Award No. 14053
Docket No. TE-13634

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Northern Pacific Railway Company, that:

Case No. 1

1. Carrier violated the Agreement between the parties when on July 21, 1961, it required or permitted the Conductor of Train No. 66, an employe not covered by the Agreement, to handle Train Order Nos. 2 and 3 from Hinckley, Minnesota to Willow River, Minnesota, and there deliver to the crew of Extra 856 East at a time the Agent-Telegrapher at Willow River was not on duty.

2. Because of this violation, Carrier shall compensate the Agent-Telegrapher at Willow River, John Balasz, in the amount of a call of two (2) hours' pay at the time and one-half rate.

Case No. 2

1. Carrier violated the Agreement between the parties when on July 19, 1961, it required or permitted the Conductor of Train No. 65, an employe not covered by the Agreement, to handle Train Order No. 40 from Central Avenue to Wrenshall, Minnesota, and there deliver to the crew of Extra 855, thus re-opening a train order office at Wrenshall on that day.

2. Because of this violation, Carrier shall compensate H. J. Councilman, idle on July 19, 1961, in the amount of a day's pay of eight (8) hours.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, effective April 1, 1956, as supplemented and amended, is available

Award 1257, ORT vs. AT&SF, Referee Tipton:

"* * * the working conditions prior to the time the agreement was ratified formed as much a part of the working conditions as the rules in the agreement, unless the written rules of the agreement provide otherwise. Or to state it another way, where the written agreement is silent on a particular question, then the working conditions that govern prior to the effective date of the written agreement will govern with the same force and effect as the written provision of the agreement."

We find the following in Award 4104, ORT vs. DL&W, Referee Parker:

"Another well recognized principle is that after a contract has been executed the conduct of its signatories is often just as expressive of their intention and the construction they place upon its terms as the written words themselves and where uncertainty exists, the mutual interpretation given it by the parties as evidenced by their actions with respect thereto, affords a safe guide in determining what they had in mind when it was executed. See Awards 2436 and 1435."

The analyses of operating rules, of schedule rules, the affidavits of the practice since the year 1903 and the understanding of the parties for more than sixty years should make it crystal clear to your Board that the handling of "in care of" orders is not violative of the Telegraphers' Schedule on the Northern Pacific. The Organization by means of the instant claims are attempting to accomplish indirectly through a sustaining award that which they have not been able to accomplish directly in negotiations. The claims should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD:

CASE NO. 1

On July 21, 1961, the Carrier required the conductor of Train No. 66 to carry two train orders from Hinckley to Willow River and deliver them to the crew of Extra 856 East at the latter station. The need for these train orders arose because of delays resulting from a broken drawbar in the train of Extra 855 West. An employe covered by the Telegraphers' Agreement is employed at Willow River but was not on duty at the time the train orders in question were handled. He filed a claim for a call of two hours at the time and one-half rate on the ground that delivery of the orders by a conductor violated his contractual right to handle train orders.

CASE NO. 2

On July 19, 1961, the Carrier required the conductor of Train No. 65 to carry a train order from Central Avenue to Wrenshall and deliver it to the crew of Extra 855 East at the latter station. The need for this train order arose from ordinary delays encountered in normal railroad operation. No employe covered by the Telegraphers' Agreement is presently employed at Wrenshall, although formerly two such employes held positions there. Claim was filed for a day's pay in favor of the occupant of a nearby position who was observing a rest day. Grounds for the claim was a contention that the

use of a conductor to effect delivery of a train order is contrary to the provisions of the Telegraphers' Agreement.

At the outset, in considering these two claims, we feel constrained to observe that if the parties had made as diligent an effort to settle the dispute in handling on the property as they have in attempting to support their positions before the Board they would likely have succeeded.

In any event much of the material submitted as evidence by both parties is inadmissible because it was not cited and made a part of the dispute in handling on the property. In reaching a decision we have given no consideration to this improperly submitted material.

While these claims were being handled on the property the General Chairman conceded, in effect, that in case of emergency train orders could be delivered by the means employed here without encroaching upon the rights of Telegraphers. Of course they contended that no emergency was involved in either case.

With respect to Case No. 1, the reason for the action complained of was an attempt to minimize extensive delays caused by a broken drawbar in the train of Extra 855 West. While the parties have not cited a definition of the term "emergency" in their agreement, it is generally understood that an unusual delay caused by a "break-in-two" is considered to be such. We believe the delay involved in this case was of such duration that it must be considered an emergency. Therefore, the claim in Case No. 1 must fail.

In case No. 2, there is no showing of a condition that could properly be described as an emergency. Thus, if the conclusions of the Employes are valid the claim is meritorious.

A very careful search of the record, rejecting all that is not properly contained therein, reveals nothing of probative value to support the Employes' contention. Mere assertion and conclusion without proof is not enough to establish convincing evidence of agreement violation. Rule 58 relates only to the copying of train orders. The Scope Rule, to be effective as a reservation of work provision, requires evidence of such effect in relation to the delivery of train orders on this property. No such evidence having been submitted, this claim, too, must be denied for the burden of proving its case rests with the petitioner.

For the reasons discussed above, the two claims are 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 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 22nd day of December 1965.