Award No. 10364
Docket No. TE-9143

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Raymond E. McGrath, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY EASTERN LINES

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway System; that

1. The Carrier violated the Agreement between the parties when on September 17, 1955, it required or permitted an employe at Newton, Kansas, not covered by said Agreement to perform telegraphic communications work covered thereby; and

2. The Carrier shall now be required to pay C. Jones the equivalent of a "call" payment at the established rate of his regularly assigned position.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

The Carrier maintains relay telegraph offices at Newton, Kansas, and La Junta, Colorado, in each of which several employes covered by the Telegraphers' Agreement are employed in around-the-clock service.

At 1:50 A. M., September 16, 1955, the Carrier required or permitted a roundhouse clerk at Newton, Kansas, an employe not covered by the Telegraphers' Agreement, to telephone the following message to an employe at La Junta, Colorado, who is likewise not covered by the Telegraphers' Agreement.

"Unit 328L on 2/123 has dead man foot pedal cut out may need diaphragm. Also, engine Lineup as follows — 123 — 40CBAL, 223-39CBAL, 2/123-328LAB, 21-37CBAL, 17-310L308BAL, 35-150CA132B15CL."

amended Railway Labor Act and the enacting clause, viz., Article XXIX of the current Telegraphers' Agreement.

In conclusion, the Carrier respectfully reasserts that the Employes' claim in the instant dispute is entirely without support under the Agreement rules and should either be dismissed or denied in its entirety for the reasons set forth herein.

The Carrier is uninformed as to the arguments the Organization will advance in their ex parte submission and accordingly reserves the right to submit such additional facts, evidence or argument as it may conclude are necessary in reply to the Organization's ex parte submission of any subsequent oral arguments or briefs the Petitioner may submit to the Board in this dispute.

All that is contained herein is either known or available to the Employes and their representatives.

OPINION OF BOARD: This dispute involves an alleged violation of an Agreement between Atchison, Topeka and Santa Fe Railway Company and their employes represtented by The Order of Railroad Telegraphers. The effective date of this Agreement was June 1, 1951 and the Agreement was in effect between the parties on the dates pertinent to a discussion of the alleged violation.

The Carrier maintains relay telegraph offices at Newton, Kansas, and La Junta, Colorado. These offices are 355 miles apart. In each of these offices several employes covered by the Telegrapher Agreement are employed in around the clock service.

The employes state that at 1:50 A. M. September the 16th, 1955, the Carrier required or permitted a roundhouse clerk at Newton, Kansas, who was not covered by the Agreement to telephone to an employe at La Junta Colorado, this latter employe also was not covered by the Agreement. The conversation alleged to have taken place at that time was as follows:

> "Unit 328L on 2/123 has dead man foot pedal cut out may need diaphragm. Also, engine Lineup as follows — 123-40CBAL, 223-39CBAL, 2/123-328LAB, 21-37CBAL, 17-310L308BAL, 35-150CA132B150L."

The Employes refer to the above conversation as a telephone "message." The Employes state that another employe of the Carrier who was covered by the Agreement listened in on the telephone and copied down verbatim what was said. (R-71). The name of the employe who listened in and copied the conversation verbatim does not appear in the record. The names of the roundhouse clerk at Newton, Kansas, or employe at La Junta, Colorado, do not appear in the record. No statement affirming or denying the conversation by either the clerk at Newton, Kansas or at La Junta, Colorado, appears in our record. The copied conversation taken down by the employe who listened in does not appear in the record. No record of the Carrier with reference to the telephone conversation appears in the record of this case.

The employe's claim on the above set of facts that the Carrier violated the Agreement when it required or permitted an employe at Newton, Kansas, not covered by the Agreement to perform telegraphic communications work covered thereby; and that the Carrier now be required to pay C. Jones

the equivalent of a "call" payment at the established rate of his regularly assigned position.

The position of the Carrier with reference to this claim is that it should be denied because:

1. The claim described by the Petitioner's President is incorrect for the reason that the subject matter of the Employes claim occurred on September 16, 1955 and did not occur on September 17, 1955, as stated in the original claim that was submitted to the Board and is not the claim that was submitted and handled to a conclusion with the Carrier.

2. That the claimant Jones is not the proper claimant.

3. The complained-of telephone conversation that occurred on September 16th did not constitute the transmission of any train order or message of record which employes subject to the Telegraphers Agreement had rights to transmit.

4. No rule or Agreement gives to the Telegraphers a monopoly right to the use of the Carrier's communication telephone system.

The Carrier's statement of facts (R-36) reads in part as follows:

> "At or about 1:50 A. M. September 16, 1955 the Roundhouse Clerk on duty at Newton, Kansas called the Roundhouse Clerk on duty at La Junta, Colorado, some 355 miles distant from Newton, on the Carrier's communication telephone system and informed him that the deadman foot pedal on Diesel 328-L on Passenger Train No. 2/123 had been cut out at Newton and should be repaired at La Junta. The Roundhouse Clerk at Newton also identified the Diesel locomotives that were then lined up to be used out of Newton, Kansas on Passenger Trains Nos. 123, 223, 2/123, 21 and 17 and Freight Train No. 35."

Carrier's position that this claim of September 16, 1955 is not properly before the Board because the original complaint filed herein showed the date of the claim as September 17, 1955 is without merit.

The employes concede that a typographical error was made. The submission filed by the Employes (R2 -to R23) shows that the Employes were submitting to the Board the dispute of September 16, 1955 which was handled on the property.

The difference in dates is obviously a typographical error that in our opinion did not in any way prejudice any of the rights of the Carrier. To dismiss this case on this type of technicality would be a serious error.

The statement by the Carrier that the claimant Jones is not the proper claimant also is without merit. The Employes cited an Agreement violation and filed a claim for a call payment on behalf of C. Jones. This claim was handled to a conclusion with the Carrier and is properly before this Board.

> "If it is held that the Agreement was violated a penalty for such violation will be justified. Otherwise, the sanctity of the Agreement cannot be upheld and violation thereof discouraged." Award 7628.

In Award No. 6063, Adolph E. Wenke, Referee states:

> "Carrier contends that the claim should be disallowed because none of the claimants lost any time as a result of this company doing the work. This claim is primarily to enforce the scope of the Agreement and not for work performed. If the scope has been violated then a penalty is imposed to the extent of the work lost. As to who gets the penalty that is but an incident to the claim itself and not a matter in which the Carrier is concerned, for if the Agreement has been violated, it must pay the penalty thereof in any event."

The Carrier states (R-42):

> "there is no Agreement rule or understanding in effect between the parties hereto which serves to give employes subject to the current Telegraphers Agreement a monopoly right to the use of the Carrier's communication system."

This Board agrees with that statement and has so held in countless previous awards.

This brings us to the main question in this case. Was the verbal telephone conversation, message or communication which took place between the Roundhouse Clerk at Newton, Kansas, and the Roundhouse Clerk at La Junta, Colorado, a "message of record" within the meaning of the Agreement between the parties and under the Scope Rule as it has been interpreted by this Board and by the parties to the Agreement.

The Employes argue strongly that the work qualifies under the Scope Rule and the Claimant should prevail.

The Carrier argues that the facts in this case do not disclose a "message of record from train dispatchers for the purpose of advancing the movement of their train or other trains * * *", under Article XIII of the Agreement.

In this case we have the following situation with reference to the burden of proof.

We agree completely with the statement contained in Award 7338 BRC vs. Missouri Pacific, Referee H. Raymond Cluster:

> "The burden of producing such evidence is upon the claimant, who alleges that the Agreement has been violated * * *".

We also agree with the following statement from Award 9261 BRT vs. AT&SF, Referee Roscoe G. Hornbeck. "Of course many submissions proceed upon ex parte statements only, and when material statements are made by one party and admitted or not denied by the other, they may be accepted as established facts. * * *"

In our case as the employes facts were stated in the complaint there was simply the entirely unsupported statement that the telephone conversation occurred. If the record stopped there this complaint would have to be dismissed. But the Carrier in its first statement of facts admits the basic facts upon which the complaint is based. This admission it is presumed was made after an investigation and verification of the facts.

Notwithstanding the nature of the subject matter of the conversation there is nothing in writing in the record. The record discloses only the statement by the Employes that someone — name unknown to the Board because it is unstated in the record — listened in on the conversation, took it down verbatim. The Employes have not entered into the record the written statement as copied by the employe who listened in on the conversation. This by itself would not be sufficient to sustain the burden of proof. But as stated above the Carrier has admitted the basic facts set forth in the complaint and **does not deny the balance of the details in the telephone conversation.**

We are convinced that the Carrier is satisfied — (a) that the telephone conversation took place, and (b) that the subject matter as set out in the complaint is substantially correct.

The Carrier undoubtedly has a record of the engine numbers that were used on the various numbered trains and on each particular train and if the numbers used in the reported telephone conversation were not correct or if there was no problem on that date with reference to the dead mans pedal the Carrier had an opportunity to show this in the record. This was not done.

The Board, therefore, finds that the telephone conversation as set out in the complaint took place. It is difficult to conceive in view of the subject matter that it was not reduced to writing — but neither party has produced a written record of the conversation.

At Award No. 4624, Referee Charles S. Connell decided November 1949 we find the following:

> "The Carrier contends that the train crew employe, the conductor in this instance, merely had a conversation, and did not copy a train line-up or any matter of record. It is an agreed fact that the conductor did receive over the telephone a line-up of train movements * * *. The question as to whether the conductor then copied the information received over the phone on a piece of paper is of little interest in this case since the violation of the Agreement came when the conductor received the information over the telephone."

On the basis of the above award we find that if the subject matter of the message or conversation was proper work for a telegrapher, then the fact that it was not reduced to writing does not necessarily determine whether or not it is a "message of record."

At R-128 in Carrier's brief we heartily agree with the statement that: "Prohibitions attributed to the Scope Rule have been the result of extremely conflicting Board Awards."

In discussing the Scope Rule of the Telegraphers Agreement, Judge Carter the Referee in Award No. 4516, says in part:

> "This Board has sought to follow the communication work of the Morse code operator and preserve for him the work which traditionally belonged to him.
>
> * * * * *

"But it was really apparent that the use of the telephone was so general that every use of the telephone was not contemplated or intended as telegraphers work. It was thereupon determined that employes whose duties require the transmitting or receiving of messages, orders, or reports of record by telephone in lieu of telegraph constitutes the telephone work reserved exclusively to telegraphers Award 1983."

We have examined the subject matter of the telephone conversation in the case before us. We have reviewed the many Awards cited to by both parties on the application of the Scope Rule under similar sets of facts.

We think that the following statement from Award No. 8663 applies to the facts in this case:

"The record contains samples of the messages transmitted by the clerk. They do not appear to be purely informational but are communications of record and have to do in part with the operation of trains. For example, some give car numbers, with information as to the cargo and the character and destination of shipment."

We find that the Agreement has been violated in the instant case and the claim should be sustained.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10364, DOCKET TE-9143

The Majority's decision in **Award 10364** is palpably wrong.

The Labor Member's Referee Brief in this case stated the Issue as follows:

While it is true that many 'issues' have been discussed by the parties in the 'nine' separate submissions, the main and **only real issue**

before the Board is whether the communication transmitted by Roundhouse Clerk at Newton to Roundhouse Clerk at La Junta was a communication of records." (Emphasis added.)

The Carrier, in one of its submissions (R., p. 162) said:

"The specific 'question at issue' is whether the Roundhouse Clerk transmitted a 'matter of record' via the telephone on September 16, 1955."

In the General Chairman's briefs, he covered a number of subjects, and the Carrier Member answered those issues in his Referee Brief and attempted to present to the Referee pertinent awards in connection therewith. On page 10 of that brief he said:

"Over the years, the Carrier has recognized the telegraphers' right to perform communication work **of record.** Nothing more."

That statement was made on the basis of the settlements in the record, and the Carrier's so agreeing by letter; such is not in the basic Labor Agreement between the parties.

In other words, it was agreed by all parties at interest that there was only one issue to decide: Was the telephone conversation a "message of record" within the meaning given that term on this particular property by numerous settlements. The Referee stated during panel hearing that this was the **only** issue involved, and the only issue on which he was going to rule.

Since this was his first case on his first assignment, he requested that the Carrier Member furnish him a few awards which would be helpful to him in trying to determine what is a "message of record" as the term has been generally used in the railroad industry.

The Carrier Member had handed the Referee seventy-five (75) awards so that he would have a reasonable number on each pertinent issue in the case as it appeared prior to the Labor Member's agreeing that there was really only the one issue involved. The Referee handed those 75 awards back to the Carrier Member, and requested in lieu thereof "a few" awards on the subject of "messages of record". It was then pointed out that the record already contained a citation of **Award 4737,** which deals with this subject. From among the 75 awards returned by the Referee to the Carrier Member, a number of them were handed back to the Referee, after reading excerpts therefrom to him about "messages of record". No other awards offered by the Carrier Member were retained by the Referee because of his stated intention to rule on one point only — whether or not this was a matter of record. Among the Awards retained by the Referee were **1938, 4050, 4208, 4280, 4791, 4927, 5081 and 5181.** He was offered several times that number, but after he reviewed those listed, he said they would surely suffice, and well they should have. They showed any number of messages that, while reduced to writing, were nevertheless not considered "messages of record". Some of such messages were about movement of cars and related subjects.

Bearing in mind that the issue had, by agreement of all parties at interest, been confined to whether or not there was involved a "message of record", within the meaning given that term by these parties, the Majority nevertheless launched into whether or not a complete monopoly exists, etc. After disposing of that "issue", which no longer existed, the Majority said:

"This brings us to the main question in this case. Was the verbal telephone conversation, message or communication which took place between the Roundhouse Clerk at Newton, Kansas, and the Roundhouse Clerk at La Junta, Colorado, a 'message of record' within the meaning of the Agreement between the parties and **under the Scope Rule** as it has been interpreted by this Board and by the parties to the Agreement.

"The Employes argue strongly that the work qualifies under the **Scope Rule** and the Claimant should prevail." (Emphasis added.)

There, again, the Majority is in gross error. We challenge them to point out any reference to, much less definition of, "message of record" in the Scope Rule of the Agreement. It simply is not there — neither written nor implied.

The Majority then mention Article XIII of the Agreement. That rule is captioned "Handling Train Orders". The only portions thereof relating to "messages of record" cover only the copying by train and engine service employes under stated circumstances. We feel sure the Majority must know that roundhouse clerks are not "train and engine service employes". Furthermore, the very fact that Petitioner found it necessary to negotiate a special rule to cover "train orders or messages of record copied by train and engine service employes" is added proof that if they had intended to restrict the use of telephones so that roundhouse clerks could not use them, such could have been accomplished only by Agreement. Search the Agreement, and no such rule will be found.

The Majority state that they agree with **Awards 7338 and 9261** regarding burden of proof, but then set about, in absolutely wierd fashion, to make a mockery of the principle with which they profess to agree. Bearing in mind that the issue was whether or not there was a "message of record" involved, and that the Majority "agrees" with the burden of proof principle, let us look at their own "findings of proof":

"In our case as the employes facts were stated in the complaint there was simply the entirely unsupported statement that the telehone conversation occurred.

* * * * *

"Notwithstanding the nature of the subject matter of the conversation there is nothing in the writing in the record. The record discloses only the statement by the Employes that someone — name unknown to the Board because it is unstated in the record — listened in on the conversation, took it down verbatim. The Employes have not entered into the record the written statement as copied by the employe who listened in on the conversation. This by itself would not be sufficient to sustain the burden of proof. * * *"

Seeking solace in the absence of proof, the Majority abjectly says the Carrier admitted a telephone conversation took place. That is indeed true, and thousands of additional ones undoubtedly took place on the same day. The Carrier has not admitted, but rather **denied** that it was a message of record. Petitioner's burden was to prove the contrary, which they did not do.

The Majority is further in abject error in trying to draw comfort from **Award 4624, regarding train line-up.** Subsequent awards have overruled that one, but more pertinent here is the fact that no train line-up was involved in the instant case.

Following their quotation from irrelevant Award 4624, the Majority penned this "classic":

> "On the basis of the above award we find that if the subject matter of the message or conversation was proper work for a telegrapher, then the fact that it was not reduced to writing does not necessarily determine whether or not it is a 'message of record.'"

We have asked the Majority to tell us how a group of words, letter and figures can be made a matter of record without their being reduced to writing. Obviously, we have received no answer.

In their wanderings from **the pertinent issue,** the Majority get back to the Scope Rule, and by reference to and quotation from **Award 4516,** try to breathe life back into Board-made dictum which was erroneous from the start, and which has since been overruled by a legion of better-reasoned awards. The Majority would have found this to be true if they had considered the awards presented for the Carrier.

In any event, **Award 4516,** even if it were still a recognized precedent, could no more than beg the issue here. It simply does not determine what is or is not a "message of record", and that was the only issue before us.

Award 8663, cited and partially quoted by the Majority, is squarely against their decision. The very excerpt they quoted says:

> **"The record contains samples of the messages transmitted by the clerk.** They do not appear to be purely informational but are **communications of record** and have to do in part with the operation of trains. For example, some give car numbers, with information as to the cargo and the character and destination of shipment." (Emphasis added.)

The Majority admitted, as is shown above, that no message was produced in this record. Furthermore, **Award 8663** does no more than beg the issue in this case.

So that the record will be complete, we list in closing the awards cited and handed to the Referee on behalf of the Carrier at panel hearing:

603	615	652	653	700	701	1078
1145	1277	1320	1983	4050	4208	4259
4265	4280	4733	4737	4791	4927	5081
5181	5182	5229	5248	5564	5582	5583
5584	5585	5660	6055	6071	6222	6330
6341	6359	6625	6788	6824	6996	7076
7153	7154	7338	7343	7400	7401	7402
7439	7825	7826	7908	7953	7970	7976
8065	9204	9222	9261	9344	9551	9565
9572	9573	9609	9783	9953	9956	10067
10164	10169	10200	10201	5866		

None was accepted other than those mentioned above on "messages of record". It should be obvious to anyone reading the record in Docket TE-9143, **Award 10364,** that the award is a nullity. It should be so treated. See subsequent **awards 10385 and 10387,** among others.

O. B. Sayers

G. L. Naylor

W. F. Euker

R. E. Black

R. A. De Rossett