

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Denver and Rio Grande Western Railroad, that:

(1) The Carrier violated the terms of the prevailing agreement between the parties when on December 21, 1951, it required or permitted Conductor Nelson of Work Extra 1506 to handle Train Order No. 1 at Red Cliff, Colorado, which authorized this train to move from Red Cliff to Minturn; in consequence of which violation the Carrier shall compensate Telegrapher C. E. Ward, senior idle Telegrapher, an amount equivalent to one day's pay at the minimum telegrapher's rate on the division, for work denied.

(2) The Carrier further violated the terms of the prevailing agreement between the parties when on March 6, 1952, it required or permitted Conductor Pickering of Work Extra 1228 to handle Train Order No. 69 at Scofield, Utah, which authorized this train to move from Scofield to Helper; in consequence of which the Carrier shall compensate Telegrapher J. H. Harmon, senior idle extra Telegrapher, an amount equivalent to one day's pay at the minimum telegrapher's rate on the division, for work denied.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties bearing date of June 1, 1946, hereinafter referred to as the Telegraphers' Agreement.

At 1:35 a.m., December 21, 1951, Conductor Nelson of Work Extra 1506, handled Train Order No. 1 at Red Cliff, Colorado, designated by the Carrier in the train order as Mile Post 292, which authorized this train to move from Red Cliff to Minturn. There are no telegraphers employed at Red Cliff, their positions having been declared abolished some time in 1947. The Organization claimed one day's pay on behalf of Telegrapher C. E. Ward who was the senior idle telegrapher on this date on the Grand Junction Division, which is the division where the violation occurred. The Carrier declined payment of the claim.

At 4:22 p.m., March 6, 1952, Conductor Pickering of Work Extra 1228 copied Train Order No. 69 at Scofield, Utah, which authorized this train to move from Scofield to Helper. There are no telegraphers employed at Scofield,

Carrier does not agree. The first paragraph of Rule 21 above quoted is Rule 16 of Decision 757 of the United States Railroad Labor Board dated March 3, 1922. A careful reading of the rule will show the Labor Board in making the rule did not attempt to hamper or hinder operation by prohibiting the issuance of train orders unless a telegrapher was provided to copy them. Neither did it intend that all wayside telephones, as well as those at blind sidings, be discontinued or that telegraphers be provided at such points where they might not be required to use the telephone or perform any other work for days or weeks at a time.

The Organization is fully aware of the provisions of Rule 21, particularly the first paragraph thereof. This is evidenced by the fact that during negotiations in connection with the Current Telegraphers' Agreement the Organization requested the following to be added to Rule 21:

"(D)—It is understood that the application of the penalty for violations of Rules 1 and 21 of this agreement at a point where no employes covered by this agreement are employed, the following will govern:

1. When extra employes are idle on date of violation on the division involved, the senior idle extra employe on that division will be allowed eight (8) hours pay at the pro rata rate of pay for the minimum Telegrapher position of the Division.
2. If no extra employes are idle on the division where the violation takes place, the nearest idle employe on his or her rest day will be allowed eight (8) hours pay at the pro rata rate of pay for the minimum Telegrapher position of the division involved."

The Carrier, of course, refused to agree to the addition of the above-quoted language to Rule 21.

The Carrier asserts the employes by the submission of this claim are attempting to have your Board, by an Award, apply the provisions of Rule 21 in a manner contrary to the plain reading and intent of the rule, and in the manner in which the employes requested the rule be modified to which the Carrier would not agree—in negotiations in connection with the current agreement.

The Carrier further asserts there is no merit to the claim and for reasons above stated it respectfully requests the claim be denied.

All data in support of Carrier's position have been submitted to the Organization and made a part of this particular dispute. The right to answer any data not previously submitted to Carrier by Organization is reserved by Carrier.

OPINION OF BOARD: The claims herein request a day's pay for failure to call Telegraphers Ward and Harmon for the purpose of receiving telephone orders improperly handled by conductors in charge of wrecking trains that had been sent out to re-rail equipment at Red Cliff, Colorado and Scofield, Utah, the derailments having been caused by heavy snow fall.

Rule 21(c), 1 & 2 read as follows: "1. Train and engine service employes will not be required or permitted to transmit or receive train orders, clearances, written messages, or to block or report trains by telephone or telegraph, except in emergency."

It is further understood and agreed that, "2. The word 'emergency' as used in the preceding paragraph is construed to mean: storms, accidents, including delays to trains due to engine or equipment failures, breaks-in-tuos, obstructions caused by wrecks, washouts, high water, slides, snow blockades, or other unforeseen occurrences arising where life or property may be in

jeopardy requiring immediate attention, which could not have been anticipated when train was at previous open telegraph office, and which would result in serious train delays."

In view of the fact that the word "derailments" is not specifically mentioned, resort must be had to its inclusion in "other unforeseen occurrences" in which case it would be limited by the language qualifying those words, i.e., "where life or property may be in jeopardy requiring immediate attention, which could not have been anticipated when train was at previous open telegraph office, and which would result in serious train delays."

The record discloses that the train order involved in claim 1 was copied eight hours and fifteen minutes after the derailment occurred and in claim 2, thirty-one hours after. Assuming "that life or property" might have been in jeopardy, that fact "could have been anticipated when train was at previous open telegraph office" in which case there was no emergency within the meaning of this rule, and consequently a telegrapher should have been called to do the work.

We think Rule 21(c) 1 was agreed to as a modification of the Scope Rule to prohibit the handling of train orders by outsiders except as provided therein (Rule 21 C) and the burden was on the Carrier here to bring itself within the exception of "an emergency" as defined in the rule.

Carrier says, however, that it need not pay in this case, because no penalty attaches for failure to pay, arguing that Rule 10, under which payment is sought is not mandatory. A sufficient answer to that is that it is mandatory in the sense that the work done by the trainmen was "required" and claimants herein were entitled to perform it. Carrier made a similar argument in Award 5186 wherein we made answer as follows: "* * * it does not necessarily follow that where no penalty has been provided, this Board is helpless and without authority to make an award which will tend to enforce compliance with the terms of the contract." We construe the claim as one for damages and not as a claim for penalties.

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 Employees involved in this dispute are respectively Carrier and Employees 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 violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of May, 1954.