Award No. 11882
Docket No. T-10217

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

William N. Christian, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, Chicago and St. Louis Railroad, that:

1. Carrier violated the Agreement between the parties when on July 11, 1956 at Otterbein, Indiana, it required or permitted a conductor of a Work Train to "OS" and transmit other transportation communications over the telephone outside the assigned hours of the agent at this location.

2. Carrier shall, because of the violation set forth above, compensate the agent at Otterbein, Indiana a minimum call payment of two (2) hours in accordance with Rule 12 of the Agreement.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute effective June 1, 1948, as amended.

At Page 64 of said Agreement is listed:

Otterbein.....Agent and Opr.....1.24

Subsequent increases through the medium of collective bargaining have brought the rate for Otterbein to $2.128 per hour not including the cost of living adjustment as provided for by the Agreement of November 1, 1956.

On August 31, 1956, Local Chairman Karlock of the Organization filed the following claim in his letter of that date addressed to Superintendent R. Clear. We quote:

"Claim is presented as follows:

ment failures and hot boxes. In other words it was practice to be conversant with the dispatcher to expidite trains or report any condition pertaining to the movement of trains. Also in case of train or crossing accident to report seriousness of same to dispatcher. As general yardmaster I have talked to dispatcher requesting time for yard crews to occupy main track also to report tonnage for the running of an extra train and in case of detour movement to talk to dispatcher regarding any moves to be made thru yards under my jurisdiction. I talk to the dispatcher many times as asst. trainmaster as to the movement of trains and conditions effecting movement of these trains.

"/s/ F. J. McGuirk
Asst. TM"

* * * * *

Photostatic copies of the above statements, as well as many others of like import (39 in all), are attached as Carrier's Exhibits "G" to "SS", inclusive. These statements are from Lake Erie and Western District employes and were freely given. Hundreds of similar statements could be obtained, as the facts are not peculiar to any district and are well known to all employes having any experience with the handling of such matters on this railroad.

As the Carrier has shown and as the above statements confirm, the practice complained of has been traditionally and historically followed on this railroad. It is not now, and never has been, exclusively assignable to telegraphers under the Scope Rule of their agreement.

The claim is in effect a request that your Board rewrite the present Scope Rule along lines more to the Employes' liking. That is not a function of this Board.

The claim is without merit and should be denied.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The issue is whether Carrier violated the Scope Rule of the effective Agreement by requiring or permitting the conductor of a work train to transmit to a dispatcher the following message by telephone (R. 5):

"Put the work extra in clear at Otterbein at 3:10 P.M. Will work from Montmorenci to Oxford in AM."

Interpretation and application of the Scope Rule determines the case on its merits. The critical question is:

Did Employes, by tradition, custom and practice on this property, perform the work to the exclusion of others?

Awards 11592 (Strak), 10918 (Boyd), 10425 (Dolnick), 9953 (LaDriere). The Employes have not sustained the burden of proving an affirmative answer to the critical question.

Award 10356, involving the same issues, parties and Agreement, is palpably wrong. Instead of applying the above test, Award 10356 rests its reasoning solely upon Award 4516 involving a different Carrier (which would not necessarily have the same tradition, custom and practice as the Carrier herein), and involving the issuance of line-ups.

Affidavits attached to Carrier's ex parte submission which could not have been exhibited to Employes during the handling of the claim on the property are excluded from our consideration, Employes having objected thereto at the first opportunity. Award 11128 (Boyd).

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

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1963.

LABOR MEMBER'S DISSENT TO AWARD 11882 DOCKET TE-10217

The United States Court of Appeals, in a recent case,[1] has referred to this Board as possessing "awesome powers". One may readily agree that a tribunal, which has the legal power to render a final and binding decision against one party, with no right to review whatsoever; yet, the other party, when it loses, has the right to unlimited review in federal courts, does indeed possess naked power in the nth degree. The uninhibited exercise of "such awesome powers", by a Referee not having had previous experience on any Division of the Board, is the subject of this dissent.

AWARD 10356

The Referee says:

"Award 10356, involving the same issues, parties and Agreement, is palpably wrong. Instead of applying the above test, Award

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

10356 rests its reasoning solely upon Award 4516 involving a different Carrier (which would not necessarily have the same tradition, custom and practice as the Carrier herein), and involving the issuance of line-ups."

It is understandable that the novice finds it difficult to apply the rather sophisticated reasoning utilized by the experienced referee in referring to precedent awards of the Board. Award 4516 has been cited by more referees, in cases of Telegraphers' involving the handling of communications, than any other award. It has been cited by number more than forty times and in others, the principles announced therein. The following referees have cited Award 4516 specifically:

BOYD, Robert O.	4919	4923	4925	4926	5181	5182
CARTER, Edward F.	4575	4577	4882	4967	5038	5086
CHRISTIAN, Wm. N.	11882					
CLUSTER, H. Raymond	7954					
COFFEY, A. Langley	5079	5133				
CONNELL, Charles S.	4624					
DONALDSON, J. Glenn	5407	5410	6698			
DOLNICK, David	10515					
JOHNSON, Howard A.	9572					
LADRIERE, Raymond E.	9951	9952	9954			
LARKIN, John Day	7154					
MCGRATH, Raymond E.	10364	10366				
MCMAHON, Donald F.	6290	6364	11156			
PARKER, Jay S.	5430	5416				
RADER, LeRoy A.	6588					
ROBERTSON, Francis J.	5230					
SCHEDLER, Carl R.	10356					
SHARPE, Edward M.	6461					
STONE, Mortimer	4772					
WENKE, Adolph E.	6068	6167				
WHITING, Dudley E.	5524					
WYCKOFF, Hubert	5639	6607				

Furthermore, it is not reasonable to impute to the learned Referee deciding Award 10356, a failure to examine the awards submitted to him. As was shown in the Master File in Docket TE-8456 (Award 10356), which was handed to the Referee in the instant case,

548	4375	6290
943	4376	6343
3397	4395	6967
3812	4458	7859
4287	4575	8263
4373	4811	8264
4374	4900	8329
	5524	9952

in addition to Award 4516, and others, were cited as favorable to Employes' Position.

For instance, Referee Carter, author of Award 4516, rendered decision in Award 4287, which involved similar factual circumstances and a similar Scope Rule. When similar disputes next arose, involving the same parties and same Agreement, the Board unanimously, and without the assistance of a neutral rendered Award 4373, 4374, 4375, 4376 and 4395 sustaining the substantive violations as claimed. Referee Carter also rendered decision in Award 4575, involving the same parties and same Agreement, and the claim was again sustained. The next case in point rendered by Referee Carter was Award 4458, which was almost identical factually, to the case in the instant docket, and the claim as again sustained.

In Award 5524 (Referee Whiting), which involved similar substantive claims, it was stated:

> "In Award No. 4516 we set forth the principles which determine whether telephone communications are such as have been reserved to telegraphers under the scope rule of their agreement or whether they are such as may properly be performed by persons not under the agreement. We held that the telephone communication work reserved to telegraphers was that which they traditionally performed prior to the advent of the telephone and we said:
>
> > 'We adhere to those awards which hold that the use of the telephone by persons not under the Telegraphers' Agreement at a station when an assigned operator is off-duty and available for a call, is a violation of the Agreement and entitles the operator to payment for a call.'"

The principles set forth in Award 4516, to be applied to determine Telegraphers' Agreement coverage, have been followed by many referees, in cases not involving the handling of train line-ups. For instance, in Award 9951, involving the handling of messages, Referee LaDriere said:

> "It is interesting to examine the facts in the case before us and compare them with the requirements laid down in the awards referred to.

For instance, the messages here were the type that were necessarily sent by telegram in the old days of Morse code. These cars had been loaded in Wilson, some miles away, were made into a train for Greenville before the shippers were able to furnish information as to consignee, destination and route. Therefore it was necessary to send this information to Greenville before the train arrived there. Traditionally that could have been done in no other way than by telegraph because of the distance and the time limit. Under Award 4516 this is clearly telegraph work."

In another case involving messages, Referee Boyd said:

AWARD 5182

"The telephone is a convenient and ready way to communicate; its use requires no training. Consequently when this Board has been called upon to interpret the Scope Rule of the Telegraphers, such as is here involved, with respect to the work of transmitting communications by telephone, it has recognized that every use of the telephone was not intended as Telegraphers' work, and, in general has confined the application of the rule to the work of transmitting or receiving messages, orders or reports of record by telephone in lieu of the telegraph. See Awards 4516, 4280 and 1983."

In another award, involving handling of message, Referee McGrath said:

AWARD 10364

"In discussing the Scope Rule of the Telegraphers Agreement, Judge Carter the Referee in Award 4516, says in part:

> 'This Board has sought to follow the communication work of the Morse code operator and preserve for him the work which traditionally belonged to him.
>
> * * *
>
> 'But it was really apparent that the use of the telephone was so general that every use of the telephone was not contemplated or intended as telegraphers work. It was thereupon determined that employes whose duties require the transmitting or receiving of messages, orders, or reports of record by telephone in lieu of telegraph constitutes the telephone work reserved exclusively to telegraphers Award 1983.'"

Thus, when Referee Schedler in Award 10356 found, as a fact, that the telephone communications there involved, did pertain to and affect the movement of trains, he held, quite correctly, that the work was within the ambit of the principles set forth in Award 4516. It is now, much too late for the novitiate to attack the soundness or reasoning of Award 4516.

SCOPE RULE

In the instant award, the Referee says:

"Interpretation and application of the Scope Rule determines the case on its merits. The critical question is:

> Did Employes, by tradition, custom and practice on this property, perform the work to the exclusion of others?"

The Referee then cites:

Award 11952 (Stark)

Award 10918 (Boyd)

Award 10425 (Dolnick)

Award 9953 (LaDriere)

This is followed by the bare conclusion:

"The Employes have not sustained the burden of proving an affirmative answer to the critical question."

Then, in order to find that Award 10356 was "palpably erroneous", the Referee said that the referee in that award failed to apply "the above Test". It would seem reasonable that a Referee, in setting forth a "test" or announcement of a hard and fast principle of construction, would also give some citation of authority or reasoning to support the "test".

It is assumed that the Referee thought that he did so in citing four awards. It will be noted, however, that three of the cited awards were rendered subsequent to Award 10356. Referee Schedler in Award 10356 could not have had the benefit of the three later awards. The other award (9953) was duly cited to and urged upon Referee Schedler in the panel discussion of that case. Instead of relying upon bare numbers, the Referee should have given the reader some clue as to where, in the Referee's opinions, in the cited awards, his "test" was to be found. More especially is this true, when his self-announced criteria was to be used as a basis for disagreement with an award of a distinguished referee of long experience. As was stated recently by Referee Hall in Award 11897:

> "It has been the practice of this Board to follow a precedent once it has been established unless it is subsequently found to be palpably erroneous. By this, we do not mean that we must follow blindly precedent awards; still, if there is to be a departure from or the rejection of a prior award on the property and between the same parties, the reason or reasons for such departure should be set out clearly in the Opinion."

Let us now review the awards, alleged by the Referee, to support his "test".

Award 9953 was written by Judge LaDriere. The opinion states:

> "As to whether the message was a communication of record, it is well to remember that the use of the telephone is not reserved exclusively to telegraphers or any other craft. Award 5182-Boyd, 6703-Donaldson, 9343-Begley and the fact that the substance of a

telephone conversation is reduced to writing does not make it a communication of record. Awards 4265-Shake, 5660-Wyckoff. There is nothing in our record here which shows that the message was ever written. There is no contention here that the Conductor's use of the phone was in lieu of telegraph service formerly performed by an employe and there was no telegraph-operator at Mishawaka.

Under the circumstances and in view of the above, it is our belief that the message was not a communication of record and the claim should be denied. See also Award 5181-Boyd, 5660-Wyckoff, Awards 15, 16, 58 of SBA 117 and Award 58 of SBA 305 and 6363-McMahon and others."

On the same date, May 26, 1961, that Award 9953 was adopted, two other awards of Referee LaDriere were also adopted. These were Awards 9951 and 9952.

As heretofore stated, Award 9951 involved handling messages. The dispute there was between The Order of Railroad Telegraphers and Norfolk Southern. The Referee quoted from Award 4516, as follows:

"The Scope Rule of the Telegraphers Agreement does not purport to specify or describe the work encompassed within it. It sets forth the class of positions to which it is applicable. The traditional and customary work of those positions, generally speaking, constitutes the work falling within the Agreement. * * * It cannot be disputed that the classes specified deal largely with communication service. Historically, communication service on the railroads was carrier on largely by telegraph. * * * The advent of the telephone * * * and other progressive methods of communication, has gradually reduced the work of the Morse code operator. This Board has sought to follow the communication work of the Morse code operator into the advanced methods of communication and preserve for him the work which traditionally belonged to him.

In the case before us, we are concerned only with the use of the telephone. * * * This situation undoubtedly accounts for the inclusion of "Telephone Operators (except switchboard operators)" in the Scope Rule. But it was readily apparent that the use of the telephone was so general that every use of the telephone was not contemplated or intended as telegraphers' work. It was thereupon determined that employes whose duties require the transmitting or receiving of messages, orders or reports of record by telephone in lieu of telegraph constitutes the telephone work reserved exclusively to telegraphers. Award 1983."

Award 9952 involved dispute between Telegraphers' and New York, Chicago and St. Louis (Wheeling and Lake Erie District). There, Referee LaDriere said:

"There is abundant holding that given a Scope Rule which lists positions instead of dolineating the work to be done thereunder, resort should be had to tradition, historical practice and custom. Award 5133-Coffey, Award 4919-Boyd, Award 6032-Whiting, Award 7970-Elkouri, and many others.

* * *

In arriving at a conclusion, we have carefully considered all the elements present — including the interesting information furnished by Carrier in the record as to the development of the handling of lineups over a great period of years, the attempts of the Organization to amend the agreement so as to obtain a better position from which to deal, and other matters in the case, particularly the great weight of the Awards which favor the Organization, and it is our opinion that we should adhere to the position that the sending or receiving of lineups under the circumstances herein has been and is the work of telegraphers. Award 4516-Carter; 5181, 5182-Boyd, 8183-Smith, 6588-Rader, 4772-Stone, and numerous others."

Thus, it is clear that the prime issue in Award 9953 was whether the telephone conversation constituted a communication, within the class exclusively reserved to Telegraphers' under the Scope Rule. The Referee, found as a fact, that it was not within such category and denied the claim. In Award 9951, he found that the messages, there involved, were within the class and sustained the claim.

In Award 9952, there was no question as to whether the line-ups were within the class. The question was whether such communications were reserved to Telegraphers' under the Scope Rule of the Agreement. The Referee found in favor of the Organization.

Award 9953 does not support the "test" announced by the Referee in the instant case.

The next award, cited, in date order, is Award 10425. This dispute involved the handling of two messages concerning reservations of sleeping car space on passenger trains. Referee Dolnick cited Award 9953, then said:

"The principle laid down by this Board in Award 6363 (McMahon) is applicable here. The Board said:

'The record shows ticket clerks held positions at Boulder and were members of the Clerks' Organization. Their duties, as designated by the position as "Ticket Clerks", were primarily employed to sell tickets and perform other duties incidental to their work. They also were required to handle telephone communications concerning passenger reservations. Certainly it cannot be said this is work belonging to the Telegraphers.'"

It is clear that the primary question in Award 10425, as in Award 9953, was whether the messages were within the class exclusively reserved to Telegraphers' under the Scope Rule. The Referee found they were not.

In Award 10918, the issue was whether telephoning certain train information to operator at adjacent telegraph station, by clerical employe was violative of Scope Rule. The Referee found, as a fact:

"Formerly the messages, were transmitted directly to the train dispatcher. Beginning in 1952, at the request of the Organization, the messages when not handled by the Telegrapher were transmitted to near-by Telegraphers. This claim was initiated in February 1956."

The Referee also found that there had been no change in the collective bargain, that would have bearing on or vitiate the existing practice. The Referee specifically, however, distinguished Award 10356, as follows:

> "Nevertheless, it is urged that Award 10356 which involved the same parties as here is controlling. But an examination of the record in that case shows that that claim was based on a trainman telephoning the dispatcher an "in the clear" report. That is not the basis of the claim here. We believe that Award 7825 parallels the situation here and should be given great weight."

Award 10918 (Boyd) was written by a distinguished Referee, who had had much experience on this and other Divisions of the Board. That he was quite familiar with principles to be applied in construction of Telegraphers' Scope Rule, is shown by his citation of Award 4516 in Awards 4919, 4923, 4925, 4926, 5181 and 5182. Referee Dolnick, author of Award 10425 was also familiar with Award 4516, citing it in Award 10515, as follows:

> "There is no disagreement with the Organization's contention that teletype machine operators and printers are covered by the Scope Rule and that clerks may not replace telegraphers when such automatic machines are installed. Awards 9988 (Begley), 10192 (Begley) and 864 (DeVane). In the case now before this Board, clerks did not replace telegraphers. The Carrier had no Agreement with the Organization covering telegraphers at Houston. Award 4516 (Carter) cited by the Organization is not to the point and does not deal with the question here involved."

The last award, cited by the Referee, as supporting his "test" was Award 11592. (Referee Stark). In the last paragraph of the Opinion it is stated:

> "It may also be noted that in Award 10367, cited by the Organization, the Telegrapher's claim was sustained because of a consistent pattern of Carrier settlements which, the Board found, warranted the conclusion that 'practice, custom and tradition has been established on this property to allow the telegrapher at the adjacent station a call where the regular morning lineups are copied by an Employe . . . direct from a dispatcher . . .' But, as noted above, in the case at hand there is no evidence or proof of an established practice or consistent pattern which would support Petitioner's claim." (Emphasis ours.)

In the first paragraph of the Opinion, in Award 10367, it is stated:

> "This particular case is limited, however, to the copying and handling of train lineups by a Gang Foreman or an Employe under his supervision at point where no telegraph service Employes are employed."

The partial quotation, in Award 11592, from Award 10367 reads in full as follows:

> "We believe from our examination of the record that practice, custom and tradition has been established on this property to allow the telegrapher at the adjacent station a call where the regular morn-

ing lineups are copied by an Employe not covered by the Telegraphers' Agreement direct from a dispatcher while at a point where no telegraph service Employe is employed."

It is interesting to note that Award 10367, cited in Award 11592, involved the same parties, and the same Agreement as in the instant case. On the other hand, Award 11592 involved dispute between Telegraphers' and Clinchfield Railroad. Further, it must be noted that Referee McDermott, in Award 11367, said:

"We have given particular attention to Award 9952 and 8329 cited by the Organization. We do not believe that on this property under the circumstances herein this decision is at variance with the aforementioned awards."

We have heretofore discussed Award 9952. Award 8329 involved the handling of a message. The dispute was between the same parties and involved the same Agreement Rule that was before the Board in the instant case. In this Award (8329) Referee McCoy said:

"The Carrier contends that to sustain this claim would overthrow a forty-year practice. The evidence does not support this contention. The Organization cited a number of claims which had been paid on somewhat similar facts, and one claim that had been paid on identical facts.

Since we find that the message communicated by the signal maintainer was of that class, the communication of which is reserved to telegraphers under the Scope Rule, the claim must be sustained."

CONCLUSION

As stated at the beginning of this dissent, the Referee is possessed of an "awesome power", when he can, without giving logical reasons, strike down the claims of the Claimants in Dockets TE-10217, 10218, 10219 and 10220. Under the law, as construed by the Supreme Court of the United States,[2] the Claimants are forever barred from recovering the small sums involved in these particular claims. The awards are, the Court holds, as a matter of law, final and binding, insofar as they dispose of the particular monetary claims.

With one exception (in Docket TE-10220), the parties to the instant dispute recognized that the issues in Docket TE-8456 (Award 10356), were the same. It is not unlikely that both parties felt that the same decision would be rendered in these cases as in the earlier case. Had the Referee chosen to follow the direct precedent of Award 10356, and sustained the claims, then the Carrier would have had an option to accept the decision or refuse to comply with the award or awards. In the latter event, the Organization and the Claimants, would have been left to the remedy provided in 45 USCA Section 153(p), The Supreme Court has said[3] that this remedy is exclusive.

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

[3] Brotherhood of Locomotive Engineers, et al v. Louisville & Nashville (10 L ed 2d 172)

Award 10356 was rendered on February 16, 1962. The Board fixed April 16, 1962, as the date of the order for compliance by Carrier. The award required the payment of money. The Carrier had the option of recognizing the legal validity of the award or refusing to comply therewith, thus forcing a review by appropriate federal court. It is assumed that the officers of Carrier, including its legal department, made a complete evaluation of the award, in the light of the record presented to the Adjustment Board and pertinent court decisions. Such evaluation, as to legal probity, undoubtedly included a careful evaluation of prior awards of this Division. After such evaluation, in due course, the Carrier officers charged with making such decision, found it proper to fully comply with the provisions of Award 10356. Substantial payments were made, to employes entitled to receive same, under the provisions of the award.

An anomaly is thus created, that a Referee of this Division has rendered an award, finding that a prior award is "palpably erroneous", when in fact, the Carrier, itself, acting through its duly authorized officers, has decided that the prior award (10356) was legally enforceable. An award certainly is not "palpably erroneous" when one of the parties, having the right, as a matter of law, to force federal court review, pays substantial amounts in full settlement of same. In the case referred to in Footnote 3, the Court held that the Organization could not utilize the strike weapon to enforce an award of the Adjustment Board.

In view of the foregoing, it is clear that Awards 11882, 11883, 11884 and 11885 are erroneous. They have merely served to deprive the Claimants of compensation contractually due them. Conceding the inexperience of the Referee, and the mass of material with which he had to cope, it is still not understandable why the awards were proposed or adopted. A sense of impartial caution should, it seems, impel the new referee to accept direct precedents. Other ad hoc referees, without previous experience with this Board, regularly do so. Indeed, to fail in this regard, is to endanger the efficacy of the Board's decisions.

LABOR MEMBER
J. M. Willemin

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 11882, DOCKET TE-10217

We have stated previously, the purpose of a dissent is to clarify and enlighten — not confuse or mislead. Unfortunately, the Dissentor again attacks the decision in Award 11882, not on the basis of a direct and honest appraisal of the record — but solely on the personal grounds that the Referee was a so-called "novice". It is obvious this attack is a negative tribute to the Referee's perceptive ability to distinguish between proper and improper authoritative citations and apply only that authority which is directly relevant to the issue.

The Dissentor states that "the uninhibited exercise of 'such awesome powers' by a Referee not having had previous experience on any Division of the Board, is the subject of this dissent." (Emphasis ours.)

A dissent which has for its avowed purpose an attack on the Referee's inexperience or exercise of "awesome powers", has clearly missed its pur-

pose. The Dissentor's arguments might be relevant, although hardly meritorious, if they were placed in the Congressional record as part of a movement to change the structure and purposes of the Railway Labor Act. However, those comments are not befitting in a dissent to an award of this Board.

We propose to briefly discuss two aspects of this dissent. First, we intend to set the record straight on Award 4516 and its application to the facts of the case. Secondly, we will objectively review the test applied by the Referee in Award 11882.

First, the Dissentor makes a comment regarding Award 4516, which sets the stage for his dissent and is, of course entirely incorrect. He says:

> "* * * It is now, much too late for the novitiate to attack the soundness or reasoning of Award 4516." (p.5)

The Dissentor is entirely wrong when he says the Referee in Award 11882 attacked "the soundness or reasoning of Award 4516." We agree he certainly had sufficient grounds for attacking that award — grounds which another "experienced" Referee — fully exploited — but the fact remains he did not attack the logic or the rationale of Award 4516. The reader can best judge the veracity of the Dissentor's statement by reading the Referee's only comment on Award 4516, as follows:

> "Award 10356, involving the same issues, parties and Agreement, is palpably wrong. Instead of applying the above test, Award 10356 rests its reasoning solely upon Award 4516 involving a different Carrier (which would not necessarily have the same traditions, custom and practice as the Carrier herein), and involving the issuance of line-ups."

The Referee in Award 11882 simply pointed out the reason for his conclusion that Award 10356 was palpably wrong. That conclusion was predicated on the Board's failure to apply the test which we have applied in literally hundreds of cases, and which we correctly applied in this case. He properly found the Board erred in Award 10356 — not 4516 — in accepting the custom and practice on another railroad when the proper test is to look at the custom, practice and tradition of the railroad whose Scope Rule he is interpreting.

Because the Dissentor has incorrectly ascribed a statement to the author of Award 11882, which the record shows he did not make, we would take the opportunity to make an observation of this sacrosanct Award 4516, and then permit the reader to draw his own conclusions as to the accuracy of the remaining remarks of the Dissentor concerning that award.

The general principles which Dissentor asserts were enunciated in Award 4516, are not set forth except indirectly, in the citation of other awards. For example, an extract is quoted from Award 10364, which in turn, contains the following quoted portion of Award 4516:

> "In discussing the Scope Rule of the Telegraphers Agreement, Judge Carter the Referee in Award No. 4516, says in part:
>
> 'This Board has sought to follow the communication work of the Morse code operator and preserve for him the work which traditionally belonged to him.
>
> * * *

'But it was really apparent that the use of the telephone was so general that every use of the telephone was not contemplated or intended as telegraphers work. It was thereupon determined that employes whose duties require the transmitting or receiving of messages, orders, or reports of record by telephone in lieu of telegraph constitutes the telephone work reserved exclusively to telegraphers Award 1983.'"

The reader will notice the author of Award 4516 cites only one award as his authority — that was 1983. In our recent decision, Award 11908 (Hall) (an experienced Referee), we had these comments to make with regard to the esteemed authority for Award 4516, namely, Award 1983:

"In addition to the comment made concerning Award 3114 in Award 4770 it is imporant that we comment further on Award 3114. In that Opinion the following language from Award 1983 — Bakke was cited with approval:

'. . . The Award there quoted with approval a statement from the United States Labor Board as follows:

"Thus, it is law by order and contract that employes whose duties require the transmitting and/or receiving messages, orders and/or reports of record by telephone in lieu of telegraph are properly classified as working under the Telegraphers' schedule and such duties belong exclusively to that class."'

"In using this statement in Award 1983, the Opinion cited Award 604, (Swacker) and from that award Referee concluded that Decision No. 757 of the United States Railroad Labor Board had held as he had quoted in Award 1983. This was in error, as what the Referee in Award 1983 had quoted as a decision of the United States Railroad was in fact nothing more than argument presented by the Order of Railroad Telegraphers in their Submission in Award 604. An Award is no stronger than the reasoning and authority behind it. Consequently, we must reject the Awards cited in support of Claimant's position."

By an odd coincidence, this same comment is found in another award and there stated in this manner:

"* * * We quite agree that awards interpreting agreements ought not to be overturned except for very sound reasons. Changes in the interpretations of identical provisions of agreements tend to confuse rather than facilitate their application. We must point out, however, that an award cited as a precedent is no better than the reasoning contained within it, especially where awards in conflict with it exist. * * *"

The award announcing this principle is none other than — Award 4516. We must assume the Dissentor embraces that statement with the remainder of Award 4516. On what grounds then, can the Dissentor justifiably attack a decision when the Referee follows this precept enunciated in 4516? The cloak

of infallibility which the Dissentor seeks to lay across the shoulders of Award 4516, does not look well when the decision which served as the fountainhead for the principles stated therein, is disclosed to be entirely erroneous. It is quote improbable that the author of Award 4516, a distinguished jurist, would make the same claim for his decision, that the Dissentor now makes, if he were aware of the facts now revealed in Award 11908, facts which the Dissentor has known all along. Indeed, based on his own remarks set out above, we are inclined to believe he would be the first to concede the error and disavow the award.

We noted previously, the Dissentor attacks Award 11882 because of the test applied by the Referee. We said we would review the test to determine whether it was as the Dissentor infers, a test applied for the first time by this Referee. The simple answer again will be found in Award 11908 (Hall), where the same test was applied as follows:

> "It will be noted that the Scope Rule involved here is of the general type which does not define nor describe work, but simply lists, by title, the classes of employes who are covered by the terms and provisions of the Agreement. In interpreting such general type scope rules, this Division has consistently applied the principle of determing whether or not the work in dispute has been performed exclusively by Claimants through practice, custom and tradition on the property of the Carrier involved, and that under this principle the burden rests with the Petitioner to prove the Claim. See Award 4791 — (Robertson); Award 5564 — (Elson); Award 10425 — (Dolnick); Award 10675 — (Ables); Award 10951 — (Ray); Award 10954 — (Dolnick); Award 10967 — (Dorsey); Award 11812 — (Christian)."

In Award 10918 (Boyd), whom the Dissentor characterizes as a "distinguished Referee" with which we are in agreement, applied the test as follows:

> "The Scope Rule on this property and on most others had its genesis in the U. S. Railroad Administration and first appeared in Agreement between these parties in the July 1, 1919 Agreement. It has remained practically unchanged through several contract renegotiations. It enumerates the positions covered by the Agreement. It does not define the work; nor does any provision of the Agreement do this. In order, therefore, to support the contention that the Claimant has exclusive right to the work, the subject of this claim, resort must be had to tradition, historical practice and custom; the burden of proof being on the party claiming the work (Award 6824).
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> * * *
>
> "As we have found that on this property the Scope Rule does not reserve to employes under the Telegraphers Agreement the exclusive right to the work the subject of this claim, we must conclude that the Carrier did not violate the Agreement as alleged, and therefore the claim should be denied."

It is clearly apparent the test has been applied by many Referees — all of whom could hardly be classified as novices.

The decision in Award 11882 is perfectly sound and is based upon a wealth of precedent for support.

CARRIER MEMBERS

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