Award No. 13303
Docket No. TE-12653

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY — EASTERN LINES

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Panhandle & Santa Fe Railway, that:

1. The Carrier violated the Agreement between the parties when, on March 18, 1960, it required or permitted employes at Way, Kansas and Nickerson, Kansas, not covered by said Agreement to perform telegraphic communications' work covered thereby; and

2. The Carrier shall now be required to pay O. M. Shafer the equivalent of a "call" payment at the established rate of his regularly assigned position.

EMPLOYES' STATEMENT OF FACTS: Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

At approximately 5:28 P. M., March 18, 1960, Yardmaster Frederick, an employe not covered by the Telegraphers' Agreement, at Way, Kansas, by use of the telephone (radio) communicated with Train No. 72 at Nickerson, Kansas, seeking the location of Train No. 72, and copied the following message from Train No. 72:

> "We are at Nickerson now. We have 83 cars for you to set out at Way."

Following receipt of this message, Yardmaster Frederick transmitted the following message to Train No. 72:

> "Set out in Long 6".

The Organization's District Chairman filed claim, April 8, 1960, (Employes' Exhibit No. 1) with Carrier's Division Superintendent, for a call payment in behalf of O. M. Shafer, regular assigned Agent at Nickerson, Kansas. The claim was subsequently appealed to the highest officer designated by the Carrier to handle such disputes and was denied. This dispute has been handled on the property as provided by the Agreement between the parties and in accordance with the Railway Labor Act, as amended. Your Board has jurisdiction over the parties and the subject matter.

As to the Employes' allegation that record was made of the car initial, number, type of car and contents of each of the 83 cars, the Carrier fails to comprehend what bearing this could have upon the case even if it were true, as no mention was made thereof in the complained-of radio conversation.

In reference to the "Third" reason given by the Carrier for declining the claim, i.e., " * * * Telegraphers' Agreement is silent with regard to 'radio' and the use thereof, * * * ", the employes contend that work of this nature has historically, traditionally and contractually been performed by telegraph service employes. This statement is absolutely false. The employes have never established monopolistic rights either historically, traditionally or otherwise to the use of radio on the respondent Carrier's property.

Concerning the allegation that an identical case was filed by the Local Chairman on the Missouri Division April 16, 1955 and paid by the respondent Carrier, this also is false. The case referred to was not identical to the instant dispute, in that the yardmaster at Shopton, Iowa issued instructions to crew of Extra 333 East after it had departed Shopton concerning a pick-up at Dallas City, Illinois. This claim was paid for the reason that the instructions did not relate to work in the yard where the yardmaster who issued the instructions was assigned.

In conclusion, the Carrier respectfully asserts that the Employes have, in their presentation and handling of the instant claim on the property, failed to meet their burden of proof of an Agreement violation and it is wholly without support under the Agreement rules and should be either dismissed or denied for the reasons previously set forth herein.

OPINION OF BOARD: This claim is based on the Scope Rule and Article XIII of the Telegraphers' Agreement. The Organization contends that the Carrier violated the Agreement when, on March 18, 1960, it required or permitted employes not covered by the Agreement to perform communications' work reserved for Telegraphers under the Agreement. The communications took place by and between the Yardmaster at Way, Kansas and members of the crew of Train No. 72 at Nickerson, Kansas. The Organization asks that the Carrier pay to O. M. Shafer, the Agent-Telegrapher regularly stationed at Nickerson, Kansas the equivalent of a "call" payment (Article III, Section 3 of the Agreement) at the established rate of his regularly assigned position. When the communications in issue were sent Shafer had already finished his tour of duty for the day, but the Petitioner claims he was available and should have been called.

It is not denied that on the afternoon of the day in question the Yardmaster at Way, Kansas used the radio-telephone to communicate with Train No. 72 at Nickerson, Kansas to seek its location on the line. Way is some 13.7 miles distant from Nickerson. In turn, the Yardmaster received and copied the following radio-telephone message from the crew of Train No. 72: "We are at Nickerson now. We have 83 cars for you to set out at Way." The Yardmaster then responded to the train crew: "Set out in Long 6."

The Carrier resists the claim principally on the grounds that (1) the Telegraphers' Agreement "is silent with regard to 'radio' and the use thereof", and, therefore, the covered employes do not have the exclusive right to the use of radio, and (2) that the communications at issue did not constitute the transmission of any "train order" or "message of record" within the accepted and established meaning of Article XIII of the Agreement. In this latter connection the Carrier maintains that the contents of the communica-

tions were informational in character essential only to the yarding of the train and, in essence, were no different than if the Yardmaster had communicated this same information by means of hand signals or word of mouth upon arrival of the train at the terminal yard.

The Organization counters by contending that the Carrier's "monopoly" argument is a "smoke screen" beclouding the only germane issue in this case, namely, whether the nature of the communication in question was of the kind that traditionally belonged in the work domain of Telegraphers. The Organization does not argue that it has an exclusive right to perform all radio-telephoning on the Carrier's property; it is the communication work performed that governs and not the system of communication utilized. And as for the communication not being a "message of record", the Organization contends that it was at least the equivalent since it contained such vital information as (1) location of train, (2) number of cars to be set out at Way, (3) instructions as to where the set out at the yard was to be made. It argues, too, that the message, although not a "line-up" in the strict sense of that term of railroad art, was for all practical purposes akin to one.

It is by now well established that the silence of the Scope clause as to radio-telephone does not deprive the Telegraphers of work which, by custom, practice, usage and tradition, belongs to them (e.g., Award No. 8 Special Board of Adjustment No. 269, Award No. 22, Special Board of Adjustment No. 506). Nor certainly can it be questioned, especially by this Carrier, that "line-ups" are messages of record which must be communicated through telegraphers (Awards 604, 1261, 1268, 1281, 1303, 1563, 1752, 4516 and many others). The hard core question is whether the communication at issue is either a "train order", "line-up" or other "message of record" which governs the movement of trains over the road or affects the safety of persons and property required to be a matter of formal record.

At the panel discussion the Organization readily conceded that the message in dispute was not a "train order". And certainly from the abundance of precedent that it generously cited it could hardly be held that this message was a "line-up" or akin to it. On the contrary, the character of the communication seemed to be a routine yarding dialogue, the only difference being that the exchange of conversation took place some distance from the yard rather than at the yard itself (See, Awards 12306, 11343, 10363, 9629, 1396).

In sum, it was not established that the nature of the communication involved constituted a "message of record" as that term is commonly understood in railroad usage. Nor does the fact, as has been frequently held by this Division, that this conversation was reduced to writing convert it into a "message of record" (e.g., Awards, 10525, 11805). The settled principle of this Division is that where, as here, the Scope Rule does not describe or define the work to be performed by the employes "the Petitioner has the burden to show that the transmission of this type of message was by history, custom and tradition reserved exclusively to Telegraphers" (Award 12607). The Petitioner has not done so and, therefore, its claim must be denied.

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February 1965.

DISSENT TO AWARD 13303, DOCKET TE-12653

Most of the comments of the Referee in the Opinion of Board and the denial of the claim are so unresponsive to the clear issue and the facts presented by the record that I feel obliged to register a most emphatic dissent.

The purpose for which this Board was created cannot be served by carelessness or failure to understand the facts and arguments presented by a dispute. Award 13303 suffers from both of these infirmities and is, therefore, erroneous in its conclusions although some of its observations are profoundly supported by logic and prior awards of this Board.

The Opinion of Board gets off to an erroneous start by stating that:

> "This claim is based on the Scope Rule and Article XIII of the Telegraphers' Agreement . . .".

The record shows quite clearly that Article XIII not only was never used as a basis for the claim but that the Carrier's reference to certain parts of that Article as a sort of defense was challenged on the property as being irrelevant.

In the original claim letter (Employes' Exhibit No. 1) the District Chairman said:

> ". . . we respectfully cite Article I, Scope Rule; Article IX, Section 5; Article III, Sections 3 & 4 and Article XX of the Telegraphers' Agreement."

In their ex parte submission the Employes cited, quoted and relied upon Article I; Article II, Section 5; Article III, Section 3; and Article XX, Sections 2, 2-b, 6-a and 15-g. (Pages 5, 6 of the Record).

Nowhere, in the handling of the dispute on the property, was there any mention of Article XIII until the Carrier's highest appeals officer in his denial of the claim stated that the subject matter of the claim was not any one of the things prescribed by Article XIII. (Employes' Exhibit No. 6).

The General Chairman, in his response to the letter just mentioned, said:

> "Your 'Fifth' reason is not in point for the reason the Scope

Rule covers the use of such type of communication the same as regular telephone communication, as stated by the majority in Special Board of Adjustment 269, Case No. 8. District Chairman's claim letter dated April 8, 1960 clearly cites the Scope Rule as authority in this claim.'

In the Employes' rebuttal statement (Page 58 of the Record) they say:

"This claim is based on the Scope Rule of the current Telegraphers' Agreement . . .".

And at page 77 of the Record, in its rebuttal statement, the Carrier says:

"While there is no rule in the current Telegraphers' Agreement so stipulating, this Carrier long ago acceded to the generally accepted theory that telegraph service employes alone have the right to transmit and/or receive messages (by telegraph or telephone) between stations where telegraph service employes are employed, provided such messages involve **matters of record** as that term has been interpreted by repeated awards of this Board, and except under circumstances covered by Article XIII of the Telegraphers' Agreement."

In the fact of such a record, the basic premise that "This claim is based on . . . Article XIII . . ." is palpably erroneous, and thus every conclusion reached from such a fallacious premise is erroneous.

Article XIII is a special rule dealing, in Section 1, exclusively with an exception to the general right of telegraphers to handle train orders. Awards 5871, 5872, 5992. The remaining sections deal solely with situations where train and engine service employes become involved in the handling of train orders or other communications which have as their purpose "advancing the movement of their train". As the General Chairman so clearly pointed out in his letter to the Assistant Vice President, supra, the communication here involved was not one coming within the provisions of Article XIII. And the Carrier does not dispute that statement.

Perhaps the Employes' characterization of the Carrier's reference to Article XIII as a "smoke screen" was very well taken. It surely had the effect of obscuring from the mind of the Referee the true basis of the claim.

The Referee, with the support of the Carrier Members composing the majority, correctly found that:

"It is by now well established that the silence of the Scope clause as to radio-telephone does not deprive the Telegraphers of work which, by custom, practice, usage and tradition, belongs to them (e.g. Award No. 8, Special Board of Adjustment No. 269, Award No. 22, Special Board of Adjustment No. 506). Nor certainly can it be questioned, especially by this Carrier, that 'line-ups' are messages of record which must be communicated through telegraphers (Awards 604, 1261, 1268, 1281, 1303, 1563, 1752, 4516 and many others). . . .".

It is nothing short of amazing to find the majority, after making such a fundamentally correct observation, going back to the fallacious premise, discussed above, to formulate—in the same paragraph—an erroneous statement of the issue presented. The paragraph quoted continues :

". . . The hard core question is whether the communication at issue is either a 'train order', 'line-up' or other 'message of record' which governs the movement of trains over the road or affects the safety of persons and property required to be a matter of formal record."

No such question was posed by any facet of the claim or argument. The only question posed was whether the use of the radio-telephone by a yardmaster to communicate with a train crew 13.7 miles away for the purpose of learning the location of the train, the number of cars the train had to be set out when it reached the yard, and to give operational instructions to the crew, was "in lieu of telegraph" so as to bring it within the scope of work covered by the telegraphers' agreement.

The nature of the communication was carefully explained to the Referee in lengthy oral argument. The component concerning location of the train, from which the Yardmaster could easily calculate the arrival time at Way was likened to a "line-up" which is universally provided to yardmasters not only on this railroad but on every other railroad in the nation. Awards dealing with such "line-ups" were discussed. An example is Award 4624, where a conductor of a train used the telephone to inquire as to the location of other trains and where the carrier argued that only a "conversation" took place, the same argument made by the Carrier here. In Award 4624 this Boaerd said:

"The Carrier contends that the train crew employe, the conductor in this instance, merely had a conversation with the dispatcher in regard to his work and did not copy a train line-up or any matter of record. It is an agreed fact that the conductor did receive over the telephone a line-up of train movements on his run, and that there was an agent-telegrapher available on call to have received said line-up. The question of whether the conducetor then copied the information received over the phone on a piece of paper is of little interest in this case since the violation of the Agreement came when the conductor received the information over the telephone."

In spite of the plain facts revealed by the record, one of which was that the Yardmaster received information as to the location of the train—13.7 miles away—the Referee held that:

". . . the character of the communication seemed to be a routine yarding dialogue, the only difference being that the exchange of conversation took place some distance from the yard rather than at the yard itself . . .".

This is not only inaccurate, it brushes aside the obvious question we were given to decide. The "exchange of conversation" did not take place some distance from the yard. The Yardmaster received and transmitted information at the yard itself. The conductor received and transmitted information at Nickerson, 13.7 miles from the Yard. The means of communication was a radio-telephone. Before the advent of the telephone such an exchange of information over that distance could only have been accomplished by use of the telegraph. When the Carrier chose to utilize the radio-telephone in that manner its use was "in lieu of telegraph", therefore, the work accomplished was work reserved to the telegraphers by the Scope Rule of their agreement, as plainly set forth in Awards 4249, 4516 and a host of others.

The primary basis for the claim—the Scope Rule—was sound. The facts

clearly established a violation of the agreement, requiring a sustaining award. The contrary result is palpable error and a grievous malfunction of this Board.

I dissent.

J. W. WHITEHOUSE
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD NUMBER 13303, DOCKET NUMBER TE-12653

The Award is completely responsive to the issues as presented. It is fully supported and represents a competent application of principles to facts.

In considering how responsive the dissent is to the Award we find the "amazing" statement that the whole Award is erroneous because Article XIII "was never used as a basis for the claim".

> "This claim is based on the Scope Rule **and Article XIII** of the current Telegraphers' Agreement. * * * " **(Emphasis ours.)**
> (P. 14 of Organization's ex parte submission)

Accordingly, what the dissenter describes as the "erroneous start" of the Referee is practically a direct quote from Petitioner's position except for one word. Thus there is no basis whatever for the statement in the dissent that "every conclusion reached from such a **fallacious** premise is erroneous". **(Emphasis ours.)**

Article XIII did arise in connection with the handling. Even the dissent recognizes that the Carrier's highest officer stated:

> "Fifth: Inasmuch as the alleged improper use of the radio did not involve either the handling of any train order in violation of Article XIII, Section 1 or the copying of any train order or message of record by train and engine service employes in violation of Article XIII, Sections 2, 4 or 5 of the Telegraphers' Agreement, * * * ."

The fact that Petitioner disagreed as to the application of Article XIII does not influence its pertinence to the case. It is difficult to conceive of what could be more applicable than the standard train order rule when the dissent itself contended that the principle issue was the telegraphers' right to work traditionally performed by the Organization in a claim directed to such work allegedly performed by a train crew and a yard master. The Carrier is clearly entitled to raise and discuss Agreement provisions it considers applicable in defense of the claim.

Observations of the dissent concerning the issue, claim and argument require comment. A principle issue as outlined by the Award was the nature of the communications and not whether the means used was in lieu of telegraph. Of course, if the nature of the communications was such as not to bring them within the contract that was determinative and concluded the inquiry. This issue was considered of record and thoroughly explored in argument. One cannot unilaterally restrict the scope of the Board's inquiry by framing his own issues.

This Award drafted by an experienced arbitrator after extended argu-

ment exhibits a degree of care and comprehension of facts, issues and principles, consistent with the highest standards. The well reasoned Award on its face stands as the best refutation of some of the rather intemperate and clearly unfounded language of the dissent.

/s/ T. F. Strunck
/s/ D. S. Dugan
/s/ R. E. Black
/s/ P. C. Carter
/s/ G. C. White