Award No. 5992
Docket No. TE-5815

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul G. Jasper, 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:

(1) That the Carrier violated and continues to violate Rules 1 and 2 of the telegraphers' agreement when it permitted or required train service employes to copy train orders on the Rio Grande Division on various dates and at stations shown in the attached exhibit hereto; and

(2) That the senior idle telegrapher, Rio Grande Division, be compensated for 8 hours at $1.34¼ per hour for each of the following dates: October 15, 22, November 3, 8, 12, 16, 17, 18, 21, 24, 28, 30, December 3, 8 and 10, 1948, for this work to which they were entitled to perform but of which they have been deprived by these violative acts of the carrier.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement between the parties bearing date of December 1, 1944, which was in effect on the dates involved in the instant claim. A copy of the agreement is on file with this Board and is hereby made a part of this dispute.

On the dates shown, the Carrier permitted or required conductors and engineers, employes not under the Telegraphers' Agreement, to copy train orders which were a matter of record, direct from the train dispatcher by use of telephones located in booths or station buildings at points shown in Employes' EXHIBIT "V".

No emergencies existed which necessitated the copying of these train orders by train crew members at the points specified. Their issuance was brought about by reason of the Carrier's failure to maintain a sufficient number of open offices to provide adequate train order service for normal operation on the Rio Grande Division. In order to cope with changing situations and keep trains moving between the too few open stations, the train dispatchers resorted to the issuance of orders to trains at such points as are exemplified by Employes' EXHIBITS "A-2" to "U-2" inclusive.

POSITION OF EMPLOYES: The following rules of the agreement are invoked in this dispute: Rule 1, Rule 2 Sections (a), (b) and (c), Rule 17 Sections (a) and b) and Rule 29.

Station	Dates Closed
Hermanas	September 6, 1945
Lewis Springs	September 16, 1945
Tecolote	June 4, 1946
Newman	July 20, 1946
Duran	February 27, 1947
Bernardino	August 2, 1947
East Lordsburg	August 15, 1948
Three Rivers	August 15, 1948

It will be noted by referring to carrier's Statement of Facts that not one of the stations closed during the period September 16, 1945 to September 30, 1948 is shown in the list of stations involved in the instant claim; in fact, Lanark, Hawkins and Lizard, included in the claim as stations to which train orders were addressed, have never been open train order offices since the establishment of the Rio Grande Division in 1924.

Carrier's position in this docket is fully sustained by Award No. 4259 of this Division, and in the light of that award and the facts as contained in the foregoing, the carrier submits that there is neither merit to nor basis for the instant claim and avers that it should be denied.

Carrier respectfully requests the Board to so find and to render an award declining the claim.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced).

OPINION OF BOARD: The Claimant contends that the Scope Rule of their Agreement was violated on the Rio Grande Division of the Carrier when the Carrier permitted employes not covered by the Agreement to copy train orders direct from the train dispatcher. The orders were copied over the telephone.

The claim is for a day's pay for the senior idle telegrapher on each day the Agreement was violated.

On each of the dates alleged in the claim the train order was copied at a location where an operator was not maintained.

The Carrier contends that Rule 29 is controlling. The train order rule is as follows:

"Rule 29

HANDLING TRAIN ORDERS

Section (a). No employe other than covered by this agreement and train dispatchers shall 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 employe shall be paid for the call.

Section (b). If instructed by train dispatcher or other authority to clear train or trains before going off duty, leaving clearance card and/or orders in some specified place for those to whom addressed,

employe shall be paid a call as provided in Rule 16 for each train cleared."

The Carrier argues that no operator was employed at the stations where the train orders were copied and, therefore, under Rule 29 (a) employes not covered under the Agreement could copy train orders without violating the Agreement.

The same contention was made by the Carrier in Award No. 5086 and this Board found against the Carrier. We feel that the last cited award is controlling on that issue.

The copying of train orders is work reserved exclusively to those coming under the Agreement. The Scope Rule grants this right. Rule 29 (a) gives the employes not covered by the Telegraphers' Agreement the right to copy train orders in the case of emergency at stations where an operator is employed and is available or can be located. In which case the operator must be paid a call. This rule does not grant this same right at stations where operators are not employed. The penalty is not the same.

There can be no question that this is a special rule modifying the Scope Rule, but it covers only that which is spells out.

Rule 29 is unambiguous and clear, therefore, we cannot by interpretation say that an employe not under the Agreement has the right to copy train orders at stations where no operator is employed. If the Carrier was to have this right then it would have been very easy to so state in the Rule. We cannot by interpretation put a corollary in the Rule.

Rule 29 is not a grant of work to the employes coming under the Agreement. It is a restriction and limitation on the Carrier expressly set out, and in modification of the Scope Rule. Under the conditions as expressed in Rule 29 the work of copying train orders by others may be done.

The Carrier also argues that because of past practice copying of train orders by employes not covered by the Agreement is not a violation. Past practice will not in and of itself permit an Agreement to be violated. Past practice may be considered in determining what the parties regard an uncertain and ambiguous rule to mean. It may also be considered in instances where it is contended that there has been an agreed to interpretation whereby the parties have become bound.

The facts in the instant case do not support the Carrier in its contention that past practice is controlling. As heretofore said the Rule is unambiguous and is certain. The facts further reveal that there has been no agreed to interpretation of Rule 29.

The Agreement has been violated as claimed and there is no justification for denial on the basis of past practice.

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 Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of October, 1952.

DISSENT TO AWARD 5992, DOCKET TE-5815

Here we have the unworkable situation of the Referee in this case overruling, or ignoring, the majority in Award 5866 on this same Carrier property, who in the latter case had in turn overruled, or ignored, the majority in Award 5086, which latter Award is now felt by the majority in the instant case to be "controlling". The author in the instant case has not felt that the Award entered this year on the same Carrier, under the same rules and practices, is controlling, but rather an Award on another Carrier entirely, entered two years ago. It is this frightening instability and interpretative torture of rules that makes it impossible for this industry to function with that efficiency and economy that is its formally declared public duty.

Under Rule 29 an operator must be employed and must be available before he has an exclusive right to handle train orders, yet the majority hold herein that Rule 29 cannot be interpreted to "say that an employe not under the Agreement has the right to copy train orders at stations where no operator is employed." Yet the majority in Award 5866 on this same Carrier, entered two months ago, said that the same rule would have been violated by train service crews copying train orders **only** "if an operator had been employed at Pastura." The majority properly concluded in Award 5866 that the rights of operators are limited under Rule 29 "to offices where an operator is employed." Now, a few weeks later, another Referee thinks not. Where in the realm of logic does this leave the Carrier? Is it bound by this Board's interpretation of its rule of 30 years' experience, or by this Board's interpretation of a rule on another railroad clear across the North American continent?

The Scope Rule does not have that guarantee of exclusive performance of scattered minutiae with which the majority herein attempts to clothe it.

We dissent for these reasons.

/s/ E. T. Horsley

/s/ W. H. Castle

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp