Award No. 11481
Docket No. TE-10446

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

1. Carrier violated the Telegraphers' Agreement when they did not call Agent-Telegrapher J. M. Parkis, North Creek, New York, to receive, copy and deliver train order No. 9 and blocking instructions for C&E Engine 4076 on March 23, 1957, also train order No. 8 and blocking instructions for C&E Engine 4065 on March 30, 1957.

2. Carrier shall now compensate Mr. J. M. Parkis for one call on each of the days specified above as provided for in Article 3(d) of the Agreement, total amount claimed $14.39.

3. Mr. Parkis shall be compensated for all subsequent violations of this nature at North Creek, New York.

EMPLOYES' STATEMENT OF FACTS: There was at the time this claim arose in full force and effect a collective bargaining agreement entered into by and between The Delaware & Hudson Railroad Corporation, hereinafter referred to as Carrier, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The Agreement was effective July 1, 1944.

The claim submitted in this dispute was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes and failed of adjustment. Under the provisions of the Railway Labor Act as amended, this Board has jurisdiction of the parties and the subject matter.

1. North Creek, New York, is a telegraph or telephone office.

2. There is one position (Agent-Telegrapher) covered by Telegraphers' Agreement at this point and the assigned hours of service are 7:15 A.M. to 4:15 P.M., Monday thru Friday, (1 hour for lunch).

delivered by a telegrapher direct to a conductor who was to execute them. Under similar circumstances, on at least three different occasions, the Board has held that it is not a violation of agreements to handle train orders in this manner.

The carrier respectfully urges that this claim be denied, inasmuch as it is the function of the Board to interpret agreements as they are written, and not to add qualifications to plain and unambiguous provisions. To hold otherwise would, in effect, add a new sentence to the rule, providing that "Train orders must be delivered at the point at which they are to be executed."

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

OPINION OF BOARD: We are presently involved in a dispute which arises from the following facts: North Creek, New York, is the location of a telephone office at which point the Claimant, J. M. Parkis, is the owner of the one position-Agent Telegrapher-covered by the Agreement with assigned hours 7:15 A. M. to 4:15 P. M., Monday through Friday; that the dates March 23, 1957, and March 30, 1957, were Saturdays and rest days of the Claimant but he was available for service on each of these days; that the scheduled service for the train involved was ordinarily performed on Monday through Friday with no service being required on Saturdays and Sundays but on successive Saturdays, March 23 and 30, 1957, due to additional service required, it was found necessary to work this train; that Monday through Friday Claimant normally handled train orders at the North Creek station similar to those here involved; there was a normal train operation here though not on days when the train was usually operated. Train Orders 8 and 9 on these two days were copied by the first trick operator at Whitehall, New York, and in turn delivered to Conductor J. A. Herron, a resident of Whitehall who stopped at Whitehall station to pick up the train orders and blocking instructions for his crew at North Creek, Whitehall being by highway 58 miles from North Creek, and (according to Claimant) by rail 91 miles.

It is the contention of the Claimant that no emergency existed on either of these dates and that he was not called to perform the services for which he was available, he having the exclusive right to handle (manually) any and all train orders, involving the train and crew addressed in Train Orders 8 and 9 at his Station; that Conductor Herron, a train service employe, not covered by the Telegraphers' Agreement did handle the train orders by carrying them from Whitehall to North Creek by automobile there making delivery to those whom the orders were addressed as well as the clearance cards containing the block permits necessary to enable movement of trains; that the sole purpose of the Carrier in requiring and permitting the operator at Whitehall to copy the train orders in question and permitting Conductor Herron to carry them from Whitehall to North Creek and there make delivery of them to the train crew to whom the train orders were addressed was, solely for the expedience and convenience of the Carrier and for the purpose of avoiding the rule which required the use of the Claimant to perform the work which he was entitled to.

Article 23(a) provides:

"Handling Train Orders

"(a) The handling of train orders at telegraph or telephone offices is restricted to employes under the scope of this agreement

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

Carrier on the other hand maintains that since both Train Orders 8 and 9 were handled (received, copied and delivered) by an operator at Whitehall and delivered to the Conductor of the crew which was to execute them and carried by him to North Creek, there has been no violation of Article 23; that the train orders were handled, only, by an employe covered by the Agreement and the Conductor of the crew assigned to carry them out and there is nothing in Article 23 which provides that train orders for train crews must be delivered at a particular station.

In controverting Carrier's contention, Petitioner urges that normally train orders involving the operation of this train were handled by the Agent Telegrapher at North Creek where the service was to be performed and were (manually) delivered by him to the train crew.

Carrier has relied, in part, on an early Award — 1489 — involving a similar train order rule but on another railroad. Though the question there raised involved the delivery of a train order by an operator to the Conductor of the crew which was to execute it at a station removed from that where the order was delivered to the Conductor, the fact and circumstances are dissimilar from those involved in the instant matter. In that Award, it is stated: "The rule in question is clear and explicit and we find nothing which requires that train orders shall be handled through one station rather than through another." By the same token, we cannot read into the rule a proposal that the Carrier can handle train orders under conditions similar to those involved in the current case at any station it chooses regardless of the established practice on the property.

It was the usual and established practice at North Creek for the Agent Telegrapher at that station to handle all train orders directed to the train crews controlling the normal operation of this train within the area of North Creek. We can conceive of no logical reason why there should have been any deviation from the usual practice on the days in question.

This Opinion is consistent with Awards 8661 and 10063, involving this Petitioner and this Carrier.

For the foregoing reasons we find the Agreement has been violated and Claimant is entitled to compensation for three hours at the pro rata rate.

What we have here decided is based on the merits of this case — and this case alone.

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 has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of June 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11481, DOCKET TE-10446

We conceive the purpose of a dissent to be a clear and constructive explanation of the errors committed by the Majority in their logic, their assimilation of the facts and/or their interpretation of a specific contract provision. If that is so, we have here a classic example where all the reasons for dissents will be realized and their necessity permanently established in our work.

The errors committed in this case are not those dealing with some technical aspect of railroading where error might be excusable for lack of understanding. Here the facts and the issues were definitely spelled out. A conductor obtained a train order from an operator at a telegraph office on two separate occasions. The train orders were addressed to him and the train to which he was assigned. The operator **received, copied** and **delivered** the order to the conductor. The telegrapher performed each and every facet of the work required under our liberal interpretation of the word "handle". Yet, according to this Referee, that wasn't sufficient compliance with Article 23(a). It must not only be **received, copied and delivered** within the meaning of Article 23(a), but the order must also be received, copied and delivered at the point where it is "normally" received, copied and delivered. This finding is incredible and certainly unacceptable. It is directly contrary to the numerous awards given to the Referee, holding that train orders do not have to be delivered at any particular station, and they are not required to be delivered at the point where they are to be executed, regardless of the presence or non-presence of the train order office at that point. See **Awards 1489, 4819, 6609, 8012, 9223 and 10418.** The pathetic irony of the situation is amply demonstrated by one of the awards cited by the Petitioner in support of their claim, **Award 5810.** There, we held:

> "The record does show that on seven Sundays, train orders were handled at the passenger station for freight trains moving outside of yard limits. They were delivered directly to train crews at the passenger station. **We see no violation in this, even though such train order may have been handled at the freight yard office if there had been a telegrapher on duty. We know of no rule which requires that train orders be delivered to train crews at any particular station.** * * *" (Emphasis ours.)

Thus, we find the Referee's decision is not only repugnant to the numerous awards cited by the Carrier, but also at odds with the precedent cited by Petitioner.

The Referee's attention was directed to one award in particular and the Carrier made it abundantly clear this award was, in all particulars, exactly on point with the case we were considering. It emphasized and re-emphasized the importance of the precedential effect which we should give this particular award. Initially, the Referee simply ignored the decision, apparently because it was not from the same Carrier, although it was grudgingly admitted that the Train Order Rule was "similar". Subsequently, the Referee decided he should make some casual reference to the decision and we see the results. The Referee says:

> "Carrier has relied, in part, on an early Award — 1489 — involving a similar train order rule but on another railroad. Though the question there raised involved the delivery of a train order by an operator to the Conductor of the crew which was to execute it at a station removed from that where the order was delivered to the Conductor, the fact and circumstances are dissimilar from those involved in the instant matter. In that Award, it is stated: 'The rule in question is clear and explicit and we find nothing which requires that train orders shall be handled through one station rather than through another.' By the same token, we cannot read into the rule a proposal that the Carrier can handle train orders under conditions similar to those involved in the current case at any station it chooses regardless of the established practice on the property."

Let us analyze the statement made. First, it is conceded that **Award 1489** did involve "a similar Train Order Rule, but on another railroad." For the benefit of the reader, the **Standard Train Order Rule** was involved in both cases. Thus, we know the Board interpreted the identical rule in both instances. Therefore, the fact that different Carriers were involved is immaterial. Incidentally, there is no better demonstration of this point than a review of the precedent relied upon by the Board in **Award 8661**, which this Referee embraces. In **Award 8661**, not one of the awards cited in support of the Majority's interpretation of the Standard Train Order Rule was from this Carrier, but that fact did not disturb the Majority when they sustained the claim. One is left with the impression that awards from other Carriers are only rejected when they would result in a denial award.

The next portion of the Referee's statement alluding to **Award 1489**, reads:

> "* * * Though the question there raised involved the delivery of a train order by an operator to the Conductor of the crew which was to execute it at a station removed from that where the order was delivered to the Conductor, the fact and circumstances are dissimilar from those involved in the instant matter. * * *"

Using "reverse English", the Referee is saying the identical factual situation prevailed in that case that prevailed here. The train order was received, copied and delivered by an operator to a conductor to whom addressed at Enid, 30 miles from Billings where the conductor lived. The conductor then drove his car, just as he did in our case, and carried the train order to Billings where his train was located, the point where the orders were executed. There was an operator located at Billings just as there was here at North Creek, although in neither instance, was he on duty. Although conceding by inference that the facts were the same, the Referee then states:

> "* * * the fact and circumstances are dissimilar from those involved in the instant matter. * * *"

We might respectfully ask — in what manner were they dissimilar? The Referee chose not to tell us, and apparently, we will never know. The reader can review the facts of Award 1489 and judge for himself whether he is willing to accept the Referee's statement as fact or fiction.

Instead of contriving to distinguish Award 1489 on factual grounds, the Referee might have ruled that Award 1489 was palpably erroneous. However, had he done so, he would then have the moral responsibility to direct our attention to those palpable errors. It is evident he did not relish that task. The unmistakable and overpowering truth is — Award 1489 was not in error, it was factually on all fours with our case, it should have been followed and it would have resulted in a denial award in this case. The Referee's failure to follow Award 1489, in our opinion, is inexcusable.

Award in Docket No. 2, Special Board of Adjustment No. 132, contains an interesting comment relative to a similar situation. There with Referee Francis Robertson, the Board said:

> "The same crew operated Extra 2825-W as operated 2825-E. On its westward trip the crew was given train orders for Extra 2825-E c/o Extra 2825-W. The employes claim a violation of their agreement ostensibly on the basis that that part of the orders which gave the train authority to proceed on its eastward trip should have been given to it at its western terminal.
>
> "We cannot subscribe to the employes' contention. The members of the crew operating 2825-W and 2825-E were identical persons. They neither transmitted nor 'handled' train order to any other person or crew. Hence there could be no reasonable basis upon which to hold that there was a violation of the agreement."

Award in Docket No. 12, Special Board of Adjustment No. 132, held:

> "The sole question involved in this dispute is whether or not it is a violation of the Telegraphers' Agreement for the Conductor of a train to receive train orders from an operator at one point and deliver a copy of the same to the crew of a helper engine which is to assist his train at another point.
>
> "We can find no basis for a finding of violation of the Telegraphers' Agreement under the circumstances involved in this case. The helper engine became a part of the train at the point where it coupled on to assist the train as originally made up. Thus, it is no different in principle than if the helper engine were coupled into the train at the point where the operator delivered the train order to the conductor. Delivery of a copy of a train order by a conductor to the engineers handling his own train could not conceivably be considered an infringement on the Telegraphers' Agreement.

Now, permit us to analyze the decisions which the Referee did adopt as controlling precedent in this case, namely, Awards 8661 and 10063, awards from this same property. This analysis will permit the reader to evaluate the awards accepted as well as those rejected and will enable the reader to evaluate the awards accepted as well as those rejected and will enable the reader to draw proper conclusions as to which cases were similar or dissimilar.

In Award 8661, the facts were stated by the Petitioner in the Statement of Claim presented to this Board, and read as follows:

"1. Carrier violated the agreement between the parties hereto when on September 4, 9 and 18, 1954, it caused, required or permitted train service employes, not covered by Telegraphers' Agreement to carry Train Orders Nos. 3, 7 and 3, respectively, from Whitehall to Castleton and there make delivery of such orders to Conductor and Engineer of trains to which addressed."

In Award 10063, the facts are stated in the claim, to wit:

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

As noted by the subject quoted above, the facts in both of those cases involved "in care of" train orders; that is, train orders which were delivered to crew "A" by an operator and then redelivered by Crew "A" to Crew "B" for execution. The Board found in effect, that delivery was not effectuated by the operator, but rather, by the crew to whom the orders were first delivered. Our case is completely dissimilar. Here, the orders were delivered to the crew (conductor) to whom the orders were addressed and who was designated to execute the order. There was no intermediary, no other persons were involved. All facets of the operator's work had been performed by an employe covered by the Telegraphers' Agreement when the operator received, copied and delivered the train orders to the conductor assigned to execute them. There is certainly no comparison between the facts involved in our Award 11481 and the precedent cited by the Referee in Awards 8661 and 10063.

Finally, the Referee relies upon which he terms "the usual and established practice at North Creek" in the handling of train orders for trains working in that area.

The Petitioner advanced this argument for the first time in their Rebuttal Brief when they injected a new argument into the case involving an alleged violation of the Rest Day Rule, Rule 3½, Section 1(b). The Referee was advised the argument was an attempt to change the issue and not properly admissible. Award 11005 (Boyd). The Referee made no reference to the rule but then adopted the theory behind the rule when he said "it was the usual and established practice at North Creek", etc. This was his initial error. Secondly, there is no evidence in the record that operators normally handle these train orders during the week even if that fact was important, which it is not. We have nothing but the unilateral assertion advanced by the Petitioner in their Rebuttal Brief and not before. The Carrier never had an opportunity to rebut this assertion. For example, the Carrier may normally use the Train Dispatcher to handle the train order during the week, which it has a perfect right to do as evidenced by two recent decisions from this same Carrier, Awards 11244 (Moore) and 10914 (Boyd). Thus, we have a decision premised on a unilateral assertion which Carrier was not afforded the opportunity to rebut, which even if factual, is completely immaterial to the issue presented to the Referee for decision. The fact that it was immaterial is strikingly illustrated again by Award 1489.

The facts in Award 1489 show that it was the usual practice for the operator at Billings to handle train orders for trains working in that area when he was on duty. That fact was not given controlling effect in the decision in that case, and certainly should not have been given the effect attributed to

it in this decision. See again, **Award 5810**, supra, where we pointed out that it made no difference whether the order would **normally** be copied at the point in question, since Carrier was not restricted to having train orders delivered at any particular station. See also **Awards 9119, 10056 and 7073**, all of which recognize Carrier's right to have work done on Saturdays at Point "A" by another operator, which is normally performed Monday through Friday at Point "B" by a different employe under the Telegraphers' Agreement. The Referee simply ignored these awards.

Indeed, we have even recognized that a Train Dispatcher may handle train orders on the rest days or holidays observed by a regular Telegrapher which the latter handles from Monday through Friday under the Train Order Rule. See **Awards 9217, 5468 and 4922**. If that is true, then certainly the Majority went completely afield in finding a violation of the Train Order Rule in this instance when **Operator** "X" handled the train order instead of Operator "Y".

Finally, in an apparent attempt to expiate the error committed in this case, the Board says, "what we have here decided is based on the merits of this case and this case alone." Needless to say, we expect to hold the Majority to this statement.

For the reasons recounted above, this award represents a flagrant misinterpretation of the contract. It should be treated as an invalid award.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts