule 217 and that the rights under the Scope Rule must prevail, unless past practice, as the carrier contends, is controlling.

On the question of past practice the Division has taken the position that where there is a conflict between the collective agreement and the Operating Rules of the carrier the provisions of the Agreement must prevail, and this even though the conflicting Operating Rule of the carrier and the practice previously employed were of long standing and of wide use. See Awards 1456, 1713, 1719 and 2926. This is adopted as controlling here, in consequence of which the claim must 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 22nd day of July, 1952.