Award No. 15740
Docket No. TE-15395

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Thomas J. Kenan, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad (Gulf District), that:

1. Carrier violated Scope Rule 1 and Rule 2 (c) of the Telegraphers' Agreement when, on the 11th day of November, 1963, it required and permitted train dispatcher at Palestine, Texas, to authorize telegrapher on duty at Taylor, Texas to contact No. 66 by radio and ascertain No. 66's whereabouts and other information pertaining to "control of transportation." Train service employe on No. 66 reported that train was passing Thorndale, Texas at 11:15 P. M.

2. Carrier shall compensate the agent-telegrapher working at Thorndale, Texas on November 11, 1963, for one call, three hours, at the pro rata rate applicable at that station for this violation.

EMPLOYES' STATEMENT OF FACTS: Thorndale, Texas is located on the Taylor Subdivision of the Missouri Pacific Railroad (Gulf District), 12.6 miles north of Taylor, Texas. This is a one-man agency, manned by the Agent-Telegrapher, with assigned hours of 8:00 A. M. to 5:00 P. M., Monday through Friday, with meal period from 12:00 Noon to 1:00 P. M.

At 11:15 P. M. on November 11, 1963, Train Dispatcher R. P. Bailey contacted the Telegrapher on duty at Taylor, Texas and instructed the Telegrapher to get on the radio and locate Train No. 66. Conductor Spencer on Train No. 66 advised the Telegrapher that No. 66 would arrive at Valley Junction at 12:15 A. M. The Telegrapher on duty at Taylor then reported the location of No. 66 and that the Conductor stated No. 66 would arrive at Valley Junction at 12:15 A. M. and that No. 66 had passed Thorndale. Dispatcher then put out Train Order No. 304 to Valley Junction, care of No. 7, which read:

'No. 7 eng 20 wait at Valley Jct until 1215 AM, Gause 1225 AM, for No 66 eng 465.

Order to No 7 at Valley Jct

RPB Complete 1119 PM."

as a result of any additional information that was furnished by the telegrapher at Taylor, but on information that the dispatcher had at his disposal prior to the alleged violation.

In view of the foregoing, claim that Carrier violated Rules 1 and 2(c) of the Telegraphers' Agreement, is without merit, and is hereby declined.

Yours truly,

/s/ B. W. Smith"

7. The General Chairman rejected the decision of the Director of Labor Relations in letter dated March 6, 1964, which reads in part as follows:

"The statements contained in your letter are not realistic. The true facts as set forth in our letter of November 15, 1963, clearly stated what actually occurred.

Carrier is taking the same unsound argument as that used in Award No. 22 of Special Board of Adjustment No. 506. The Referee clearly saw through the subterfuge being employed of securing vital 'control of transportation' information as in this dispute. The issue here is no different in fact or principle to that in Award No. 22."

There can be little, if any, doubt that Award No. 22 of Special Board of Adjustment No. 506 is erroneous, since that Award is in direct conflict with Award 43 of Special Board of Adjustment No. 305 (Carrier's Exhibit B). In Award 43, the claim of a telegrapher was denied, even though the train crew member gave a train dispatcher his location directly and did not report such by way of a telegrapher to be relayed (as in Award 22 and the instant case) to the dispatcher.

8. The Employes requested conference to discuss this claim, which was granted by the Carrier, and held March 31, 1964. In confirming the conference under date of April 3, 1964, the Carrier's letter reads in part as follows:

"You cited Award 22 of Special Board of Adjustment No. 506 in support of your position in this dispute. However, the primary element necessary to constitute reporting a train, time of arrival, is missing in the instant disputes. 'Time' was the controlling factor for the decision sustaining the claim in Award No. 22 of Special Board No. 506."

The Carrier's final decision declining the claims in the conference of March 31, 1964, was rejected by the Employes by letter dated June 2, 1964.

(Exhibits not reproduced.)

OPINION OF BOARD: The train dispatcher at Palestine, Texas, directed the telegrapher on duty at Taylor, Texas, to contact Train No. 66 by radio and either "ascertain its whereabouts" (as is contended by the Employes) or find out if it was having any trouble (as is contended by the Carrier), all relative to the train dispatcher's desire to get Train No. 66 to Valley Junction in time to meet there with Train No. 7.

The telegrapher talked by radio to the conductor of Train No. 66. The telegrapher next reported to the train dispatcher that Train No. 66 was not having any trouble, and was "going by" Thorndale then. The Employes contend the train conductor's radio conversation with the telegrapher at Taylor amounted to a train report, since the conductor stated that the train was then going by Thorndale, and that only the telegrapher at Thorndale could give this report. The Employes cite Rule 2 (c) of the Agreement and Award No. 22, Special Board of Adjustment No. 506 (Ray).

The Board can neither sustain the Employes' contention that the conductor's conversation with the telegrapher at Taylor was prohibited by Rule 2 (c) of the Agreement, nor can the Board follow Award No. 22, Special Board of Adjustment No. 506.

Rule 2 (c) provides as follows:

"RULE 2.

HANDLING TRAIN ORDERS, ETC.

(c) Train dispatchers will not be required nor permitted to transmit train orders or handle block by telephone or telegraph to train and engine service employes, except in emergency; nor will train and engine service employes be required or permitted to take train orders or to block, or report, trains by telephone or telegraph, except in emergency. Emergency is defined as follows:

Casualty or accident, engine failure, wreck, obstructions on track through collision, failure to block signals, washouts, tornadoes, slides, or unusual delay due to hot box or break-in-two that could not have been anticipated by dispatcher when train was at previous telegraph office, which would result in serious delay to traffic."

This rule prohibits train and engine service employes from reporting trains **to train dispatchers.** Although this is not explicitly stated, it is so clear that it is implicitly understood. Conversations between train and engine service employes and telegraphers do not rise to the dignity of train reports; the telegraphers are not the authority to whom these reports are made.

Any train report made (if any was made) occurred when the telegrapher at Taylor reported back to the train dispatcher. Rule 2 (c) obviously does not prohibit telegraphers from making train reports.

Award No. 22, Special Board of Adjustment No. 506, involved a similar situation and held Rule 2 (c) was violated. The Special Board stated:

"The violation as we see it was the report as given by the train service employe to the telegrapher for relay to the dispatcher. Rule 2 (c) says train service employes shall not be permitted to report trains. It does not say except to a telegrapher. If the dispatcher could use a telegrapher to get these reports from a train service employe, it could then evade the rule."

Since Rule 2 (c) is too clear to admit of the construction placed on it by the Special Board, we hold that its Award 22 was palpably in error and not binding on this Board.

ADDITIONAL AND SEPARATE OPINION OF REFEREE, AFTER REHEARING

The foregoing "OPINION OF BOARD", as well as the "FINDINGS" and "AWARD" which appear below, were circulated among the members of this Board after preparation by this Referee and before adoption of this Award by the entire Board. A rehearing of this matter was requested by the Employes, and was held.

The Employes argued at the rehearing that this Board was without authority to refuse to follow Award No. 22, Special Board of Adjustment No. 506. This argument was based upon the fact that in the agreement between the Carrier and the Employes which created Special Board of Adjustment No. 506, there appears the following statement:

> "J. The Board shall . . . make findings and render an award in each case submitted to it. . . . **Such awards shall be final and binding upon all parties to the dispute.** . . ." (Emphasis ours.)

The Employes argued that once Rule 2 (c) of the Agreement had been interpreted by Special Board of Adjustment No. 506 with respect to a specific situation, the same rule must **of necessity** thereafter be interpreted the same way by this Board should the same situation again arise between the same parties. As additional support for this argument, the Employes cited several decisions of the Supreme Court of the United States and the lower federal courts, the thrust of which decisions, for the problem at hand, is that the federal courts will not judge disputes properly arbitrable under the provisions of the Railway Labor Act, nor will they review the merits of awards of this or similar Boards. United Steelworkers v. American Manufacturing Company, 363 U.S. 564 (1960); United Steelworkers v. Warrior & G. Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960); International Association of Machinists, AFL-CIO v. Central Airlines, Inc., 10 L. ed. 2d 67 (1963); Gunther v. San Diego & Arizona E. R. Co., 15 L. ed. 2d 308 (1965); Independent Petroleum Workers v. American Oil Company, 324 F. 2d 903 (7th Cir., 1964); and Philadelphia Mar. Tr. Ass'n v. International Long. Ass'n, L. 1291, 365 F. 2d 295 (3d Cir., 1966). The Employes urged that since the courts cannot overturn the "final and binding" Award No. 22, Special Board of Adjustment No. 506, then surely this Board should feel itself compelled to follow such award if it be a true precedent in this case.

The Employes finally argued that, since this Board cannot rewrite or alter the terms or language of the Agreement, then Award No. 22, Special Board of Adjustment No. 506, must be followed since it clarified (by prior agreement of the parties), any ambiguities which may have existed with respect to the application of Rule 2 (c) to the situation at hand.

The foregoing arguments, as formidable and intriguing as they may be, do not compel this Referee to alter his decision, for the following reasons:

1. A refusal to follow Award No. 22, Special Board of Adjustment No. 506, because of palpable error in such award, does not interfere with the "final and binding" nature of such award upon all parties to that dispute. That award stands, untouched by this award. The present refusal to accept Award No. 22 as a precedent

does not reverse it or unbind the Carrier from any unfulfilled obligation to comply with the order contained in such award. The provision — that awards shall be final and binding upon both parties to a dispute — appears both in the Railway Labor Act, Section 3, First (m), and in the agreement which created Special Board of Adjustment No. 506. This provision means that awards of this Board or of Special Boards of Adjustment are res judicata as between the parties to disputes, with no appeal to the courts on the merits allowed. This provision has nothing to do with the principle of stare decisis.

2. The fact that the courts (as well as this Board), cannot reverse Award No. 22 on its merits has nothing to do with the treatment this Board accords it for its value as a precedent. To be sure, Award No. 22 is entitled to the weightiest consideration possible in the present case, for the parties and issue are identical. Nevertheless, nothing appears in the Railway Labor Act nor the agreement which created Special Board of Adjustment No. 506 which compels the slavish following of Award No. 22 in the present case.

3. To hold that this Board must, of necessity, follow Award No. 22 would be contrary to the traditions of this Board and inconsistent with its past practices. While this Board has always announced its strong attraction to the principle of stare decisis, it has never surrendered outright to such dogma. See Awards No. 12522 (West), 11788 (Dorsey), 11897 (Hall), 13491 (Dorsey), 13701 (Williams), 13728 (Mesigh), 14200 (Seff), 15358 (Stark), 7968 (Elkouri), and others cited in Willemin, Selected Awards Annotated, 9.401, which are only a few of the many awards that state that prior awards should be followed unless palpably wrong.

4. The interpretation of agreements, the prime task of this Board, is first and last a search for the intention of the contracting parties. An earlier award by another referee, no matter how entitled it is to respectful consideration, is not an expression emanating from the contracting parties. It is the opinion of another referee. The strong tendency of this Board to follow precedent may, for all practical purposes, establish a referee's opinion as the accurate expression of the intention of the contracting parties. But, the legitimacy of this effect and, ultimately, the dignity of this Board, depend upon the extent to which referees' awards actually do conform to the intention of the contracting parties. Policy considerations, such as the needs for consistency and the final settling of disputes over interpretations, do justify a referee's following a precedent even when he feels such precedent likely fails to express the intention of the contracting parties. But, when the precedent palpably fails in this respect, considerations of policy can no longer be permitted to deflect this Board from its primary aim — the discovery and effectuation of the intention of the contracting parties.

For the foregoing reasons, this Referee rejects the Employes' contention that Award No. 22, Special Board of Adjustment No. 506, must be followed even if it is palpably erroneous. And Award No. 22 was palpably erroneous, for it rested on the finding that a train service employe made a train report to a telegrapher. It is impossible to make a train report to a telegrapher. Telegraphers are not the authority to whom these reports are made.

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 no violation of the Agreement occurred.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of July 1967.

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