Award No. 9988
Docket No. TE-6800

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

UNION PACIFIC RAILROAD COMPANY
(South-Central District)

STATEMENT OF CLAIM: Claim of The Order of Railroad Telegraphers on the Union Pacific Railroad, South-Central and Northwestern Districts, that:

(a) The Carrier has violated and continues to violate the agreement between the parties signatory thereto, when it requires or permits employes not covered by said agreement to "handle" train orders at West End Yard Office, Las Vegas, Nevada, and

(b) that the Carrier has violated and continues to violate the agreement when it requires or permits other than those covered by said agreement to operate printing and/or mechanical telegraph machines used in the transmission or reception of messages and reports of record, and/or to perforate tape or cards as a function in the transmission or reception of messages and reports of record at the West End Yard Office, Las Vegas, Nevada, and

(c) that for such violations the Carrier shall compensate the senior idle employe or employes covered by the Telegraphers' Agreement for the equivalent of a day's pay for each 8-hour shift, both day and night, since August 25, 1952, the date on which the new yard office at Las Vegas was placed in service, at the telegraphers' rate applicable to that particular location.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of January 1, 1952, by and between the parties and referred to herein as the Telegraphers' Agreement, is in evidence.

In connection with the handling of train orders by employes not subject to the effective agreement at the Las Vegas Yard, Carrier's assistant superintendent issued the following bulletin:

the Carrier's position on the merits set forth in its Response to Notice of Ex Parte Submission in that docket is equally applicable to Paragraph (b) of the Organization's claim in this docket. The Carrier's position in the Salt Lake City case is incorporated herein by reference and is made a part of this submission.

It has been demonstrated in this submission that —

(1) The dispute covered in Paragraph (b) of the Organization's claim should be dismissed; and

(2) In any event, there is no merit to either of the Organization's Claims (a) and (b).

For the reasons set forth herein, the Carrier submits that the Organization's claims in this docket should be denied.

All information and data contained in this Response to Notice of Ex Parte Submission is a matter of record or is known by the Organization.

OPINION OF BOARD: The procedural question of giving a third party notice has been fully disposed of. Therefore, these claims will be considered on their merits.

The employes states that prior to August 25, 1952, the Carrier's freight and communication activities were located in and near the passenger station at Las Vegas. A telegraph office was located in the passenger station building. Telegraphers employed in that office handled all train orders, delivering them directly to the crews of all trains in both directions. The telegraphers also performed all the communication work normally associated with the operation of such a terminal. Exchange of the messages, consists, and other items involved in the communication work, between the telegraph office and the yard office was accomplished by means of a pneumatic tube. On August 25, 1952, the Carrier extended its freight facilities about a mile west of the passenger station. A new yard office was built at the west-end of the new yard and was open for business on August 25, 1952. This office is known as the West-End Yard Office. The necessary clerical force was moved from the old yard office near the passenger station. Instead of providing for telegraphers at the new yard office, a new pneumatic tube was installed to connect the existing telegraph office with the new yard office. This device apparently was used for the same purpose as the one it replaced. But in addition, it was also used to effect delivery of train orders to the crews of those trains which departed from the new West-End Yard Office. The grievants object to the use of the tube, contending that their right to deliver train orders to the crews addressed is thereby violated. The telegraphers perform the usual work involved in the handling of train orders, that is, they copy them in manifold, repeat to the dispatcher to check for mistakes, accept responsibility for their proper delivery to the crews addressed, and prepare the copies for delivery. However, instead of actually delivering the orders to the crews in the usual manner, and as required by the Carrier's operating rules, the telegraphers are obliged to place the orders, along with other material, in the pneumatic tube carrier. This pneumatic tube carrier substitutes for human messenger. It carries the papers to the West-End Yard Office where they are received by a clerk. The orders are then delivered to the crews by the yard clerk, who takes them out of the pneumatic tube.

The issue presented in Claim (a) by the employes is simply whether employes outside of the scope of the Telegraphers' Agreement may properly be required to deliver train orders.

As we stated in Award No. 6071, this is not a new issue and while the awards are conflicting, there is unanimity upon the proposition that where, as here, the Scope Rule lists positions instead of delineating work, it is necessary to look to practice and custom to determine the work which is exclusively reserved by the Scope Rule to persons covered by the Agreement.

Rule 62 reads as follows:

> "Train Orders. No employe other than covered by this schedule 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, in which case the telegrapher will be paid for the call."

From a careful reading of the record before us, we find that no telegrapher is employed at the West-End Yard Office. Therefore, the Carrier has not violated Rule 62 of the effective Agreement. The record also shows that the telegrapher performs every duty that he has performed in the past, with the exception of personally handing to the crews of those trains which depart from the new West-End Yard Office the train order. The Scope Rule of the Telegraphers' Agreement does not give to them this work of personally handing to the crew these train orders. Rule 62 states that they have the exclusive right, except in emergency, of the handling of the train orders at stations where telegraphers are employed. Custom and practice show that employes other than telegraphers have handled train orders at offices where the telegraphers are not employed, and as they are not employed at the West-End Yard Office the Carrier did not violate the Agreement.

The employes state that sometime after August 25, 1952, the Carrier placed in service at the West-End Yard Office a number of electro-mechanical devices, the purpose of which is to compile records which are necessary to the operation of the Carrier's freight trains, and to communicate those records to other offices, some of which are located many hundreds of miles from Las Vegas. Before the change was made, the purely clerical work, that is, the compiling, typing, writing, of the required records and reports was performed by clerks; and the communication work, that is, the transmission by telegraph, teletype, telephone was performed by telegraphers. The new machines are semi-automatic, requiring a human operator to set the machines in motion and to feed them the material which results in communication of intelligence between distant points. The employes object to this use of clerical employes, who are not subject to the Telegraphers' Agreement, to perform the work required to make these machines function as communication devices and thus divert work from the telegraphers.

The Carrier states that it installed certain IBM machines at its West-End Yard Office to handle the preparation of wheel reports, consists, manifest and manifest passing reports, and other clerical statements and records at Las Vegas which were formerly prepared and handled manually by clerical employes at the yard office. The Card Record Bureau at Las Vegas, located in the West-End Yard Office, employs the following machines:

(1) One IBM Alphabetical Key Punch Machine
(2) Two IBM Tape Controlled Card Punch Machines

(3) Two IBM Card Controlled Tape Machines
(4) One IBM Sorter Machine
(5) One Alphabetical Accounting Machine
(6) One IBM Alphabetical Interpreter
(7) Two Teletype Receiving Printers and
One Teletype Transmitter

The machines involved in the Card Record process at Las Vegas, the work functions performed by the employes at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office in Salt Lake City. The question of the use of these machines at the Carrier's North Yard Office at Salt Lake City was decided in Award 8656 on January 12, 1959 and that Award denied the claim made by the employes. The key to the entire IBM system is the punch card in which holes are punched either manually or automatically from a punched tape to correspond with certain information which the associated equipment uses in the compilation and reproduction of various reports and records. The new system was put into effect by the Carrier on October 28, 1952. No part of the process as it pertains to the receipt and transmission of information on the teletype printer machines occurs as a result of activation of any device by the employes of the IBM Card Record Bureau — the process is entirely automatic.

The Board finds that Award No. 8656 stated:

> "A careful review of the record does not support petitioners' claim that other employees of the Carrier are performing work belonging exclusively under the Telegraphers Agreement. Rather such work as telegraphers might otherwise perform or might have rights to under the Agreement is now performed not by other employees but by the automatic operation of the machines in question.
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> "The Division has not supporter the proposition that when an automatic machine is installed to perform a certain function, the employee who previously performed that function is entitled to remain simply to watch the automatic machine operate. * * *"

We are in accord with what was said in Award No. 8656 in that the Division has not supported the proposition that when an automatic machine is installed to perform a certain function, the employe who previously performed the function is entitled to remain idly by and watch the automatic machine operate. However, from the evidence produced at the hearing in this docket, we find that these machines are not automatically operated. To the contrary, we find that the clerks who are now operating these machines must place these perforated cards in the machine, then push a button and then the machine operates.

The record shows that under the Telegraphers' Agreement the Scope Rule states that the agreement will govern the wages and working conditions of teletype operators and printer operators. The record also shows that even though the Scope Rule does not give to the telegraphers the exclusive right to perform this work, they have exclusively performed the work, in the past, of teletype operators and printer operators.

The Carrier states in this submission when it refers to the number of machines that it has installed at the West-End Yard Office at Las Vegas,

that it has installed teletype machines and its gives in detail the work performed by these teletype machines. The Carrier states that the teletype machines function as follows:

> "This auxiliary equipment functions completely automatically in conjunction with the car handling system. For the receipt and distribution of information used in the car record processes, two teletype receiving printers and one teletype transmitter have been installed adjacent to the Car Record Bureau. Attached to the receiving printers are two teletype reperforators.
>
> "The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point. At the receiving point it produces information on a printed page. Using the same impulses, and simultaneously to the printing of the information on paper, the reperforator punches a tape on which information corresponding to that shown on the printed page is reproduced.
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> "The tape produced by the reperforator is then used to produce punched cards by the process desribed in Item (2) above.
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> "The teletype transmitters operate in the same manner: The tape produced electrically from cards by the process described in Item (3) is inserted in the teletype transmitter. Electrical impulses imposed by the code on the tape activate the teletype transmitter. The machine produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point.
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> "A reperforator at the distant point of reception duplicates the information on a tape and the entire procedure is repeated."

The Carrier, by its own admission, states that the tape produced electrically from cars by the process described in Item 3 is inserted in the teletype transmitter. This tape is inserted by a clerk and it is work which comes under the Telegraphers' Agreement. The teletype receiving printer is also work that comes under the Telegraphers' Agreement and has been performed in the past by telegraphers and not by clerks. The tape at a distant point that is transmitted to the teletype receiving printer must be inserted by someone to activate that machine.

In Award No. 8656, the Board found that the work was not performed by other employes, but by the automatic operation of the machines in question. We find that the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office is performed by an automatic operation of the machines in question, but is activated by a clerical employe. Tape-producing machines activate by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher.

The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office.

The Carrier shall compensate the senior idle employe covered by the Telegraphers' Agreement for the equivalent of a day's pay for each eight-

hour shift since October 5, 1952 at the Telegraphers' applicable rate to that particular location for each day or shift that the two teletype receiving printers and the one teletype transmitter was used at that location.

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 violate as stated in the Opinion.

AWARD

Claim (a) denied.

Claims (b) and (c) sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of July, 1961.

DISSENT TO AWARD NUMBER 9988, DOCKET NUMBER TE-6800

This docket involves two separate claims based on different alleged Agreement violations. Part (a) involves a claim arising out of the handling of train orders by other than telegraph employes, and Part (b) involved the Carrier's utilization of automatic IBM machines in its mechanized car record procedures.

In this **Award 9988**, which was adopted by a majority composed of the Referee and the five Labor Members, the Board correctly finds that Part (a) of the claim should be denied, that the manner in which train orders were handled at Las Vegas was not in violation of the Telegraphers' Agreement. The Board correctly holds that the ultimate personal delivery by clerical employes of train orders to the train crew members does not violate the so-called Train Order Rule, and, further, that "the Scope Rule of the Telegraphers' Agreement does not give to them [telegraphers] this work of personally handing to the crew these train orders." This holding represents a correct reading of the applicable Agreement provisions and a proper adherence to this Board's prior decision in **Award 6071** (Referee Begley) involving the same Agreement provisions, the same Carrier and the same problem.

This dissent is not directed to the Board's action as to Part (a) of the claim. We do dissent, however, to the Board's erroneous action in sustaining Parts (b) and (c).

The dispute presented in Part (b) of the claim involved the Carrier's use of the IBM machines and is the same, identical dispute which was presented to and denied by this Division in a companion docket, TE-6799, resulting in denial **Award 8656** (Referee Guthrie).* The parties in the two dockets are the same, the same Agreement is involved, and, save for the fact that here the dispute arose at Las Vegas, Nevada, instead of Salt Lake City, Utah, the facts of the two disputes are identical in every respect. The results achieved by the IBM machines here and those in **Award 8656** are the same in every detail. None of this is open to question because the record in the two dockets is the same, identical record, both the Carrier and the Telegraphers' Organization having incorporated in this docket the factual statements, arguments and contentions set forth in their respective submissions in Docket TE-6799 (**Award 8656**). In sum, the dispute here and in **Award 8656** are one and the same dispute.

The Board has recognized the identity of the dispute in the two dockets. In fact, we find the Board reciting from and concurring with the very statements in **Award 8656** which formed the basis for the Board's denial of the Telegraphers' claim that its Agreement had been violated in the utilization of automatic IBM machines. Thus, while approving **Award 8656**, the Board comes to a conclusion directly opposite to that reached in **Award 8656** and finds that the Carrier's action in the same, identical circumstances was a violation of the Telegrapher's Agreement! One may well ask: "How can this be?". Unfortunately, the answer to this question cannot be found in the Board's Opinion in **Award 9988** nor in any logical or reasonable appraisal of the record in this case. The instant decision is simply not explicable on the basis of the record before the Board. The explanation, if any, must be found elsewhere.

It will be our purpose in this dissent to point out the serious errors in the instant award. At the outset we point out that, apart from any consideration of the merits of this automation aspect of the dispute, the Board's inconsistent action in denying the claimed violation in **Award 8656** and sustaining the claimed violation in Part (b) here, strikes at and challenges the very basis of the Board's position in railroad labor relations as intended under the Railway Labor Act.

The Board's action here leaves the Carrier and, for that matter, the employes, in an unworkable situation. In **Award 8656** this Board, in a decision from which there was no dissent, found that the Carrier's manner of operation in its mechanized car record procedures did not violate the Telegraphers' Agreement. This Board stated:

> "A careful review of the record does not support petitioner's claim that other employees of the Carrier are performing work belonging exclusively under the Telegraphers Agreement. Rather such work as telegraphers might otherwise perform or might have rights to under the Agreement is now performed not by other employees but by the automatic operation of the machines in question."

That was on January 25, 1959. For nearly three years both the Carrier and the Organization have operated under such award. Almost three years later,

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*Both Docket TE-6799 (**Award 8656**) and Docket TE-6800 (**Award 9988**) were companion cases and were originally handled together with Judge Robert G. Simmons in April 1954 on the Third Party Notice issue. They were not disposed of at that time, and the dockets later became separated.

this Board reverses itself, and this same Carrier and its employes are now told in **Award 9988** that clerical employes are performing work belonging to telegraph employes in violation of the Telegraphers' Agreement. Such a situation is intolerable and makes for an instability flatly contrary to the clear intent of the Railway Labor Act. Further, all carriers are charged by Congress in the Interstate Commerce Act with the duty to conduct their operations in an efficient manner. The Board's action makes such objective impossible.

It has long been axiomatic with the National Railroad Adjustment Board that to fulfill its function of dispute settlement a uniformity of interpretation of labor agreements is essential. To interpret the same contract one way in one award and then in the exactly opposite way in another only serves to create further disputes involving the identical issue.* The Board has recognized this sound principle and held that unless an award is "palpably wrong" there is never any warrant in overruling, in a subsequent dispute between the same parties, a previous award construing the same provisions of their Agreement. See **Award 8104** (Referee Guthrie) and **7968** (Referee Elkouri) as representative on this question.

Moreover, this Division in **Award 9435** (Referee Begley) held:

> "This Referee is in accord with the thinking of the Referee who sat with the Third Division in rendering Awards 9254 and 9255, wherein he states that he 'considers the use of the words "without prejudice" unfortunate if they were intended to convey the meaning urged by the Carrier'. However, **this Referee is also inclined to follow precedent on the point of issue, particularly in view of the Railway Labor Acts' requirement that where no money award is concerned, as in the present case, the Board's Awards shall be final and binding upon both parties to the dispute."****

In an article which appeared in the July 1959 **Railroad Telegrapher**, Mr. J. M. Willemin, attorney for the Telegraphers' Organization, stated:

> "When a collective agreement rule has been construed, the interpretation of that particular rule becomes, so to speak, a part of the agreement as though it had been written into the agreement in the first place. **The interpretation thus becomes a vested right, and should not, except for very clear, positive, and cogent reasons, be subsequently changed.** The parties to any agreement have the right to change the same at any time, in conformity with the provisions of the Railway Labor Act."

This observation finds sound roots in the Railway Labor Act, itself, which provides at Section 3, First (m) that awards of this Board of the type of **Award 8656** are "final and binding" upon the parties.

One would have thought, then, that in view of **Award 8656** there would have been no question as to the disposition to be made in the identical dispute

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*In **Award 8656** the Board found that the use of the transmitting teletype machines at Salt Lake City was not in violation of the Telegraphers' Agreement. The Board now says that it is a violation to automatically receive a communication at Las Vegas from Salt Lake City, although it has held that there was no violation in its transmission from Salt Lake City!

**All emphasis is supplied unless otherwise indicated.

in Part (b), that the Board would recognize it should be denied. Such action would have been in accord with what the Telegraphers' Organization, itself, has said. The interpretation of the Telegraphers' Agreement which was made in **Award 8656** became "so to speak, a part of the agreement * * * a vested right". The Board recognized and followed this principle in denying the claim put in Part (a), and its failure to do so as to Part (b) goes a long way down the road in destroying confidence in the **ad hoc** adjudicatory processes envisaged by the Railway Labor Act. This is especially true where no attempt was made to show that **Award 8656** was "palpably wrong" and the Board in its Opinion here does not even attempt to advance any reasons, let alone "clear, positive and cogent" reasons for not following the previous interpretation.

And it must be remembered, the situation here was unique — this was not simply a case of the Board following sound precedent — here we had the **identical** dispute presented on the same record.

The foregoing discussion is made without regard to the merits of this dispute to which we now turn.

(1) Even a casual reading of the Board's Opinion discloses such inconsistent and inaccurate statements as to demonstrate a lack of understanding of the issues tendered in this dispute.

In **Award 8656** this Board, upon the identical record, found and held that clerical employes were **not** performing work which belonged exclusively to Telegrapher employes. This Board found that "such work as telegrahers might otherwise perform or might have rights to under the Agreement is now performed not by other employes but by the **automatic operation** of the machines in question."

In the instant **Award 9988**, this Board (page 4) recognizes, as, of course, it must, that —

> "The machines involved in the Card Record process at Las Vegas, the work functions performed by the employees at Las Vegas in connection with the machines and the results achieved are identical in every detail to the machines used, work functions performed and results achieved in the same operations at the Carrier's North Yard Office in Salt Lake City.",

and on the same page, this Board also finds —

> "No part of the process as it pertains to the receipt and transmission of information on the teletype printer machines occurs as a result of activation of any device by the employees of the IBM Card Record Bureau — **the process is entirely automatic.**"

The Board then states:

> "**We are in accord with what was said in Award No. 8656** in that the Division has not supported the proposition that when an automatic machine is installed to perform a certain function, the employee who previously performed the function is entitled to remain idly by and watch the automatic machine operate." (Last paragraph, page 4, **Award 9988**)

Then follows the almost unbelievable and wholly inconsistent statement—

> "* * * we find that these machines are not automatically operated."

This is not all. Subsequently, on page 6, the Board says:

> "We find that the work performed on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office **is performed by an automatic operation** of the machines in question, but is activated by a clerical employee."

The Board also stated:

> "The new machines are **semi-automatic**, requiring a human operator to set the machines in motion and to feed them the material * * *." **(Award 9988**, page 3, second paragraph)

The Board thus demonstrates its inconsistency on a point which is crucial to its ultimate determination. At one place it says the machines are automatic and concurs with prior **Award 8656** to that effect, and then in the next breath proceeds to say they are not "automatic" but are "semi-automatic" because someone has to start the machines. Then, in further confusion, it concedes that the machines "automatically operate." It is regrettable to find inconsistency as between some of the awards of this Division. To find inconsistency within the same award is indefensible.

Further misunderstanding is also shown at the bottom of page 4, where the Board, in purporting to distinguish this case from **Award 8656**, said—

> "To the contrary, we find that the clerks who are now operating these machines must **place these perforated cards in the machine**, then push a button and then the machine operates."

Then on page 6, first paragraph, reference is made to the fact that the machine-produced tape is inserted in the teletype transmitter and—

> "This tape is inserted by a clerk and it is work which comes under the Telegraphers' Agreement. The teletype receiving printer is also work that comes under the Telegraphers' Agreement and has been performed in the past by telegraphers and not by clerks. The tape at a distant point that is transmitted to the teletype receiving printer must be inserted by someone to activate that machine."

It is thus impossible to determine whether it is the insertion of the cards or the tape or both which the Board is considering. The Carrier is thus left in a real quandary. Further, the Board's concern over what is done at the "distant point" (see last sentence of above quotation) when this dispute concerned only the machines at Las Vegas indicates a serious lack of understanding as to what was involved here.

The Board's inconsistent and erroneous statements in its Opinion in **Award 9988** show it to be "palpably wrong," valueless as precedent and, in addition, of doubtful legal validity.

(2) We will subsequently discuss the Board's confusion as to the term "automatic." We discuss at this point the purported **basis** for its

erroneous statement that these machines are "not automatically operated", but that they are "semi-automatic." In the last paragraph on page 4, after indicating that it was "in accord" with **Award 8656**, the Board stated:

> "However, **from the evidence produced at the hearing** in this docket, **we find that these machines are not automatically operated.** To the contrary, we find that the clerks who are not operating these machines must place these perforated cards in the machine, then push a button and then the machine operates."

Thus, the Board admits that this "evidence" furnished the basis for its purported distinguishing of this case from that involved in **Award 8656**, a task which was surely necessary to the sustaining of Part (b) of the claim in this docket.

The "hearing" referred to in the Opinion was the hearing which was held before the Third Division with the Referee sitting with the Division as a member thereof. As everyone knows, such a hearing, with the Referee present, is not a hearing in the usually accepted sense of that word. It is supposed to be an oral argument to the Board on the record in the dispute before it. For the Board to have accepted, considered and relied upon any "evidence" at the referee hearing which did not appear in the written record was flatly contrary to this Division's rules and regulations, and we submit such action by the Board has destroyed the Award's validity.

In the letter which this Board sent the parties advising of the hearing before the Board with Referee Begley, it was stated:

> "The hearing is for the purpose of orally reviewing and arguing the **evidence already presented. The Third Division is not disposed to accept evidence not heretofore presented.**" (Letter dated March 1, 1961)

Moreover, even with the initial hearing before the Third Division, the Division's Executive Secretary in his notice of hearing advised the parties:

> "In consideration therewith you are hereby advised that the Third Division is not disposed to admit known evidence at an oral hearing which has not theretofore been presented for consideration by the interested parties during negotiations between them in their undertaking to adjust the dispute without petition to the Adjustment Board." (Letter dated April 9, 1956)

Such instructions are, of course, premised on the Board's original regulations issued as Circular No. 1, October 10, 1934:

> "Hearings. — Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.
>
> "The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."

(These regulations are codified in the Code of Federal Regulations, Title 29, Chapter III, Part 301.)

The record in this docket upon which **Award 9988** was rendered, was by the parties' own stipulation, the identical record before the Board in Docket TE-6799, **Award 8656.** For the Board to consider anything not contained therein was a flagrant violation of its own rules.

All familiar with the Board's procedure are aware of the Board's rule. Indeed, at the start of the hearing which was held in this docket with the Referee present, the Chairman of the Division admonished both parties of the Board's rule in this regard. This was reiterated during the hearing.

The Board, having provided that no evidence will be presented or considered at hearings, must adhere to its own rules. While this situation is not commonplace, an Agency violating its own rules has been considered and condemned by the Courts. In **Sangamon Valley Television Corp. v. United States** (1959), USCA-DC, 269 F.2d 221, the Court of Appeals held —

> "Agency action that substantially and prejudicially violates the agency's rules cannot stand."

This case involved an application for a television license. The Federal Communications Commission had set a time limit on the filing of written statements favoring or opposing the application and provided that no additional statements would be accepted thereafter. Contrary to such rule, the applicant for the television channel filed ex parte statements and discussed the application with the Commissioners individually after the time the Agency had set for the filing of written statements had passed. In that case, unlike the situation here, there was no showing that these statements furnished the basis for the Commissioners' decision. See also, **Service v. Dulles** (1957), 354 U.S. 363, 388, where the Court said:

> "While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."

(3) The Board, in its erroneous attempt to distinguish this case, infers that the Referee in prior **Award 8656** did not understand the meaning of the word "automatic". Because the machines must be activated, we are told that they are not "automatic" but instead are "semi-automatic". The Board's distinction is without merit, whatever "evidence" is considered.

The word "automatic" has historically been subjected to various changes in meaning, but within recent generations has acquired stable senses. It is correctly applied to the automatic machines under consideration here, which are so constructed that when certain conditions have been fulfilled, i.e., place plugs in proper jacks, punched cards and perforated tape in the desired position, and push the button which turns on the power, they operate indefinitely without supervision until the conditions have materially changed. The conditions have materially changed, of course, when one operation for which the machine were set is completed and another set-up is made. Thus, under the stable sense of the word as defined in Webster's Dictionary of

Synonyms (1951)* these machines are in fact entirely "automatic", and not merely semi-automatic. See **Awards 4063** (Referee Carter), **6416** (Referee McMahon) **8656** (Referee Guthrie), **9313** (Referee Howard A. Johnson), **9333** (Referee Weston), **9611** (Referee Rose).

According to **Award 9988**, there can be no automatic machines except perhaps a perpetual motion machine, and even that must at least once be activated. As far as we know, all automatic machines require some outside action to start them or commence their operation. But **Award 9988** says that any machine which needs starting by an outside source is only "semi-automatic". It is on the basis of this mistaken and long since rejected view of automation that the Board proceeded to make **Award 9988** flatly contrary to **Award 8656.**

The argument that an automatic machine is not automatic when it requires human action to start its automatic action has been recognized as specious a number of times. In **Award 1008** (Referee Mills), this Board said that—

> "Every automatic operation requires human thought and action to release it."

More recently, in **Award 6416** (Referee McMahon), the Board rejected the argument that an automatic elevator was not automatic because it was still necessary to push a button to activate the elevator.

This dispute cannot be disposed of on the basis of labels. Even though these machines be mistakenly labeled as "semi-automatic", there is still no basis to conclude that the Telegraphers' Agreement was violated. The mere insertion of a tape or activation of an automatic teletype machine is not in this situation work which comes under the Telegraphers' Agreement. The violation here charged was premised on allowing clerks to "**operate** printing and/or mechanical telegraph machines." Merely to start a machine is not to "operate" it. Rather, to "operate" a machine is to perform work on it, and here the Board recognized that the "work performed" on the two teletype receiving printers and the one transmitter is "performed by an **automatic** operation of the machines in question." (Page 6, second paragraph)

This dispute was not concerned with the activation of an automatic machine. Not once in the handling of this matter before the Board did the Organization premise its claim on any alleged right to merely activate the

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* "**Automatic** has historically been subjected to various changes in meaning and has only within recent generations acquired stable senses. Originally, it was used to describe a thing that was self-acting or self-activated because it contained the principle of motion within itself. 'In the universe, nothing can be said to be **automatic**' (Sir H. Davy). Now in the sense here considered, it is applied to machines and mechanical contrivances which, after certain conditions have been fulfilled, continue to operate indefinitely without human supervision or until the conditions have materially changed; thus, an **automatic** firearm is so constructed that after the first round is exploded the force of the recoil or gas pressure loads and fires round after round until the ammunition is exhausted or the trigger is released; a thermostat is an **automatic** device which maintains the temperature of artificially heated rooms by operating the appropriate parts of a furnace when the temperature exceeds or falls below the point at which it is set."

machines, and the mere act of inserting the IBM perforated tape into the automatic teletype machines was never discussed in the record. The Board in this dispute has erroneously equated "operation" with "activation".

The dissenting Labor Member's distinction in **Award 9913** between operating a machine and the mere act of turning it on and off points up the error in the statement in **Award 9988** that:

> "The Board finds that the Carrier has violated the Telegraphers' Agreement when it permitted its clerical force to operate the two teletype receiving printers and the one teletype transmitter at its West-End Yard Office." (Page 6, next to last paragraph)

The error in the Board's conclusion is further compounded because of its failure to distinguish between the transmitting and receiving machines. The record here is barren of even an attempted showing that clerks at Las Vegas have any duties whatsoever in activating the receiving teletype machines at that point. **Award 9988** now says that it is a violation of the Agreement to automatically receive the tape at the West End Yard Office where no clerical employe participates in the activation of the receiving machines*, yet it was perfectly proper and not in violation of the Agreement to utilize the transmitter machine at Salt Lake City which, in fact, automatically activates the receiving machines at the West End Yard Office at Las Vegas in addition to other places. The Board in its **Award 8656** is telling the Carrier it is not a violation of the Agreement for clerical employes to activate the transmitter machine and then "operate" it at Salt Lake City but in **Award 9988** it decides that it is a violation of the Agreement at the West End Yard Office at Las Vegas for the Carrier to utilize the automatic receiving machines where no employe has anything whatsoever to do with their operation.

The mere act of inserting the IBM perforated tape is not and does not have essentially a communication purpose. The record here shows, without denial by the Organization, that the primary purpose of the machine arrangement was the performance of what is undisputedly a clerical function, i.e., the creation of a compiled typewritten list of matters which are both to be retained as records at the Las Vegas office, as well as being transmitted to other distant points. As pointed out by the Carrier and quoted by the Board at page 5, the teletype "produces a printed copy of the information contained on the tape and at the same time reproduces the same information on a receiver at some distant point." Thus, with the accomplishment of the clerical function, the incidental communication function was automatically performed without any infringement whatsoever of any Telegrapher's rights. This was also the case in **Award 9913** (Referee Begley). It was, in fact, recognized in **Award 9913** that where an alleged communication function is automatically performed as a simultaneous concommitant of the performance of a recognized clerical function, telegraphers' rights are not thereby impaired or violated, and that there is no requirement that such automatic functions should be removed from the machines. While in that case the Board was referring to the production of perforated tape as an automatic result of the physical act of typing reports by clerks on manual teletype machines, the same principle is even more applicable where the automatic

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*See first sentence of second quoted paragraph at Page 5 of the Board's Opinion — "The teletype receiving printer is activated by electrical impulse imposed automatically at some distant point." No one at Las Vegas even turns these machines on.

preparation and compilation of clerical reports simultaneously results in the automatic transmission thereof. (Even if the act of inserting the tape and activating the teletype could be said to be merely a semi-automatic act, it was nevertheless for the purpose of completing a recognized clerical function, and the simultaneous transmission and communication results were still themselves a mere automatic incident of that clerical function.) All of this was recognized by President G. E. Leighty in his discussion of these automatic machines in his report to the "Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers" which was held in Chicago, Illinois, in June 1960. In discussing these machines, Mr. Leighty stated at page 192 —

> "As inevitably occurs in the case of an invention, it is greatly improved upon as time passes and that has been very true of the mechanical telegraph machine. The International Business Machine Company brought to the railroad industry the IBM machine in the last few years, which can combine the work of the clerical employe, for example, who before prepared the communication and gave it to the telegrapher to transmit, and the work of the telegrapher, because it actually transmits the communication which formerly was transmitted by the telegrapher. Thus, as the clerk does the work on the IBM which he formerly did on the typewriter, preparing a communication for transmission, this machine at the same time cuts the tape the simpler machine (the teletype) used to cut in the telegraph office, and with the assistance of reperforators or a wire chief in combining circuits, **this clerk can also in most cases from his clerical station do the actual transmitting in one operation.**"

We have seen that although the Board said that the machines are "not automatic" it recognized (page 6, second paragraph) that the actual communication work was performed by the automatic operation of the machines:

> "* * * **the work performed** on the two teletype receiving printers and the one teletype transmitter at the West-End Yard Office **is performed by an automatic operation** of the machines in question * * *."

We submit that if the "work performed" is "performed by automatic operation of the machines" there can be no performance of such work by clerical employes so as to violate Telegraphers' rights. This inescapable conclusion cannot be avoided by saying that the machines are "activated by a clerical employe" and thus the Telegraphers' Agreement was violated.

(4) We now turn to the Board's very serious and presumptious error in **Award 9988** in directing the Carrier as to how it shall conduct its operations and to rewrite the Telegraphers' Agreement accordingly — all in accordance with its own ideas of what should be done but without any lawful basis whatsoever.

The authority of the Board is limited by law to interpreting the Agreement between the parties. The Board is without authority to attempt to direct the operation of the Carrier in any manner. As was stated in **Award 6967** (Referee Carter) —

> "It is the prerogative of Management to detemine the manner in which the work shall be performed * * *. It may use any

method it sees fit to correct violations without any restraining directives by this Board."

When the Board here says that —

"Tape-producing machines activated by clerks may not be used to reperforate tape or be connected to through circuits. Tape produced by a clerk must be fed into a transmitting machine for communication between on line offices by a telegrapher." (**Award 9988**, page 6, second paragraph),

it goes far beyond its statutory authority and is contrary to fundamental principle. Apart from rules governing its procedures, this Board does not possess any rule-making power.

Furthermore, the dictum that "Tape-producing machines activated by clerks may not be used to reperforate tape" is not only contrary to **Award 8656** covering the identical dispute, but is contrary to the previous awards of this Division involving teletype and similar machines on other carriers, the most recent award being **Award 9913** (Referee Begley) rendered by the Board constituted as here, as well as **Awards 9005, 9006** (Referee Daugherty), **9454** (Referee Grady), and **8538** (Referee Coburn).

Moreover, the Board's "directive" as to the manner in which IBM produced tape is to be used by this Carrier erroneously infers that the IBM machine produced tape was produced by a clerk. This is completely at odds with the facts and the record. The tape was produced by the automatic IBM machines, howsoever activated, and was not produced in any sense of the word by a clerk. This Board knows better. In **Award 9913** (Referee Begley) where the teletype was actually physically operated by a clerk it was still recognized that the tape was "**automatically** made when the consists, messages, reports, etc., are typed out by the clerks [on teletype machines]."

This Board may erroneously determine to sustain this claim; it cannot, however, determine that a tape producing machine may not be used to reperforate tape* or be connected to through circuits, or that such tape cannot be inserted in a transmitter by other than a Telegrapher. The Board's statement is all the more serious upon the realization that in the entire handling of this matter the Telegraphers' Organization never even indicated that the Carrier was limited in its use of the tape producing machines or the tape produced thereby.

(5) The Board's Opinion as to Part (b) also shows a refusal to correctly read and comprehend the plain language of the Scope Rule of the Telegraphers' Agreement. The Opinion states:

"The record shows that under the Telegraphers' Agreement the Scope Rules states that the agreement will govern the wages and working conditions of teletype operators and printer operators. The record also shows that even though the Scope Rule does not give to the telegraphers the exclusive right to perform this work, they have exclusively performed the work, in the past, of teletype operators and printer operators." (Page 5)

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*This was precisely involved in denial **Award 9913**.

The Scope Rule includes teletype operators and printer operators, but its coverage is clearly limited to such positions as are "herein listed." Then, under "Rule 5, General Telegraph Offices," the Agreement lists "4 Las Vegas 'VG'" followed by the positions and rates. The "West-End Yard office" is not listed. Compare the Opinion in Award 8538 (Referee Coburn):

> "Does the currently effective Agreement provide that the work involved here [i.e., operation of teletype machines] is exclusively telegraphers? The Scope Rule includes certain designated positions 'and such other positions as may be shown in the appended wage scale or which may hereafter be added thereto.'
>
> * * * * *
>
> "Petitioner's position is untenable for several reasons. First, there is no evidence in this record that printer clerks were performing such 'identical work.' Manifestly this would have been impossible because no teletype machines were in use in these locations prior to September 1, 1953. **Second, while the wage scale appended to the agreement does list printer clerks and other positions in various telegraph offices on this property, the coverage of the Agreement is limited to the specific positions set out in the wage scale appendix.** There is no reference to or listing of the position of printer-clerk at either the Richmond or Los Angeles offices or in other offices of this Carrier where clerical employes operate teletype machines. * * *"

Just as in Award 8538, the Agreement provisions pertinent here limit the application of the Scope Rule to Telegraphers in the listed Telegraph Offices, and there is no reference to or listing of the position of teletype or printer operator or any other telegrapher position at the West-End Yard Office at Las Vegas.

The Board in denying Part (a) of this claim had no difficulty in correctly reading the Train Order Rule which limited the exclusive grant of rights to "telegraph or telephone offices where an operator is employed." The Board pointed out, at page 3, that "we find no telegrapher employed at the West-End Yard Office," and held that since Telegraphers "are not employed at the West-End Yard Office the Carrier did not violate the Agreement." The same common-sense reading of the Scope Rule required a denial of the claim in Part (b).

(6) The Board has also failed to recognize this dispute in Part (b) as essentially nothing more than a protest against the installation of labor-saving machines — automation. Carrier correctly argued in this docket that such protests were not proper subjects of the adjudicatory system under the Railway Labor Act and that the Board was without jurisdiction thereover. It was pointed out that the remedies, if any, for the economic problems posed by situations where automatic machines, howsoever activated, tend to reduce employment must be found in the field of negotiations.

Railroad labor organizations, themselves, have recognized that the proper forum to consider and deal with the impact of automation is in the field of negotiation. See, in this connection, interview with Grand President Harrison of the Brotherhood of Railway Clerks, Railway Age, July 29, 1957. More-

over, the Organization in this docket never disputed, in fact, never discussed, the Carrier's position that this was a matter for negotiation and not adjudication. This was for good reason because it has also recognized the validity of the Carrier's argument, that the dispute here is one for negotiation. President Leighty, in his Report to the 1960 Telegraphers' Convention, reviewed this entire problem. He said:

"The most prevalent type of mechanical telegraph machine used in the beginning was the teletype and while we quite generally were given jurisdiction over such machines that were used in telegraph offices, they were frequently installed in traffic and 'off-line' offices and given to other employes than telegraphers to operate and very frequently this was permitted to occur without any protest being lodged from our people because we were not manning the machines. Thus it gradually came to pass that employes in at least one other craft than ourselves were operating some of these machines. This even led at times to negotiated agreements by the railroads with the other organizations than ours which at least gave other employes some rights to the operation of this type of machine. The result was that almost universally when the National Railroad Adjustment Board was created in 1934, and we resorted to it for support of our claim to exclusive jurisdiction, we failed to receive it from that body.

* * * * *

"These improvements have in this way created a situation where a composite operation on the IBM machine takes place, consisting partly of work formerly performed by the clerical employe and part that the telegrapher previously performed but now no longer performs. **As arbiters such as the NRAB were almost universally holding that neither craft had exclusive jurisdiction over these new and improved machines, it seemed useless to continue our claim that exclusiveness was ours,** while at the time the machines were being placed by most carriers in the offices of clerical employes to operate, leaving us with nothing but a claim.

"Accordingly **I revised our policy and began to claim instead that we have an equity in what in fact is a composite operation where these IBM and teletype machines are used.** So far as railroad managements were concerned, I have found they have quite generally been willing to entertain this new type of claim and to make agreements with us that give us a share in this work. The amount of work performed on these machines is quite often greatly expanded over what was handled where messages were moved by Morse or even by teletype only and the result is that on several roads where we were making no progress in securing exclusive jurisdiction, **we are now by agreement being integrated into the composite work of both teletype and IBM machines** without material loss of positions which otherwise would have resulted from the introduction of this type of communication device.

* * * * *

"* * * This improved type of rapid transmission and reception is being adopted on many railroads of the country and it was im-

> perative that we get in on the ground floor of each new installation and **have the management understand our policy in which we are claiming only an equity in the work in question.** * * *" (Page 191, Report of President G. E. Leighty to the "Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers", Chicago, Illinois, June 1960)

The Organization in effect recognizes, as it must, that what we have in this dispute is a jurisdictional dispute over a new "composite operation" resulting from the utilization of the new automatic machines. As such, the dispute should have been denied or, in any event, dismissed as being jurisdictional in nature and not properly susceptible of disposition by Board award. This type of situation was discussed and remanded in **Award 4768** (Referee Stone):

> "* * * Patently, the marvel of CTC types of centralized control and electrical operation was not contemplated in assigning the traditional duties to the two crafts. (Telegraphers and Dispatchers) The new task of operating a control board in part unites and in greater part supplants the duties and positions formerly assigned to each. Therefore, the matter of its proper assignment constitutes a jurisdictional dispute * * *."

See also **Awards 4452** (Referee Carter), **4769** (Referee Stone), **6205** (Referee Shake), **6224** (Referee McMahon), **7299** (Referee Carter), and **8143** (Referee Elkouri).

The Board's sustaining of Part (b) of the claim awards the Telegraphers' Organization more than a mere "equity in what in fact is a composite operation" and which the Organization, itself, recognizes is properly sought at the bargaining table.

(7) The Organization in Part (c) of the claim sought, for the alleged violations, the payment of one day's pay for each 8-hour shift, day and night, since August 25, 1952. Such payments were to be made to the "senior idle employe or employes covered by the Telegraphers' Agreement." The award sustained the claim, changing the date to October 5, 1952 and adding the further limitation that payment is to be made for each shift "that the two teletype receiving printers and the one teletype transmitter was used at that location."

The claim as submitted and as sustained by the Board is vague and indefinite and for that reason alone should have been rejected by the Board. As representative on this question, see **Awards 8674** (Referee Vokoun), **8500** (Referee Daugherty), **8330** (Referee Wolff), **8124, 6937** (Referee Coffey), **6885, 6760** (Referee Parker), **6529, 6528, 6486** (Referee Rader), and **6348** (Referee L. Smith), The Carrier cannot be required to search its records to determine both the dates of violation and the persons to whom such allowances are to be paid. As representative on this question, see **Awards 8855** (Referee Bakke) and **9343** (Referee Begley). Moreover, it is probable that many of the Carrier's records necessary to such a determination are no longer available.

Not only is the phrase "senior idle employee covered by the Telegraphers' Agreement" so vague and indefinite as to be incapable of ascertainment, it also erroneously purports to reward many persons who were not in any way

even affected by the alleged violations.* There is no sanction for such action either in the Railway Labor Act or in the Agreement.

It is clear that the Board's order here cannot satisfy the requirements of the Railway Labor Act. In this connection see **System Federation No. 59 vs. La. & Ark. Ry. Co.**, 119 F.2d 509, where the Court of Appeals stated:

> "Further finding that it was unable to determine who upon the list submitted, was entitled to relief, it yet found generally that many of the employees had been furloughed and not reemployed in violation of the rules and were therefore entitled to relief. Its findings of fact therefore, and its award, instead of being and containing the definite determinations of fact, as to the persons entitled to relief, and the relief to which they are entitled, contemplated and required by the act, consisted of merely general statements, that some of the employees were entitled to some relief, and that those so entitled should be awarded such relief as they were entitled to. The Act contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts."

For all of the foregoing reasons we dissent.

/s/ **J. F. Mullen**

/s/ **P. C. Carter**

/s/ **R. A. Carroll**

/s/ **W. H. Castle**

/s/ **D. S. Dugan**

ANSWER TO DISSENT, AWARD 9988, DOCKET TE-6800

The Carrier Members' dissent is one of the most amazing documents ever to have been conceived by those masters of sophistry. Its greatest value is to document for all time the inconsistency of its authors.

First of all, they improperly describe the dispute. There was a single claim, in favor of one employe for each shift, based on an allegation that the manner in which the Carrier was effecting delivery of train orders and handling communication work at a new yard office in Las Vegas violated various provisions of the Telegraphers' Agreement.

However, it makes no material difference whether we consider the dispute as consisting of one or two claims. Many disputes involve more than one aspect and require consideration of more than a single issue.

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*The Agreement here covers two districts, South Central and Northwestern, and extends from Los Angeles to Salt Lake City, thence up to Portland, Oregon. Any employe in that territory would be an employe "covered by the Telegraphers' Agreement." Thus, an employe at Portland, Oregon, many miles from Las Vegas, Nevada, if he be the senior idle employe on any of the three shifts on any day since October 5, 1952 is given a gift of a day's pay!

That portion of the dispute in which the Employes contended that Rule 62 was violated by the manner in which delivery of train orders was effected raised two questions: (1) Does the "handling" of train orders — which, with one exception, is restricted by the rule to telegraphers — include their physical delivery to the train crews addressed; and (2) is the new yard office at Las Vegas a place subject to the rule.

Both of these questions were improperly answered. With respect to the first question Rule 62, and the practically unbroken line of precedent awards on the point involved were completely ignored, the award merely stating — without citation of authority — that the scope rule does not give telegraphers the work of personally handing train orders to the crews. This in the face of numerous awards to the contrary which were cited to the Referee. I will take the time to note two of these:

Award 5871 (Referee Yeager):

> "In all of these awards claims were sustained for acts of the carrier similar to the one complained of in this docket. It is true that in most, if not all of them, the charge was a violation of a specific prohibitory provision of the particular Agreement, as in Award 1096. **In the opinions where the matter was exhaustively considered,** however, **the true basis of the awards was the removal of work from the Scope of the Agreements and causing it to be performed by those not covered,** and not the fact that in the instances there was a prohibitory provision." (Emphasis added).

Award 5122 (Referee Carter):

> "The Carrier urges that the rule is different where a telegrapher is not maintained at the point where the train order is to be delivered to the crew that is to execute it. It further urges that the method employed has been used for many years and is a practice which has been generally followed. Assuming that it did become a general method of handling under situations such as we have here, it is not controlling for the reason that the work of sending, receiving, copying and delivering train orders is reserved to telegraphers by their agreement. **The delivery of train orders to a train crew by one outside the Telegraphers' Agreement, is a violation of the Telegraphers' Agreement.**" (Emphasis added).

These awards deal, respectively, with cases where train orders were delivered by employes other than telegraphers at a place where a telegrapher was employed but not on duty, and at a place where a telegrapher was not employed. Both of them cite numerous awards reaching similar conclusions.

The Referee, however, based his opinion on a single prior award, 6071, which he wrote himself, which did not involve a similar issue, and which has been declared erroneous by a subsequent award involving the same basic issue, the same parties and the same agreement: Award 8867.

The second question was primarily one of fact. The record shows that the parties were in agreement that the new yard office is located within the confines of Las Vegas, the Carrier twice stating that the new yard office was "within the terminal" along with the telegraph and other offices. This fact alone divested the case of any similarity to Award 6071. This fact

placed the disputed issue on all fours with Part 1 of the claim in Award 5122, even to the distance of about a mile from the telegraph office in each case.

This agreement upon the facts and applicability of Award 5122 were brought to the attention of the Referee in a special supplemental memorandum by this writer at the time of panel argument.

Both the facts and the prior awards having a proper bearing on the issue were ignored. The Carrier Members characteristically express their satisfaction with the result, which proves once again that they are not interested in establishing and maintaining a line of sound precedent awards — unless they are favorable to the carriers.

Disposition of the issue relating to the delivery of train orders by Award 9988 is erroneous. I so stated at the time the award was adopted, and reserved the right to append to the award my reasons for so holding. These comments will serve that purpose.

The balance of the Carrier Members' dissent is a rambling, repetitious attack on that portion of the award which sustains the right of telegraphers to perform communication work. Its author apparently made no effort to systematize his remarks, thus making it somewhat difficult to organize a coherent reply. Perhaps that was the reason.

One main theme of the dissent is an alleged concern over the value of precedent. They say:

> "It has long been axiomatic with the National Railroad Adjustment Board that to fulfill its function of dispute settlement a uniformity of interpretation of labor agreements is essential. . . ."

They cite numerous awards and an article from the official organ of the Employes in support of their statements.

Much more authority could have been cited. Indeed, the Supreme Court of the United States has held that such uniformity is desirable. **Slocum v. The Delaware, Lackawanna and Western Railroad Company, (339 U.S., 239).**

If the Carrier Members were sincere in these contentions I would be most happy to agree with them. But they are not sincere. Precedent, to them, is sacred only when the result is favorable to them. On the same day that they issued their dissent to Award 9988 they issued a dissent, signed by the same members, to Award 9998, q.v., in which they referred to the following of precedent as "pernicious error." The precedent there was in favor of the employes.

Such inconsistency surely should make suspect anything its authors utter.

The dissenters' displeasure with Award 9988 on this point arises from their comparison of this case with the dispute disposed of in Award 8656. In that case Referee Guthrie ruled in favor of the Carrier on a finding that the machines at Salt Lake City operated automatically and thus eliminated all work belonging to telegraphers. In that respect Award 8656 was "palpably wrong", and Referee Begley properly noted the difference between his finding and that of Referee Guthrie.

The Carrier Members, in their championing of precedent, forgot to mention the fact that our "axiomatic" thinking includes an exception when the "precedent" is "palpably wrong". Award 8656 is one of those cases envisaged by Referee Garrison when he wrote Point 3 of his famous memorandum to Award 1680, and thus should have been overruled.

The record here clearly shows that the machines do not operate automatically. The Carrier itself describes the operation in detail, noting — among other things — that the teletype machines require attention from someone to make them operate as communication devices. The Referee correctly found that employes not subject to the telegraphers' agreement were thus performing the work of a "teletype operator", one of the classifications enumerated in the scope rule of the telegraphers' agreement.

The effect of such enumeration in a scope rule is so well known and so compatible with the Referee's finding here that no comment is necessary.

Now let us go back to "precedent". In at least a dozen instances during the past nine years, to my personal knowledge, the Carrier Members have argued that the right of telegraphers to perform communication work is not breached as long as they are not entirely eliminated from the operation. In other words, if a telegrapher is permitted to insert a coded tape in a teletype transmitter, even though the work of coding the tape was performed by others, he has no valid complaint.

I have resisted that contention with all the energy I possess. It ignores the fact that preparation of the tape, used in most instances solely for transmission of the information involved, represents the major portion of the communication work. But the Carrier Members have prevailed in most cases.

The latest such case was Award 9913. That award was adopted over my protest by a majority consisting of the same Carrier Members who signed the present dissent and the same Referee with whom they now find fault for reaching the same conclusion in Award 9988 that he reached in Award 9913.

In other words, the Carrier Members were happy to join the Referee in denying a claim where telegraphers were permitted to insert the tape in a transmitter, but they disagree with him when he applies the same reasoning to sustain a claim where the telegraphers were not even permitted to perform that minimal amount of work.

As I have noted previously, such inconsistency is characteristic of the dissenters, and makes their dissents of little value.

Not only are the dissenters inconsistent; they also have little regard for the true facts. For example, they say in a footnote, with respect to operation of the receiving teletypes at the location in question "No one at Las Vegas even turns these machines on." No such statement appears in the record. Furthermore anyone who has even the slightest acquaintance with operation of such machines knows that they must be "turned on", that the received material must be torn off, that various other actions by human attendants are essential, and that all of these functions are included in the classification "teletype operator", an employe covered by the scope of the Telegraphers' Agreement on this property.

Another example is their quotation, out of context, of a small portion of the Report of the President of the Telegraphers' Organization to the last convention. No such references were made in the record where the Employes could have made suitable reply. The subject of the President's remarks was not stated. That subject did not include disputes such as we were here considering. If the dissenters wish to challenge this statement let them publish the full text of the President's report. But they should pay for its publication themselves just as the Organization paid for it originally.

In some respects the dissent is correct, or nearly so. The dissenters recognize the absurdity and futility of "hearings" before the referee. But let us not forget it was the Carrier who requested this "hearing", so if it served to clarify anything that was in the record to its detriment, it has no one to blame but itself. Here, we must think of the Carrier and the dissenters as little boys who initiate a game of marbles but refuse to play unless they always win.

As a matter of fact, and regardless of what the Referee's words are taken to mean, the Board did not accept or act upon any "evidence" that was not in the written record. The Carrier there stated that "The tape produced electrically from cards by the process described in Item (3) **is inserted in the teletype transmitter.**" (Emphasis added). Also, the Carrier stated that ". . . two teletype receiving printers and one teletype transmitter have been installed . . .". See Carrier's "Statement of Facts" in its Ex Parte Submission. These statement were made about the location involved, where no telegraphers were employed. It stands to reason that employes other than telegraphers were the ones by whom the tape ". . . is insrted in the teletype transmitter." This was the "evidence" referred to, and it is in the written record. It follows that the dissenters' conclusion in the following statement is wrong, although their premise is correct:

> "For the Board to have accepted, considered and relied upon any 'evidence' at the refcrcc hearing which did not appear in the written record was flatly contrary to this Division's rules and regulations, and we submit such action by the Board has destroyed the Award's validity."

The two remaining points I wish to discuss further prove the inconsistency of the dissenters.

First, the Carrier did not make the argument that:

> "The Scope Rule includes teletype operators and printer operators, but its coverage is clearly limited to such positions as are 'herein listed' . . .".

The Carrier Members made it, contrary to the Boards rules and their own understanding of them. The Referee correctly ignored such extraneous 'evidence' and argument.

Second, the argument raised by the dissenters in point (7) of their dissent was not advanced in the record, and thus has no proper relevance to any phase of the case. It is obviously an afterthought, designed to aid the Carrier in any effort it may choose to make to avoid full compliance with the award.

We take note of the fact that claim (c) in Award 9753, a case involving these same parties, was similar in all essential respects to claim (c) in Award 9988. The dissenters found no fault with its form there. Furthermore, the parties had no particular difficulty in reaching agreement on the payments to be made in that case. Clearly, they should have no difficulty in reaching agreement here.

I sincerely hope that neither the Carrier nor anyone else will be so misled by the dissenters' drivel that they make the mistake of taking it seriously.

J. W. Whitehouse
Labor Member