NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri-Kansas-Texas Railroad, that:

1. The Carrier violated the Telegraphers' Agreement when it failed or refused to call Mr. W. E. Hurt, agent-telegrapher, Stringtown, Oklahoma, Sunday, February 11, 1962 to perform communication service in connection with train movements at that point; and that

2. The Carrier shall now be required to compensate Agent-Telegrapher W. E. Hurt for February 11, 1962, at the minimum rate per day for telegraphers as set forth in the Agreement plus regular rate.

EMPLOYES' STATEMENT OF FACTS: Claimant W. E. Hurt is identified as the regularly assigned agent-telegrapher, Stringtown, Oklahoma, 8:30 A. M. to 5:30 P. M., Monday through Friday, rest days Saturday and Sunday. February 11, 1962, the claim date, was Sunday. Employes covered by the Telegraphers' Agreement (which by this reference is made a part of this submission) are subject to being called for service at all times of the day or night, seven days per week.

The facts relating to this claim are fairly set forth in the following correspondence exchanged between General Chairman W. C. Thompson, General Superintendent R. B. George, and Vice President A. F. Winkel:

GENERAL CHAIRMAN W. C. THOMPSON
TO GENERAL SUPERINTENDENT R. B. GEORGE,

FEBRUARY 20, 1962

"Please see your letter of February 13, 1962, without file, addressed to W. E. Hurt, Agent, Stringtown, Oklahoma; his Time Slip No. 9 dated February 11.

R. L. Schumacher, Agent, McAlester, Oklahoma, was called by the Dispatcher's office at Denison and instructed to go to String-

then proceeded to the car and shoved it into the clear of the main track at Burg, as instructed prior to departure Denison.

Sunday, February 11, 1962, was one of Claimant's rest days. Claimant resides at McAlester, 28 miles north of Stringtown.

Attached hereto and made a part hereof is copy of correspondence exchanged by the parties in handling this case on the property, Carrier's Exhibit A.

(Exhibits not reproduced.)

OPINION OF BOARD: There are more than one hundred pages in the record of this case. There are digressions from the Rules and the case law of this Board. Adjudication will more expeditiously be accomplished if parties to proceedings adhere to the Rules and succinctly state in their respective Submissions the relevant and material facts as developed on the property (supported by documentary evidence made part of the record on the property) and frame the issue in the case. Bear in mind we sit as an appellate body — the record is made on the property. Issues may not be raised for the first time before this Board; and, with few exceptions, evidence may not be first introduced in proceedings before this Board.

This Board has established by case law that the filing of "notice of intent" with this Board within the nine months prescribed by Article V of the August 21, 1954 National Agreement satisfies that time limitation and the prescriptions of the Railway Labor Act. We are aware that certain Carriers take the position that our interpretation is legally unsound. Unless and until such time as our interpretation is found erroneous by ultimate judicial order, we will affirm the established case law of this Board. For those reasons we will deny Carrier's motion to dismiss because the "notice of intent" and not the petition was filed within the time limitation prescribed in Article V. See our Award Nos. 7813, 7850, 8422, 8424, 8669, 8764, 9059, 9108, 9203, 9220, 9246, 2811, 9944, 9945, 10075, 10500 and 14687. The last cited Award recently rejected this Carrier's argument on this point.

In its Rebuttal Submission Carrier contends for the first time that the claim presented to the Board is fatally at variance with the Claim processed on the property, and for this reason moves for dismissal. This motion is denied for two reasons: (1) it was made untimely; and, (2) even if timely made it finds no support in the record — substance, not form or phraseology, is the test.

Carrier argues that the work of finding a runaway car and flagging a train is not work exclusively reserved to telegraphers. Petitioner disavowed making any such claim. We find the Claim to be that a Supervisory Agent violated Telegraphers' Agreement when he transmitted and delivered messages relative to the movement of a train from the closed station at Stringtown, Oklahoma. There is no denial that: (1) the situs was a closed station; (2) there was an emergency; (3) the transmittal and delivery if made as alleged was a violation of the Agreement. The issue, therefore, is one of fact: Did the Supervisory Agent transmit and deliver messages as averred by Petitioner? We turn to the pertinent rule and the facts of record.

The pertinent rule is:

"RULE 1.

(d) Station or other employes at closed offices or non-telegraph offices shall not be required to handle train orders, block or report trains, receive or forward messages, by telegraph, telephone or mechanical telegraph machines, but if they are used in emergency to perform any of the above service, the pay for the Agent or Telegrapher at that office for the day on which such service is rendered shall be the minimum rate per day for Telegraphers as set forth in this agreement plus regular rate. Such employe will be permitted to secure train sights for purpose of marking bulletin boards only.

NOTE: (It is understood that 'closed offices' also mean an office where other employes may be working not covered by this agreement, or an office which is kept open a part of the day or night.)"

We now reach the facts of record. The Claimant, W. E. Hurt, is Agent at Stringtown, Oklahoma.

From the Claim submitted on the property we excerpt:

"R. L. Schumacher, Agent, McAlester, Oklahoma, was called by the Dispatcher's office at Denison and instructed to go to Stringtown and take care of No. 6, account of one coal car located on the north end of crusher lead started rolling northward, and rolled over derail through two switches and out on the main line, and rolled by Mile Post 600 slightly over 1½ miles from where it started.

It is reported that someone at the subprison called the Southwestern Stone Company and advised their Superintendent, Mr. Howard Willison, about the car being out on the main line. He tried to call Atoka and failed to raise anyone, and immediately called the Katy at Denison about 10:20 A. M.

Stringtown is closed on Saturday and Sunday except by calls. Mr. Schumacher is Agent at McAlester and he was called at 10:30 A. M. and instructed to go to Stringtown and find the car and get No. 6 by.

Mr. Schumacher flagged No. 6 and tried to get the Engineer to cut off the engine and get the car and bring it back to Stringtown, but the Engineer and Conductor both refused, and didn't like the idea until they had some instructions from the Dispatcher's office. Therefore, Mr. Schumacher called the Dispatcher from Stringtown on the Dispatcher's telephone and got instructions which resulted in No. 6 pushing the car ahead of No. 6 to Burg, and there setting it on a runaround track. Mr. Schumacher advised the Agent, W. E. Hurt, that he did communicate with the Denison office from Stringtown, and no attempt was made to call the Agent-Telegrapher, W. E. Hurt. Mr. Hurt is assigned to the Agency at Stringtown, and was the logical man to be called instead of Schu-

macher; and for this violation of Rule 1(d) Mr. Hurt exercises his right by turning in a Time Slip No. 9 on February 11 (Sunday) for this violation." (Emphasis ours.)

The R. L. Schumacher referred to in the quotation is a monthly rated Supervisory Agent. Carrier does not deny the sentence printed in dark type in the quotation.

Carrier admits that at about 10:45 A. M. on Sunday, February 11, 1962, it knew or had reason to believe that the coal car had rolled on to the main line. It admits that if this had occurred it knew the car would be on the main line somewhere between Mile Posts 601.56 and 594.0. Then it says that the following instructions were given to the crew of No. 6, scheduled to depart Denison (Mile Post 660.9) running North at 11:10 A. M. and scheduled to arrive Stringtown (Mile Post 602.6) at 12:26 P. M.:

> "They were to proceed from the north siding switch (MP 601.56) to Burg (MP 594.0) looking out for a car on the main track and if a car was found they were to shove it to Burg and put it in the clear of the main track. The Conductor of No. 6 was so advised and instructed personally by the Assistant Chief Dispatcher at Denison and the Engineer of No. 6 at Denison and the crew of No. 42 at Ray were instructed via radio."

Carrier alleges that the only reason Supervisory Agent Schumacher was directed to find the car was to "minimize the delay to the train (No. 6) by locating the car in advance of its (No. 6) arrival," and to inform the Dispatcher of the location. Further, Carrier says, Claimant was not available because he was at his home in McAlester, which by Mile Post is 36.6 miles from Stringtown.

We do not credit Carrier's defense for the following reasons: (1) its admission that the car would be found between Mile Posts 601.56 and 594.0 — thus eliminating any reason for having the Supervisory Agent driving his automobile over thirty miles for the sole purpose of finding the car and reporting its whereabouts; and, (2) if the crew of No. 6 had received their orders as to the location of the car and what to do with it, the Supervisory Agent could serve no useful purpose at Stringtown. From our study of the record as a whole we are persuaded that the crew of No. 6 did not receive the orders as alleged at Denison and the Supervisory Agent was dispatched to find the car, flag No. 6 and transmit and deliver messages as to the car's movement by No. 6. Since the messages were through Stringtown, at which location the Claimant was the regularly assigned Agent, he is a proper Claimant contractually entitled to the penalty prescribed in Rule 1(d) regardless of availability; but, we note he was as available as the Supervisory Agent, both being in McAlester.

Carrier argued that Petitioner bore the burden of proof that messages relating to the movement of the train were in fact transmitted and delivered by the Supervisory Agent. This is so. But, when Petitioner made a prima facie case, as it did, the burden of going forward with the evidence shifted to Carrier. The unsupported assertions of Carrier did not satisfy its burden. In civil matters when a party has in its peculiar control evidence of probative value which it fails to adduce it can be presumed that if such evidence was adduced it would be unfavorable to that party. In this case Carrier had or should have some record of instructions issued to the crew

of No. 6. Even if there were no such records it could have obtained statements from members of the crew and/or the Supervisory Agent. Failing in this Carrier did not satisfy its burden of going forward with the evidence and Petitioner's prima facie case stands not rebutted. We will sustain 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 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 31st day of March 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15444,
DOCKET TE-14061 (Referee Dorsey)

This Award arbitrarily invokes a rule of evidence against the Respondent while failing to invoke the same rule against the Petitioner and disposes of the controlling issue by making a finding of fact for which there is no supporting evidence whatever.

The Award is correct in observing that the claim submitted on the property was that:

> "Mr. Schumacher flagged No. 6 and tried to get the Engineer to cut off the engine and get the car and bring it back to Stringtown, but the Engineer and Conductor both refused, and didn't like the idea until they had some instructions from the Dispatcher's office. Therefore, Mr. Schumacher called the Dispatcher from Stringtown on the Dispatcher's telephone and got instructions which resulted in No. 6 pushing the car ahead of No. 6 to Burg, and there setting it on a runaround track . . ." (Emphasis ours.)

The Award is also correct in disregarding the new claims which Petitioner attempted to put before us in its initial submission, to which Carrier objected.

Carrier immediately and emphatically denied that the train crew got their instructions through Agent Schumacher, contending that the train crew received their instructions before leaving Denison. The controlling question presented is whether the train crew received instructions regarding handling of the car at Denison, as alleged by Carrier, or at Stringtown, as alleged by Petitioner; thus, the Award is correct in noting that:

> ". . . The issue, therefore, is one of fact: Did the Supervisory Agent transmit and deliver messages as averred by Petitioner? . . ."

Furthermore, the Award correctly states the law on burden of proof and concealment of evidence. It states:

> ". . . Petitioner bore the burden of proof that messages relating to the movement of the train were in fact transmitted and delivered by the Supervisory Agent . . . when a party has in its peculiar control evidence of probative value which it fails to adduce it can be presumed that if such evidence was adduced it would be unfavorable to that party. . . ."

However, the application given these two sound principles is so completely arbitrary as to render the Award invalid.

First, let us consider the rule against concealment of evidence. Two points are significant here. In the first place, the rule is applicable to petitioners as well as to respondents, and in the second place, the rule does not apply where evidence is equally available to both parties. To properly invoke the rule, there must be a definite showing that the particular evidence is peculiarly within the reach of the party against whom it is invoked.

In this case, the Petitioner admittedly withheld direct evidence on the specific and controlling issue which was apparently both readily and solely available to Petitioner. In his letter to Carrier's Superintendent, the General Chairman stated:

> ". . . We also have witnesses to the effect, if it is necessary, that he was seen using the telephone, and also heard using the telephone. Therefore, your 'alibier' did not have his story quite good enough to keep from paying this claim." (Emphasis ours.)

Although Carrier emphatically and consistently denied that Agent Schumacher got instructions for the train crew, Petitioner never came forward with its witnesses or any statement from its witnesses to prove its basic contention that Mr. Schumacher "requested instructions as to how your office wanted this situation handled." Since Petitioner allegedly had witnesses who heard what was said but failed to come forward with these witnesses or their statement, we must conclude that the testimony would have been against it.

The Referee ignores this clear withholding of evidence by the Petitioner and in shocking misapplication of the rule, assumes that Carrier concealed evidence merely because it failed to adduce evidence which the Referee assumes it had, and further because Carrier did not take statements from the trainmen. Petitioner had equal access to the trainmen, and does not assert otherwise. In his letter submitting the claim, the General Chairman purported to say exactly what the Engineer and Conductor had said to the Supervisory Agent. He could only have obtained this information directly from the Engineer and Conductor. Why did not the

Petitioner get statements from the Engineer or Conductor to verify its assertions? Certainly there is nothing in the experience of this Board which would suggest that an Engineer or Conductor would more readily give a favorable statement to Carrier than to the representative of this class of employes. Furthermore, Petitioner had the burden of proof, and it was its responsibility to obtain this evidence if such was believed to be relevant. Petitioner did not assert that it was restricted in any way from obtaining statements of the Conductor and the Engineer.

Now let us consider the finding that Petitioner has met its burden of proof. The reason offered for this finding is simply that the Referee considers the defense asserted by Carrier to be unworthy of credit. Specifically, he finds:

> "Carrier alleges that the only reason Supervisory Agent Schumacher was directed to find the car was to 'minimize the delay to the train (No. 6) by locating the car in advance of its (No. 6) arrival', and to inform the Dispatcher of the location. Further, Carrier says, Claimant was not available because he was at his home in McAlester, which by Mile Post is 36.6 miles from Stringtown.
>
> We do not credit Carrier's defense for the following reasons: (1) its admission that the car would be found between Mile Posts 601.56 and 594.0 — thus eliminating any reason for having the Supervisory Agent driving his automobile over thirty miles for the sole purpose of finding the car and reporting its whereabouts; and, (2) if the crew of No. 6 had received their orders as to the location of the car and what to do with it, the Supervisory Agent could serve no useful purpose at Stringtown. . . ."
> (Emphasis ours.)

Here is what Carrier actually asserted at various points in its initial submission:

> "The Roadmaster and the Assistant Roadmaster could not be located at the time and for that reason the Supervisory Agent at McAlester, Mr. R. L. Schumacher, was called about 11:15 A. M. and instructed to drive south in his automobile and look for a car on the main track north of Stringtown and if he did find a car to advise where No. 6 had put the car to clear the main track. Mr. Schumacher drove south in his automobile and did find a car on the main track north of MP 600. He drove on into Stringtown and so advised the train dispatcher at Denison. Mr. Schumacher arrived Stringtown ahead of No. 6 and flagged No. 6 and advised the crew the location of the car on the main track. No. 6's crew informed Mr. Schumacher they had been advised about the car prior to departure Denison and were instructed on handling the car.
>
> * * * * *
>
> They could have located the car without any assistance and the purpose in calling the supervisor was to minimize the delay to the train by locating the car in advance of its arrival.
>
> Supervisors are used in emergencies of this kind and, as the Roadmaster and Assistant Roadmaster were not available, the Supervisory Agent at McAlester was used to locate the car.

Claimant would not have been used to locate this car even if he had been on duty at Stringtown as it had rolled about three miles north of Stringtown. . . ." (Emphasis ours.)

The Referee's refusal to credit these defenses of Carrier on his own assumption that there could have been no reason for the Supervisor to go on to Stringtown if the train crew had knowledge that the car was located at some point within a 7.56 mile territory is manifestly without foundation in reason or fact. It is admitted that the Supervisory Agent found the car approximately three miles north of Stringtown. By flagging the train at Stringtown and reporting the exact location to the train crew he eliminated the necessity of the train crew's proceeding at such a reduced rate of speed as to be able to stop their train entirely within the line of vision of the Engineer. Furthermore, viewing the situation with foresight instead of hindsight, the car admittedly could have been at a point 7.56 miles from Stringtown, thus making it necessary for the train to go 7.56 miles slowly enough to be able to stop on the piece of trackage which the Engineer could see ahead. The record does not disclose the terrain, and obviously if there were curves or other impediments to vision, reducing speed to such an extent could have resulted in serious delay. The obvious injustice in this conclusion of the Referee is manifested by the fact that in rebuttal Petitioner quoted Carrier's statement about avoiding delay to the train and significantly did not deny that what was done would in fact minimize the delay to the train. The only comment was the unsupported assertion that Claimant should have taken the place of the Supervisor. Under the consistent rulings of this Board, the failure of Petitioner to deny that what was done would minimize delay to the train constitutes an admission of Carrier's assertion in that regard, and it is both arbitrary and capricious for the Referee to say that the purpose of minimizing delay would not be a reason for the Supervisor to go on to Stringtown.

The provisions in the law making Awards of this Board final and binding do not empower the Board to validly make a finding or an Award that is not supported by any relevant evidence. Both the Federal Courts and the Congress have noted that Awards which have no foundation in reason or fact are invalid, and should not be enforced by the Courts. **Barnett v. Pennsylvania-Reading Seashore Lines**, 145 F. Supp. 731, affirmed 245 F.2d 579. **Gunther v. San Diego & Ariz. E. Ry.**, 382 U.S. 257 (1965). Report No. 1201 of Committee on Labor and Public Welfare, U.S. Senate, dated June 2, 1966, in connection with bill (H.R. 706) to amend the Railway Labor Act.

We dissent.

G. L. Naylor
R. E. Black
T. F. Strunck
P. C. Carter
G. C. White

LABOR MEMBER'S RESPONSE TO DISSENT, AWARD 15444, DOCKET TE-14061

"He draweth out the thread of his verbosity finer than the staple of his argument."—(Shakespeare, Love's Labour's Lost: Act V. Sc. 1, Line 18.)

J. W. Whitehouse
Labor Member

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.