Award No. 11667
Docket No. TE-10131

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Jim A. Rinehart, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY (WHEELING AND LAKE ERIE DISTRICT)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The New York, Chicago and St. Louis Railroad (Wheeling and Lake Erie District) that:

1. Carrier violated and continues to violate the Agreement between the parties when on June 19, 1956 and subsequent dates it requires and permits employes not covered by the Agreement to handle (receive, copy and deliver) train orders at Herrick, Ohio.

2. Carrier shall compensate the senior idle telegrapher, extra in preference, a day's pay on each date the violation occurs beginning June 19, 1956 and continuing thereafter until the violation is corrected.

3. A joint check of Carrier's records be ordered to determine the dates of violations and the employe to be paid.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

Herrick, Ohio is a station on the Carrier's lines where there are a number of auxiliary tracks forming a small "yard". It is necessary for a large proportion of freight trains to stop at Herrick for the purpose of setting out and picking up cars. A number of years ago there was an agent-telegrapher position at this station. At the time cause for claim arose there were no positions under the agreement at this location.

On June 19, 1956, the initial date of the claim, Conductor Rose on Extra East Engine 803, which was stopped at Herrick, handled (received, copied and delivered) five train orders. These five train orders, as well as other train orders handled at Herrick on subsequent dates, are reproduced in a letter from General Chairman Howes to Chief Train Dispatcher Counts; this letter is attached hereto as O.R.T. Exhibit No. 1. It will be noted that none of the train orders were addressed to Conductor Rose's train. Four were addressed to

The Carrier, in its submission in this case, has conclusively shown that the claim is without merit and should be denied because:

1. The rules, as interpreted by over 40 years of custom and practice do not support the claim.

2. The Employes, during such period, have attempted not only once, but on six different occasions (1933, 1937, 1939, 1947, 1954, and 1957), to secure through negotiation, the adoption of a rule which would support the claim.

3. The Employes are now attempting to secure (through an interpretation by this Board) what they have been unable to secure by negotiation on the property. The writing of new rules is not a function of this Board.

Without in any manner waiving its position as set forth above, the Carrier desires to make the following additional contentions:

1. The claim, being made in behalf of unidentified "senior idle extra" employes, is improper in that it is not a claim in behalf of a specific, named claimant as required by the language of Article V, Section 1(a) of the Agreement of August 21, 1954. (National Time Limit on Claims Rule.)

2. With respect to Part 3 of the claim, the various Divisions of the Board have held that the Carrier should not be expected to develop claims for unnamed employes on unspecified occasions.

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

(Exhibits not reproduced.)

OPINION OF BOARD: This is a Scope Rule case. First, we are met with Carrier's objection to consideration of the claim because the Claimant was not named therein. Rule V, Section 1(a), of the August 21, 1954 Agreement applicable is as follows:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

It has been held unnecessary to name the Claimant where he is so specified or designated that Carrier may identify him by its records. Award 10533 (Mitchell), 10576 (LaBelle).

There is no evidence in the record that Carrier cannot determine and identify Claimant from its own records.

The issue is whether Carrier violated Rules 1 and 26 of the effective Agreement in assigning and permitting train service employes to do the work of receiving, copying and delivering train orders at Herrick, Ohio. Rules 1 and 26 are as follows:

"RULE 1 — SCOPE

This agreement will govern the working conditions and rates of pay of telegraphers, agents, telephone operators (except telephone switchboard operators), agent-telegraphers, agent-telephoners, manager-telegrapher, telegrapher-clerks, levermen, towermen, tower and train directors, block operators, staffmen, operators of mechanical telegraph machines, and other combined classifications listed in the accompanying wage scale, all of whom are hereinafter referred to as 'employes.'"

"RULE 26 — HANDLING TRAIN ORDER

It is not the disposition of the Railroad to displace employes covered by this agreement by having trainmen or other employes operate the telephone for the purpose of blocking trains, handling train orders or messages. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator."

The record discloses that Conductor Rose on June 19, 1956, copied 5 train orders at Herrick on train order form 19. He handled orders for his train and for others, also.

Herrick is a side track and a member of other tracks used as a yard for storage of empty cars for loading of coal produced in the vicinity. There is no position covered by the Telegraphers' Agreement assigned to Herrick and it is defense of the Carrier that because of the history, custom and practice on the property, for many years, the rule has been modified at that place to the extent that the acts of Conductor Rose did not violate the Agreement.

This dispute has been diligently and strongly presented by the Telegraphers and Carriers alike. This included the background and history from the Act of Congress of 1907; the Hours of Service Act (Title 45. U.S.C. A-62); also, the various unsuccessful attempts to amend the rule in a number of later agreements and finally, the argument that the principle of Award 3524 by Carter was the result of a combination of errors and, therefore, erroneous. That principle as there stated is:

"We think it is established as a general proposition that telephone communications consisting of messages and reports of record belong to the telegraphers by virtue of the scope rule of the Telegraphers' Agreement."

It has been held in many awards that as to messages of "record," the best example of this is in relation to transmission of train orders.

The task of reconciling all the conflicting awards is evident, as was stated in Award No. 10535 (Ables) with reference to Award No. 5901:

". . . As is usually the case in these Telegrapher Agreement decisions, the referee cautioned against broad application of the finding with the final words 'Each case must turn on its own facts and merits.'"

Rule 26 does not name or specify "Car Lineups" but nevertheless in Award 9952 (LaDriere) it was held that the sending or receiving of lineups by a section foreman was a violation of the Telegraphers' Agreement. That dispute was between the same parties involved here, and concerned the same rules of the same Agreement. The award was made by this Division of the Board. Carrier's argument there likewise referred of efforts of Telegraphers in 1948 to amend Rule 26 and their failure to accomplish that end. Forty years of unchallenged custom and practice was asserted by the same Carrier there. The claim was sustained. To reach that decision the Referee and the Board had to go further than is necessary here. Rule 26 is actually named and specifies **"Handling Train Order."**

The Award No. 9952 (LaDriere) recites a line of precedents and we adopt and follow it.

Accordingly, the claim should be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of August 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11667, DOCKET TE-10131

This decision is tragically erroneous and will not withstand the test of court scrutiny.

We will deal with the merits of the decision, although the error committed in reference to that portion of the claim dealing with unnamed claimants should not be overlooked. First, the Referee referred to Herrick, the point involved in the dispute, as being "a side track and a member of other tracks used as a yard." This is at odds with the facts. The Organization referred to Herrick in this manner:

"Herrick is a blind siding and yard."

The Carrier referred to it in this manner:

"Herrick is the designation given a blind siding. . . ."

These are the facts submitted by both sides. We must accept them. The train orders which the Petitioner submitted show the blind siding at Herrick was a passing siding and was used as a passing siding on the dates in question. The train orders submitted as part of Petitioner's case unequivocally show this. The decision completely ignored the argument presented in behalf of the Carrier that the admitted facts and evidence here bring this case squarely within the exception of Rule 26, which reads:

"RULE 26 — HANDLING TRAIN ORDER

It is not the disposition of the Railroad to displace employes covered by this agreement by having trainmen or other employes operate the telephone for the purpose of blocking trains, handling train orders or messages. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator."

Herrick is a passing siding, the parties referred to it as a "blind siding," the train orders substantiate the fact that it was a passing siding and for that reason alone, there was absolutely no valid excuse for the Majority to ignore the evidence or deliberately disregard facts in reaching their decision.

As in most contentious proceedings, it is a rare occurrence when the parties are in solid agreement upon vital facts — but when they are — as they were here — it is imperative that we accept them. The Majority's calloused disregard of admitted facts destroys the award and leaves it indelibly marked as invalid.

The Majority was referred to two decisions from the same property — **Award 9952**, by the Organization, and **Award 10918**, by the Carrier. Neither dealt with an interpretation of Rule 26, but both concerned the Scope Rule. In **Award 9952**, the claim was sustained when the Carrier's argument on past practice was ignored. In **Award 10918**, we properly took cognizance of the past practice on the property as submitted by the Carrier, and the claim was denied.

In this case, the Majority again disregarded the history of past practice submitted by Carrier — although the incredulous part of it is — the Organization conceded at the outset that past practice controls in interpreting this Scope Rule. We feel enough has been shown to render this award worthless as precedent in any future case. In any event, the file contains additional reference to other errors if this award is ever cited as precedent.

For the reasons stated above, we dissent.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts