# Award No. 15525
# Docket No. TE-14537

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Don Harr, Referee**

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## PARTIES TO DISPUTE:

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

## ATLANTA AND WEST POINT RAILROAD-THE WESTERN RAILWAY OF ALABAMA

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atlanta and West Point Railroad–Western Railway of Alabama, that:

1. Carrier violated the terms of an Agreement between the parties when on December 5, 1962, it failed to call J. C. Cravey, regularly assigned first shift telegrapher-clerk, Selma, Alabama, to perform duties of telegrapher-clerk, Selma, Alabama.

2. Carrier will, because of the violation set out in paragraph 1 hereof, compensate J. C. Cravey for a call in the amount of $7.61, as provided by Article 4(c) of said Agreement.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the Atlanta & West Point Railroad Company–Western Railway of Alabama, hereinafter referred to as Carrier, and its Telegraphers, hereinafter referred to as Employes, represented by The Order of Railroad Telegraphers, hereinafter referred to as Organization, effective September 16, 1956 and as amended.

Copies of said Agreement, as prescribed by law, are assumed to be on file with this Board and are by this reference made a part hereof.

At page 24 of said Agreement under Article 25, Rates of Pay, are listed the positions at Selma, Alabama on the effective date thereof. For ready reference the listing reads:

| Station | Position | Per Hour | Overtime |
|---|---|---|---|
| Selma Yard | CT | $1.974 | $2.961 |
| Selma Yard | CT | 1.974 | 2.961 |

J. C. Cravey, hereinafter referred to as claimant, was, on the date involved in this claim, the regular occupant of the first shift telegrapher-clerk's position at Selma, Alabama. Assigned hours 5:00 A. M. to 1:00 P. M., work week Saturday through Monday, rest days Thursday and Friday.

of this Board and the relevant provisions of the Railway Labor Act, as amended, but failed of settlement. The dispute is, therefore, appealed to your Honorable Board for adjudication.

(Exhibits not reproduced.)

**CARRIER'S STATEMENT OF FACTS:** Selma, Alabama, is the western terminus of The Western Railway of Alabama. Operations at Selma are joint between The Western and Louisville and Nashville Railroad, with The Western as the governing line. Operations at Selma are under the direction of the local agent. The telegraph operators are located at the yard office. There are two shifts of operators, the first shift working from 6:00 A. M. to 2:00 P. M., and the second shift from 6:00 P. M. to 2:00 A. M. There are two yard engines assigned at Selma, one day and one night. The foremen of such engines are classified and assigned as footboard-yardmasters, receiving standard footboard-yardmasters' pay.. As such, they supervise yard engine operations on their respective shifts, reporting to the Agent.

At Benton, Alabama, on carrier's Selma Division, some twelve or thirteen miles from Selma, are located two large trestles. At the time of this claim, there was a weight restriction of 210,000 pounds on these trestles, this being covered by special instructions in time table, reading:

> "Cars weighing more than 210,000 pounds gross must not be handled on Selma Division without authority."

When such a car showed up at Selma, the train dispatcher on duty was appraised of same, whereupon he would handle with bridge department for authority to move car. When they were moved, it was usually with a spacer car on each end of the heavy load.

Footboard Yardmaster Hatfield was on duty and in charge of the yard at 4:30 A. M., Central Standard Time, on December 5, 1962. A question arose concerning movement of SHPX 17855, containing LP gas, weighing in excess of the load limit of 210,000 pounds. Footboard-Yardmaster Hatfield called the dispatcher concerning movement of car.

Claim was filed for a call for claimant account alleged violation of scope rule. Claim was declined at all levels on the property.

**OPINION OF BOARD:** This claim arose when a footboard yardmaster at Selma, Alabama used the telephone to communicate with the train dispatcher at Atlanta to obtain permission to move a car that weighed in excess of the load limit. At the time in question there was no telegrapher on duty at Selma.

To justify a sustaining Award, the Employes must show (1) that they are granted the exclusive use of telephones under the Scope Rule of the agreement, (2) that they have historically and customarily, exclusively performed the work in question on the property, or (3) that the instructions given by the train dispatcher constituted a train order and that they would be entitled to the work under the Train Order Rule.

The Scope Rule of the effective Agreement reads:

"ARTICLE 1.
EFFECTIVE DATE – SCOPE

Effective September 16, 1956, the following rules, regulations and rates of pay will apply to all Telegraphers, Telephone Operators (except switchboard operators), Agent Telegraphers, Agent Telephoners, Towermen, Levermen, Tower and Train Directors, Block Operators and Staffmen, also such Station Agents, Assistant Agents, Ticket Agents and Ticket Sellers as are listed herein."

This Scope Rule is a general Scope Rule.

Award 12383 (Engelstein) states:

"We first look to the Agreement to determine if it reserves the work in question exclusively to the employes on whose behalf the claim is made. We find that the Scope Rule is of the general type which enumerates positions, but does not define the work specifically allocated to telegraphers. We then search the record for evidence that the work in dispute has been performed exclusively by this craft through practice, custom, and tradition. We do not find that it is enough for Petitioners to show that telegraphers customarily performed the work. They must prove that the telegraphers handled the messages to the exclusion of all other classes of employes. We observe that the messages transmitted by telephone contained information related to the work for which the employe was responsible in the course of his regular duties, as, for example, directions or instructions within his jurisdiction as a supervisor. The telephone is not an exclusive instrument of the telegraphers' craft, but is a tool necessary and available to other classes of employes in their duties."

See also Awards 13923 (Dorsey), 12706 (Yagoda), 11223 (Sheridan), 14494 (Rohman), and 15169 (Lynch).

The employes are not entitled to exclusive use of telephones under the Scope Rule, and they have not established their right to this work by past practice, custom and tradition.

We then are faced with the question of whether or not a train order is involved. We have held that an order, written or verbal, that controls the movement of a train can be a Train Order. In this case, the footboard yardmaster was concerned only with the make-up of the train, not the movement of the train. The communication here does not meet our tests of what constitutes a Train Order. We will deny 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 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 28th day of April 1967.

## DISSENT TO AWARD 15525, DOCKET TE-14537

I feel obliged to dissent from the decision of the majority principally for two reasons: (1) Its failure to discuss prior awards involving these same parties and cited as controlling precedent for a sustaining award; and (2) Its discussion and purported decision of questions that were not at issue.

**First.** In presentation to the Referee, I cited seven prior awards involving these same parties and the basic question of telegraphers' right to handle communication work. I carefully pointed out to the Referee — both in writing and orally — that these awards are completely consistent in holding that on this property the work of handling communications of the types customarily referred to as "messages, orders and/or reports of record" is reserved to telegraphers when they are employed at the place where the work is performed. Telegraphers were employed at the place where the communication work in the instant case was performed by a yardmaster. The cited awards required a sustaining award here unless it could successfully be shown that this particular communication does not properly fall within the category "of record." No attempt was made by the majority to distinguish this particular communication from those so labeled in the cited prior awards. No mention was made of the awards involving these parties, although one lengthy quotation and five additional citations of awards dealing with other parties and issues do appear in the Opinion of Board.

I must in all candor look upon this failure of the majority to reconcile its decision here with the prior awards as an admission that it could not do so.

**Second.** In the second paragraph of its Opinion of Board the majority sets up three tests which it says the employes must successfully meet in order to justify a sustaining award. The first of these reads:

> ". . . (1) that they are granted the exclusive use of telephones under the Scope Rule of the agreement . . ."

No such issue was ever raised in this case. The only possible ground for such a statement to be found in the record is a petulant cry from the Carrier

in its ex parte submission that "If the Organization has the exclusive right to use the telephone, they should have negotiated same into the agreement." This ungrammatical language might well be said to create a presumption that although the employes do have such a right, they did not put it into writing in the agreement. More to the point, however, is the fact that no such statement was made during handling on the property; and a mere extraneous exclamation of irritability certainly does not create an "issue" for decision of this Board. The employes quoted with approval the following excerpt from Award 4516:

> "But it was readily apparent that the use of the telephone was so general that every use of the telephone was not contemplated or intended as telegraphers' work. . . ."

The second test conceived by the majority is:

> ". . . (2) that they have historically and customarily, exclusively performed the work in question on the property . . ."

This is an inaccurate distortion of the issue that was involved. No test of "exclusivity" was suggested by the record of handling on the property. The only issue there was whether the communication was "of record." The "exclusivity" theory — if it can properly be dignified by such a term — came "exclusively" from awards that have adopted impossible criteria for demonstrating scope rule rights. Award 15162, to which I referred during oral argument to the Referee, contains this mature observation:

> "The 'exclusivity' factor in the test is a harsh burden of proof. The Referee would propose striking it if the factor was not imbedded for so long a time in this Division's case law; and, relief potentially available to the organizations through the collective bargaining process."

The present award clearly demonstrates the error by which the "exclusivity factor" became imbedded — like a malignancy — in the case law of this Division.

The third test invented by the majority is this gem of irrelevancy:

> ". . . (3) that the instructions given by the train dispatcher constituted a train order and that they would be entitled to the work under the Train Order Rule."

I have searched the record in vain for any mention of the Train Order Rule, or of any reference that could conceivably raise any question of the telephone conversation or instructions issued by the dispatcher being a "train order." Obviously, no one who has the faintest notion of what the term "train order" means would confuse the communication in question with a train order. It certainly is error for this Board to impose as a test a technical term peculiar to railroading when neither party, nor any Board member has suggested such a test.

Our awards contain many references to "palpable error", without precisely defining the phrase. No definition is needed to rank Award 15525 among the best examples of what is meant by that appellation.

Finally, it should be understood that my criticism is not directed to the integrity of the Referee. I'm sure his intention was only to render a proper award. I am equally sure he made serious mistakes, and for the reasons given I dissent.

**J. W. Whitehouse**
Labor Member

## CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 15525, DOCKET TE-14537

The dissent of the Labor Member registers his disappointment in the fact that the Referee did not agree with his contentions. The dissent consists, primarily, of a rehash of the arguments presented by the dissenter to the Referee and not accepted. The dissent changes nothing, adds nothing, and does not detract from the award which is based upon sound precedent enunciated in many prior awards of this Division, some of which are cited in Award 15525.

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

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