Award No. 11653
Docket No. TE-10057

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, 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 and Western Railroad, that

1. Carrier violated the Agreement beginning on July 16, 1956, and each succeeding day thereafter when it required or permitted Agent R. B. Westfall at Hamilton, Illinois, to hang train orders for Train No. 120, in the train order rack and go off duty at 5:00 P. M., leaving the train orders unattended for No. 120 to pick up after its departure daily from Keokuk, Iowa.

2. Carrier shall compensate R. B. Westfall, Agent at Hamilton, Illinois, for a 3-hour call at pro rata rate for each day that a violation occurred as stated in paragraph 1.

EMPLOYES' STATEMENT OF FACTS: R. B. Westfall is the regular assigned agent at Hamilton, Illinois, on August 16, 1956. His assigned hours are 8:00 A. M. to 5:00 P. M. He is the sole employe covered by the agreement.

On July 16, 1956, and each day thereafter, prior to 5:00 P. M., the dispatcher gave agent Westfall train orders, clearance cards, and work instructions while he was on duty at Hamilton. The train orders applied to Train No. 120, which was due at Hamilton at 6:54 P. M. daily. The dispatcher understood that agent Westfall would not be on duty at the time that the train orders had to be delivered to the train No. 120. In view of this fact, agent Westfall was instructed to hang the train orders and messages in a train order rack at his station before 5:00 P. M. The train orders, messages and clearance cards were unattended from the time that agent Westfall went off duty at 5:00 P. M. or earlier on Sundays to the time the train picked them up.

Agent Westfall could have been notified before 5:00 P. M. that he would have to remain at the station until No. 120 departed or the Carrier could have called him at his home where he has a telephone and required him to return to Hamilton Station to handle train orders for No. 120.

A claim was made in behalf of R. B. Westfall for a three hour call pro rata rate for each day that the violation occurred. The claim was handled

"(b) 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."

The provisions of this rule were first placed in the Agreement of August 29, 1947, and were not changed when the Agreement was revised on September 30, 1953.

At the time this Rule was first placed in the Agreement, April 29, 1947, it was the custom and practice and had always been the custom and practice to make delivery of train orders and clearance cards received from the train dispatcher by placing them on the train register or in a waybill box. The Employes were fully familiar with this custom and practice. (See Carrier's Exhibits B, C, D and E.)

This custom and practice has continued to this day, with the use of the train order rack starting on or about 1949 in lieu of placing them on a train register or in a waybill box, to avoid stopping the train and the consequent delay thereto. Furthermore, telegraphers commonly place train orders on the train register during their tour of duty where they are picked up by conductors while the telegraphers are engaged in other duties. Also, telegraphers commonly (daily) place train orders and clearance cards in train order racks during their regular tour of duty from where they are picked up by the train to which addressed, while the telegraphers are engaged in other duties; similarly, telegraphers commonly (daily) place train orders and clearance card in train order racks, to be picked up by the train to which addressed, after their tour of duty.

This is and always has been the usual and accepted custom and practice on this property. No detail in the handling of train orders is delegated to employes outside the Scope of the Telegraphers' Agreement.

Here, we have the situation where certain work, sometimes performed by a telegrapher when he was on duty, completely eliminated by the mechanical handling. And, the Telegraphers have contended at no time that the delivery of train orders by means of this mechanical device was improper.

Denial Award 7343 is herewith cited as involving an analogous situation.

All data herein submitted has been made known to, and fully discussed in conference, with Employes' Representatives and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: It has been agreed between the parties that the principles and facts involved in this present controversy are identical to those involved in a recent Award 11473 (Moore) between these same parties and involving the same property. Carrier insists that Award 11473 is a precedent award controlling this dispute and binding on the Board. To the contrary, the Petitioner, though admitting the existence of the award, contends that Award 11473 is not binding on the Board, as it is palpably erroneous. The Board, as a consequence, finds itself in the position of having to consider the stability or instability of the award as a precedent.

The subject with which we are concerned in this type of dispute has been presented to this Board on many occasions, commencing with Award 86, and continuing down through many awards since then, including several in which the facts are practically identical to ours.

In Award 11473, the Board, in denying the claims of the employes, relied principally on Award 8327 (McCoy) and Award 10917 (Boyd). In Award 8327 it appears there was a departure from the holdings of many prior awards. The Opinion in that award rested, primarily, on the premise that "no human hand had intervened between the telegrapher and the train crew to whom the order was addressed." In support of the Opinion expressed in Award 8327, the Referee cited prior Award 1821 (Yeager) and Award 7343 (Coffey). In Award 1821, which was, also, in opposition to the prior awards of this Division, we note the following:

> "The easy, and perhaps, excusable, thing to do would be to follow the precedents set forth in Awards 1166, 1169, 1170 and 1422, . . . My sincere conviction is that the decisions there were predicated on a fallacious premise, . . ."

Nowhere in the Opinion is it indicated what the fallacious premise was. In a later Award 5872 (Yeager), the same Referee, though only the Scope Rule was involved, which did, however, include employes who are required to handle train orders, and under facts similar to those involved here, rendered a sustaining award in favor of the employes. In Award 9319 (Johnson) we find the following comment:

> "In Award 1821, as here, the train order rule was involved; in Award 5872, it was not, but Referee Yeager held the difference immaterial and sustained the claim on the basis of the scope rule, thus, in effect, reversing his original opinion and wiping out the only early award denying such claim."

In Award 7343, the other Award relied upon in Award 8327 we find upon examination that it neither involves a train order rule nor is a train order rule ever mentioned. What the Board was there concerned with was a general Scope Rule reserving to the persons covered, all work which by custom, tradition and historical practice had become identified as work of the class. Thus, we find the only support for Award 8327 is Award 1821, which was reversed in a later award by the same Referee who wrote the Opinion in Award 1821.

Let us then turn to a consideration of Award 10917 (Boyd) which has been cited by the Referee in Award 11473 in support of his position. The query presented to the Board was whether Award 10400 (Mitchell) was palpably wrong and should be avoided as a precedent. It was stated in Award 10400:

> "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."

From an analysis of these prior awards we are forced to a conclusion that the only award that can be claimed as supporting Award 11473 is Award 8327.

It is the Petitioner's contention in this controversy that **to handle train orders** contemplates **receiving, copying and delivering them to the train crews** which are to execute them and that what is contemplated is **personal delivery of the same to the train crews by the operator.** Petitioner's position has been supported by the following awards, in many of which the facts are identical to those now before us: Awards 86, 709, 1166, 1169, 1170, 1422, 1680, 1713, 1878, 1879, 2087, 2926, 2927, 2928, 2929, 2930, 3611, 3612, 3670, 4057, 5087, 5122, 5872, 9319, 10239.

In Award 1166 (Hillard) we note the following:

> "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."

In Award 2926 (Carter) we find the following statement:

> "We think the phrase 'to handle train orders' contemplates receiving, copying and delivering them to the train crews which are to execute them. Awards Nos. 86, 1166, 1713, 1878 and 1879. That the proper interpretation of this rule has been given the most serious consideration by this Board is evidenced by the many vigorous dissents filed by the Carrier Members. The phrase, however, has been interpreted as we have herein stated in so many awards by so many learned referees, that it must be accepted as a meaning to be generally applied in all collective agreements arising under the Railway Labor Act in which the words appear. Unless such an interpretation so generally established by the awards of this Division are to be accepted and applied in the adjustment of disputes arising out of Rule 1 (b) and similar rules, the purpose of the Railway Labor Act will be seriously restricted. A time should come when matters of this kind should be considered as finally settled until such time, at least, as they are changed by negotiation or mediation. We think that time has come irrespective of the wide differences of opinion between the carriers and the organizations with reference thereto."

The cogent reasoning expressed in the foregoing statement is applicable to the problem presented to us here. It is our Opinion that Award 11473 is plainly in error in failing to follow the overwhelming majority of awards in this Division on the subject presented. We do this in furtherance of maintaining consistency in the awards of this Division and so as to avoid conflict and confusion in them.

In accordance with the vast majority of awards rendered by this Division we believe the claims herein should be sustained.

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

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11653, DOCKET TE-10057

With this **Award 11653** we are confronted with two conflicting decisions between the same parties, involving the same issue, and the same rule of the effective agreement; i.e., Rule 1 (b)—

> "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."

In the case covered by **Award 11473,** the claimant telegrapher at La-Harpe, Illinois, received, copied and delivered the train orders by placing them on the train register for the crews of the trains addressed. In the other case, the telegrapher at Hamilton, Illinois, received, copied and delivered the orders by placing them in the mechanical train order standard at his station, where they were received by the crew of the train without stopping. In both cases, the entire handling of the train orders was confined solely to the telegrapher on duty, and the evidence disclosed that on none of the dates involved did any employe not covered by the Telegraphers' Agreement handle train orders at either station.

Just prior to **Award 11473,** the last decision on this particular issue (the placing by claimant telegrapher of train orders in waybill box before going off duty) was **Award 10917.** There, the organization urged that **Award 10400,** between the same parties, was "palpably wrong" and should be ignored. We quote, for ready reference, the following paragraphs of the opinion in **Award 10917:**

> "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.

"On a particular property, if a question has been decided that decision should stand if there are reasonable grounds to support it. It would only create confusion to do otherwise. We believe that the reasoning expressed in the Opinion in Award 8327 will support a denial award here.

"As in that Award (8327) there was no work performed by anyone not covered by the Telegraphers' Agreement in effecting delivery. Nor was any instrumentality employed in making delivery except the inert waybill box.

"Train orders must be accurate and safely delivered to the addresses. The safe operation of the railroad requires this. The Carrier's operating rules require personal delivery, obviously a requirement to minimize the risk of non-delivery. But the Carrier has reserved the right to alter its rule by specific instructions. This it may do so long as the specific instruction does not violate the collective bargaining agreement. In this instance it has not required the delivery of the train order to be made by any employe not covered by the Telegraphers' Agreement."

Next came the case decided by **Award 11473**. The evidence of record in that case showed that there was no Telegraphers' Agreement in effect on the T. P. & W. until 1947, that it had long been the practice on that property for operators to attach orders to the train register where they were later picked up by the crews of trains, either while the operator was still on duty or after he had gone off duty, that this method of delivery was continued in effect, and that no claims arose until August, 1956. The agreement was revised in 1953, with no change in Rule 1 (b). It was the Board's duty and responsibility to decide whether or not Rule 1 (b) of the effective agreement was violated. **Award 11473** plainly shows that the Majority very definitely considered the two lines of conflicting awards in reaching the decision:

"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."

In view of the foregoing, it is difficult to understand why the Majority ignored the evidence in Docket TE-10057 and the Board's findings in Award 11473 and elected instead "to consider the stability or instability of the award as a precedent." The opinion is based primarily on the Labor Member's Dissent to Award 11473. The errors of that dissent (followed by the Majority here) were fully pointed out and dealt with in "Carrier Members' Answer to Labor Member's Dissent to Award 11473, Docket TE-10198." Carrier's Answer will not be reproduced, but by reference is incorporated and made a part of this dissent.

The Majority disregarded, among other evidence in Docket TE-10057, the following affidavit (Carrier's Exhibit "E") by R. B. Westfall, who was named by the organization as the claimant in this case:

"My name is R. B. Westfall, age 67. I entered the service of the TP&W Railroad Company as an Operator March 19, 1911, and served as agent at various locations from 1913 until October 26, 1957, at which date I retired.

"I came to Hamilton, Illinois, as agent about July, 1948, and worked this position until my retirement. During this entire period train orders were left on the train register, or later in train order rack provided for that purpose. This was following the procedure of handling train orders that was in effect when I took over the agency. These orders were picked up by train crews after I had gone off duty."

The Majority also overlooked other pertinent evidence which distinguished the two TP&W cases from the prior sustaining awards; i.e., that carrier's Operating Rule 211 had been changed and no longer required personal delivery of train orders. Carrier, in its submissions, cited and specifically relied on denial Award 7343 (Coffey), in which the Board said:

"The employes attempt to prove in this docket that the word 'delivery' should be construed in a technical sense in accordance with a special meaning given to it by usage so as to require personal delivery. We are not impressed with such proof as they have been able to bring forward and it does not serve to overcome the showing that is made in this record that Carrier does not always expect manual delivery and change of possession in connection with its train orders.

"The Carrier's proof of what was intended by it is in the elimination of the word 'personally' from the operating rules, and a clearly published intent not to relinquish all control over delivery of train orders as circumstances require and dictate, as its operating rules show. We have looked closely to see if there is anything by rule, custom, or established practice that clearly runs counter to Rule 211, of the current Operating Rules, and, finding none, the change in the rule and the published intent must be respected."

The Opinion in Award 11473 plainly shows that this distinguishing element was not overlooked by the Majority in their consideration of the case and review of prior awards.

For the reasons stated, we dissent.

R. A. DeRossett

R. E. Black

W. F. Euker

G. L. Naylor

W. M. Roberts