Award No. 10619

Docket No. TE-8874

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY COAST LINES

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

1. The Carrier violated and continues to violate the Agreement between the parties when it requires or permits train or engine service employes to use the telephone for the purpose of requesting and obtaining orders and/or messages direct from the train dispatcher, authorizing the advancement of their trains.

2. The Carrier shall compensate (a) the senior qualified extra telegraph service employe on the seniority district who had not already become entitled to payment under Article XIII of the Agreement an amount equivalent to a day's pay for each of the following specific dates: March 10, 1955, March 25, 1955; April 3, 1955; April 4, 1955; April 10, 1955; April 18, 1955; May 5, 1955; May 21, 1955; May 28, 1955; May 29, 1955; May 30, 1955; June 2, 1955; June 3, 1955; June 4, 1955; June 5, 1955; June 11, 1955; June 23, 1955; June 24, 1955; June 27, 1955; July 1, 1955; July 14, 1955; July 15, 1955; August 10, 1955; August 18, 1955; October 1, 1955; October 29, 1955; October 30, 1955; November 10, 1955; November 14, 1955; November 21, 1955 and November 30, 1955; and (b) each of the two such senior extra employes an amount equivalent to a day's pay each day for May 13, 1955; June 1, 1955; June 7, 1955; June 12, 1955; June 15, 1955; June 16, 1955; June 26, 1955; June 28, 1955; June 29, 1955; July 2, 1955; July 9, 1955 and September 27, 1955; on each of which days two violations of the agreement occurred. If there be no such idle extra employes on any of the above listed dates, the Carrier shall compensate the senior regularly assigned employe or employes idle on a rest day on each of such dates and/or for each occasion, an amount equivalent to 8 hours' pay at the time and one-half rate of his position for work lost by him; and

3. The Carrier shall be required to compensate the senior idle extra employe or employes; or the senior regularly assigned employes

on the basis of claim in Item 2 above for each day and each occasion that such violations occur subsequent to the dates named therein. The individual employe or employes entitled to receive pay under the claim herein shall be determined by a joint check of the Carrier's records.

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

In order to dispose of the question as to whether employes covered by the Telegraphers' Agreement had an exclusive right to handle train orders the following Memorandum of Agreement, effective April 9, 1948, was adopted by the parties hereto:

"MEMORANDUM OF AGREEMENT between The Atchison, Topeka and Santa Fe Railway Company (including Gulf, Colorado and Santa Fe Railway Company and Panhandle and Santa Fe Railway Company) and The Order of Railroad Telegraphers, with respect to the copying of train orders or messages of record by train and engine service employes:

IT IS AGREED:

1. Train and engine service employes will not be required or permitted to copy train orders or messages of record from train dispatchers for the purpose of advancing the movement of their train or other trains, except in cases of emergency.

Emergencies as referred to herein are:

(1) Storms, washouts, high water;

(2) Wrecks, slides, snow blockades;

(3) Accidents;

(4) Failure of fixed signals or train control;

(5) Engine and equipment failure and break-in-two's; which could not have been foreseen prior to train passing or leaving last open office of communication, and which would result in serious delay to trains.

(6) Danger to life or property requiring immediate attention.

2. It is understood that the following procedures are permissible and not in conflict with this Agreement:

(a) At points where there is no telegrapher employed or where one is employed but not on duty, a telephone conversation about work performed or to be performed about obtaining permission to cross over from one track to another or to flag block, or about the probable arriving time of other trains; and

(b) At junction points or points where spur tracks join main tracks where telegraphers are not employed, train and

provided for therein to " . . . the senior qualified extra telegraph service employe on the seniority district who does not start service that calendar day or who has not already become entitled to payment under this Article XIII for that calendar day . . ." In other words, even if the handling complained of in the instant dispute were violative of Article XIII, Section 5, as contended by the Employes, and the Carrier emphatically reasserts that it was not, that rule (Article XIII, Section 5) expressly limits the payment of the penalty prescribed therein to an **extra employe** and does not provide for the payment of any penalty to regularly assigned employes, either on their rest days or otherwise.

In conclusion, the Carrier respectfully asserts that the Employes' claim in the instant dispute is entirely without support under the governing agreement rules in effect between the parties hereto and should be either dismissed or denied for the reasons previously expressed herein.

The Carrier is uninformed as to the arguments the organization will advance in its ex parte submission, and accordingly reserves the right to submit such additional facts, evidence and arguments as it may conclude are necessary in reply to the organization's ex parte submission or to any subsequent oral argument or briefs presented by the Order of Railroad Telegraphers in this dispute.

All that is contained herein has been both known or available to the Employes and their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Two preliminary questions are raised by the Carrier, as in Award 9261: they are as follows:

(1) The jurisdiction of the Board to entertain the claim because the several items now contained in one appeal, were submitted and handled as separate claims to a conclusion with the Carrier on the property and that the Employes' action in combining the separate and distinct claims is improper and cannot be joined here.

(2) The failure to name the individual claimants precludes an Award under the Railway Labor Act.

As in Award 9261, we express no opinion as to the validity of those defenses but consider and dispose of this submission on another aspect presented by the record.

The formal claim here is that on 56 specific occasions, with dates named, the Carrier, in 53 claims set forth in Employes' Ex Parte submission, members of train crews used the telephone to contact train dispatchers for the purpose of requesting more time on superior trains: that they were advised by the dispatcher to use a certain number of minutes on certain trains to advance from one point to another, permitting the inferior train to advance to a point where it could clear, without delaying, a following superior train. That extra trains were stopped at various stations and that it was necessary to obtain time beyond the scheduled arrival of certain passenger trains if the freight trains were to proceed. In each instance, it is claimed, members of the train crews were furnished information and instructions authorizing the freight

trains to advance. Claimant further contends the authority and information was furnished for the sole purpose of advancing freight trains and was not for the purpose of performing work at any of the stations at which the freight trains were located when the authority was issued.

The provisions of Article XIII of the Agreement provide as follows:

"ARTICLE XIII

HANDLING TRAIN ORDERS

Section 1. Except as otherwise provided in Sections 2, 3 and 4 of this Article XIII, no employe other than covered by this Agreement and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call.

Section 2. Train and engine service employes will not be required or permitted to copy train orders or messages of record from train dispatchers for the purpose of advancing the movement of their train or other trains, except in cases of emergencies.

Emergencies as referred to herein are:

(a) Storms, washouts, high water;

(b) Wrecks, slides, snow blockades;

(c) Accidents;

(d) Failure of fixed signals or train control;

(e) Engine and equipment failure and break-in-two's;

which could not have been foreseen prior to train passing or leaving last open office of communication, and which would result in serious delay to trains.

(f) Danger to life or property requiring immediate attention.

Section 3. It is understood that the following procedures are permissible and not in conflict with this Agreement:

(a) At points where there is no telegrapher or telephoner employed, or where one is employed but not on duty, a telephone conversation about work performed or to be performed, about obtaining permission to cross over from one track to another or to flag block, **or about the probable arriving time of other trains**; and

(b) At junction points or points where spur tracks join main tracks where telegraphers or telephoners are not employed, train and engine service employes may obtain telephone check on overdue trains, but train orders or messages of record may not be copied unless an emergency exists as defined herein.

Section 4. When train orders or messages of record are copied by train and engine service employes at stations where telegraph service employes are employed, this Article XIII will govern, regardless of whether emergencies as defined herein exist.

Section 5. When train orders or messages of record are copied by train and engine service employes at small non-telegraph stations, or at other stations where no telegraph service employes are employed, and when emergencies as defined herein exist, no payments will be made; when such emergencies do not exist, the senior qualified extra telegraph service employe on the seniority district who does not start service that calendar day or who has not already become entitled to payment under this Article XIII for that calendar day, will be paid one day at the minimum telegraphers' rate applicable to the seniority district, it being understood that one payment is to be made for each such occurrence, excepting that not more than one day is to be paid any such extra employe on any calendar day. In each instance wherein payment is due under this Section 5, the Chief Dispatcher will notify **the employe entitled thereto to make claim therefor.**

Section 6. Except as provided in Sections 2 to 5, inclusive, of this Article XIII, train orders issued under the authority of Rule 217 of the Operating Rules and Regulations will be transmitted to a telegraph service employe and by him delivered to the employe in whose care the order is addressed, it being recognized that the procedures established by such Rule 217 are not in violation of any rule of this Agreement."

Claimant claims a violation of Section 2, of said Article.

Carrier maintains that the areas involved herein are double track territories and that since April 6, 1943, all extra trains have been operated under the so-called "current of traffic rules"; in 1948 Carrier's Operating Rules were revised and Rules 251 and 252 were promulgated; these are still in effect and read as follows:

"251. On portions of the railroad so specified in the time table, trains will be run with the current of traffic by block signals, whose indications will supersede the superiority of trains.

252. The movement of trains will be supervised by the train dispatcher, who will issue instructions as may be required."

Carrier further contends that under such rules, trains as involved here, are cleared at terminal to proceed with current of traffic on double track governed by block signals, whose indications supersede time table superiority. In other words, they follow block signal indications just as they do in Centralized Traffic Control territory, except as they otherwise might be directed by the train dispatcher. A train dispatcher may thus clear an extra (authorize it by numbered clearance card) at a terminal with instructions to clear time on certain trains in which event the extra may proceed on signal indication, subject to further instructions enroute: or he may clear an extra at a terminal without any instructions and if none given enroute, the extra proceeds on signal indication to its objective terminal.

Present Rule 252 provides that train dispatchers will issue such instructions as may be necessary: however, these instructions, when given enroute, are neither reduced to writing nor made a matter of record. Advices so given train and engine service employes by the train dispatchers concern the probable arrival time of trains. They are neither train orders nor messages of record and train dispatchers do not, and are not, required to record them in their train books.

Carrier further contends that in all of the claims in the instant dispute a member of the crew of an extra train contacted the train dispatcher from either (1) blind sidings or stations at which telegraph service employes are not employed, or (2) from stations at which telegraph service employes are assigned but not on duty, to inquire as to the probable arrival time of following trains. In most of the individual claims herein, the only contact was between the crew member and the dispatcher, and in such cases, the dispatcher did not make a record of the conversation in his train order book, there being no need to do so since the telephone conversation did not constitute a train order.

We come now to a determination of the facts of this case. We have carefully examined the claims of the Organization. As phrased in each instance set forth in Claimant's statement, the request was for more time on some particular passenger train following or a request for permission to move the extra train ahead of such a following passenger train. The answer in each instance gave the inquirer the information as to the probable arriving time of such train. Carrier in its submission admits the various calls but maintains the calls were all made to ascertain the probable arrival time of such trains. It should be noted that, in a few of the instances cited by claimant, the Dispatcher in the exercise of caution, told the inquirer to listen on the telephone and he would give him time on a following train. A typical illustration is set forth in case No. 50, where dispatcher, in answer to a question described by Claimant as a request for additional time on No. 3, told the inquirer to remain on the telephone and he would give him ten minutes on No. 3. Dispatcher then rang the telegrapher at Ludlow and issued the following D-251 message, addressed to C&E Extra 205 West:

> "Later, clear No. 3 Eng. 51 - 15 minutes late at Pisgah, and on time from Pisgah."

To us, the foregoing and the rest of the record clearly shows that the requests of the various trainmen, as cited herein, were designed to ascertain probable arrival time of other trains. It is also our opinion that the progress of various freight trains involved here were controlled by the block system in operation on that part of the system over which said trains were moving and not by train order or message from the dispatchers.

It should also be noted that it will be presumed that train orders are in all instances of record, all messages are not and such messages as are contemplated by Section 2 of Article XIII of the Agreement must be "messages of record".

Since the telephone conversations, in our opinion, did not constitute a train order, an oral train order, or the copying of a train order, or other work shown to be exclusively within the scope of the Organization, the claim must be denied. Awards 9261 and 9318.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1962.

DISSENT TO AWARD 10619, DOCKET TE-8874

This award, clearly a result of incomplete comprehension of the facts and issues involved, can serve no purpose other than to confuse the parties.

The "Opinion of Board" adopted by the majority (Referee and Carrier Members) is so incomprehensible that it defies analization. Apparently the majority relied heavily on Awards 9261 and 9318. But both of these awards are for all practical purposes entirely foreign to the issues here involved.

Award 9261 did not reach the merits of the dispute there involved. It merely held that the Employes had not presented the degree of proof necessary to sustain their claim. In an unusual procedure they were given an opportunity to check certain of the Carrier's records to determine whether such proof as the Referee required could be obtained. And when this check failed to produce anything more than had previously been presented the Referee ruled that the employes had not met their burden of proof. On this narrow issue I could find no reason for disagreement with the conclusion reached — although I considered the basic premise to be in error — and therefore filed no dissent.

The present record contains no such real or fancied defect. The example described by the majority clearly shows that the message involved was "of record" and was handled in a manner indicating that the dispatcher knew the requirements of Article XIII of the Telegraphers' Agreement.

Award 9318 dealt with the securing of a register check at a branch line junction point on another railroad. Neither the facts nor the agreement requirements were sufficiently similar to those of this case to give the award any pertinancy here.

Then, in a view completely foreign to those factors bearing on the question of whether a "D-251 Message" is a "message of record", the majority says that the trainmen were merely ascertaining the probable arriving time of other trains, a use of the telephone permitted by Article XIII.

The expression of these two views by the majority shows the degree of confusion by which it was beset. The advice about the "probable arriving time of other trains" certainly could not authorize the use of main tracks for running purposes on the time of overdue superior trains. This is the function of a "D-251 Message."

Such improper observations about facts as clear as those of the present case, so as to make them come within an exception never dreamed to be applicable by the parties tend to make a mockery of the collective bargaining process.

For the foregoing reasons I consider Award 10619 to be entirely erroneous, and hereby express dissent.

J. W. WHITEHOUSE
Labor Member

REPLY TO LABOR MEMBERS' DISSENT TO AWARD 10619, DOCKET TE-8874

With reluctance is this filed, but it seems necessary lest the casual reader places the award in improper perspective and assumes it is weakened as precedent. Certain conclusions in the dissent are based upon premises requiring clarification.

Contrary to what is alleged, Awards 9261 and 9318 represent excellent supporting authority. For example, Award 9261 presented a similar dispute, with variation in dates and incidents, involving the same facts and issues between the same parties. Both parties recognized the relationship by many references in the instant docket, one of which from the Organization's submission reads:

> " * * * another dispute concerning action similar to that in dispute herein has been presented to your Board and been assigned to Docket TE-7970" (Award 9261).

Obviously Award 9261 is not "entirely foreign" to this case, as a superficial comparison of many verbatim portions of the records will attest. It is difficult to conceive of two cases more closely related.

It is noteworthy that the Board in Award 9261 found claims for 32 specific dates. The "unusual procedure" referred to in the dissent applied to only one of those dates, so any comments relating thereto cannot apply to the others.

Also it is not clear by what definition of "merits" it is concluded that Award 9261 "did not reach the merits of the dispute". The Board clearly stated that it declined from expressing any opinion on jurisdictional and procedural issues raised. Obviously the decision based upon failure of proof which either was not or apparently could not be supplied can only reasonably be considered as a decision on the "merits", which result is equally applicable to the instant case where the same deficiencies of proof existed.

As to Award 9318, even a cursory reading thereof will demonstrate its obvious application on principle.

No designation as "foreign" can possible obfuscate the relevance of either Article XIII or Rule 25. As a matter of fact, the Board quoted them from the applicable Agreement which certainly establishes their pertinence. Assumption of the facts in issue can not fairly dismiss excerpts from the Agreement as "completely foreign" to the dispute.

The award is sound and the dissent does not detract therefrom.

/s/ T. F. Strunck

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ D. S. Dugan