

Award No. 13729
Docket No. TE-12789

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly 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 Atchison, Topeka & Santa Fe Railway, that:

1. Carrier violated the Agreement between the parties when on February 14, 1960, it required or permitted the Engineer of Extra 159-C East to handle (copy, complete and deliver) a train order at Ridgeton, Kansas.

2. Carrier further violated the Agreement when on February 14, 1960, it required or permitted a Section Foreman, an employee not covered by the Telegraphers' Agreement, to transmit a message by use of the telephone at Quenemo, Kansas.

3. Carrier shall now be required to pay J. R. Clark and R. L. Weaver each the equivalent of a day's pay at the minimum telegrapher's rate applicable to the seniority district as compensation for work lost to them.

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

At approximately 12:20 A. M., February 14, 1960, Train SF-59-M, Extra 900 West stopped near Quenemo, Kansas, account failed journal, and immediately notified the Train Dispatcher of the trouble.

At approximately 1:30 A. M., February 14, 1960, Train Order No. 302 reading:

"At Quenemo on Eastward or South track car on main track between siding switches with failed journal and cannot be moved."

"It is also significant that despite the long list of awards which are relied upon by the Organization, going back to 1937, enforcing the Scope Rule under similar circumstances, the Organization has not heretofore sought to secure any relief from this Board. Neither can we disregard the numerous attempts by the Organization to secure by negotiation the result which it seeks from this Board, especially its pending request of the Carrier to adopt a train order rule in the language as set forth above." (Emphasis ours.)

Attention is also directed to the following quotation from the Opinion of Board in Third Division Award No. 8538 which denied a claim in a dispute that existed between the parties hereto and in which the petitioning Order of Railroad Telegraphers was also attempting to have the Board grant employees subject to the Telegraphers' Agreement that which the Petitioner had been unsuccessful in obtaining by means of negotiation:

"Third. The record shows that Petitioner has sought unsuccessfully to revise this Scope Rule to insure an exclusive right to the operation of teletype machines, whether located within or without established telegraph offices.

When a collective bargaining agreement is consummated and existing practices are not abrogated or changed by its terms, those existing practices are just as valid and enforceable as if authorized by the agreement itself, (Awards 1257, 1568, 3461, 41054); and particularly when, as here, an existing practice is sought to be changed.

Claimants here have not conclusively established their right to perform the work in question to the exclusion of others similarly employed, either through custom and practice on this property or under the terms of the contract. Thus, in effect, this Board is being asked to grant something the agreement does not provide. The rule that we are without authority so to do is too well established to require further comment." (Emphasis ours.)

In conclusion, the respondent Carrier respectfully reasserts that the claim of the Employees in the instant dispute is entirely without merit or support under the governing Telegraphers' Agreement and should, for the reasons stated herein, be denied in its entirety.

OPINION OF BOARD: Three claims arose out of an incident occurring on February 14, 1960, when at 12:20 A. M., Extra Train 273 West stopped near Quenemo, Kansas account failed journal. At 1:30 A. M. same date, Train Order No. 302 was issued to trains on Eastern Division that Eastward or South track blocked between siding switches at Quenemo. Extra Train 159-C East was ordered Emporia, Kansas at 1:00 A. M. but did not depart until 3:35 A. M. same date. At approximately 4:30 A. M., in order to transmit Train Order No. 305 to Extra Train 159-C, the Emporia Dispatcher stopped the train at Ridgerton, Kansas, a closed station through the medium of the Traffic Control System. Engineer Arthur of 159-C East, contacted the Emporia Dispatcher who transmitted Train Order No. 305 direct to him over TCS telephone. Engineer Arthur relayed order to Conductor Robbins at rear of train via radio.

Train Order No. 305 reads:

"Speed Limit 20 MPH on Westward or North Track between 20 and 30 poles West MP 73 between Quenemo and Melvern. Sound whistle freely this location."

At 8:10 A. M., same date, Section Foreman Logan transmitted the following message from Quenemo, a closed station, to the Emporia Dispatcher via TCS telephone:

"Eastward track OK for service and necessary repairs have been completed."

The parties have presented to the Board three cases: TE-13820, TE-13824, and TE-12789. All three cover different Claimants and varying periods of time. The three cases all involve the same basic issue for adjudication, that being, whether or not the use of the company telephone by employees other than those subject to the Telegraphers' Agreement, constitutes the transmission of a message of record, governing the movement of trains, thereby being work within the Scope of the Telegraphers' Agreement; and whether such transmission is an emergency within the exception of Article XIII of the Agreement.

In the instant dispute, the Employees contend that Train Order No. 305 was a message of record governing the movement of Extra Train 159-C East, thereby covered by the Scope of the Telegraphers' Agreement; and Article XIII Section 2 and 5 apply, as no emergency existed insofar as Extra Train 159-C East was concerned.

Carrier asserts that Article XIII Section 2 and 5 provide, that when train orders or messages of record are copied by train and engine service employees at small non-telegraph stations, or at other stations where no telegraph service employees are employed (such as Ridgeton), and when an emergency exists, as in the instant case, no payments will be made. Section 2(e) defines engine and equipment failure as an emergency.

Sections pertinent to this dispute of Article XIII read:

"Section 2. Train and engine service employees will not be required or permitted to copy train orders or messages of record from train dispatchers for the purpose of advancing the movement of their train or other trains, except in cases of emergencies.

Emergencies as referred to herein are:

- (a) Storms, washouts, high water;
- (b) Wrecks, slides, snow blockades;
- (c) Accidents;
- (d) Failure of fixed signals or train control;
- (e) Engine and equipment failure and break-in-two's;

which could not have been foreseen prior to train passing or leaving last open office of communication, and which would result in serious delay to trains.

- (f) Danger to life or property requiring immediate attention."

"Section 5. When train orders or messages of record are copied by train and engine service employes at small non-telegraph stations, or at other stations where no telegraph service employes are employed, and when emergencies as defined herein exist, no payments will be made; when such emergencies do not exist, the senior qualified extra telegraph service employe on the seniority district who does not start service that calendar day or who has not already become entitled to payment under this Article XIII for that calendar day, will be paid one day at the minimum telegraphers' rate applicable to the seniority district, it being understood that one payment is to be made for each such occurrence, excepting that not more than one day is to be paid any such extra employe on any calendar day. In each instance wherein payment is due under this Section 5, the Chief Dispatcher will notify the employe entitled thereto to make claim therefore."

We find that Article XIII is controlling in determining the rights of employes to handle and copy train orders in the use of company telephone. Train Order No. 305 was issued under an emergency condition created by Extra Train 900 West and the copying of that train order by Engineer Arthur was in strict compliance with Section 2, Article XIII of the Agreement. Train Order No. 305 was one of necessity, and under the emergency defined in the Agreement, therefore no payment was called for under Section 5 of Article XIII.

We cannot agree with Petitioners' contention that Train 159-C East is the only train concerned in this dispute and if an emergency existed, it only pertained to or affected Train 900 West. The wording of Section 2, Article XIII specifically refers to **other trains affected** in cases of emergencies:

"... for the purpose of advancing the movement of their train or **other trains, . . .**" (Emphasis ours.)

The circumstances of the derailment was one of a continuing, existing emergency at the time 159-C East left Emporia at 3:35 A. M. and the necessity for the issuance of said order was based on the advice of a Trainmaster at the scene. This order was given at approximately 4:30 A. M., well after 159-C East had passed the last open office at Emporia. Though it is apparent knowledge was available to the dispatcher and the train crew of 159-C East, prior to the 3:35 A. M. departure, of the derailment, we cannot subscribe to the Organization's argument that the dispatcher should have issued orders to 159-C East while it still remained at Emporia. It would be difficult indeed to believe the dispatcher at Emporia could project or foresee the actual existing conditions at the scene of the accident to competently issue a running order to 159-C East. For the foregoing reasons, Claims 1 and 3 must be denied.

As to Claim No. 2, we find no violation of the Agreement rules. The conversation between the Section Foreman who was present at the derailment site, and the train dispatcher, was only in connection with making a report of work that had already been performed in connection with his duties. It did not pertain to matters of record, therefore, the 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 Employees involved in this dispute are respectively Carrier and Employees 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 13th day of July 1965.