Award No. 10063

Docket No. TE-8811

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE & HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware & Hudson Railroad, that:

1. Carrier violated agreement when on November 30, 1955, it caused, required or permitted train service employes not covered by the Telegraphers' Agreement to carry Train Order No. 1 from Saratoga to North Creek and there make delivery of such order to conductor and engineman of Engine 4107.

2. Carrier shall compensate Agent-Telegrapher J. M. Parkis, North Creek, for one call account violation on November 30, 1955.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect an agreement, effective July 1, 1944, entered into by and between The Delaware & Hudson Railroad Corporation, hereinafter referred to as Management or Carrier, and The Order of Railroad Telegraphers, hereinafter referred to as Telegraphers or Employes. The Agreement is, by reference, included in this submission as though copied herein word for word.

This dispute was handled on the property in the usual manner to the highest officer designated by Carrier to handle such claims. The claims were denied and the dispute failed of adjustment. Such handling was in accordance with the provisions of the Railway Labor Act, as amended. The dispute not having been settled by Management of Carrier in accordance with the agreement, is submitted to the Third Division, National Railroad Adjustment Board for Award. This Board has jurisdiction of the parties and the subject matter.

This dispute concerns the handling of train orders at North Creek, New York.

At North Creek there is one position covered by the Telegraphers' Agreement. The position is classified as agent-telegrapher.

On November 30, 1955, at 12:59 P. M. at a time when the agent-telegrapher was not on duty but available for call, Carrier's officers required conductor of Extra 4064 to carry train order No. 1 from Saratoga to North Creek and there make delivery to conductor and engineer, Engine 4107. The train order was in the following form:

nadoes, slides, or unusual delays due to hot boxes or break-in-two that could not have been anticipated by the dispatcher when the train was at the last previous open telegraph office or which would result in serious delay to traffic."

It will be noted that Paragraph (b) of this proposed rule is designed to support the claim presented in the instant case. No similar language is contained in the Train Order Rule now in effect.

In Award 7153 the Board found that the long-established practice of handling train orders, as provided in Operating Rule 217, was violative of neither the Scope Rule nor the Train Order Rule. The following is quoted from the Opinion in Award 7153:

"We are urged to conclude that the Scope Rule, together with Article 20, requires that the Carrier restore the Telegrapher (or the Clerk-Telegrapher) position at Remini for the dates in question, and that the Scope Rule overrides the Operating Rule (217). Since the Operating Rule has long been in existence; since it was common practice when the Scope Rule was adopted; and since there is nothing specifically in the Scope Rule which nullifies this ancient rule and the practice under it, we are left with little in the way of sound reasoning to support such a claim.

"Both parties were fully cognizant of the provisions of Rule 217, and the practice under it, at the time of the adoption of their Agreement in 1939. Had there been any serious intention to change this, more definite language to that end should have been added in the Scope Rule or at some other point in the Agreement. Failure to do this in 1939, and failure to do it in the 1946 negotiations leads us to the conclusion that the parties have not agreed to change the long-established practice. It is a matter for further negotiation. It is not for us to read into the language of the Scope Rule something which the parties themselves have quite obviously omitted."

The train order involved in this case was issued by a train dispatcher and copied by a telegrapher. It was handled strictly in accordance with the operating rules and in the same manner as simliar train orders have been handled for over fifty years without protest or claim from telegraphers, the Telegraphers' Agreement having been in effect since November 1, 1937.

Claim is not supported by agreement rules and long-established practice thereunder and carrier respectfully requests that it be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made a part of the particular question in dispute.

OPINION OF BOARD: Article 23, Section (a) of the Agreement specifically states:

"The handling of train orders at telegraph or telephone offices is restricted to employes under the scope of this agreement and Train Dispatchers, except in emergency. In emergency, if an employe under the scope of this agreement is available or can be promptly located

he must be called to handle train orders and if not so called will be paid as provided by the call rule."

This language is clear and unequivocal. The only justification for sidestepping the above provision would be an emergency, as explained in section (b) of the same Article—which reads as follows:

"Emergencies as herein specified shall include casualties or accidents, engine failures, wrecks, obstruction of tracks, washouts, tornadoes, storms, slides or unusual delays due to hotbox or break-in-two that could not have been anticipated by the Train Dispatcher when train was at last previous telegraph office, which would result in serious delay to traffic."

In the present case there was no apparent emergency. The agent-telegrapher at North Creek was not on duty but was reportedly on call.

Had the Carrier unsuccessfully put through a call for the Claimant, their action in then routing the train order through the conductor of Extra 4064 would have been accepted and unquestioned.

The Carrier, however, acted without first attempting to locate the agent-telegrapher at North Creek. The Saratoga Office was open round the clock, and it is understandable that the Carrier found it more expeditious to by-pass the North Creek agent-telegrapher. However, that action was not compatible with the terms of Article 23 (a) of the Agreement.

The Carrier defends its action on the grounds that it acted in accordance with the provisions of Operating Rules 85 and 217—which have been in existence over many years.

It is quite possible that the Operating Rules are more expedient, efficient, and expeditious than the terms of Article 23 (a); BUT if that is the case—provisions of the Operating Rules should be incorporated into the Agreement.

Article 27 of the Agreement provides machinery for modifying or revising the Agreement.

If the present provisions are cumbersome, inconvenient or inefficient steps should be taken to modify them. When no such steps are taken—both parties must be considered as having accepted the Agreement in its entirety and be subject to the authority of its provisions. The Board, too, must accept all of those provisions as mutually binding upon both parties.

If operating rules have been in practice in opposition to the terms of the Agreement, the situation is not a defense but rather a condemnation of past practice—and of both parties.

An Operating Rule cannot supersede or take precedence over the Agreement. The Agreement is a sacrosanct document intended to protect the rights of both parties and cannot be treated lightly. If either or both parties were to act in or acquiesce to its violation—by subterfuge, by evasion, by neglect or by unilateral action—that invaluable document would soon be rendered completely worthless.

If past practice were the sole criterion of Carrier or Organization action—violations could eventually become the rule. Mere repetition does not and should not constitute authority or legality.

As for semantics, various interpretations of the word "handling" seem to be beside the point. The fact is that according to Article 23 (a) of the Agreement the Claimant was entitled to a call but was not called and, therefore, he should be compensated.

The Carrier introduces a proposed train order rule from a notice covering requested revision of the Telegraphers' Agreement proposed by the Organization under date of February 3, 1955 but not adopted. The Carrier states that section (b) of this proposed rule "is designed to support the claim presented in the instant case" but adds that "No similar language is contained in the Train Order Rule now in effect." That observation is in accordance with the facts.

It must be pointed out, however, that similar language is contained in Article 23 (a) of the Agreement, e.g.,

> "In emergency, if an employe under the scope of this agreement is available or can be promptly located he must be called to handle train orders and if not so called will be paid as provided by the call rule."

And in the above-mentioned proposed train order rule,

> ". . . the employe, if available or can be promptly located, will be called to perform such duties and paid under the provisions of the applicable call rules; if available and not called, the employe will be compensated as if he had been called."

Does it not follow then, that the Agreement itself is designed to support the claim in the present case.

Both parties in this case have introduced numerous past awards to support their individual positions. The content of these awards has been carefully reviewed and weighed.

However, it must be noted that precedent is not gospel—and relying entirely on precedent can result in compounding mistakes and perpetuating error.

This case, therefore, has been decided on the merits of this case—and this case alone.

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 Carrier violated the Agreement and must compensate the Claimant for one call.

AWARD

The Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of September, 1961.

DISSENT TO AWARD NO. 10063, DOCKET NO. TE-8811

Award 10063 is in error and we dissent thereto for the reasons set forth in our Dissent to Award 1096 and our Dissents to numerous subsequent awards on the same issue. The record shows that the practice of delivering train orders "in care of" has been in effect under operating rules on this Carrier since 1899, and that the first agreement between the parties to this dispute was effective on November 1, 1937.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ J. F. Mullen