Award No. 9203
Docket No. TE-8041

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Orders of Railroad Telegraphers on the Texas and Pacific Railway, that

1. The Carrier violated Article 1 and other articles of the agreement between the parties hereto when on Saturday, December 25, 1954 (Christmas Day), and Saturday, January 1, 1955 (New Year's Day), it failed to use O. L. Haptonstall the regularly assigned rest day relief telegrapher whose assignments included work on the first shift operator position at Mineola Yard Office, Mineola, Texas, and assigned certain duties of his position to employe not subject to the agreement.

2. The Carrier shall compensate O. L. Haptonstall additionally for eight (8) hours at the time and one-half rate for the two holidays in question.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties with effective date of May 15, 1950. A copy is presumed on file with the National Railroad Adjustment Board and by this reference is made a part of this submission.

Claimant O. L. Haptonstall is the regularly assigned rest day relief telegrapher at Mineola Yard, Mineola, Texas. Saturday is one of the work days in the work week assigned to Mr. Haptonstall. On December 24, 1954, the following message was sent to operators and others at Mineola Yard:

"NY KS Fort Worth Dec 24-54

RHB ARH Oprs—Mineola Yard

There will be no operator on duty at Mineola Yard 8 A. M. to 4 P. M. Saturday 25th—

JWM 208 pm"

pay for **work performed** on a holiday. Claimant performed no work, and therefore has been properly compensated.

The Carrier asserts that the claim is without merit and requests your Board to so decide.

It is affirmed that all data submitted herein in support of the Carrier's position has heretofore been presented to the Organization and is hereby made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was the regularly assigned rest day relief telegrapher scheduled to provide relief on Saturdays at Mineola, Texas. He was notified that his services would not be needed on Saturday, December 25, 1954 and again on Saturday, January 1, 1955, both recognized holidays. He received a pro rata day's pay for each day as provided for in the National Agreement even though the position is not worked on a holiday, and seeks further payment of eight hours at time and one-half rate, contending that in fact the position was not blanked on either day but the duties were assigned to employes not covered by the Telegraphers' agreement.

Carrier seeks dismissal upon the grounds: first, that there is no evidence in the record to show that the General Chairman notified the Chief Dispatcher in writing that his decisions were rejected, as required by the National Agreement, and, second, that petitioner's ex parte submission was not filed with this Division within nine months from the date of the decision of the highest officer designated to handle such matters, as required by that agreement.

As to the first contention: Petitioner has raised no question as to these procedural matters; such matters are not facts or supporting data bearing upon its dispute, therefore it is not necessary that they be set out in its submission. If Carrier disputes proper compliance with any procedural requirement the duty falls on it to set out the facts and supporting data bearing upon it. Carrier has not shown as a fact that the Chief Dispatcher was not notified as required by the agreement but only that it does not affirmatively appear in the submission, so its contention based thereon must be denied.

As to its second ground for dismissal, the Railway Labor Act provides that disputes may be referred by petition of the parties or by either party to the appropriate Division with a full statement of the facts and all supporting data bearing upon the dispute. It provides no time limitation or method of procedure, but, under authority given in the Act, the Board has established a method of procedure requiring that in case of an ex parte submission the petitioner first serve written notice upon the Division of intention to file its submission on a certain date (30 days hence) and provide copy to the other party with statement of question involved and brief description of the dispute and thereupon the Secretary of the Division must immediately request the other party to file its submission within the same time.

The Time Limit Agreement upon which Carrier relies does not require that all claims shall be barred unless within nine months from the date of the decision of the highest officer, a petition be filed with the Division as

required by the Act; rather, it requires that within that period "proceeedings be instituted" before the Division. Proceedings are instituted when they are initiated or begun. In case of ex parte submission, the first and necessary step is the serving of notice upon the Division. That notice sets the machinery of the Division in motion by requiring the Secretary immediately to request and fix the time for the filing of submission of the opposing party, thus requiring that party to proceed, and thereby the proceedings are initiated and "instituted." This Division has consistently so held in several awards, as have other divisions.

Petitioner insists that, regardless of other reasons, the claims here must be sustained because claimant was not in either case given 48 hours notice that he was not to work on the holiday, under Article 5(d), requiring that the assigned hours of each position will be posted and 48 hours advance notice be given of any change therein except in emergency. We cannot concur. The blanking of a position for a day does not change the assigned hours of the position.

Petitioner does not dispute the right of Carrier to blank the position if there was no work of the position to be performed. However, if there was work of the position to be performed, claimant was entitled to perform it and if any of its duties belonging exclusively to telegraphers were assigned to employes outside the Telegraphers' agreement, claimant was entitled to the pay the same as if he had been used for the work. The issue to be determined is whether work belonging exclusively to claimant's position was performed by employes outside the Telegraphers' agreement on those days. Petitioner asserts and Carrier denies that such work was performed on the holidays involved.

The essential facts are not in dispute. On each of the holidays an extra train was assigned to operate from T & P Junction to Texarkana. Mineola was a subdivision terminal where the train crew was changed and a telegraph office was maintained on full time basis. On these days while claimant's job was blanked, clearance card and train orders for the outbound crew were transmitted to the telegrapher at T & P Junction who delivered them to the outbound train crew with instruction to "Deliver all your train orders to outbound crew at Mineola Yard."

Claim here is based both on the Scope Rule and Train Order Rule. The latter provides that no employe other than covered by the agreement and train dispatchers will 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 an emergency. This claim arose at a telegraph office where claimant was employed. Carrier having blanked his job for the day, cannot say he was not available. The work of handling train orders at that office during his shift belonged to him, exclusively.

Carrier asserts that the clearance card and train orders containing instructions to run extra from T & P Junction to Texarkana were properly delivered by a telegrapher to the train crew at T & P Junction and governed movement of the train through Mineola to Texarkana. Train orders are not delivered to trains but to crews. It has been well established by awards of this Division that the handling of train orders includes their delivery to the crews which are to execute them. The clearance card and train orders to be obeyed by the Mineola outbound crew were not delivered to that crew by a telegrapher but by a conductor, not covered by the agreement. The fact that in this instance the same orders applied to operation over

both subdivisions made them no less separate orders as applied to the separate crews. An essentially identical claim was sustained in award 1304 and similar claims were sustained in Awards 1096, 5087 and 8661.

Carrier urges, further, that it has been the practice for one crew to turn its orders over to a relieving crew for a great many years under Rule 217 of the Uniform Code of Operating Rules and predecessor rules. The same contention, under the identical rules, was made and denied in connection with the claims decided in the three awards last mentioned. As held in those awards, where there is ambiguity as to the meaning and application of the rule, as involved in Awards 7343 and 8327, which are stressed by Carrier, then the application on the property may control, but where there is no such ambiguity the rule must prevail over contrary 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 Employe involved in this dispute are respectively carrier and employe 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

Claims 1 and 2 are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January, 1960.

DISSENT TO AWARD NO. 9203, DOCKET NO. TE-8041

Award 9203 is correct in recognizing that Carrier did not violate the agreement in blanking a seven-day position on a holiday and in not giving forty-eight hours notice thereof under Article 5 (d).

Award 9203 is also correct in reaffirming this Division's denial of the claims in Awards 7343 and 8327.

Award 9203 is in error, however, in sustaining the claims herein on authority of Awards 1096, 5087 and 8661. In each of those cases, a train order was given to the crew of one train for delivery to the crew of an entirely different train. The dissents to those Awards bespeak the fallacy thereof.

In the instant case, like in the cases covered by Awards 7343 and 8327, no one handled the train orders involved herein but telegraphers

and the crews of the train to which they were addressed. The fact that, in the instant case, one crew relieved another en route at Mineola on the train to which the orders were addressed did not effect a second delivery of the orders inasmuch as they were addressed in the first place to the Conductor and Engineer of the the train, whoever they might be. Consequently, a sustaining award was not warranted in this case. For this reason, among others, Award 9203 is in error and we dissent.

/s/ **W. H. Castle**
/s/ **J. E. Kemp**
/s/ **C. P. Dugan**
/s/ **J. F. Mullen**