Award No. 11473
Docket No. TE-10198

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TOLEDO, PEORIA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Toledo, Peoria & Western Railroad, that:

1. Carrier violated the Agreement when on the dates noted below it failed and refused to permit the employes designated below to deliver train orders and clearance cards addressed to designated trains and instead required the named employes to leave said train orders on the train register at LaHarpe, Illinois, at the end of their tour of duty, which orders were later picked up by train service employes of said trains.

J. S. Carter Aug. 7, 1956 — Cleared Extra 202 West at 11:50 A. M.

J. S. Carter Aug. 9, 1956 — Cleared Extra 204 West at 11:48 A. M.

J. S. Carter Aug. 10, 1956 — Cleared No. 103 at 11:50 A. M.

J. S. Carter Aug. 13, 1956 — Cleared No. 103 at 11:45 A. M.

B. R. Barnett Aug. 7, 1956 — Cleared No. 123 at 11:48 P. M.

K. O. Colvin Aug. 11, 1956 — Cleared Extra 207 West at 11:35 P. M.

2. Carrier shall compensate each of the employes named above in paragraph 1 for a 3-hour call, at pro rata rate, for each violation listed above.

EMPLOYES' STATEMENT OF FACTS: Claimant J. S. Carter is the regular assigned Agent at LaHarpe, Illinois. His assigned hours are 4:00 A. M. to 12:00 noon, Monday through Saturday. Sunday is his assigned rest day.

Claimant B. R. Barnett is the regular assigned relief Operator No. 1 with headquarters at LaHarpe, Illinois. As part of his relief assignment he works 4:00 P. M. to midnight, Mondays and Tuesdays at LaHarpe, Illinois.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute involves the handling of train orders. Herein the Claimants were instructed by the dispatcher to leave the orders and clearance cards pinned to the train register when they went off duty. The parties agree that telegraphers are entitled to the work of handling train orders to the exclusion of all other employes.

This type of dispute has been presented to this Board many times. There is a long line of awards on similar cases and cases exactly in point, beginning with Award 86. Therein a third party carried the message to another station. Award 709 dealt with the making of additional copies and is not squarely in point. Award 1096 also involves the third party handling train orders. We then come to Awards 1166, 1169 and 1170. These are in point and all sustained the claim. Award 1422 is squarely in point, except therein the operating rule directed the operator to personally deliver a copy to each person addressed. Award 1680 is in point and follows the previous awards. Thereafter follows a long line of awards which have all accepted the opinions set forth therein.

On the other side, Award 8327 is in point with the instant case. Therein the Board did a very thorough job in going through the entire history of this type of dispute. The Board therein discussed practically all awards dealing with the issues involved herein and chose to follow Award 1821 and 7343.

Thereafter, Award 10917, which is the most recent, followed Award 8327. In Award 10917, the operating rules required personal delivery, whereas in the instant case the rules have been changed and do not require personal delivery.

We choose to follow the latter line of awards and specifically adopt the language in Award 10917 and 8327.

We cannot under any circumstances see how the Agreement was violated. No employe, except one covered by the Telegraphers Agreement, handled the train orders in question. We feel that Awards 8327 and 10917 have much more logic and sound reasoning behind them than the other awards. For that reason we find the Agreement was not violated.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 6th day of June 1963.

LABOR MEMBER'S DISSENT TO AWARD 11473, DOCKET TE-10198

This dispute involved, primarily, the meaning to be given the word "handling" as used in Rule 1(b) of the Agreement. This rule reads:

> "The handling of train orders or blocking of trains at stations where an employe as per this rule is employed, will be confined to employes covered by this Agreement and train dispatchers, provided such employe is available and can be promptly located. When not called in conformity with this rule, the employe will be notified and paid for a call."

There was no conflict in the evidence submitted to the Board. It was agreed that LaHarpe, Illinois, was a station where "an employe as per this rule is employed"; it was agreed that the two claimants, on the dates involved, were available and could have been promptly located to perform service on an overtime or call basis. It was agreed, that on each date involved, the claimants "were instructed by the dispatcher to leave the orders and clearance cards pinned to the train register when they went off duty"; that the orders were later picked up, from the train register, by train service employes in charge of the trains to which the orders were addressed.

The sole question for decision was whether, under Rule 1(b), the claimants were entitled, as a contractual right, to personally and manually deliver the orders to the train service employes in charge of the trains, on an overtime or call basis. The Referee found "No employe, except one covered by the Telegraphers' Agreement, handled the train orders in question." If, by this finding, the Referee intended to say that the orders were not "touched" or "moved" from the time the claimants placed them on the train register until picked up by the train service employes, then such negative finding would be supported by the record. There was no contention, by either party, in this regard. If, however, one construes the finding as being controlling, then it simply begs the issue. Otherwise stated, the issue was not whether "another" employe touched, carried, transported or "handled" the train orders, during the interim between their being "pinned" to the train register and their being picked up by the train service employes of the trains to which addressed. The issue was whether the carrier was obligated by contract, to allow the claimants, personally, to deliver the orders to the train crews instead of using the inanimate train register method.

Rule 1(b) stems from a rule granted by United States Railroad Labor Board in Decision 757, rendered on March 3, 1922. The rule there promulgated read:

"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."

The first dispute to reach this Board, after its creation in 1934, on this rule, was AWARD 86. There the carrier had caused train orders, received and copied by telegraphers on duty at Texline, addressed to work train at Grenville, to be carried by Conductor of No. 1 from Texline to Grenville, where he placed them in the waybill box, located on the outside of the station building. Afterward, the orders were picked up, each morning, by Conductor of the Work Train, at a time prior to regularly assigned hours of the Agent-telegrapher.

In that dispute the carrier contended that the words "handle train orders" meant "copy train orders". The Referee said:

"We cannot agree with the carrier's position in the interpretation of this rule. The rule is quite clear and requires no unusual interpretation. Doubtlessly it was made for the purpose of preventing encroachments upon that work to which the employes in that particular craft were entitled."

The first dispute to be resolved by the Board, where the facts were indistinguishable from the present docket, was AWARD 1166. There the same rule was involved as in AWARD 86. The Referee found the facts to be:

"Briefly, Belvidere, Kansas, a station and telegraph office on the carrier's line, is served by an agent-telegrapher. A certain train leaves that station at a time when the agent is not on duty, but who may be located and is available for calls. The carrier, instead of calling its agent at an opportune time for that purpose, requires that the agent shall place orders received by him during his regular shift in relation to that train in a box locked with a switch key in the agent's charge, whence the train crew, also provided with a key thereto, may obtain the orders as it goes on duty."

The referee cited Awards 86, 709 and 1096. He found that the rule, which shall hereinafter be referred to as the Standard Train Order Rule, was, as was stated in Award 86, intended to prevent encroachments upon the work "to which the employes in that particular craft were entitled." He approved the holding in Award 709[1]. He further said:

"On the whole, we are convinced that it was the intention of the parties to make rule 13 of the agreement broad in its application, and to embrace therein recognition of the right of telegraphers employed in the railway service to enjoy whatever of employment that service offered; and, that in appraising the scope thereof there was not dearth of knowledge of the carrier's operating rule 210, as well

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[1] "We have said that 'under a fair and reasonable interpretation' of rule 13, there would be involved 'the physical process of passing' train orders 'from hand to hand'."

as of the rigidity of its enforcement at the hands of carrier management, as also appears."

Referee Hilliard rendered the same decision in AWARDS 1169 and 1170. His decision was followed by Referee Bushnell in AWARD 1422; Referee Garrison in AWARD 1680; Referee Bakke in AWARD 1879; Referee Carter in AWARD 2928; Referee Rudolph in Awards 3611 and 3612; Referee Fox in AWARD 4057; Referee Parker in AWARD 5013; Referee Guthrie in AWARD 8657; Referee Johnson in AWARD 9319 and Referee Gray in AWARD 10239.

The Referee, in the instant case, recognized these decisions by citing AWARDS 1166, 1169, 1170, 1422 and 1680; stating that they are directly in point; and, "Thereafter follows a long line of awards which have all accepted the opinions set forth therein."

AWARD 8327

The Referee in the instant case finds, however, that the Referee in AWARD 8327 "did a very thorough job in going through the entire history of this type of dispute". Let us see if this conclusion is sound. In AWARD 8327, the Referee cited Awards 709, 749, 1096, 1878, 1820, 2926, 2930. In regard to these awards he stated:

"These cases are unquestionably sound."

He also cited AWARDS 1166, 1680, 1821, 3670, 4057 and 7343. In regard to the first cited award, the Referee said:

"That decision (Award No. 1166) was clearly wrong."

Finally, the Referee set forth the precedent basis for his award as follows:

"So we have a situation where we must decide either on the basis of a long line of precedents which we think unsound and contrary to principle, or on the basis of principle supported by two Awards Nos. 1821 and 7343. We must either repudiate our latest decision supported by one earlier decision and principle, or confirm our latest decision and repudiate the earlier decisions as erroneous. We have no question as to our duty. It is to confirm Award Nos. 1821 and 7343, and thus confirm sound and long-established general principles."

In confirming and approving Awards 1878 (Bakke), 2926 and 2930 (Carter), the Referee chose to ignore the fact that Referee Bakke was the author of AWARD 1879, rendered on the same date and involving the same Agreement as Award 1878. He ignored the fact that Referee Carter was the author of AWARD 2928, rendered on the same date and involving the same Agreement as Awards 2926 and 2930. In other words, the Referee said that, in effect, these Referees were forthright and correct, when he approved the decision, but on the other hand "took the easy path" when he did not so approve.

In relying on AWARD 1821, the Referee refused to consider what was said about the holding in AWARD 1879. There Referee Bakke said:

"All that we said in re Docket TE-1904, Award No. 1878 has application here, except in so far as the Carrier relies on Award No. 1821 recently announced, and that award is the only thing necessary to discuss in this case.

"Referee Yeager in that award, with utmost sincerity, which we do not question, says he cannot subscribe to the acknowledged holding of the awards he cites, although admitting their analogy to that docket.

"In that connection this referee has read with interest the memorandum of Dean Garrison, attached to his award in No. 1680 and without philosophizing further on the subject, he unhesitatingly exercises his prerogative in pointing out where he believes Referee Yeager fell into error in his opinion.

"He says the decisions (1166, 1169, 1170 and 1422) 'were predicated on a fallacious premise, and * * * the decisions to the extent that they interpreted and applied the rule, were incorrect.' He does not attempt to say what the "fallacious premise" was and the only deduction we can make is that he had in mind the major premise upon which the long list of awards rest, viz. the telegraphers exclusive right to all work covered by the agreement at his station. That is the premise in these cases, and when so considered as it must be, it stands as a Gibraltar upon which all of these cases must and can rest with security.

"It is difficult to believe that Referee Yeager meant what he said when he used the language 'It (the rule) excluded any phase of handling by any one not covered by the Schedule before it came into the hands of the train crew.' If he meant that, it destroys the very protection the rule was intended to and does give to the telegraphers, and sets at naught the long list of awards that have gone before.

"We cannot change the effect of Award No. 1821 relative to the situation in that case, but we can by the award here re-establish the unquestioned line of authority interpreting the rule involved, and one of the things it prohibits is 'the waybill box' method of evading the rule, which was what was attempted in the instant case.

"The Carrier violated the Second paragraph of Rule 1 of the Agreement and the claim must be sustained."

The Referee in citing AWARD 3670 refused to consider what was there said relative AWARD 1821, as follows:

"Cases with facts exactly corresponding to those in the matter before us have come before this Board many times. All save one of them have resulted in awards in favor of the organization. Awards 1166 et al. The one dissent came from a referee who felt so strongly that the precedents were predicated on the 'fallacious premise' that 'handling' of train orders included the actual handling of the orders to the crew that he denied the claim. Award 1821. Even in so doing, he indicated a degree of reluctance to break away from precedent. Since that award the Board, with two different referees, has returned to the well-beaten path. Awards 2928 and 3612."

In citing AWARD 4057, the Referee refused consideration to the following:

"The question raised herein was first considered by this Division in Award No. 1166, on a case arising on the Atchison Topeka and

Santa Fe Railway, on rules similar to those quoted above, and where the practice here complained of was involved. It was held that the practice violated the Agreement. Award No. 1166 was followed by this Division in its Awards Nos. 1169, 1170 and 1422; but in its Award No. 1821, it failed to follow its previous awards on the question, and denied the claim there asserted. However, in a series of Awards Nos. 2926 to 2930, both inclusive, it returned to its former position, and in claims arising on this Carrier, and on the rules quoted above, made affirmative awards. These later awards were subsequently affirmed by this Division in its Awards Nos. 3612 and 3670, although in the latter award the referee was somewhat less than enthusiastic in sustaining the claim there made."

Furthermore, the Referee refused to consider the findings of Referee Yeager, who was the author of AWARD 1821, in his later AWARD 5872. It is to be noted that Referee Yeager, there, specifically cited AWARD 3670 as authority for his decision. In AWARD 9319, Referee Johnson commented:

"* * * thus, in effect, reversing his original opinion and wiping out the only early award denying such claim."

Referee McCoy in AWARD 8327, also relied on AWARD 7343. It is difficult to understand the basis for such reliance. There was no rule in the collective agreement similar to the Standard Train Order Rule interpreted in the cited awards. Also, the Referee found that the Operating Rules of the Carrier has been changed, prior to negotiation of the Agreement, to eliminate any requirement that the operator "personally" hand the train orders to train service employes.

Referee Coffey (Award 7343) had had much experience as a referee with this Division, at the time the award was rendered. A careful reading of the opinion, bearing in mind that no awards were cited, leads one to believe that the Referee did not intend to impinge upon any prior decision of the Board. This thought is buttressed by the statement in the concluding paragraph of the Opinion:

"This case can be easily distinguished from those where Carriers have resorted to artifice, sharp practice and subterfuge to escape the **force of rules** or established practice." (Emphasis ours.)

It is clear that Referee Coffey was referring to cases where Standard Train Order Rule was present in the Agreement. The foregoing is similar to the language of Referee Carter in AWARD 5122:

"The handling of train orders at a station where there is an employe covered by the Telegraphers' Agreement is work belonging to that employe. His right to the work cannot be circumvented by devices such as depositing the train orders in waybill boxes or attaching them to train registers. Award 1878."

Careful reading of the complete opinion of the Referee in Award 8327, leads one to believe that the decision was based upon the personal philosophy of the Referee, as reflected in the following sentence:

"No one is entitled to perform work that the carrier does not want performed by anyone."

This statement is at odds with the public policy promulgated by the Congress, the Supreme Court decisions and the vast majority of awards of this Board. Let this be illustrated —

In the case of American Newspapers Publishers Association v. NLRB (345 US 100) it was contended by the appellant, that the Congress had prohibited collective bargains requiring pay for work, which the employer did not want employes to do. The employers contended that such a requirement in the Agreement contravened the provisions of the Labor Management Relations Act of 1947. The Supreme Court said:

> "Section 8(b) (6) leaves to collective bargaining the determination of what, if any, work, including bona fide "made work" shall be included as compensable services and what rate of compensation shall be paid for it."

While it is true that the foregoing was stated in construing a provision of LMRA 1947, no one would suggest that it is not equally applicable to collective bargaining agreements entered into under the provisions of the Railway Labor Act. In Order of Railroad Telegraphers v. Railway Express Agency (321 US 342) the Court said:

> "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

In Railway Employes v. Hanson (351 US 225) the Court held that collective bargaining agreements negotiated under provisions of the Railway Labor Act bear the "imprimatur of federal law."

AWARD 10917

In the instant case, the Referee says:

> "Thereafter, Award 10917, which is the most recent, followed Award 8327"
>
> * * *
>
> "We choose to follow the latter line of awards and specifically adopt the language in Award 10917 and 8327"

In the foregoing, the Referee, for some unexplained reason chose to ignore AWARD 10400. This award involved the same parties and the same issue as Award 10917. In AWARD 10400, Referee Mitchell said:

> "It is unnecessary to review in details the many Awards which deal with the question of handling train orders, because there is a difference in the Agreement that confronts us in this case, and we are bound by the Agreement before us.
>
> "The rule in this case, we quote from the Agreement:
>
> "RULE NO. 12 — HANDLING TRAIN ORDERS
>
> "No employes other than those covered by this agreement shall be required or permitted to transmit or receive train orders or messages by telephone or telegraph except in cases of emergency.

"Thus we see that the rule in the case before us limits the rights of the telegraphers to 'transmit or receive train orders', and not the handling of the train orders in what is referred to as the Standard Rule. It follows that the claim must be denied."

In AWARD 10917, Referee Boyd said:

"The issue presented here was before the Division in TE-8618 (Award 10400) when a similar claim was decided. The Carrier urges here that this prior award involving the same parties, similar facts and raising the identical issue is controlling here. The Organization recognizes the importance of precedent and that precedent should control in proper cases. They urge here that Award 10400 is "palpably wrong" and should be ignored. We have, therefore, examined carefully the briefs and citations furnished the Referee in Docket TE-8618 as well as the material contained in this docket and the briefs and citations of the parties.

"Is the decision or the opinion of the Board, or both 'palpably wrong'? That is, obviously wrong? A mere difference of opinion when there has been a long record of conflicting views on a particular question does not justify a conclusion on our part that a prior award was palpably wrong. After a careful study of many prior awards on this subject we have reached the conclusion that the decision was not palpably wrong but that the Opinion placed a restrictive interpretation on Rule 12 — Handling Train Orders. This rule adds nothing to the scope rule, it merely removes any possible doubt that the handling of train orders belongs to the Telegraphers."

The Referee rendering decision in AWARD 10917, could, and perhaps would have been content to merely cite Award 10400 as controlling precedent, except for the vigorous contention that the award was "palpably erroneous". He did not "rely on" or "follow" Award 8327. It was cited only in connection with his discussion of whether AWARD 10400 was "obviously wrong".

It is a gratuitous disservice to this distinguished Referee, to impute, that he did not fully understand the question at hand. On the same day that AWARD 10917 was adopted, the same Referee rendered decision that was adopted as AWARD 10914. Therein, he discussed AWARD 8657 and Interpretation No. 1 (Serial 189). Furthermore, in AWARD 5253, Referee Boyd stated:

"This Board has interpreted the word "handle" to include the work of receiving, copying and delivering train orders"

and,

"We deem the work of delivering train orders is the function of transmitting such to the person for whom it is intended."

In this latter Award, Referee Boyd cited AWARD 5013, wherein it was stated:

"We are not disposed to labor long on the Carrier's first point. This Division of the Board, after extended and spirited debate on the subject, is now definitely committed to the view that a Train Order Rule containing language of the kind to be found in the one now under consideration is clear and unambiguous and that its terms,

particularly the phrase "to handle train orders, are to be construed as contemplating the receiving, the copying, and the delivering of train orders to the train crews which are to execute them."

Thus, to recapitulate: Awards 1166, 1169, 1170 were rendered in 1940; 1422 in 1941; 1680 and 1879 in 1942; 2928 in 1945; 3611 and 3612 in 1946; 4057 in 1948; and, 5013, in 1950. With the exception of Award 1821, all sustained the position of the Organization as to the rule interpretation. The issue was so well settled, that it was not until 1958, that this Board was again called upon to resolve a similar dispute. Then came Award 8327.

The same issue was again presented in 1959. In Award 8657, Referee Guthrie stated:

"No considerations have been brought to our attention in the instant case which would justify a reversal of this long line of Awards by the Division."

Carrier members of the Board urged the Referee to follow Awards 1821, 7343 and 8327. (See Dissent to Award No. 8657.) The Referee was not persuaded.

In 1960 the issue was again presented and resulted in Award 9319. Again, the Carrier Members urged Awards 1821, 7343 and 8327. (See Dissent to Award No. 9319.) Referee Johnson was not persuaded.

In 1961 the issue was again presented. Award 10239. The same awards were again urged but to no avail. Referee Gray said:

"It is elementary that when a rule has been interpreted by the Courts and by Review Boards and are so overwhelming in number that such a ruling is virtually mandatory. To do otherwise would be to dissent to the majority opinion."

If we accept the finding of Referee Johnson in Award 9319, in stating that Referee Yeager reversed himself and thereby eliminated Award 1821, as a precedent; the line of awards, which the referee in Award 11473 followed, reads like this:

AWARD 8327

It is true, the Referee added AWARD 10917, as being in the "line". Merely citing an award number does not make it relevant. One cannot ignore the fact that provisions of the collective bargains are construed by this Board. This is the law. It is also true that the Board has the jurisdiction to hear "grievances" whether based on provisions of the Railway Labor Act[2] or on bargaining agreement[3].

The fact that the evidence giving rise to the claim in AWARDS 10400 and 10917 was similar to the evidence that caused claim in AWARD 11473, does not of and within itself control. It is the evidence, when applied to provisions of the collective bargain, that produces the decision. In AWARD 10400,

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[2] Award 262 — 4th Division, Enforced Odom v. Thompson (85 F.Supp. 477)

[3] Thomas v. New York, Chicago & St. Louis (185 F.2d 614)

the Referee found, as a fact, that the rule of the bargain invoked was dissimilar to the Standard Train Order Rule. He found that the Carrier had not agreed to the same latitude of work coverage.

CONCLUSION

The Railway Labor Act vests in the National Mediation Board the power to appoint or commission referees to sit with this Division. The referee is empowered to "make awards" in the specified cases. His actions in proposing an award are not subject to control.[4] His decision is made "final and binding" as a matter of law, when the claim is denied[5] or in a non-money award[6]. Recently, the Court of Appeals for the Fifth Circuit referred to the Board as possessing "awesome powers".[7]

In United Steelworkers v. Enterprise Wheel & Car (363 US 593) the Court discussed the 'power' of an arbitrator or referee. The Court said:

> "* * * an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."

Wherein can it be said that Award 11473 draws its "validity" from the collective bargain? The issue concerned interpretation of the words "handling train orders." This Division in a series of Awards (14) had interpreted the word "handling" to include manual delivery. Against these 14 awards are pitted one (Award 8327) or possibly two (Award 1821). That settlement of issues should become final, instead of being churned anew, illustrated in the quotation from the Supreme Court of Illinois decision in Neff v. George (4 N.E. 2d 388) as quoted in AWARD 1277 of the Fourth Division:

> "* * * The general rule is, that decisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, unless the evils of the principle laid down will be more injurious to the community than can possibly result from a change. * * *"

It is in line with statement of Referee Miller in AWARD 3670:

> "Both the carriers and the members of the organizations which do business with this Board must come to depend on such long series of awards to govern their own interpretations of agreements and to give stability to their day-to-day relationships. In fact, the referee has no doubt that Congress contemplated this when, in enacting the Railway Labor Act, it centered the final disposition of grievances on all carriers throughout the country in a single Board."

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[4] Whitehouse v. Illinois Central (349 US 366)

[5] Union Pacific v. Price (360 US 601)

[6] Brotherhood of Locomotive Engineers v. Louisville & Nashville (10 Led 2d 172)

[7] Hodges v Atlantic Coast Line (310 F.2d 438)

It is in accord with the opinion of the Supreme Court in Slocum v. Delaware L. & W. (339 US 239) wherein the Supreme Court said:

> "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

While it is not likely that another referee would choose to follow Award 11473; that it will be disregarded as was Award 8327; it cannot be overlooked that awards of this type tend to create additional disputes. What appears to have been a settled issue, has purportedly been cast aside in favor of something new. This defeats the very purpose of the National Board. It furnishes fuel for the various reports that the Adjustment Board has failed in its purpose.

Those familiar with the Board's operation over the period of years, well know that the ad hoc referees have consistently adhered to established precedent. Indeed, from the very beginning of the Board, it has been recognized by both partisan members and referees, that consistency and uniformity in interpretation was an absolute necessity, if the Board was to function with any degree of usefulness.

Let us use one more illustration to point up the error in the decision. The Agreement between Telegraphers' and Missouri Pacific provides in Rule 1(b);

> "No other employe except train dispatcher, and those covered by this agreement, will be permitted to handle train orders, * * *"

In AWARD 56, SPECIAL BOARD OF ADJUSTMENT NO. 117 (August 9, 1956) it was held that this rule was violated when Carrier required claimants to "leave train orders and clearance cards on train register" which were later picked up by train service employes. Referee Smith, in sustaining the claims, cited AWARDS 5013, and 5122 of this Division as authority.

Since the Referee in the instant case, adopts in toto the Opinion of Referee McCoy in AWARD 8327, it is to be assumed that he agrees with the sentence: "No one is entitled to perform work that the carrier does not want performed by anyone." The 14 awards cited to the Referee spell out, with unmistaken clarity, the meaning of the Rule, as follows:

> "If instructed by train dispatcher, or other authority, to clear train or trains before going off duty, leaving clearance cards or orders in some specified place for those to whom addressed, employes shall be paid under the provisions of the call and overtime rule." [8]

AWARD 11473 does not comport with established precedent. It fails to accord to Telegraphers', the vested rights, granted in rules interpretation over the period of years. True, it does deprive the claimants, in this particular case, of the few dollars claimed in damages for breach of the Agreement. True, they are denied further recourse, in this particular claim, by the denial. The

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[8] Rule 2(b) Telegraphers' Agreement — Missouri Pacific (Gulf District).

Award does not, however, and could not change the meaning of the Agreement, competently entered into by the parties. It does not, and could not, add to nor take from the words used by the parties. This Board, as authorized by law, had long since interpreted the identical words, prior to the execution of the Agreement. It is presumed that the parties had knowledge of such interpretations. This being so, it is also presumed that the parties intended such construction of their own agreement. It was not seriously urged that the unilateral change of Carrier's operating rules, only seven days prior to the filing of the first claim, but years after execution of the Agreement, had any particular bearing on the interpretation of the Agreement.

AWARD 11473 is in error in its interpretation of the rules and in its denial of the claims.

J. M. Willemin

Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 11473, DOCKET TE-10198

We have previously noted the purpose of a dissent is to constructively point out error committed by the Majority in interpreting the contract or in evaluating the facts. The Dissenter abjectly fails in this respect. We could leave the dissent as its own best refutation of the point it seeks to make — charitably assuming it seeks to make a point. The Dissenter substitutes a rambling dissertation on a group of awards, with quick and abbreviated references to those awards, without permitting the reader an opportunity to exercise his own intelligence in the matter. The Dissenter's reliance upon the awards is slanted and distorted and does not enable anyone unfamiliar with the refinements of this question, an opportunity to properly appraise or evaluate the merits of those awards. The Dissenter cloaks the facts of many cases in anonymity, disguises the true decision, and in general, misrepresents the awards and particularly, the so-called "major premise" for those decisions which are cited. In short, he has attempted to persuade anyone not schooled in the technical and legalistic distinction of this problem that the awards which he cites are support for the principle that Carrier may not eliminate work which is not required to be performed.

First, we must look at the rule being interpreted to obtain our perspective. We will underscore that portion of the rule which forms the so-called "major premise" for the Petitioner's arguments in the awards cited. The rule reads:

> "The **handling of train orders** or blocking of trains at stations where an employe as per this rule is employed, **will be confined to employes covered by this agreement** and train dispatchers, provided such employe is available and can be promptly located. When not called in conformity with this rule, the employe will be notified and paid for a call." (Emphasis ours.)

The language "the handling of train orders will be confined to employes covered by this agreement * * * " is the language referred to by the Organization and relied upon in past cases to support their claim. Their argument simply stated has been that **employes outside the scope of the Telegraphers' Agreement are not permitted to handle train orders** under the underscored

language cited above at train order offices, for to do so would be an encroachment upon their work. We will run into this word "encroachment" in many awards cited by Petitioner. Obviously, you do not have an encroachment unless someone is encroaching upon the work allegedly belonging to the Telegraphers. It was imperative, therefore, that the Telegraphers' Organization had to prove that someone outside the Telegraphers' Agreement was performing their work, and in each case, that was the allegation that was made.

We will note again this has been the Petitioner's argument in past cases dealing not only with "in care of" train order disputes, where the train order is delivered at point "A" by an operator to train "X", which in turn, delivered said order at point "B" to train "Y" for execution by train "Y" — in short, where the delivery was effectuated by an intermediate train crew, but the same argument of encroachment by another craft was also used, where the factual situation showed the train order was received and copied by an operator at point "A" and placed (delivered) on a register sheet or in a waybill box and ultimately picked up by the train crew which was to execute it. There is a definite and clear distinction between the two cases, notwithstanding the fact that Petitioner's argument in each case was identical. In the former case involving "in care of" orders, the Carrier utilized the services of another crew to effect delivery. In the latter case, where the order was placed on a train register or in a waybill box, there was no other employe outside the Telegraphers' craft used to perform work of handling train orders — all of the work was done by the operator. In some instances, the Carrier had dispensed with the requirement of personal delivery, a requirement which the Carrier unilaterally had imposed through its operating rules — and which mind you — was no part of the rule set forth above which the Board was construing. The work of handling train orders was confined to employes covered by the Telegraphers' Agreement in the latter cases — it was not in the former.

Notwithstanding the difference in the two cases as outlined hereinabove, the Petitioner argued in each case that someone was encroaching on their work. This was the foundation stone for their position before the Board. More important, it was the foundation stone for the erroneous decisions in earlier cases. Unless it is found that someone outside the craft is handling train orders at train order offices — other than Dispatchers — there has been no violation of the train order rule. The Organization knew this and made its argument accordingly. Therefore it would seem to be a very simple matter, in the resolvement of any dispute, to determine whether there was, in fact, an employe outside the craft of the Telegraphers' Agreement performing work which accrued to that craft. If the facts showed that such work was being done by non-Telegraphers, the claim would be sustained, otherwise the claim would be denied. Unfortunately, many of the awards which the Dissenter has cited, failed to appreciate the distinction just explained and even failed to understand why the Organization was holding that employes of another craft were performing their work.

We intend to prove (1) that the precedent followed by the Majority in Award 11473 is sound, correct and without error; (2) that the precedent relied upon by the Dissenter is erroneous from the standpoint of facts, logic, interpretation and in particular because the decisions in those cases were not even responsive to the argument the Organization had advanced. We will place at rest forever the mythical grounds which the Organization has used to persuade the Board in the earlier decision that the Train Order Rule was violated — when no employe outside the Telegraphers' Agreement handles that train order.

Now for the first time, the Dissenter, who represents the Telegraphers' Organization, frankly and candidly admits the record shows no other employe touched or handled the train order. Thus, the basis for recovery here — unlike the earlier cases now cited by Dissenter — was predicated solely and exclusively upon the question whether Carrier had the right under the Train Order Rule to dispense with a certain function or a certain part of a function. The Dissenter readily concedes the issue involved is whether Carrier must either adopt or continue a "make work" policy in order to pay a telegrapher a call.

Had the Organization admitted this fact prior to the issuance of **Award 1166,** we would not now be faced with the early decisions sustaining a claim where no employe from another craft touched or handled the train order except the crew to whom it was addressed. It is safe to say that no impartial Referee reading the Train Order Rule, uninfluenced by the erroneous precedent, could possibly construe the rule to mean that it prohibited Carrier from dispensing with a certain part of the handling when the work function was not being assigned to anyone outside the craft. The use of the word "confined" in the rule means the work was restricted to Telegraphers. It does not mean the work of "handling" will be preserved in perpetuity — anymore than it could mean that Carrier must continue to operate with train orders.

Thus, had the issue been properly framed and admitted by the Organization from the outset as it is now, without the disguise of an allegation that someone outside the craft was performing the work — we would not have the conflict of authority to consider because the claims would have been denied. In any event the issue is now conceded. In this connection the Dissenter said:

> "Otherwise stated, the issue was not whether 'another' employe touched, carried, transported or 'handled' the train orders during the interim between their being 'pinned' to the train register and their being picked up by the train service employe of the trains to which addressed. The issue is whether the Carrier was obligated by contract to allow the Claimant personally to deliver the order to the train crews instead of using the inanimate train register method."

Anyone trying to find that issue as set out above in any of the awards which the Petitioner relies upon, would have a very difficult time indeed. As stated previously, the issue in each of the awards which the Dissenter has referred to involved the alleged performance of telegrapher's work by those outside the craft. They did not involve the question of Carrier's right to dispense with certain work previously performed by the Petitioner.

Award 86 referred to by the Dissenter was the type of situation alluded to above wherein train crew "A" delivers a train order, properly received and copied by a Telegrapher, to another point where it was executed by train crew "B". In that case, the delivery was effectuated, not by the Telegrapher, but **by train crew "A".** This is a completely different situation from our present one. The failure to appreciate that difference in interpreting the train order rule, has caused a great deal of difficulty in resolving the various disputes presented to this Board. Failure to understand this distinction in facts was caused, no doubt, by the Organization's argument — the same in both cases — that someone outside the craft was performing their work. In **Award 86,** the Dissenter points out that the rule was doubtlessly made for the purpose of preventing **encroachments** upon that work to which the employes in that craft were entitled. In that case also, the Organization pointed out that someone

else was doing their work, that train crew "A" was making delivery of the train order to train crew "B". The Board found in that case that a violation of the Train Order Rule had occurred. Subsequent Referees on both sides of the conflicting awards agreed that the decision was sound on the facts presented. **Not so in this case.**

The Dissenter next directs our attention to **Award 1166** and states that the facts there were indistinguishable from those found in the present case. **Award 1166,** in turn, relies upon three Awards, **Awards 86, 709 and 1096,** for support in its interpretation of the Train Order Rule. In addition, **Award 1166** also relies upon the Carrier's Operating Rules, Rule 210 in particular, which required **personal delivery** of the train order to each person addressed. The gist of this award was that the requirement for personal delivery, which was a unilateral rule promulgated by the Carrier, became part of the contract and, in particular, part of the Train Order Rule and, therefore, every time a train order was issued, the Carrier was obliged to see that a Telegrapher personally delivered that train order to the train that was to execute the order. All of this, mind you, from the Rule which we have set forth hereinabove.

We might quickly ask — what of those Carriers where there has been no operating rule requiring hand-to-hand delivery. It certainly could not be said their Train Order Rule was adopted with that requirement in mind. As we will see, this imposed no obstacle in future awards.

The reader may be curious to determine how the Board was able to reach the point where it held that Carrier was obliged to have a Telegrapher personally deliver the train order to the train crew involved. The answer will be found in one of the three Awards relied upon by the Majority in that case, namely, **Award 709. Award 709,** with Referee Spencer, involved the Telegraphers and the Santa Fe Railway. In that award, after Telegraphers copied train orders, additional copies thereof were made through a duplicating process. A violation was claimed when **other than** Telegraphers made the additional copies of the train order through the duplicating process. You will note, it was the alleged performance of work **by other than Telegraphers** that was involved in that case. With respect to the Train Order Rule, it was said:

> "It would appear that under a fair and reasonable interpretation of this rule, the handling of a train order should include not only the physical process of passing it from hand to hand in the performance of its function but also the work involved in its preparation. * * *"

The statement made by the Board in that case, to wit: "the physical process of passing it from hand to hand" was a gratuitous remark, unnecessary to the decision, yet it was relied upon by the Board in **Award 1166** involving a completely dissimilar situation where no one outside the craft performed the Telegrapher's work. Note again, the requirement was imposed by the **operating rules** of that Carrier, not the contract. Furthermore, it was not a requirement under the Operating Rule on many other Carriers to which this Board improperly applied the principle in subsequent cases. The net result was that not only the Carrier that had the operating rule requiring manual hand to hand passing of train orders, but all other Carriers, whether they had that requirement or not, were then under and by force of the Board Awards, placed under the same interpretative umbra.

The third award cited in **1166** is **Award 1096** with Referee Sharfman, and that case was analogous to **Award 86,** the only difference being the orders

were received and copied by a Telegrapher at one telegraph office and **placed in care of a train crew for delivery** to another crew at another telegraph office. In **Award 1096,** the Organization argued as follows:

> "The orders in question were originally transmitted to the telegrapher at Bloomington, except on August 24, when it was transmitted to the telegrapher at Ontario. Orders were addressed to trains at South Fontana and sent in care of a train moving in the opposite direction. **Train and enginemen were, therefore, required to handle and make delivery of orders in violation of the agreement.**
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> * * *
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> "The Carrier, however, **has attempted to delegate the work belonging to the telegraphers to another craft not covered by the agreement** and thus avoid payment for this service." (Emphasis ours.)

This was the same contention made in the case covered by **Award 709.** It was the same contention made in the case covered by **Award 86.** In each case, it was the alleged improper assignment of work to employes in another craft which formed the basis for the violation of the contract, and in none of those cases was the issue the same which is now concededly involved in this case, namely the elimination of certain work, or, worse still, the imposition of certain work not theretofore required. With this background, we can now properly evaluate the merits of **Award 1166.**

The author of **Award 1166** also authored **Awards 1167, 1168, 1169 and 1170. Awards 1166, 1169 and 1170** involved a factual situation similar to that covered by the award rendered in the present case. **Awards 1167 and 1168** involved the handling of train orders by employes not covered by the Telegraphers' Agreement. The Referee made no distinction in the factual situation involved, and, as a matter of fact, in **Award 1168,** the Referee said:

> "We think that in principle the record here parallels the records in awards No. 86, No. 709, No. 1096, and currently, **No. 1166,** . . . and **No. 1167,** . . . and that the doctrine declared in those awards is in consonance with the purposes and spirit of the agreement. We should not make departure." (Emphasis theirs.)

This is the unforgivable mistake made by the Referee in **Awards 1166, 1169 and 1170** when he failed to distinguish between the arguments made by the Organization in those cases and the facts presented to the Board. The argument being that an **employe outside the craft was performing their work,** and the facts in **1166, 1169 and 1170** did not bear out this assertion.

The reader will note as he scans the awards offered by the Dissenter in support of his argument that in certain instances, they run in a series, that is, a Referee had a group of four or five cases, some of which involved the placing of a train order on a train register, while others in the same group involved the handling of train orders by employes outside the Telegraphers craft. It will be further noted that invariably the Referees treated the factual situations in the same manner just as though, in each instance, an employe outside the Telegraphers craft was handling the train order. That, of course, was not the case and the Referees failed in reviewing the records, to make that distinction, a distinction which is now conceded by the framing of the issue in this case by the Dissenter. The Referees failed to make this distinction primarily because the Organization argued in each case that someone outside

the craft was doing their work. At no time did they concede, as the Dissenter now does, that the issue involves a make work proposition and in that respect was different from the other disputes. They were lumped together like money in a counting house until they lost their identity. That was the Organization's strategy. They succeeded — for a time.

The next award cited by the Dissenter is **Award 1422**, Referee Bushnell, involving the Order of Railroad Telegraphers vs. The Kansas, Oklahoma and Gulf Railway Company. That Carrier, like the Atchison, Topeka and Santa Fe, also had an Operating Rule, Rule 211, which required personal delivery of train orders to the person addressed. The Organization relied upon that rule in conjunction with the Train Order Rule to support their argument that the words "handle train orders" as used in the Train Order Rule means the receiving of the train order and its delivery to the person or persons addressed personally by the Telegraph operator. However, their argument in **Award 1422** is succinctly stated in that case as follows:

> "* * * Only in an emergency is an employe **not under the agreement permitted to handle a train order,** and when so done the telegrapher must be paid for a call." (Emphasis ours.)

Further on in the same case, the Organization said:

> "The operator was not called or notified to report on duty on these following mornings to complete his handling of these train orders. He was not permitted to complete the work which was properly his under the terms of agreement; instead, **employes not under the agreement were required to perform this work** which was the legitimate work of the operator. * * *" (Emphasis ours.)

Again, we note the argument of the Telegraphers' Organization continued to be that employes outside the scope of the Telegraphers' Agreement were performing certain work which accrued exclusively to that craft. That was the contention made throughout the earlier presentations to this Board. It was the contention which the Board ostensibly accepted in rendering the favorable decisions for the Petitioner. At no time was there even a veiled suggestion the issue in those cases boiled down to the elimination of work by the Carrier, rather than the transfer of work to employes outside the craft.

The Dissenter apparently accepts that issue now, stating the issue was whether the Carrier was obligated by contract to allow the Claimants personally to deliver the orders to the train crews instead of using the inanimate train register method. Now, you will note, there is not the slightest hint of any alleged transfer of work to employes outside the craft. The Organization felt safe in unmasking the issue and resting upon the citation of awards rendered in their favor **only because** they have successfully made the improper transfer of work argument in the past. **Award 1422** refers to the earlier awards, including and in particular, **Award 709**, as well as **Award 86 and 1096**, all of which have been previously distinguished and none of which support the interpretation which the Board sought to make in **Award 1422** based upon a completely different factual situation. In short, **Awards 1166, 1169, 1170 and 1422** involved different facts and for that reason the Board was in obvious error when it relied upon precedent on a totally different issue. No better appreciation of this could be submitted than the argument of the Organization in each of these cases. It was predicated solely upon the use of other than Telegraphers to perform telegrapher's service. In none of the four cases just cited was this a fact. Absent this fact, no violation of the Train

Order Rule was proven. That is precisely what the Majority found in the Award which the Dissenter is now attacking. However, the logic and the reasoning of our **Award 11473** is unassailable and Dissenter's frustrated attempts to attack it collaterally through the precedent it relies upon rather than directly by pointing out error in misinterpretation of the rule conclusively establishes the correctness of the decision. If an error has allegedly been made in interpreting a contract, the obvious approach is to direct attention to the misinterpreted language. The Dissenter, for good and sufficient reason, prefers not to discuss the rule or attempt to convince the Majority how the rule requires the Carrier to maintain a "make work" situation. Indeed the Dissenter knows full well that to argue such a preposterous concept from the cold language of the Train Order Rule would put the searchlight of truth on their argument and dissolve it completely. The Train Order Rule has already been interpreted not to prohibit the use of a Train Dispatcher at a train order office to handle train orders — **Award 10672**; and not to prohibit the use of outside crafts at non-telegraph offices. If the rule were a "make work" rule, which the Dissenter now suggests, then the Organization overlooked that argument completely when they advanced the disputes just mentioned. It is clear this Board did not feel it was a "make work" rule and we convincingly so stated. **Awards 7953 and 6959**, among many others.

Award 1680, Referee Lloyd K. Garrison, is the next award cited in the dissent. Again, the Petitioner's argument in that case gives us a clear perspective of the basis upon which the award was rendered. Their argument was:

> "It is the position of the Employes that Rule 29 was violated in the instant case inasmuch as train orders were placed in waybill box by Telegrapher Collins, **where they were handled by employes other than those covered by Telegraphers' Agreement at a point where an operator was employed and was available or could have been promptly located.**" (Emphasis ours.)

There is one distinctive difference between **Award 1680** and the facts involved in other cases previously submitted to the Board, the difference was the absence of an operating rule which required hand to hand delivery such as was present in **Awards 1422, 1166, 1169 and 1170.** In **Award 1680**, there is no evidence of such an operating rule. However, that apparently did not phase the Majority when they came to consider the precedential effect of the previous awards, including we might add, **Award 1096** which was previously rendered in a dispute from this same Carrier. **Award 1096** you will recall, was an award dealing with the factual situation where one train crew actually made delivery to another train crew. The Referee in **Award 1680**, was so concerned by the request of the Carrier in that case to have him exercise his own independent judgment in rendering the decision that he wrote a special memorandum to accompany **Award 1680.** What the Referee said in effect in **Award 1680** was that he did not intend to use his own personal judgment in resolving the issue presented to him in that case. Yet, that is precisely what the parties intended that he should do when the case was presented to him. The Referee was asked to interpret the contract and as an aid he was given precedent in the interpretation of the particular rule involved. If he felt that the precedent was erroneously applied in the prior cases, he had a responsibility to say so and to make his decision accordingly. He could not properly avoid that responsibility by acting as a rubber stamp, notwithstanding the number of awards previously rendered erroneously applying the principle involved. The Referee's thinking in **Award 1680** was pretty well summarized in his Memorandum in this paragraph:

"It must be remembered that the requirements of justice are not limited to the making of 'right' decisions; essential also are expedition, compliance, predictability, and uniformity of treatment. These ingredients would, in my view, tend to be destroyed if each referee were to consider himself as, in effect, a court of appeal from every other."

It should hardly be necessary to explain the error in this paragraph. The Referee says he can substitute expedience and equity for a correct interpretation of the contract; that the decision he made in this case was probably not legally correct but that he was forced to follow precedent. He apologizes for rendering the decision by attaching a memorandum explaining why he was forced to go against his convictions. You will note later on, there were other Referees who were able to follow their convictions. In any event, the Referee had a clear way out in **Award 1680** when it was noted there was no similar operating rule (not contract rule) involved in that case such as was present in the earlier decisions requiring personal hand to hand delivery. The Referee could have rendered his decision based on this distinction alone since it was obviously one of the major reasons for the decisions rendered in the earlier cases. **Award 1166.**

Chronologically, the next Award was **1821.** Referee Yeager, which, as was noted, denied the claim where train orders were placed on the desk to be picked up by the train crew who was to execute them. The orders had been received and copied and deposited on the desk by the Telegrapher assigned at that location. Again, the claim in that case and the argument used by the Organization is set forth in the record, to wit:

"Summarized, the claim here involves payment of a call to the telegrapher or telegraphers at Luther Yard Office on each day since October 12, 1940, they have been deprived of a call by the action of the carrier in **improperly using employes not under the telegraphers' agreement** to handle train orders at their office at a time when the telegraphers were not on duty."

They say further:

"That it is improper, and in violation of Rule 1(c) — Train Order Rule — of the telegraphers' agreement, **to use an employe not under the agreement to handle train orders at a telegraph office** where a telegrapher is employed and is available, * * *" (Emphasis ours.)

In support of that argument, the Organization then referred to **Awards 86, 1096, 1166, 1169.** Now if there is any doubt about the contention of the Organization in these earlier cases, that doubt is thoroughly dissolved by their reliance upon the earlier awards in support of the argument set forth above. It is the same constant thread that runs through each of these cases. The Board finally saw through this argument in **Award 1821,** and there said:

"The plain and simple fact here is that no single detail of handling train orders from inception of orders to the time they came into the hands of train crews was entrusted to any one not covered by the rule in question. The fact that a customary detail was dispensed with by the practice adopted and followed could not make of the practice a violation of the rule."

We see here for the first time, a clear recognition that it was not the transfer of work involved to outside employes but rather, an elimination of

a certain item of work. The elimination of that particular item of work eliminated the necessity for the use of the Telegrapher. That was the disguised reason for the Petitioner's claim, although ostensibly their contention was that the work was improperly assigned to other crafts. As stated hereinabove, the Organization felt compelled to make the contention that someone else was performing their work in order to prove a violation of the Train Order Rule. When they felt they had sufficient precedent in support of their position, they then abandoned their earlier contentions and simply relied upon the precedent without any proof of violation of the rule. That is what happened in Award 11473.

The Dissenter next relies upon Award 1879, Referee Bakke. In this award based upon the argument of the Organization, we have one of the clearest examples for the decisions rendered in that and prior cases, and in subsequent decisions based thereon. The argument of the Organization in Award 1879 was limited solely to the alleged performance of certain work by employes outside the craft. Evidence of that can be found in the following assertions which appear in the record.

> "It is the position of the Committee that the words 'handle train orders' as used in Rule No. 1 includes the delivery of train orders to the train crews addressed by employes covered by the agreement at telegraph offices where such orders are to be delivered, as well as the copying of the train orders, and **that when employes not under the agreement are used to deliver such orders to the exclusion of employes under the agreement**, the rule is impinged and entitles the telegrapher to a call."
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> "The principle that the delivery of train orders is **confined to employes under the Telegraphers' Agreement** and dispatchers at telegraph offices by such a rule, as promulgated by this Board in Award No. 86, is amply supported by the philosophy in a long line of subsequent awards by this Board on the subject matter. Cf. 709, 1096, 1166, 1167, 1168, 1169, 1304.
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> "* * * The agent-operator at the Carrollton office was available to call to deliver the train order which was delivered there **by an employe not under the Agreement.**
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> "Under Rule 1 of the Telegraphers' Agreement, the agent-operator at Carrollton was assured of the full fruits of his employment there by being subject to call to handle train orders that were to be delivered there to train crews. **By the Carrier's act of using an employe not under the agreement to deliver the train order at the Carrollton office** when the agent-operator was not on duty on May 21, 1941, the agent-operator was improperly deprived of a call, and he is, therefore, entitled under the rule to a call in this instance in which he was not used to perform this work that was his. We ask that our claim be sustained." (Emphasis ours.)

There is not the slightest hint or suggestion in this argument that the claim was based upon the Carrier's elimination of certain work or that the train order rule should be construed as a make work rule. It was based solely

upon the alleged transfer of such work to employes outside the Agreement. It apparently made no difference to the Referee involved there that the facts offered to him **did not show a transfer of work to employes outside the craft,** but showed rather, an elimination of a specific function which the Carrier felt it could properly dispense with. The important thing was the Organization said it involved a transfer. In Award 1879, the Referee makes this statement:

> "**All that we said in re Docket TE-1904, Award No. 1878 has application here,** except in so far as the Carrier relies on Award No. 1821 recently announced, and that award is the only thing necessary to discuss in this case." (Emphasis ours.)

Award 1878, which this same Referee authored, involved a factual situation where a train order was delivered to the conductor of train "A", who in turn delivered it to the conductor of a weed burner who was to execute it. In other words, you have here again the situation which we previously discussed in **Awards 1096 and 86.** It is easy to see that the situation involved in Award 1878, contrary to the Referee's statement, has no application to the factual situation involved in Award 1879. However again, the Referee was misled by the arguments presented by the Organization in Award 1879 which incidentally were the same identical arguments they made in Award 1878. The Organization made no distinction between the situations involved, until this recent hour, when the Dissenter admittedly finds some distinction between a case where an employe outside the craft handled the train orders and the case where the Carrier simply eliminates the performance of a certain item of work. It is rather curious to note in Award 1879 the Referee makes this comment regarding Award 1680, discussed hereinabove:

> "In that connection this referee has read with interest the memorandum of Dean Garrison, attached to his award in No. 1680 and without philosophizing further on the subject, he unhesitatingly exercises his prerogative in pointing out where he believes Referee Yeager fell into error in his opinion."

If you will recall the statement made by Referee Garrison in 1680, it was in essence that he could not exercise his own personal judgment because of the precedent already established. It would appear the Referee in 1879 embraces the philosophy of that award, and then unhesitatingly exercises his personal judgment in rejecting Referee Yeager's decision in Award 1821.

The next award cited by the Dissenter is Award 2928, Referee Carter. Referee Carter handled five cases in one group covered by **Awards 2926, 2927, 2928, 2929 and 2930.** This was the same type of situation we previously encountered with Referee Hilliard in **Awards 1166,** et al. In **Awards 2926, 2927, 2929 and 2930,** the factual situation involved the issuance of a train order to a train crew who carried it to another point where it was left at a train register and then picked up by the crew assigned to execute it. The case involved "in care of" orders. In each of the cases cited, the Organization contended that **employes outside the scope of the Telegraphers' Agreement were improperly being used to handle (deliver) train orders.** In Award 2928, the Organization said:

> "Article 1(b) the governing rule in this dispute positively restricts the 'handling of train orders' (or clearance cards) to employes under the Telegraphers' agreement, except in an emergency. Since there were no emergencies involved, violations are thus evident. * * * "

In **Award 2928**, the Opinion of the Board reads as follows:

> "In all essential features this dispute is identical with that presented in Docket No. TE-2932, Award No. 2926. For the reasons stated in that award, the claim in the instant case is sustained."

In **Award 2926**, the question was whether the telegrapher delivered train orders to the train crew that was to execute them. As you will recall, we previously stated the facts in **Award 2926** involved the receiving and copying of a train order by a Telegrapher at point "A" who then delivered the train order to an intermediate crew who, in turn, delivered it at another point to the crew that was assigned to execute it. In short, the delivery was effectuated by a train crew and not by the Telegrapher. The Referee was given a group of cases involving a similar factual situation, i.e. use of a third party to handle train orders. However, one of the cases was distinguishable. The Referee simply failed to distinguish the one case from the other cases submitted primarily because the argument of the Organization in all five cases was the same, just as it was the same in those cases represented by **Awards 1166**, et al. The Referee was led to believe that since the contentions were the same, the decision in each case should be the same. Whatever the justification for sustaining the Organization's contention in **Award 2926, 2927, 2929 and 2930**, there was absolutely no justification for the Referee to sustain the employes' position in **Award 2928** because **no one outside the craft of the Telegraphers' Agreement performed any work involved in the handling of the train order** which included receiving, copying and delivering of that train order. It was delivered to a train crew via a waybill box. The inanimate waybill box is obviously not performing any work covered by the Telegraphers' Agreement. As nonsensical as it sounds, that, in substance, is the contention which the Organization has been presenting to this Board in the disguise of an argument that an employe outside the craft is performing their work. That disguise has finally been torn from the Petitioner's argument and the Dissenter now freely admits that it is the inanimate train register or waybill box which is the source of the controversy, and not the mythical employes outside the craft at whom they have been pointing their finger for so many years.

Awards 3611, 3612 are also relied upon by the Dissenter, and he could have just as easily added **3613 and 3614**. The basis for sustaining these claims was the five previous decisions just referred to above, i.e., **2926**, et al. They were all from the same Carrier involving the same Organization. The fact the Dissenter did not refer to **Awards 3613 and 3614** for support is extremely significant however, because in those cases the Board was again presented with a question involving the intermediate handling of a train order by a train crew who delivered the order to a subsequent crew assigned to execute them. The Referee in **3613 and 3614**, in his Opinion, simply says:

> "See Opinion in Docket TE-3549, Award 3611."

It is apparent, therefore, that the same Opinion was rendered by the Referee for each of the four decisions, even though — now the Dissenter apparently concedes for our benefit, the facts involved in the latter two cases were not the same as those involved in **Awards 3611 and 3612**. It is apparent, the Referee made no distinction in his mind since the Opinion in each one of the dockets is identical. This is the sort of handling this question received before the Board in most of the earlier cases prior to the time that **Awards 7343 and 8327** were rendered. There was no study given to the factual situations involved; no attempt was made to analyze the records or the contentions of the parties; nor the merits, logic or rationale behind the arguments pre-

sented; nor even of the rule which the Board was asked to interpret. Had such an attempt been made conscientiously by the Board, we would at the very minimum see a different opinion in the various cases handled by the same Referee where different facts were involved. We would at least see a different citation of precedent in those cases.

In **Award 3612,** cited by the Dissenter, the Organization again contended as follows:

> "* * * He was available and willing, but not permitted, to complete the work which was properly his under the terms of the agreement; instead, **employes not under the agreement were required to perform this work which was the legitimate work of the operator.** The call rule was thus defeated and Article 1-(b) violated, thereby denying employment to this operator which is guaranteed him by the agreement." (Emphasis ours.)

Again, we perceive the identical chain of argument coursing through this claim which was referred to in prior cases, the argument being that employes outside the craft were performing Telegraphers' work. That statement was apparently accepted without question as it has been in every case except **Award 1821** which we have thus far considered.

Award 4057 relied upon by the Dissenter, Referee Fox, was from the same Carrier involved in previous **Awards 2926,** et al, **and 3611,** et al. Needless to say, the same argument was presented by the Organization in that case, although there, Referee Fox conceded a lack of enthusiasm in following the awards cited was expressed in **Awards 3612 and 3670.** However, he simply followed what he termed "settled policy." We can now appreciate how this so-called "settled policy" was erected on a foundation of sand. The major premise heretofore referred to by the Organization, the alleged encroachment upon their work by employes from an outside craft, was a mythical premise and did not in fact exist in this type of dispute. Apparently the Organization had no compunction about making the argument and the Board even less about accepting it.

The perfunctory handling of the dispute involved in **Award 5013,** also relied upon by the Dissenter gives more than adequate evidence of the attitude of some Referees in reviewing the merits of a case submitted to them where the parties rely upon certain precedent. The easy course is taken and the precedent is followed, although a study of that precedent would disclose complete error and more than sufficient ground for reversal of that so-called "settled policy."

Award 8657, Referee Guthrie, is cited by the Dissenter where the Referee follows the earlier decisions and states the facts in that case are essentially the same as in the earlier cases, although he conceded the facts were different from those involved in **Award 8661** which he also authored. The interesting paradox is that the same awards were cited by the Organization, and almost without exception, the same awards were cited by the Referee to support his decision in **8661,** that were cited by the Organization and then the Referee to support his decision in **8657, notwithstanding his concession that the facts in the two cases were different.** The facts in **Award 8661** which the Petitioner and the Dissenter **did not rely upon,** involved "in care of" train orders and the awards there cited are those involving orders given to an intermediate train crew either to deliver personally to the executing train crew or to place in a waybill box to be picked up by the executing train crew. At this point, of course,

the citation of authority would appear to be so immaterial and irrelevant to the issue posed for the consideration of the Board that the Referees made no attempt to distinguish between proper and improper citation. **Award 9319 and Award 10239,** simply followed the decision of **Award 8657** without exploring or considering the basic issue involved.

The Dissenter takes exception to the Majority's reliance upon **Award 8327** and in particular, to the Referee's decision in 8327, which discarded the Petitioner's precedent in favor of more soundly reasoned decisions. The Dissenter says:

> "* * * In other words, the Referee said that, in effect, these Referees were forthright and correct, when he approved the decision, but on the other hand 'took the easy path' when he did not so approve."

This remark was made in reference to the very carefully considered opinion of Referee McCoy in **Award 8327,** where that Referee had pointed out in those cases, where someone intervened between the Telegrapher and the train crew designated to execute the order, the Train Order Rule had been violated. But the Referee very convincingly proved the same factual situation was not involved in each of the cases or groups of cases handled by the same Referee, and in those cases where those specific facts were not involved, i.e., where no one outside the craft performed any Telegrapher's work, he could visualize no violation of the Train Order Rule. The Dissenter freely attacks the decision of the Referee in **Award 8327,** and much of the argument is simply a restatement of the Dissenter's displeasure with that award as shown by the dissent filed thereto at the time it was rendered. The Dissenter says:

> "Careful reading of the complete opinion of the Referee in AWARD 8327, leads one to believe that the decision was based upon the personal philosophy of the Referee, as reflected in the following sentence:
>
> > 'No one is entitled to perform work that the carrier does not want performed by anyone.'"
>
> The Dissenter then continues:
>
> "This statement is at odds with the public policy promulgated by the Congress, the Supreme Court decisions and the vast majority of awards of this Board."

The Dissenter is challenged to submit for review those decisions in "the vast majority of awards" which countenance the performance of work by employes which Carrier does not want performed, or the public policy of Congress which allegedly promulgates such a policy or the Supreme Court decisions which advocate "make work" practices.

Indeed, the public policy of this country has been enunciated in no uncertain terms on this question on numerous occasions in the very recent past through various Boards and Commissions, which have been assigned to look closely at "make work" practices, by the President of the United States.

On June 14, 1962, Emergency Board 147, appointed by the President to investigate a dispute between the Chicago and North Western Railway and the Telegraphers' Organization and submit recommendations thereon, reported as follows to the President:

"The need to abolish jobs is a matter for regret, particularly in a period when there is excessive unemployment in the economy as a whole. Certainly all of us would prefer it if railroad traffic could expand sufficiently as to require more, not fewer employes. But we must declare unequivocally that the retention of unnecessary positions is not an acceptable form of job security.

"Such a policy is clearly unsound in the railroad industry, which must struggle to maintain and improve its share of the market against competing forms of transportation. But this situation is not peculiar to the railroad industry. One of the central concepts of our economic system is that competition imposes constant pressure on business enterprises to adopt the most efficient methods, and that such pressure is in the public interest because it promotes the best possible use of resources. In this connection we are reminded that our nation's leaders, beginning with the President, have been emphasizing the necessity for more rapid increases in industrial efficiency in order to permit the achievement of our national economic goals.

"Employes who remain on jobs which have become technologically obsolete, or which provide only a fraction of a full day's work, are not contributing their potential to the national economy."

Needless to say, the retention of work, which the Carrier does not want performed can no more be justified than the retention of a position. "Industrial efficiency" is not increased by perpetuating work which is not productive and adds nothing to the national economy.

In that same document, the Emergency Board referred to President Kennedy's Transportation Message to Congress, to wit:

"An efficient and dynamic transportation system is vital to our domestic economic growth, productivity, and progress. Affecting the cost of every commodity we consume or export, it is equally vital to our ability to compete abroad. It influences both the cost and the flexibility of our defense preparedness, and both the business and recreational opportunities of our citizens. * * * For the long-range benefit of labor, management, and the public, collective bargaining in the transportation industry must promote efficiency as well as solve problems of labor-management relations. Problems of job assignments, work rules, and other employment policies must be dealt with in a manner that will both encourage increased productivity and recognize the job equities which are affected by technological change."

On February 26, 1962, the Presidential Commission made its report to the President on the Operating Employes Rules case. On page 71, the Commission said:

"* * * We have by no means seen the end of technological and economic changes as they affect the industry. Many proven technological devices are installed on only a fraction of railroad mileage and their wide-spread adoption must be anticipated. Other improvement lie ahead; new forms of power are on the roads or being tested; new modes of containerization and materials handling are coming to the fore; the prospect that coal can be economically shipped by pipelines has evoked a search for a technological answer in railroad terms. It is even conceivable — and on some runs perhaps likely — that progress in automatic controls will bring the day of the unmanned train.

"The goal of our public policy is to take advantage of technological advances and not to permit obstruction of their application. * * *

* * *

"We cannot stress strongly enough the national interest that requires the resolution of this matter in line with the stated goal. Not all nations have been willing to accept and adjust to change. The backwashes of civilization are strewn with the debris of peoples who stood stolidly against change. Where these civilizations have survived, they are characterized by poverty, drudgery, and decay and one of the world's major problems is how to pull these people out of their misery. In brief, resistance to change did not mean more employment but less; did not increase competition for man but instead put man into degraded state of competition with burros and donkeys. This is still the case whether the change at issue is an elementary one or involves the latest process of electronic automation or a new form of emergency.

"We believe that the inventor of the wheel was a human benefactor although he must have temporarily displaced many primitive porters. We believe that he who first tamed a horse and hitched it to a wheel enhanced human weal, despite the great increase in the productivity of the cart over the wheelbarrow — and the consequent displacement of labor.

"This faith has in retrospect been justified by experience. The nations which have embraced a change in technology with avidity have in the long run improved the lot of their citizens. Those nations which have scorned a change, or feared it, have prospered neither materially nor spiritually. All have lost the power to defend their freedom — some have lost the desire to be free.

"Indeed, observation reveals that the very ones who loudly decry automation as the curse of our times, the most fervent advocates of the industrial status quo, would leap to the parapets and resist any attempt to restore the technology of a generation ago, although their forbears also declaimed in favor of their status quo.

"No fair recorder of human history can fail to relate that advancing technology has lifted the most onerous burdens from man's back, has expanded his leisure and enriched his modes of enjoying it, has multiplied his means of obtaining knowledge of himself and his universe, and has provided him with protection against the wrath of nature. That advancing technology can also be put to evil purposes is a problem unrelated to our assignment.

"In short, technological advance is a public blessing. * * *"

On page 73 — the Report continues:

"1. A Freeze or Moratorium on Progress. This, as has already been set forth, is no solution. It is so utterly incompatible with American character and history that it is undeserving of serious consideration. Any industry that commits itself to such a policy is already

moribund. Its demise is foreordained. Such an industry cannot be looked to for the furnishing of employment in the future. Moreover, a freeze on technological progress is not the approach of the American railroad industry or of railroad labor."

The Dissenter cites a Supreme Court decision and implies, if he does not expressly state, that the Supreme Court has sanctioned "make work" provisions which are included in a Labor Agreement. There is obviously a difference, whether the Dissenter appreciates it or not, between a Supreme Court holding where it sanctions "make work" procedures and one where it holds, as it did in the case cited, that the parties are free to contract and include in their Agreement a provision for "make work" practices. The rule before the Board in the case represented by **Award 11473**, does not contain any "make work" conditions, therefore, the enforcement or sanction of such a condition could not be justified even under an alleged favorable public policy. In any event, had the Dissenter read more extensively from the decision of the Supreme Court, he would not have stated that "make work" policies were in line with public policy as enunciated by Congress. In that case, the Court gave clear and unmistakable evidence of the public policy regarding "make work" provisions when it stated in the words of Senator Taft, co-sponsor of the bill, the attitude of the House and the Senate, as follows:

> "There is one further provision which may possibly be of interest, which was not in the Senate bill. The **House had rather elaborate provisions prohibiting so-called featherbedding practices and making them unlawful labor practices. The Senate conferees, while not approving of featherbedding practices,** felt that it was impracticable to give a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be impossible. So we declined to adopt the provisions which are now in the Petrillo Act. After all, that statute applies to only one industry. Those provisions are now the subject of Court procedure. Their constitutionality has been questioned. We thought that probably we had better wait and see what happened, in any event, **even though we are in favor of prohibiting all featherbedding practices.** However, we did accept one provision which makes it an unlawful-labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine, and we accepted that additional unfair labor practice on the part of unions, which was not in the Senate bill. 93 Cong Rec 6441. See also, his supplementary analysis inserted in the record June 12, 1947. 93 Cong Rec. 6859."
> (Emphasis ours.)

We feel this is a fair statement of the policy of Congress and the Supreme Court regarding "make work" practices. To put it most kindly, the foregoing statements do not agree with the Dissenter's analysis of this question — but to the contrary, they do conform with the statement made in **Award 8327** and numerous other decisions rendered by this Board. **Awards 10725, 11216, 10600, 10402**, etc.

The Dissenter, in pursuing this line of argument, freely admits that what is involved in this case is "make work" and is work which the Carrier does not want performed by anyone. As noted hereinabove, this is a complete departure from the line of argument pursued by the Organization in the progression of the various claims to the Board, which decisions are so repeatedly referred

to by the Petitioner and were solely relied upon by them in the handling of the dispute covered by **Award 11473.** Had the Dissenter and the Organization he represents been forthright enough to admit, at the time **Award 1166** and subsequent awards were rendered, that the issue involved in the case was a "make work" issue, it is safe to predict that we would not today have the conflict of authority which the Board has finally and completely settled by **Award 11473.** Their recent admission to the fact that it is a "make work" proposition which is involved, has cleared the air and removed forever any doubt as to the proper resolution of this issue in future cases.

Awards 7343, 8327, 10917 and 11473, finally place the question in its proper light. As long as no one outside the Telegraphers' craft is performing any work involved in the handling of train orders, the Train Order Rule has not been violated.

The Dissenter makes this comment on page 11 of the Dissent:

> "It is true, the Referee added AWARD 10917, as being in the 'line'. Merely citing an award does not make it relevant."

This assertion has more truth in it than even the Dissenter realizes. It has been the policy of the Organization for whom the Dissenter speaks, to cite awards to the Referee, in cases involving the depositing of train orders on train registers or in waybill boxes, which are completely foreign to the issue and to the facts involved in that case. It is unfortunate that the Dissenter did not, in the course of citing the precedent for the Referee, also inform him that merely citing an award number does not make it relevant. Had the Organization candidly done so, we would not have the erroneous decisions sustaining this type of claim. We should bear in mind, no attempt is made to point to the Train Order Rule and show in what manner that rule has been violated when a train order is deposited in a waybill box or placed on a register. The truth is, the Train Order Rule does not prohibit such activities on the part of the Carrier. It prohibits the handling of train orders by other than those covered by the Telegraphers' Agreement. Unless the Employes are able to show that some one other than those covered by the Telegraphers' Agreement handled train orders, there has been no violation of the Train Order Rule. The Petitioner should realize this. The Board has come to realize it, and the Referees who handled this situation in the past should have realized it.

The Dissenter in his conclusion, makes reference to the decision handed down in United Steelworkers v. Enterprise Wheel & Car (363 US 593) and implies that the Court was there discussing the "power" of a referee. This situation of course, is not germane to our case, but it should be noted that the Court was discussing the power of an arbitrator, not of a referee. The Court recognized that the rule-making power and rule-interpreting power may be combined in the arbitration proceeding, and held that so long as the arbitrator's award "draws its essence from the collective bargaining agreement" and does not "manifest an infidelity to this obligation" a Court cannot upset his award even though "by applying correct principles of law to the interpretation of the collective bargaining agreement, it can be determined that the agreement did not so provide and that therefore, the arbitrator's decision was not based upon the contract . . ."

This Board, needless to say, is not a rules-making body, nor does this Board properly combine its interpretive functions with rules-making functions. An award of this Board is valid only to the extent that it can be supported

by the ordinary rules of contract law. In Crowley v. Delaware & Hudson Railroad Corporation (63 Fed. Supp. 164), the Board said with reference to an award from this Board:

> "Such legal rights must be determined in accordance with the law of contract, . . . and to recover here plaintiff must establish that the bargaining agreement of June 24, 1940, has been breached by the defendant."

The Dissenter has been consistently attempting to have this Board interpret its authority and power as that invested in an arbitrator. However, the Board has already discussed this argument and rejected it. In our recent **Award 10893,** we said:

> "We are not of the opinion that the decision of the Supreme Court of the United States in the case of Steel Workers vs. Enterprise, reported in 363 U.S. page 593, cited by Petitioner has any bearing with respect to the authority vested in this Board.
>
> * * *"

With respect to the rhetorical question advanced by the Dissenter as to where **Award 11473** draws its validity, the obvious answer is — from a proper interpretation of the contract. It is not predicated upon a now admitted erroneous allegation that someone outside the agreement is performing Telegraphers' work; it is not founded upon an erroneous citation of precedent dealing with an entirely different factual situation; it is not based upon a combined consideration and interpretation of the Train Order Rule and a Carrier's Operating Rule which was the basis for **Award 1166** and following Awards, but rather, it is founded solely and specifically upon an interpretation of the Train Order Rule which prohibits employes outside the craft from handling train orders at train order offices, and nothing more.

The Dissenter tips his hand when he directs our attention to the rule which is found purportedly as Rule 2(b) of the Telegraphers' Agreement on the Missouri Pacific, reading:

> "If instructed by train dispatcher, or other authority, to clear train or trains before going off duty, leaving clearance cards or orders in some specified place for those to whom addressed, employes shall be paid under the provisions of the call and overtime rule."

That is the rule which the Dissenter would have this Board render in a dispute of this type. It is not a rule found in the contract which this Board was called upon to interpret in **Award 11473,** nor has it been found, nor is it contained in any contract which has been presented to this Board in any of the cases that have been cited as precedent by the Dissenter. It is a rule which the Organization can only properly obtain through the processes of collective bargaining. In the presence of such a rule, the decision of the Supreme Court previously referred to by the Dissenter in the case of American Newspapers Publishers Association v. NLRB (345 US 100), would be appropo because then the parties had agreed upon a "make work" principle, and have incorporated that principle in their collective bargaining agreement. It is not unusual to have certain provisions involving constructive allowances, deadhead payments, payment while traveling or attending court or inquests, etc., included in the collective bargaining agreement for which the employes will receive compensation, although no work is in fact rendered. However, it is clear

that this Board has no authority to grant such a rule and it is now quite clear that is exactly what the Board has done in past cases where it has sustained claims involving the depositing of train orders in waybill boxes or on train registers. It is clear in those cases no work involving the handling of train orders was assigned to anyone outside the craft. We repeat, "No one is entitled to perform work which the Carrier does not want performed by anyone." Award 11473 is a sound decision which we expect the Board to follow.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts