# Award No. 12494
# Docket No. TE-10649

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

## (Supplemental)

**Benjamin H. Wolf, Referee**

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## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Richmond, Fredericksburg and Potomac Railroad, that:

1. Carrier violated the terms of the Telegraphers' Agreement when and because it permitted and required Conductor Johnson of Work Extra 104 to handle (receive, copy and deliver) train orders Nos. 2 and 6 addressed to his train at Possum Point, Virginia, October 3, 1957.

2. Carrier shall compensate the senior idle employe (extra in preference) for a day's pay — eight hours at the applicable rate, October 3, 1957, for the aforesaid violation. The name of the employe entitled to the compensation to be determined by a joint check of the Carrier's records.

3. Carrier violated the terms of the Telegraphers' Agreement when on the 7th day of June, 1957, it permitted and required Brakeman Brittain of Extra 1107 to handle (receive, copy and deliver) train order No. 3 addressed to C&E of that train at Possum Point, Virgina.

4. Carrier shall compensate the senior idle telegrapher (extra in preference) for a day's pay — eight hours June 7, 1957, for the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining Agreement between the Richmond, Fredericksburg and Potomac Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The Agreement was effective April 10, 1953, and is on file with this Division. The Agreement, by reference, is incorporated into this submission as though set out herein word for word.

When proper consideration is given to everything that has been heretofore stated, and due note is taken of its form and position as incorporated in Article 21, there can be little doubt that subsection (b) supra, must be regarded as qualifying the force and effect to be given the provisions of subsection (a), supra, which precedes it. So regarded, we believe that inherent in such subsection, and certainly if not inherent clearly implied therein, is the proposition that —so far as the particular agreement now in force and effect on the involved property is concerned—if train orders are handled at stations where no member of the craft is employed, they may be handled by other employes."

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In conclusion, the Carrier submits it has shown that the claims are without merit, unsupported by any rules, practice or precedent, or on any logical premise, but merely constitute an attempt on the part of the Organization to secure through an award from the Board an interpretation not intended by the parties when the rules were negotiated and is a further effort to force the Carrier to establish telegraphers' positions where none are required and could not possibly serve any useful purpose. It is clearly an unjustified make-work demand and all the claims involved should be dismissed or denied for the reasons stated herein.

OPINION OF BOARD: The facts are not in dispute. On the dates involved, conductors copied train orders by telephone at a blind siding where a telegrapher was not then employed and had never been employed theretofore.

The issue is whether or not the handling of train orders at blind sidings is work reserved exclusively to telegraphers.

The Organization relies on the Scope Rule and on Article XVII, which reads as follows:

"ARTICLE XVII.
HANDLING TRAIN ORDERS

(a) No employe other than covered by this Agreement and train dispatchers will be permitted to handle train orders except in cases of emergency.

(b) If train orders are handled at stations or locations where an employe covered by this Agreement is employed, but not on duty, the employe, if available or can be promptly located, will be called to perform such duties and paid under the provisions of Article VII; if available and not called, the employe will be compensated as if he had been called.

(c) Emergencies as specified in the preceding paragraphs of this Article shall include only casualties or accidents, storms, engine failures, wrecks, obstructions to tracks, washouts, tornadoes, slides or unusual delays due to hot boxes or break-in-two, that could not have been anticipated by the dispatcher, when the train was at the last previous open telegraph office, and which would result in serious delay to traffic."

The Scope Rule is general in character. It does not specifically and clearly define the work which is reserved to telegraphers. Under such a rule, Claimants' right to the work which they contend belonged exclusively to them, must be resolved from a consideration of tradition, historical practice and custom. Award No. 10425 and awards therein cited. Here the uncontested fact is that there was no history, practice or custom that telegraphers did this work at this blind siding. The Scope Rule, therefore, does not support this claim.

Standing by itself, Article XVII (a) would seem to support the claim. Carrier contends that subsection (b) limits the application of the Article to those stations or locations where persons covered by the Agreement are employed, and that, since there are none employed at this blind siding, the claim must be denied. The position of the Carrier is supported by the most recent awards dealing with this point. Award No. 6863 (Parker) held that subsection (b) must be regarded as qualifying subsection (a) and that, therefore, "if train orders are handled at stations where no member of the craft is employed they may be handled by other employes." More recently, Award No. 12015 (Christian) denied a similar claim on the authority of Award No. 6863.

The Organization attacks the authority of Award No. 6863 in that Referee Parker decided the claim on other grounds than those before him, i.e., the Carrier had claimed that the work done was not the handling of a train order. It did not argue that subsection (b) was a limitation on subsection (a), and, in fact, did not attack subsection (a) in any way. The implication of this criticism is that although the Carrier in Award No. 6863 deemed subsection (a) to apply to all train orders, the Referee gratuitously and incorrectly decided the claim on a novel theory which no one had advocated and which the Organization had had no opportunity to refute. Such an attack warrants a full scale re-examination of the issue.

The Organization contends that subsection (a) clearly established the parties' intention to award exclusive jurisdiction over train orders to telegraphers. It notes that subsection (c) qualifies this by excepting emergencies, which are therein defined. But, subsection (b), it argues, does not qualify subsection (a). It merely provides a method of determining the measure of damages in the event of a breach of the agreement.

Carrier asserts that prior to the adoption of Article XVII in 1953, the parties did not have a train order rule, and it was uncontroverted that, prior thereto, it was the existing practice of engine and train service employes to handle train orders at blind sidings. In negotiating the 1953 agreement, the Organization submitted the following paragraph in its proposed train order rule:

> "(c) If train orders are handled by persons other than those covered by this agreement in non-emergency cases at locations where an employe under this agreement is not employed, the senior idle extra employes will be allowed a day's pay for each occasion and at the minimum rate on the seniority district."

This paragraph was rejected by the Carrier in the negotiations and no such provision appears in the train order rule adopted.

The Carrier argued that the rejection of the proposed subsection (c) was a rejection of the attempt by the Organization to obtain exclusive jurisdiction of the handling of train orders where no telegrapher was employed. We do not think that the rejection necessarily carries that implication. The

proposed paragraph sought to specify the measure of damages by proposing a day's pay for each violation. The more logical implication of the rejection was that the Carrier refused to agree to pay for a full day. Such an implication would be consistent with the position of the Carrier when it agreed with subsection (b), which provides for a "call" for such a violation. Perhaps if the Organization would have accepted a call instead of a day's pay, agreement might have been reached on this measure of damages.

The rejection of the paragraph left the measure of damages unresolved. It is a well settled rule of law that failure to agree on the measure of damages does not preclude the granting of damages in the event of a breach of contract.

Paragraph (a) clearly gives the Organization exclusive control of the handling of train orders. This was the primary purpose of the rule. If the rejection of the proposed paragraph (c) carried the implication advanced by the Carrier, i.e., that it was resisting the attempt of the Organization to obtain exclusively jurisdiction over the handling of train orders where no telegraphers were employed, they could have resolved any ambiguity created by their rejection of the proposal if they clearly limited the application of paragraph (a) to stations and locations where telegraphers were employed. This they did not do. In this context the Carrier should not be granted an interpretation of the rejection more extensive than that it did not agree with the paragraph as proposed.

This Board has frequently held that if an exception is stated, no other exception can be inferred. Subsection (c), which deals with emergencies, is such an exception. Award No. 6863, if applicable here, would imply an exception in addition to subsection (c) and would be in contravention of this well established rule of interpretation. For these reasons, we do not agree that subsection (b) qualified subsection (a), as decided in Award No. 6863.

Carrier argued that past history should be considered in interpreting Article XVII. Whatever happened prior to 1953 was changed by the explicit language of subsection (a).

Carrier states that the failure of the Organization to protest its continuance of the pre-1953 practice is proof that there was no intention to change that practice. We disagree. The failure to assert a clear right does not extinguish it, nor does it change the intention of the parties as they expressed themselves in the language they used.

For our purpose the historic rejection of the proposed paragraph (c) has significance solely in that Carrier never agreed to a day's pay as the quantum of damages. The Organization has not proved that the senior idle employe (extra in preference) is entitled to a day's pay. Under the Agreement such an employe would be entitled to no more than a "call", or three hours' pay at the rate of the position.

In view of the fact that this Award will overrule Awards No. 6863 and No. 12015, upon which the Carrier depended, it would be unfair to impose damages. Precedent is of exceeding importance in the operation and interpretation of rules. It would be manifestly improper to reverse a precedent upon which reliance had been had, and thereby impose a financial obligation. Such a course of action would have two deleterious effects. It would penalize those who in good faith acted in reliance upon the Awards of this Board, and it might discourage this Board from reversing a precedent where that precedent, upon serious and thorough review, is deemed incorrect.

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 Carrier violated the Agreement to the extent set forth in the Opinion.

AWARD

Claims 1 and 3 are sustained.

Claims 2 and 4 are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of May 1964.

CARRIER MEMBERS' DISSENT TO AWARDS 12494, 12495, AND 12496, DOCKETS TE-10649, TE-10650, AND TE-10651

Referee Benjamin H. Wolf

In these Awards the majority committed error by failing to apply the well-established rule of contract construction, that of construing the rule in its entirety, each paragraph being read in light of the others, to ascertain the parties' intent. (Awards 11767 and 10785.) Had this well-established rule been applied, the consistent, harmonious and sensible result would have been that Article XVII applied only at stations or locations where an employe covered by the Agreement is employed.

For this and other reasons the awards are erroneous and we dissent.

R. A. DeRossett
R. E. Black
W. F. Euker
G. L. Naylor
W. M. Roberts