Award No. 18232

Docket No. TE-18203

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

SOO LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation Communication Employees Union on the Soo Line Railroad, that:

1. Carrier violated the agreement between the parties when it required or permitted Conductor of Train No. 20 to copy a train order at Auburndale, Wisconsin, 9:50 P. M., October 6, 1967.

2. Carrier shall compensate Telegrapher A. T. Mallek eight hours pro rata at the Auburndale rate shown in agreement, plus subsequent increases.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The dispute involved herein is predicated on various provisions of the collective bargaining agreement, entered into by the parties effective July 1, 1956. Claim was submitted to the proper officers of the Carrier, at the time and in the usual manner of handling, as required by agreement rules and applicable provisions of law. The dispute was discussed in conference between representatives of the parties on April 30, 1968.

The controversy arose on October 6, 1967, when the conductor of train No. 20 was required to copy train order No. 174 at Auburndale, Wisconsin. Since February 20, 1963, no telegrapher positions have been maintained at that station.

Employes contended in the handling on the property, and now contend before the Board, that certain provisions of the collective bargaining agreement were violated. (These provisions are specifically set out in Section (d) hereof, Rules Relied On.) Carrier contended: (1) that an emergency existed which, under agreement rules, licensed the action complained of and left Carrier free of any wage liability; and (2) in the alternative, the Claimant was not a proper claimant.

(b) ISSUES

The chief issues are:

(1) At the time the train order in question was copied, and under the circumstances of record, did there exist an

Claim was instituted for 8 hours' pay at the pro rata rate of Auburndale (at the rate shown in the July 1, 1956 schedule, plus subsequent increases) on behalf of "the oldest idle telegrapher and in the event all extra operators were working on this date the claim should then be paid to the senior unassigned operator nearest the point of violation." It was subsequently amended, naming A. T. Mallek as Claimant. Mr. Mallek at this time held a regular assignment as third trick operator at Stevens Point Yard Office with a Saturday through Wednesday work week and Thursday and Friday rest days.

Copies of schedule agreement, effective July 1, 1956, and supplements thereto, between the parties to this dispute, are on file with the Board and are made a part of this record by reference.

OPINION OF BOARD: The Organization contends that Rule 20 of the Agreement governing "Train Orders" and Section (1) of the Memorandum of Agreement of November 23, 1945 were violated by Carrier when on October 6, 1967 Conductor Klein of train No. 20 was permitted and required to copy and repeat train order No. 174, and that Claimant, who was on his rest day, should be paid eight (8) hours at the pro rata rate because of said violation.

Carrier's defenses to this claim are: (a) that an emergency existed because of train No. 7 going on duty at 8:45 P. M. and departing Stevens Point at 10:55 P. M. due to Stevens Point being blocked 20 minutes by switch engine, and therefore Section (2) of the Memorandum of Agreement, which defines "emergencies" and the exception of emergencies under Section (1) of said Memorandum of Agreement permitted the Conductor in this instance to copy said train order without violation of the Agreement; (b) that Claimant was a regularly assigned employe and not a proper claimant inasmuch as the second paragraph of Rule 20 provides payment only to the "senior unassigned Telegrapher."

Carrier's Superintendent, C. A. Jacobs, in his letter dated October 19, 1967, addressed to the Organization's District Chairman, J. W. Staege, alluded to the fact that: "The train sheet bears a notation, 'Stevens Point 20 min. blocked by switch engine?" Does such fact create an emergency as defined in Section (2) of the Memorandum of Agreement, and which section reads as follows:

> "(2) Emergencies as herein specified shall include casualties or accidents, engine failures, wrecks, obstruction of tracks, washouts, tornadoes, storms, slides or unusual delays due to hot box or break-in-two that could not have been anticipated by dispatcher when train was at last previous telegraph office, which would result in serious delay to traffic."

We do not find that an "emergency" existed in this instance as contemplated by said Section (2) of the Memorandum of Agreement. To us, "obstruction of tracks" does not mean obstruction by an operating switch engine. No evidence was offered by Carrier to show that the aforementioned switch engine was inoperative or could not be moved or was restricted through unforeseen and uncontrolled circumstances from being moved from its position of blocking the track. Thus failing to prove that a "perplexing contingency" or "complication of circumstances" indicated an unforeseen and long delay in blocking said track, we are compelled to deny Carrier's assertion that an "emergency" did in fact exist under all the circumstances existing at said time and place.

Second, in regard to Carrier's second defense to this claim that the second paragraph of Rule 20 provides payment only to "senior unassigned telegrapher" and not to a regularly assigned employe such as Claimant herein, or an unassigned telegrapher means an idle extra list telegrapher, it is seen that said paragraph provides as follows:

> "RULE 20. TRAIN ORDERS
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> * * * * *
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> When employes not covered by this agreement handle train orders at points other than referred to in first paragraph of this rule and under conditions other than those enumerated in paragraph (2) of Joint Train Order Agreement (see page 68), senior unassigned telegrapher will be paid one day's pay for each such instance."

It is undisputed that Claimant herein was on his rest day on the day in question. Is he a "senior unassigned employe" as contemplated by said Rule 20? The Organization contends that Carrier has in the past on many occasions considered a "senior unassigned telegrapher" to mean a telegrapher holding a regular position five days per week but unassigned on his rest days, as well as an extra telegrapher, and allowed payments to such employes when train orders were copied by other than telegraphers, and cited specific instances where this procedure was followed by Carrier.

Carrier has cited a recent Award of this Board, Award No. 18064, involving the same parties to this dispute and a similar issue as herein, the only factual distinction being that Claimant, who is also the same Claimant as in this instant dispute, was working as an extra telegrapher on a hold-down in said Award No. 18064, whereas in this dispute he was working as a regularly assigned telegrapher. In said Award No. 18064, in regard to past practices, the Board held: "As to past practice arguments, the Board has consistently held that where provisions of an Agreement are clearly unambiguous, they shall prevail over conflicting practices and either party to the Agreement may insist upon its rights thereunder at any time." The Board, in said Award No. 18064 went on to say: "The Board has also held that payments by operating officers are not determinative of the proper interpretation of rules negotiated by others. . . ." With these conclusions we do not agree and therefore find that said Award No. 18064 is not controlling in the determination of this dispute.

Evidence of custom and past practice may be introduced to sanction assertions that clear language of the contract has been amended by mutual action or agreement of the parties to said contract. Finding that the parties hereto, by past practice, have considered a regularly assigned telegrapher on his rest days to be a "senior unassigned telegrapher," we find that Carrier violated the Agreement and the claim is 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 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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1970.

CARRIER MEMBERS' DISSENT TO AWARD 18232, DOCKET TE-18203

Award 18232 is in serious erorr in its attempt to overrule Award 18064 on the basis that the Referee is not in agreement with the conclusions expressed in Award 18064 that a clear and unambiguous rule prevails over past practice, and that payment of claims by operating officers is not determinative of the proper interpretation of rules negotiated by others. The Referee's error in refusing to follow the prior award is clearly and concisely stated in the following quotation from Memorandum to Accompany early Award 1680 (Garrison):

> "5. If a case is presented involving the same controlling facts and the same rule as were involved in a previous Award, and the same data and material arguments are presented as were presented in the previous case, the Award in the previous case should be followed (unless it is clearly contrary to earlier Awards, in which case it will fall under example No. 1 above). For in such a situation there is nothing new which has not been passed upon and taken into account before, and the only question is whether the personal judgment of the later referee (assuming the cases to have been decided with referees participating) should be substituted for that of the former referee.
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> * * * in the case of this Board the composition of the referees is not stable; one goes and another comes. If referee A reverses referee B upon the same set of facts, the same rule, and the same presented data, he is simply substituting his own personal judgment for that of B. If he does so, the identical question, arising between other parties, will inevitably be presented to referee C, who will then have to choose between the opinions of B and A. His choice will not determine the matter, for the question will again come up before D, and thus the matter may never end."

In Award 18064 the Referee concurred in and followed prior awards of this Board, authored by experienced and competent referees, as to such principles. In Award 18232, disregarding prior awards furnished him, the Referee merely substituted his judgment for that of the Referee in Award 18064, stating he did not agree with the conclusions reached in Award 18064. He cited no prior awards of this Board, nor of any other authority, in support of his contrary conclusions. It is significant that he made no finding to the effect that the rule in dispute is ambiguous.

The erroneous payment of claims by an operating officer at one location on the system does not constitute an amendment of the contract. Award 18232 seeks to amend the rule by interpretation and thereby exceeds the jurisdiction of this Board.

It has often been held that an award is no stronger than the logic that supports it. On that basis Award 18232 can have no precedential value. It disposes of the dispute involved in this case alone, but settles nothing. To the contrary, it can only result in unsettling the matter and thus lead to additional disputes — the very thing this Board was designed to prevent.

G. C. White
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