Award No. 6276
Docket No. TE-6304

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago, Rock Island & Pacific Railroad that:

(1) The Carrier, having agreed or not denied there was violation of the agreement when, on dates and at locations specified in Employes' Statement of Facts, it required and/or permitted train or engine service employes to take train orders when no emergency existed,

(2) Shall now be required to pay, for each occasion specified and to each claimant designated in Employes' Statement of Facts, one days' pay of eight (8) hours at the prevailing rate.

EMPLOYEES' STATEMENT OF FACTS: There is in effect between the parties to this dispute an agreement as to rules and working conditions bearing an effective date of August 1, 1947, and as to rates of pay effective September 1, 1947.

On the dates and at the blind-siding locations tabulated below, Carrier required or permitted train and/or engine service employes, in the absence of emergencies defined by said agreement, to take train orders direct by telephone from trick dispatchers at El Reno, Oklahoma:

Date	Location	Claimant	Claimed
4-19-51	Banner, Okla.	M. W. Shaw	8 hours
5-6-51	Banner, Okla.	F. C. Beebe	do
9-29-51	Bolton, Okla.	F. C. Beebe	do
10-21-51	Choctaw, Okla.	F. C. Beebe	do
7-17-51	Council, Okla.	H. G. Dye	do
7-27-51	Council, Okla.	M. W. Shaw	do
7-25-51	Dickson, Okla.	F. T. Stephens	do
9-1-51	Hilltop, Okla.	F. C. Beebe	do
9-18-51	Lark, Texas	H. G. Dye	do
10-3-51	Lark, Texas	F. T. Stephens	do
10-20-51	Lark, Texas	H. F. Murphy	do
5-9-51	Limestone, Okla.	E. W. Huffman	do
6-15-51	McCool, Okla.	M. W. Shaw	do

But the controlling part of Rule 29 (a) insofar as this case is concerned is that part which qualified the restrictions by **limiting its application to offices where an operator is employed.**

We must necessarily conclude that the facts, as shown in this docket, do not support a sustaining award under the Rules." (Emphasis ours.)

We call attention to the fact that Southern Pacific Company Agreement Rule 29, considered in Award 5866, and Rock Island Agreement Rule 24 are fundamentally the same and that those portions of the rules applicable to the facts of both cases are exactly the same. Here we have ample proof, in your Board's latest considerations of a case involving the Telegraphers' exclusive right to the handling of train orders, in which your Board has recognized that, ". . . the controlling part of Rule 29 (a) (in our case Rule 24) insofar as this case is concerned is that part of which qualifies the restrictions by limiting its application to offices where an operator is employed."

We have said in the forepart of this Submission that we felt we have gone beyond the provisions of the Agreement when we paid, as a result of Awards 1220 and 1224, claims of the senior idle extra telegrapher when crew members, through necessity, due to a telegrapher's unavailability, copied train orders. Our position regarding these Awards has been borne out in your Board's latest consideration of the handling of train orders by crew members. Your opinion in Award 5866, wherein you consider the provisions of the applicable train order rule of the Agreement to the facts of the case, shows that when these rule provisions are properly considered there proves to be no violation of the Agreement.

The instant case is not one which a man is being denied his rightful wage for which he has labored. Nor did we refuse, when the case was being handled on the property, to pay an extra telegrapher had he been available. In this case no work was performed by a telegrapher. A telegrapher was not there. The Carrier, in this case, owes no employe for work not performed.

In summation, we state that the foregoing discussion conclusively proves that the provisions of the Agreement and the findings of your Board in Award 5866 provide ample ground for the denial of the claim.

Inasmuch as the provisions of the Agreement have been complied with, the Carrier respectfully petitions the Board to deny the claim.

It is hereby affirmed that all data herein contained is known to the employes' representative and is hereby made a part of this dispute.

OPINION OF BOARD: Claim is here made in behalf of named claimants for eight (8) hours' pay on each of the dates enumerated account of Respondent requiring or permitting train and engine service employes to take train orders.

We have often held that which was done here was work falling within the Scope of the Telegraphers' Agreements. While this was true of the prime Telegraphers' Agreement, it was specifically so provided when the parties entered into what was known as Mediation Agreement A-560.

The Respondent contends that even if the work here provided was in violation of this Agreement, that neither the Telegraphers' Agreement nor Mediation Agreement provide for, or require the payment of the penalty payments sought.

In Awards 1220 to 1225, inclusive, involving the parties hereto, this Board held under similar if not identical facts as are here present, that the Agreement had been violated and that the senior, extra, idle employe's seniority rights entitled him the privilege of performing the work, and

that he should have been compensated for his availability the same as though he had performed the work, and that no question of penalty existed but merely the carrying out of a contract provision.

In Awards 1220 to 1225, inclusive, the employe concerned was the senior, extra, idle employe. Here, each of the claimants are regularly assigned employes, and each were idle on the dates in question, the same being rest days of their regular positions, there being no idle, extra telegrapher.

Thus we are confronted with the issue as to whether or not, in the face of an unquestioned violation of both the prime Agreement and Mediation Agreement A-560, regularly assigned employes, who are idle in observance of their rest days, were entitled to perform this work when there were no extra, idle employes available.

There is no evidence of record to indicate that an emergency existed within the meaning of Mediation Agreement A-560, nor that the Respondent made any effort to call these claimants or any other employe covered by the Agreement to perform any of the work on the days cited.

The Board is of the opinion, and so finds and holds that the terms of Mediation Agreement A-560 were violated when the train orders were handled by employes not covered by the Agreement. We so held in Awards 4457 and 4459. Likewise, the Board is of the opinion, and so finds and holds that, as here, in the absence of an available, extra, idle employe, claimants were entitled to perform the work, even though breach of Agreement occurred on their assigned rest days.

These claims are meritorious.

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

The effective Agreement was violated.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1953.

DISSENT TO AWARD NO. 6276, DOCKET NO. TE-6304

Where, as here, there is no penalty provided for breach of a contract provision; and, again as in this case, there is no damage to the actual, normal earnings of the employe covered by the contract, the presumption of damage

and the assessment of a penalty are so far beyond the function of lawful interpretations as to make of this Board an administrative playground.

Here the very terms of the Agreements urged by the Employes provide that (Rule 24) only telegraphers and train dispatchers may handle train orders. The language of this rule confines telegraphers' rights to this work operation to those offices where they are employed. We have held in **Award 5866** that the application of this same rule is limited "to offices where an operator is employed." In drafting that provision the parties were careful to provide for payment for breach thereof to the telegrapher employed at that office.

Then the Employes, seeking to escape this confinement of rights in Rule 24, but without abrogating that rule, demanded that the historical practice of dispatchers transmitting train orders direct to train and engine crews be deterred by an agreement tothat effect. This was aneffort of such breadth that, in the mediation processes from which the Agreement A-560 evolved, they did not even ask for a pay provision for breach thereof. It would have been simple to have provided for a payment to be made, such as the provision in their Rule 24, and to provide to whom that payment should be made, but such a provision is **not there** and we cannot put it there.

The inability to find within the terms of the Agreement relied upon that a damage occurred to one whose regular earnings suffered no diminution, and who was regularly employed elsewhere, points up the fallacy of holding that the Agreement (A-560) calls for any payment. Therefore to write a non-existent penalty into an Agreement from which the framers omitted any such provision is far afield from the lawful function of this Board.

In our **Award 6107** we held that "Unless language expressly or impliedly authorizing payment as claimed here can be found in the Agreement itself, this Board cannot read into it such a meaning." Yet, within the same year, this Board now orders by this Award a payment to be made on an Agreement, executed in mediation, identified as A-560, the language of which is clearly devoid of authority to make any payment. This is not the intention of the statute under which we make Awards in **settlement** of disputes. This kind of a decision is not contributory to advancing of train movements in the orderly handling of the business of common carriers by rail which are impressed with the duty of providing efficient and economical transportation to the public.

For the foregoing reasons we express this dissent.

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley