

Award No. 14458

Docket No. TE-12564

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David L. Kabaker, Referee

PARTIES TO DISPUTE:

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

THE WESTERN PACIFIC RAILROAD COMPANY

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

CLAIM No. 1

1. The Carrier violated the terms of the Agreement between the parties hereto when on December 25, 1959, it permitted or required the conductor of Extra 907 West, an employe not covered by the Telegraphers' Agreement at David, California, to handle (receive, copy and deliver) Train Order No. 422.

2. The Carrier shall, because of the violation set out in Item 1 of this Statement of Claim, compensate the senior employe, idle on the holiday, a day's pay at the time and one-half rate.

CLAIM No. 2

1. The Carrier violated the terms of the Agreement between the parties hereto when on December 25, 1959, it permitted or required the conductor of Extra 918-A East, an employe not covered by the Telegraphers' Agreement at Berry Creek, California, to handle (receive, copy and deliver) Train Orders Nos. 420, 421 and 422.

2. The Carrier shall, because of the violation set out in Item 1 of this Statement of Claim, compensate the senior employe, idle on the holiday, a day's pay at the time and one-half rate.

CLAIM No. 3

1. The Carrier violated the terms of the Agreement between the parties hereto when on December 25, 1959, it permitted or required the engineer on Extra 732 West, an employe not covered by the Telegraphers' Agreement at Norvell, California, to handle (receive, copy and deliver) Train Order No. 306.

2. The Carrier shall, because of the violation set out in Item 1 of this Statement of Claim, compensate the senior employe, idle on the holiday, a day's pay at the time and one-half rate.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an agreement by and between the parties to this dispute, effective June 16, 1940, revised January 1, 1953, and as otherwise amended.

The facts in Claim No. 1 are: On December 24, 1959, at or about 11:10 P. M., Extra 918-A East while running just east of Berry Creek, California, a station location at which a telegrapher was formerly employed, struck some rocks on the track causing one of the Diesel units to derail.

On this same date Extra 907-A West, at a time not stated in the record, was instructed by the train dispatcher to pull onto the siding at David, California, a station location at which no employe under the Telegraphers' Agreement is employed, pending clearance of the derailment. Extra 907-A West arrived in the siding at David at 11:25 P. M., December 24, 1959.

At or about 3:44 A. M. on December 25, 1959, after Extra 907-A West had been in the siding four hours and 19 minutes, the train dispatcher transmitted and the conductor on Extra 907-A West at David, received, copied and delivered Train Order No. 422 over the telephone. A copy of said train order is attached hereto and made a part hereof as ORT Exhibit No. 1 — Claim No. 1.

Following clearance of the derailment of Extra 918-A East, Extra 907-A West departed David at 4:35 A. M. on December 25, 1959. The total elapsed time that Extra 907-A West was held at David was 5 hours and 10 minutes.

On the basis of the foregoing set of facts District Chairman M. F. Lawson did, on December 31, 1959, by letter, file the subject claim with Superintendent M. M. Christy. This letter is attached as ORT Exhibit No. 2 — Claim No. 1.

The District Chairman in said letter charged the Carrier with having violated the terms of the parties' agreement when, under the circumstances hereinbefore described, it permitted or required the conductor on Extra 907-A West at David to handle (receive, copy and deliver) the train order in question.

Superintendent Christy in a letter dated January 28, 1960, in reply to the District Chairman's letter filing this claim denied the claim on the ground that:

"The policy of this company with respect to issuing train orders to enginemen and trainmen at blind sidings was stated by former General Manager E. W. Mason in a letter dated December 14, 1926 addressed to your Organization and to the four operating organizations as follows:

'This Company must reserve the right to issue train orders to trainmen and enginemen at blind sidings when an emergency arises which makes it necessary either to do this or suffer delays which not only would result in loss of business but force crews to remain on the road a considerable time at points where there are no facilities for eating or sleeping.'

"Extra 923A East left Westwood at 12:32 P. M. on Order No. 304."

When Engine 732 arrived at Norvell about 2:50 P. M., Engineer Holt, apparently not sure of the running orders he held, or at least misunderstanding them, called the dispatcher by telephone requesting an order as to the arrival time of Extra 923-A East at Bieber. Although, strictly speaking, such an order was not necessary inasmuch as Engineer Holt already held orders authorizing his return movement from Norvell to Keddie, the requested order was furnished him and this last order is the one upon which Claim No. 3 is based.

PART III.

Claims Nos. 1, 2 and 3 were handled on the property in the usual manner up to and including the highest officer of the Carrier designated to handle such matters and were denied by said officer because no provision nor interpretation of the current Agreement supports the claims.

A copy of the controlling Agreement, effective June 16, 1940, Revised January 1, 1953, is on file with the Third Division, National Railroad Adjustment Board, and is hereby incorporated herein by reference. Rule 31 of said Agreement reads as follows:

"RULE 31.

Handling Train Orders. No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

Attached as Carrier's Exhibit A is copy of a letter written under date of December 14, 1926 by former Vice President and General Manager E. W. Mason.

Attached as Carrier's Exhibit B are the slow orders issued on the Third District, Western Division, on the night of December 24-25, 1959, all of which arose from changes in track conditions as a result of the existing storm.

(Exhibits not reproduced.)

OPINION OF BOARD: The basic facts out of which these three claims arose are not in dispute. The Organization claims that the Carrier violated the Agreement when it permitted a train crew member in each case, who was not an employe covered by the Telegraphers' Agreement, to handle train orders. It requests payment of a day's pay at time and one half to the three senior employes who were idle on that day.

The Organization's position is that the violation consisted of performing work (namely handling train orders) which work was exclusively that belonging to Telegraphers.

The Organization relies heavily upon the provisions of the "Scope" Rule in support of its contention that the exclusive work of handling train orders belongs to employes covered by the Agreement. It must be recognized however, that the Scope Rule does not contain specific wording, therein, which grants such exclusive right of work, to the employes covered by the Telegraphers' Agreement.

Numerous awards hold that the exclusive right exists, notwithstanding the absence of specific wording in the Agreement, where there has been an historic pattern of the customary and usual assignment of such work to the claiming employes as their "exclusive functional domain" (Awards 12935 and 12356). The logic of the awards is that a "past practice" comes into existence as a result of a consistent course of conduct recognized by the parties as a usual response to the reoccurrence of the same situation over a long and continued period of time.

However, in the instant claims, the evidence does not support the Organization's contention of exclusive right, based on past practice, for the reason that an exception has existed, to the exclusive performance of such work, in "blind siding" situations where an emergency arose.

It must be the conclusion that the right to permit train crews to handle train orders at "blind sidings" has been reserved to the Carrier; that this reserved right is founded upon an established policy and a firmly established past practice.

Support for this conclusion is based upon Decision No. 2798 of the Railroad Commission(now Public Utilities Commission) of the State of California, decided September 30, 1915. The Commission specifically noted that on this Carrier's line in the Feather River Canyon area, train orders were issued directly to train crews at blind sidings in 1915.

Further support is to be found in the letter of E. W. Mason, Vice President and General Manager of the Carrier, dated December 14, 1926. The letter is extremely persuasive evidence that a practice existed wherein train crews were permitted to handle train orders at blind sidings when an emergency arose.

The evidence supports the conclusion that the rockslide created an emergency when it derailed the engine on 918-A West. The emergency situation, precipitated by the rockslide was the proximate cause which required that 907-A West be halted at the siding at David, California. The further conclusion based on the evidence must be that 907-A West was involved in an emergency situation also.

Inasmuch as the evidence has established that a past practice has been in existence, it must therefore be the finding, in Claims 1 and 2, that the action of the conductors in handling train orders was not violative of the Agreement, since it has been determined herein that an emergency existed in both cases.

The Carrier in its argument raises an issue that the Claimant's are unnamed and therefore the claims must fail. This issue is not supported by the evidence and can not be sustained for the reason that it was not a part of the original submission. In the light of this finding it is therefore unnecessary to further consider the question of unnamed Claimants.

Claim 3 presents a somewhat different situation in relation to the question of whether an emergency existed. The dispatcher issued the order to the engineer who requested it because he became confused whether he could properly leave Norvell unless he checked on Extra 923-A East. The evidence is persuasive that no emergency existed. It might be said that the uncertainty in the mind of the engineer constituted an emergency to him but certainly not an emergency in the common use of the term or within the context of the meaning as used in the "Mason 1926 letter."

Under these circumstances, Claims 1 and 2 must be denied and Claim 3 must be sustained.

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

- (1) That the Agreement was not violated in Claims 1 and 2.
- (2) That the Agreement was violated in Claim 3 and a day's pay at straight time shall be paid as compensation to the senior employe idle on December 25, 1959.

AWARD

Claims 1 and 2 are denied.

Claim 3 is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of May 1966.

**CARRIER MEMBERS' DISSENT TO PORTION OF AWARD 14458,
DOCKET TE-12564, WHICH SUSTAINS CLAIM 3
(Referee Kabaker)**

We dissent to that portion of the award which sustains Claim 3.

**G. L. Naylor
R. A. DeRossett
C. H. Manoogian
W. M. Roberts**