Award No. 13222
Docket No. TE-12208

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD CO. (Wheeling and Lake Erie District)

THE ORDER OF RAILROAD TELEGRAPHERS

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

1. Carrier violated telegraphers' agreement, when on October 24 and November 3, 1958, it required and permitted Brakeman Engleman, train No. 170, to receive, copy and deliver train order No. 221 and Engineer H. E. Yoder, on train No. 192, to receive, copy and deliver train order No. 208 at Mishler, Ohio, direct from dispatcher at Brewster, Ohio.

2. That Brakeman Engleman and Engineer H. E. Yoder are not employes covered by the telegraphers' agreement.

3. Carrier shall compensate senior idle extra employes R. G. Garl, first out on board October 24, 1958, and Gary Farnsworth, first out on board November 3, 1958, with one days pay, 8 hours each, at the lowest rate shown in the wage scale on October 24 and November 3, 1958, covering telegrapher positions for the above violations.

4. Also, carrier shall compensate senior idle extra employe or senior idle employe on rest, as case may be, for all subsequent dates of violations at Mishler, Ohio, joint check of carrier's records to determine dates of violations, also name of employe.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute, effective as to rates February 1, 1951, and effective as to rules February 1, 1952, and as otherwise amended.

At page 14 of an Agreement between the parties hereto, effective February 1, 1910, appears the following listing:

LOCATION	TITLE	RATE PER MONTH
Mishler	Agent and telegrapher	$60.00

The date upon which the above listed position was discontinued by the Carrier is not present in the record of this case.

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 45 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, by the institution and progression of this claim, are attempting to secure what they have been unable to secure by negotiation on the property. A sustaining award would have the effect of granting the rule requested by the Employes. The writing of new rules is not a function of this Board.

The Carrier submits that this case is on all fours with Items 1, 2, 3, and 4 in Docket TE-8374 involving the Delaware and Hudson Railroad. The following reasoning of this Board in denying such claims in Award 9204 rendered recently is particularly applicable here:

> "Since the exclusive right here sought is not given by any rule of the agreement we must seek for tradition and practice. Traditionally the receipt of train orders was restricted to telegraphers; only they knew the Morse code. The telephone was not only a substitute for the telegraph but it also permitted much more extended communication and at more places than possible with the Morse code. Infrequent calls for train orders at a blind siding arising from unexpected situations are not in substitution for telegraph service but rather they employ an additional means of communication not known before the telephone appeared. We cannot believe it material whether received from a telegrapher or dispatcher. The docket before us shows long continued practice on the property for conductors to handle train orders directly from the dispatcher at blind sidings and the unsuccessful attempts by the Organization to obtain revision of the Train Order Rule to give telegraphers the exclusive right to that service as here contended for."

(Exhibits not reproduced).

OPINION OF BOARD: This is a case wherein a Brakeman and an Engineer received, copied and delivered train orders direct from a Dispatcher at Mishler, Ohio, a location where a telegrapher was not employed but where in fact one was so employed over 45 years ago, at which time the position was abolished. A telephone connected to the dispatcher's circuit was installed and used at that particular location.

The Organization contends that the Carrier, by permitting the above practice, has violated the basic contract, to wit; Rule 1, Scope; Rule 2, New Positions- Classification—Rating Positions; Rule 12, Seniority; Rule 15 (f) New Positions of a Temporary Nature; Rule 24, Extra Board Assignment of Extra Employes; and Rule 26, Handling Train Orders.

With reference to Rule 15 (f), the employes maintained that when the Brakeman and Engineer handled the subject train orders, such handling had the effect of re-opening the telegrapher position thus creating a new position

of a temporary nature of less than 30 calendar days to be filled by qualified extra employes. They also maintain that Rule 2 is controlling in this case, especially so when considered in conjunction with the Scope Rule; that both provide for the incorporation into the Agreement of positions, the occupants of which perform work similar to that performed by the occupants of positions listed in the Scope Rule. They therefore interpret Rule 2 to mean that where employes perform service in the classes set forth in Rule 1, the position so created belongs under the Scope of their Agreement. Furthermore, that where this is not possible without adding language to the Agreement, then employes classified in accordance with Rule 2 under the classifications as set forth in Rule 1, who have been denied the right to perform the class of work, are nevertheless entitled to pay.

The employes also submit for the Board's consideration the allegation that Rule 26 has been violated, in that it specifically reserves to the telegraphers, as a class and craft on this property, the exclusive right to handle communications of record in connection with the receiving, copying and delivering of train orders; further that the Carrier's use of train service employes at Mishler to perform the train order work displaced employes covered by the Agreement at this station location. This Rule reads as follows:

"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."

Additionally the employes allege that the Scope Rule, by listing the various classifications of positions covered by the Agreement, not only of necessity includes the work of such positions, but also grants them the exclusive right to such work. This essentially is the argument propounded by the employes in their original Ex Parte Submission insofar as this specific rule is concerned. However, in their rebuttal, in commenting upon the Carrier's defenses to the effect that the Scope Rule is broad and general and does not grant the exclusive right etc. as well as the Carrier's defense of practice, they state that "fortunately, here the general rule of interpreting and applying the Scope Rule of telegraphers' Agreement does not apply. Special Rule 26 applies."

The Carrier in defense asserts that the Scope Rule, listing the positions covered by the Agreement, appeared in contracts as far back as 1910, and that the Rule as currently written first was incorporated into the contract which became effective on July 1, 1919; that it was continued with but minor changes in subsequent contracts, which became effective as listed below:

November 1, 1923
February 16, 1926
April 1, 1938
February 1, 1952

The latter is the presently effective Agreement, and as Carrier states it is pertinent to an adjudication of this case to mention that the present Scope Rule first became effective five years after the last telegrapher position at

Mishler was abolished. Directing our attention to Rule 26, the Carrier states that this rule first appeared in the working Agreement, effective February 16, 1926, over twelve years after Mishler was closed and has been part of all subsequent working Agreements without change. They further point out that it is difficult to understand how the copying of train orders in 1958 displaced a telegrapher whose position was abolished almost 45 years prior thereto.

The Board in this case has been presented with numerous awards by both opposing factions. They include an infinite variety of factual situations over a long protracted period of time involving many different Carriers including the one in this case. These claims have developed into a substantial number of sustaining awards as well as an equally substantial number of denial awards. Some decisions are distinguishable from one another because of differing factual situations; however, a careful analysis of many of them leads one to the conclusion that this subject is a veritable jungle of conflicting and indeed blatantly obvious contradictory decisions. It thus becomes apparent that despite the extended period of time since the advent of the telephone, the parties to this dispute including other Carriers, have been unable to resolve this controversy or to reach any fundamental Agreement as to the meaning and effect of the rules involved.

With this as prologue we address ourselves to the evidence as presented in this case. It reveals that the present Scope Rule has been incorporated into every Agreement, beginning with the Contract of July 1, 1919, and that it has contained substantially the same language except for some minor modifications which had no effect on its substantive meaning. It is a broad general Scope Rule merely enumerating the positions covered by the Agreement and does not delineate nor define the work. Therefore, in order 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 with the burden of proof being on the party claiming the work. The Carrier has presented us with a preponderating body of evidence which shows conclusively that the practice on this property over many years has been diametrically opposed to the contentions advanced by the Organization. It is true that the Organization did list a number of cases where it was shown that the Carrier agreed to pay for certain calls made by employes not within the Scope of the Agreement, but each one of those cases is distinguishable on a factual basis from the instant case. The evidence, when considered in conjunction with this Scope Rule convinces us that the Telegraphers do not have that exclusive right which is so necessary for a sustaining award. We are further buttressed in our opinion by the fact that many specific attempts were made over the years by the Organization to revise the Contract to the extent that the claim involved, had the revisions been adopted, would now require us to issue a sustaining award. However, these attempts were unsuccessful and are persuasive that the Scope Rule does not give the telegraphers the exclusive right to perform the work involved. It is our considered judgment that the controlling rule in this case is the Scope Rule, and that the other rules cited by the Organization are of secondary importance. They do not change, modify or restrict the application of the Scope Rule in this case and we accordingly and specifically reject the contentions of the Organization that Rule 26 gives them the exclusive right to the work. The meaning and intent of the language contained therein is clear, concise, unambiguous and does not in any way restrict the Scope Rule.

The principles enunciated in this decision are by no means "de novo", since they have been articulated innumerable times in many decisions of this Board. We therefore do not consider it necessary to cite any specific awards

as precedents for our findings. We have specifically avoided citing and discussing other awards which have been presented to us by the Organization, because to do so would require a prolonged dissertation of the subject matter, requiring us to make distinctions, which, in our judgement, because of the multiplicity of conflicting decisions, would serve no useful purpose. Suffice it to say that all the awards presented by both sides have been carefully analyzed, and that the reasoning and principles upon which reliance has been made in this case, find support in many of them. We will deny the claim.

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 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 28th day of January 1965.

DISSENT TO AWARD NO. 13222
DOCKET NO. TE 12208

On October 31, 1957 The Order of Railroad Telegraphers instituted proceedings before the Board on a claim wherein the Board was requested to rule on specific claim reading as follows:

"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 employ to be paid."

That dispute was progressed in accordance with rules of procedure of the Board and was assigned Docket No. TE-10131. The Carrier filed in that Docket four separate submissions wherein its position with regard to that claim was set forth in full.

Due to the backlog of cases before the Third Division, the dispute was not reached until 1963.

On August 5, 1963 the dispute was resolved in an Award rendered by Referee Jim A. Rinehart, which was adopted by the Board as Award 11667 reading as follows:

"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 occurence 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. Awards 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.

'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, 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 this 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) is 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."

Under date of June 30, 1960 the New York, Chicago and St. Louis Railroad Company (Wheeling and Lake Erie District) instituted proceedings before the Board in the claim that is set forth in Award 13222. This dispute was ultimately docketed as TE-12208. In this case the Railroad requested the Board to enter declaratory judgment on the claim that had been presented to it by The Order of Railroad Telegraphers. In this dispute the parties were given an opportunity, in accordance with the rules of the Board, to present their respective positions. The submissions in this docket were, of course, all prepared and submitted prior to the rendition of Award 11667.

The question presented for decision in the dispute that resulted in Award 13222 is indistinguishable from the question submitted to the Board and resolved in Award 11667. Yet, it is to be noted Referee McGovern did not see fit to mention the precedent award.

Referees and partisan Board Members alike have throughout the history of the Board insisted that the usefulness of the Board was dependent upon following the principle of adherence to established precedent. More especially when the prior Interpretation involved the identical Agreement rules, same parties, similar facts, etc. Referee McGovern has in several of his awards recognized this principle.

In Award 12924, adopted on September 28, 1964, Referee McGovern said:

"This Board has frequently held that, unless palpably wrong, it is never warranted in overruling a prior award between the same parties involving the same agreement rules and the identical issues. Award 6833, 7968, 9954, 10050, 10288. We have carefully examined Award 12820. It is not palpably erroneous, and we adopt the decision as controlling precedent in this case."

In Award 13153, adopted on December 11, 1964, Referee McGovern said:

"The Board has taken into consideration the brief and the many awards presented to it, but is unable to find anything contained there-

in which would justify it in ignoring Award 5886. In the interest therefore of the doctrine of 'stare decisis' and relying on 5886, we must deny the claim."

That Referee McGovern was quite familiar with the principle, it is to be noted from his citation of Awards 6833, 7968, 9954, 10050, 10288. The Referees in these respective Awards stated:

In Award 6833, adopted December 3, 1954, Referee Fred W. Messmore said:

"From an analysis of the record in its entirety, we adhere to the interpretation placed on Rule 35 (c) thereunder by the Referee in Award 5932. This award should be accepted as binding on the parties. While the presentation made by the Employes lends force that the rule may be inadequate, this matter is one for negotiation between the parties. Negotiation apparently was had on the Chicago, Milwaukee, St. Paul and Pacific Railroad as is evidenced by the present Rule 34 (d) between the parties on that Carrier.

For the reasons given herein, the claim should be denied."

In Award 7968, adopted June 20, 1957, Referee Frank Elkouri said:

"The result reached in Award 5182, which is given some additional support by Awards 5181 and 5660, makes the following statement in Award 6833 relevant here:

'In the instant case, the following is applicable: "Unless palpably wrong this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous award construing the identical provisions of their contract." See Awards 2517, 2526.'

While there are some distinctions between the present case and the cases covered by Awards 5181, 5182, and 5660, those distinctions are not sufficiently significant to entitle this Board to sustain the present claim in the face of said Awards, which definitely are not 'palpably wrong.'

The denial Award herein is based upon controlling precedent on this same property and is not intended to be taken as an indication of how this Board might decide a similar issue on some other property."

In Award 9954, adopted May 26, 1961, Referee Raymond E. LaDriere said:

"This Division has long held that, unless palpably wrong, the Board is never warranted in overruling, in a subsequent dispute, a previous Award construing the same provision in their agreement. Awards 7968-Elkouri, 8104-Guthrie, 8687-Lynch; and whether a prior award constitutes a controlling precedent is dependent upon the soundness of the reasoning upon which it is based. Awards 8687-Lynch, 4516-Carter, 6094-Whiting, 4770-Stone, and others."

In Award 10050, adopted September 6, 1961, Referee Frank J. Dugan said:

"In Award 7968 the Board held:

'The result reached in Award 5182, which is given some additional support by Awards 5181 and 5660, makes the following statement in Award 6833 relevant here:

> "In the instant case, the following is applicable: 'Unless palpably wrong this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous award construing the identical provisions of their contract.' See Awards 2517, 2526."

'While there are some distinctions between the present case and the cases covered by Awards 5181, 5182, and 5660, those distinctions are not sufficiently significant to entitle this Board to sustain the present claim in the face of said Awards, which definitely are not "palpably wrong."'

"Rule 20 does not, as the Organization alleges, distinguish Award 2702 from the present case because it is merely a pay classification section. Nor does the fact that the Claimant assisted the foreman change the situation for so did the Claimant in Award 2702. Hence since Award 2702 is not palpably wrong and the distinctions claimed are not sufficiently significant to entitle this Board to ignore Award 2702 the claim is denied."

In Award 10288, adopted December 20, 1961, Referee Robert J. Wilson said:

"This same question was before this Board in Award 8073 where the claim was denied.

The Board has consistently held that prior awards effecting the same issue are controlling unless shown to be palpably wrong. Awards 10096, 9954 and 8458. In our opinion Award 8073 is not palpably wrong and the claim must therefore be denied."

This principle is analgous to the "law of the case" doctrine. Recently the Court of Appeals, Second Circuit—Zdanok v. Glidden Company (327 F. 2d 944) (1964) said:

"It is true enough that, as said by Judge Learned Hand, 'the law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense.' Higgins v. California Prune & Apricot Grower, Inc., 3 F. 2d 896, 898 (2 Cir. 1924). It is true also that one of the bases for the principle, the desire to save judicial time, is not too persuasive when, as here, an overruling of our previous decision might well bring 'the case' to a much quicker end than it will otherwise have, and it seems not unlikely that we may be required to face the same issue with respect to some other contract of similar ambiguity. But another consideration is applicable: where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again. Perhaps the 'good sense' of which Judge Hand spoke comes down to a calculus of the relative unseemliness of a court's altering a legal ruling as to the same litigants, with danger that this may reflect only a change in the membership of the tribunal, and of its applying one rule to one pair of litigants but a different one to another pair iden-

tically situated. This explains why a clear conviction of error on a point of law that is certain to recur, as in this court's well-known decision in Johnson v. Cadillac Motor Car Co., 261 F. 878, 886, 8 A.L.R. 1023 (2 Cir. 1919), 12 will prevail over "the law of the case" whereas 'mere doubt' will not. In the former instance the court knows that later litigants will be governed by a different rule; in the latter that is only a possibility. We hold Zdanok to be governed by our previous decision."

The burden was upon the railroad petitioner to prove that the prior award was palpably erroneous. In Russ v. Southern Railway Company (334 F. 2d 224) (1964) the Court of Appeals, Sixth Circuit, said:

"The burden of proof was on the railroad to prove that the award was wrong."

In the instant case, the railroad Petitioner did not comment on Award 11667 because its final submission in this case was filed long before rendition of that award. However, on Page 11 of the Carrier's original submission in this docket, it was stated:

"The Employes have progressed such claim to the Board in the hope of getting what they cannot get by negotiation on the property. It is now pending as Docket TE-10131."

In Award 5133, Referee A. Langley Coffey adopted December 13, 1950, the Referee was confronted with an identical question as to whether a prior award involving the same parties and etc., was erroneous. The Referee said:

"OPINION OF BOARD: On authority of Award 4018, same Agreement, same parties, and the rule at issue, the Board here finds that copying line-ups by means of the telephone, at stations where an operator, under the Telegraphers' Agreement, is employed, even though the work is performed prior to the starting time of the regularly assigned operator, comes within the scope of the subject Agreement.

The cited Award also forecloses the Carrier's contention that negotiations on the property, prior to the date of the Award, is evidence that the work is not reserved to employes covered by the Agreement. Aside from the fact that evidence of past negotiations is of qustionable value, except in cases where the intent of the parties is clouded in doubt, such evidence must always give way to clear and unambiguous language, or later rules interpretations by this Board. It does not admit of dispute that the Board's interpretation of rules becomes a part of the Agreement to all intents and purposes as though written into the rule book. Thus, the parties are governed by Award 4018, subject to valid distinctions on the facts and rules at issue, or until the weight of judicial opinion shifts. This Board has many times held, when confronted with Scope Rules, general in character, as here, that 'tradition, historical practice and custom' shall govern the work covered. Therefore, evidence of negotiations on the property in conflict therewith has no place in resolving this vital point at issue, and we are conpelled to hold that, by tradition and custom, of which the Board's Award 4018 is a part; the work of receiving and copying line-ups is under the Agreement."

In Universal Camera v. N. L. R. B. (340 US 474) the Supreme Court announced the principle to be used by Courts of Appeal in reviewing orders of the National Labor Relations Board. It said:

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously gind that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

In the instant case, Referee McGovern apparently assumed that he had the legal right to ignore the precedent award. If so, this approach was contrary to established "case law" of this Board and relevant court decisions. The Supreme Court has also warned that an arbitrator does not sit to dispense his own brand of industrial justice.

It is true the award will have the immediate effect of denying the claimants the few dollars requested as compensatory damages. That the decision settles anything, or is of any permanent significance may well be doubted. The opinion does not give any clues as to why the Referee ignored the prior award. If Referee McGovern could not conscientiously follow the decision in the prior award, the very least that could reasonably be expected of him was a statement as to why he could not do so. If the reservation of work rules were repugnant to him, they were not to the parent company. The Agreement of January 1, 1959 between the New York, Chicago and St. Louis Company and The Order of Railroad Telegraphers in Rule 30 (Handling Train Orders), provides:

> "3. If train orders are handled by persons other than those referred to in Paragraph (a) in non-emergency cases at locations where an employe under this agreement is not employed, the senior extra operator not working on the date train orders are copied shall be allowed eight hours at the minimum rate of pay on that district. If all extra operators are working on the date train orders are copied, such allowance will be paid to the operator at the nearest station who is not on duty at the time the train order was copied."

In conclusion, as was pointed out by the Court of Appeals, Fifth Circuit in Hodges v. Atlantic Coast Line (310 F. 2d 438), this Board possesses "awesome powers". When the decision goes against the claimant, he has no further recourse. Yet, when the decision is in his favor, the Carrier may refuse to comply with the award and force unlimited court review as a matter of right. See footnote 13 at page 51, Interstate Commerce Commission v. Atlantic Coast Line (334 F. 2d 46). The impartial reader of the opinion may, with good cause, question whether the award of Referee McGovern is in accord with the principles announced in many awards, including his own, and the decisions of the Federal Courts.

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT

TO AWARD 13222 (McGOVERN), DOCKET TE-12208

It is not the purpose of this answer to argue the case properly decided by this decision. That was previously done at some length. Nor is there any need to justify the decision or vindicate the Referee, as that is done exceptionally well in the course of the "Opinion of Board" in Award 13222. It has also been done most convincingly in the following recent decisions from the same

property where the same Scope Rule and Rule 26 (Train Order Rule) were involved, discussed and interpreted:

Award 13189 (West)

Award 13281 (House)

Award 13444 (Wolf)

If there was any doubt about the correctness of this decision in the Dissentor's mind, we believe those doubts should now be dissolved in the face of this real body of precedent. Assuming further the correctness and the sincerity of Dissentor's comments regarding the adherence to precedent from the same property—in the absence of palpable error—where the same rules are involved—we anticipate no further disputes originating on this property on the questions now conclusively settled by these "final and binding decisions".

We do feel compelled to comment upon the following statement made in the Dissent:

> " * * * If the reservation of work rules were repugnant to him, they were not to the parent company. The Agreement of January 1, 1959 between the New York, Chicago and St. Louis Company and The Order of Railroad Telegraphers in Rule 30 (Handling Train Orders), provides:
>
> "'3. If train orders are handled by persons other than those referred to in Paragraph (a) in non-emergency cases at locations where an employe under this agreement is not employed, the senior extra operator not working on the date train orders are copied shall be allowed eight hours at the minimum rate of pay on that district. If all extra operators are working on the date train orders are copied, such allowance will be paid to the operator at the nearest station who is not on duty at the time the train order was copied.'"

The inference is, the foregoing rule was in the contract interpreted by this Board in **Award 13222. It was not.** Rule 30 is found in the contract between the original New York, Chicago and St. Louis Railroad Company—excluding the Wheeling and Lake Erie District. The dispute covered by **Award 13222**, originated on the Wheeling & Lake Erie District. If the Organization wishes to incorporate Rule 30 or any part thereof, into the present contract, the proper procedure is prescribed in Section 6 of the Railway Labor Act. They are familiar with that procedure as evidenced by the existence of Rule 30 in the original NKP contract.

The Referee was fully apprized of the foregoing facts, just as he was made aware of the palpable error in prior **Award 11667**, more fully described in our dissent thereto. It is apparent he was convinced of that error, just as other Referees, since the rendition of **Award 11667**, have been unpersuaded by the findings therein. See and compare **Awards 11754, 11882, 11908 and 13288**, in addition to those cited above.

Award 13222 requires no affirmation from us, as it finds its merit in the logic and good judgment it employs.

/s/ W. F. Euker
W. F. Euker

/s/ R. A. DeRossett
R. A. DeRossett

/s/ C. H. Manoogian
C. H. Manoogian

/s/ G. L. Naylor
G. L. Naylor

/s/ W. M. Roberts
W. M. Roberts