Award No. 8358
Docket No. TE-7874

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, 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 and Pacific Railroad that:

1. The Carrier continues to violate the terms of the telegraphers' agreement when, beginning March 3, 1952 and continuing almost daily therefrom, contradictory to your Board's directive in Award 3199, Docket TE-3267, it requires or permits employes not within the scope of the said agreement, at its Memphis Tennessee, Yard Office, to receive by telephone, and copy, messages, consists and/or other reports of record at a time of day when the regularly assigned telegrapher is not on duty, and that

2. The regularly assigned telegrapher, Mrs. A. B. Scholl, and all telegraphers who have relieved and succeeded her on the Memphis Yard Office telegraph position, shall be paid one call under appropriate rules of the agreement for each occasion the Carrier has required or permitted employes not within the scope of said agreement to perform the work here involved.

EMPLOYES' STATEMENT OF FACTS: The existing agreement between the parties to this dispute was effective August 1, 1947 as to rules and working conditions, and September 1, 1947 as to rates of pay.

Although the whole agreement, its supplements, amendments and attachments are made a part of this submission, the Employes wish to direct special attention to Rule 1 (Scope), and Rule 13-(b) (Calls), both of which will be quoted and commented upon in "Employes Position".

At its Memphis, Tennessee, Yard Office Carrier maintains one telegraph-telephone position which works seven days each week, 8:30 a.m. to 5:30 p.m., one hour off for lunch. This position is within the scope of the prevailing agreement between the parties hereto. From the initial date of this claim, May 3, 1952, to her retirement in 1953, Mrs. A. B. Scholl was regularly assigned

29, 1955. Had the Organization been convinced of the correctness of their position, it seems likely that they would have pursued this dispute to a conclusion long before this.

No support for this claim is to be found in the Telegraphers' Agreement, nor in any Award of your Board. In fact, consistent interpretation and application of Award 3199 on this property at this location leads only to the conclusion that these conversations are not communications of record so as to be subject to the provisions of the Telegraphers' Agreement.

We respectfully request your Board to deny this claim.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives.

(Exhibits Not Reproduced.)

OPINION OF BOARD: The claim here is that Carrier violated the Agreement by permitting or requiring direct telephone communication between a dispatcher at Little Rock, Arkansas and non-telegrapher employes at Memphis, Tennessee, at a time when the regularly assigned telegrapher at Memphis is not on duty. The communications complained of occur regularly—practically daily—and are essentially uniform in content: arrival time, number of cars and their destination for Train No. 994, and arrival time of Train No. 112.

Both parties contend that this claim is governed by Award 3199, decided by this Division in 1946 without a Referee, which involved the same Claimant as here, at the same location. Each side feels that Award 3199 supports its position in the instant case. The claim in Award 3199 alleged that the Carrier violated the Agreement "when, on at least," eight specified dates between January 31, 1944 and February 8, 1945, it permitted or required non-telegrapher employes at Memphis "to receive, copy and transmit messages, consists and/or other reports of record, by means of the telephone" at times when Claimant was not on duty. In its submission in Award 3199, Petitioner set out in full, in addition to the eight messages specified in the actual claim, five other messages on other dates, which were also alleged to be violations of the same nature as the eight specified; one of these, dated September 8, 1945, was the same in every respect as the messages complained of in the claim before us.

The Opinion of the Board in Award 3199, in toto, reads as follows:

> "Under the facts and circumstances of this particular case claim for a call should be sustained on the following specific dates: February 8, July 26, August 23, 1944, January 16, 25, 30 and February 8, 1945."

The effect of this was to sustain claims for seven of the eight specified dates in the original claim. No explanation is given for the failure to sustain the claim for the eighth specified date; no mention is made of the additional five instances in Petitioner's submission; nothing is said about that part of the claim requesting payment for "all subsequent days" on which the violations occurred after the specified days.

Carrier contends that the failure of the Board to sustain the claim of September 8, 1945 was a denial thereof and that this denial is a final and

binding adjudication of all similar claims between the parties. Since that claim was admittedly the same as the claims in this case, Carrier insists that the Board has jurisdiction only to deny the present claim.

Petitioner argues that the failure to sustain each claim in Award 3199 did not constitute a denial of those not sustained, but resulted from the fact that some claims were not as well supported by documentary evidence as others. The claims which were sustained, according to Petitioner, were of the same nature as those not sustained; the principle established by the Award that the type of work involved in the successful claims belongs to telegraphers under their Agreement is applicable to the present case and calls for a sustaining award.

A diligent study of the entire record in Award 3199 fails to reveal any differentiation made by either party in its presentation to the Board between the claims that were eventually sustained and those that were not. Carrier never addressed itself to the five additional alleged violations in Petitioner's submission. As to the eight specified instances in the claim, Carrier took the same position as to all of them—that they were merely conversations and were not communications of record. Petitioner likewise treated all thirteen of the instances which it listed in the same manner, making no argument in support of one which was not made in support of all. There is no hint as to why the Board failed to sustain the claim as to the message of January 31, 1944, while sustaining the seven remaining specifically itemized messages in the claim. Nor is there a hint as to why the five additional messages were not sustained, or the claim for subsequent violations. On this state of the record in Award 3199, we cannot find as Carrier suggests, that the Board found a substantive difference between the message of September 8, 1945 and the seven messags for which it sustained claims; or that the Board's failure to sustain the claim for that date was a denial based on the particular nature of that message. We can only conclude that the difference in treatment was based on other than substantive grounds. Therefore, we do not feel bound to deny this claim on the basis of Award 3199.

On the other hand, it appears that the messages for which a sustaining award was rendered in that case do not differ essentially from the messages therein which were not mentioned in the Opinion or from the messages involved in the claim before us. The same arguments are advanced by Carrier in this case as were advanced and rejected in Award 3199 as to the claims sustained therein. We feel that the sustaining award in that case as to communications not essentially different from the communications complained of here, involving the same claimant at the same location, requires a sustaining award in this case.

The difficult and recurrent problem of third-party notice is raised by the Carrier in this case, and numerous awards rendered since the referee here assisting last spoke on the subject have been submitted to him. It is his opinion still that the resolution of this procedural matter is outside the scope of the functions assigned to referees by the Railway Labor Act; accordingly, the motion of Carrier to dismiss the claim for lack of notice to an interested third party is not granted.

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 was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 5th day of June, 1958.

DISSENT TO AWARD NO. 8358, DOCKET NO. TE-7874

The Majority finds that the Agreement was violated when Train Dispatcher at Little Rock, Arkansas, held telephone conversation with yard employes at Memphis, Tennessee, relative to the estimated arrival time of Manifest Freight Train No. 994 and the number of cars therein for the yard and connecting lines, and to the estimated arrival time of Train No. 112. The Record shows that yard employes made a pencil memorandum of this telephone conversation and used the information therein to plan their work in advance of Train No. 994's arrival. The memorandum was then thrown away. Inasmuch as the memorandum of this telephone conversation was not a message of record, as that term has been defined by this Division, Award 8358 is in error.

The error is compounded by the fact that, in **Award 3199** involving the same location and Claimant as here, the Employes submitted a claim that included a message dated September 8, 1945, which the Majority concedes is "the same in every respect as the message complained of in the claim before us." The Employes' claim for September 8, 1945, was not sustained in **Award 3199.** Thus, the exact question here had previously been adjudicated and the present claim should have been denied. Instead, the Majority sustained it under a strained ratiocination which concludes that the Division's failure to sustain the claim for September 8, 1945, must have been "based on other than substantive grounds." The fallacy of this conclusion is patent, for in the same paragraph the Majority admits "There is no hint as to why the Board failed to sustain the claim as to the messages of January 31, 1944 * * *. Nor is there a hint as to why the five additional messages were not sustained * * *."

One thing is certain—the claim for September 8, 1945, was not sustained. **Award 3199** does not say why, but it disposed of the claim before us with final and binding effect and the only logical conclusion, therefore, is that the claim for September 8, 1945, was not sustained because the Division decided that the telephone conversation in evidence for that date did not violate the Telegraphers' Agreement. The Majority has no right to resort to speculation and conjecture in order to read into **Award 3199** something not supplied on its face. The Record shows that the Carrier faithfully met its

obligation by discontinuing the performances for which claims were sustained in **Award 3199,** i.e., messages addressed to third parties for later delivery. Conversely, the Carrier had the right to and did continue the telephone conversation between the Train Dispatcher and yard employes which was the subject of the present dispute because it was not sustained therein. Further, the Employes recognized the propriety of Carrier's continuing its practice as to such conversations and made no protest for more than six years.

In **Award 3199,** the Employes submitted thirteen alleged messages. The one dated September 8, 1945, was entirely different from the other twelve. It is sheer sophistry to contend that, when but a portion of a claim is sustained, the other part is not denied.

In **Award 5394,** certain claims were sustained in part, without specifically mentioning the fact that other claims made therein were being denied because of lack of proof. In **Award 6935,** the Employes sought to progress one of the claims that had not been sustained in **Award 5394.** The Division properly held that it lacked jurisdiction to handle such claim. The Majority was cited **Award 6935** which commanded the denial of the instant claim. Instead of relying upon this sound precedent, the Majority resorted to speculation and conjecture and made an erroneous award.

The Majority herein has penalized the Carrier for correctly relying upon an Award which was made final and binding by Section 3, First (m) of the Railway Labor Act. **Award 6935.**

Further, in **Award 7585,** we dissented to the present Referee's Opinion on third party notice. His error has been made manifest by subsequent **Awards 7975, 8022, 8023, 8050, 8105, 8106, 8107, 8200, 8216, 8220, 8258 and 8326.** The Referee has authority equal to that of the regular members to deal with matters of procedure arising in the case. The Referee should have denied this claim, or deferred final decision thereon until such time as due notice of all hearings had been given to all parties involved in this dispute, as required by Section 3, First (j) of the Railway Labor Act.

For the foregoing reasons, we dissent.

/s/ J. F. MULLEN

/s/ R. M. BUTLER

/s/ W. H. CASTLE

/s/ C. P. DUGAN

/s/ J. E. KEMP