Award No. 18300
Docket No. TE-18640

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

PENN CENTRAL TRANSPORTATION COMPANY
(Northeastern Region, Springfield Division)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Penn Central Company, that:

1. Carrier violated the terms of the Agreement between the parties when commencing November 29, 1968 and continuing daily thereafter, it required or permitted employes other than those coming under the Transportation-Communication Union to copy train orders direct from the train dispatcher at various locations on the Boston & Albany Division.

2. Carrier shall now be required to compensate a day's pay or eight (8) hours at pro rata rate to the senior idle employe, extra in service, who was available; if none available, the senior regularly assigned who could have been reached within thirty minutes from his work location, or from his residence, commencing November 29, 1968 and continuing each day thereafter for the above violations.

3. A joint check of Carrier's records shall be ordered to determine the amount due each claimant and the violations after November 29, 1968 from Carrier's records and train sheets.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

This dispute is predicated upon various provisions of the collective bargaining agreement, entered into by the parties hereto, effective August 1, 1948, as amended and supplemented, and by this reference is made a part hereof.

The claim was handled in the usual manner on the property up to and including the highest carrier officer designated to handle claims and grievance, and disallowed. Conference was held June 12, 1969.

The dispute arose because carrier required its Section Foremen to copy train orders (track car permits form M) direct from the Train Dispatcher.

So far as the Carrier has been able to anticipate the basis of the claim, the substantive issue to be decided is whether a Form M is a train order in the application of Rule 27 of the Schedule Agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim as handled on the property and as submitted to the Board alleges that the Agreement was violated by Carrier requiring or permitting employes other than those coming under the Transportation-Communication Union to copy train orders direct from the train dispatcher at various locations on the Boston and Albany Division.

The record shows that what is involved is the issuance by train dispatchers to Section Foremen via the telephone of Track Car Permits (Form M) which were copied by the Section Foremen onto Form M's at various locations where telegraphers are not employed. The permits authorized the Section Foremen to occupy certain trackage with their equipment during specified times. The Carrier contended on the property and before the Board that a Form M Permit is not a train order, and that over the years Section Foremen have copied Form M's under the same circumstances as involved in the present dispute, i.e., at locations where telegraphers are not employed.

The Petitioner has referred throughout the record to the Track Car Permits (Form M) as "train orders"; however, in the handling on the property it offered no probative evidence in support of its contention that such permits were actually train orders, or that they had in the past been considered train orders, as such term is used in the applicable Agreement. The prior settlement involving the copying of train orders which provided specifically —

> "This particular claim is being settled on a non-precedence basis to either party and cannot be used for further claim references."

will not be considered by the Board.

It is well settled that in proceedings before this Board the burden is upon the Petitioner to prove all essential elements of its claim and that issues and contentions not raised in the handling on the property will not be considered by the Board. In this case the Petitioner, in the handling on the property, did not meet the required burden of proof, and the claim will, therefore, be denied.

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 25th day of November 1970.

DISSENT TO AWARD 18300, DOCKET TE-18640

This Award is palpably erroneous because it does not reach the real issue involved, nor does it make any reference to the decisive material bearing on that issue.

The dispute involved a contention by the Employes that the agreement was violated when Carrier required Section Foremen to receive by telephone direct from the train dispatcher, at places where no telegrapher was employed, "Form M" communications relating to operation of their motor cars.

The agreement involved contains a rule, Rule 27(a), which is identical with a rule negotiated by means of arbitration on the parent company — the New York Central, Lines East — and the record shows that both parties relied unequivocally on the documents involved in that arbitration proceeding and award. Under such circumstances it was clear that the parties consider the rule here to have the same intent and effect as the New York Central rule.

The latter rule has been interpreted by both the Arbitration Board from whence it came and this Division of the Adjustment Board. The interpretation by the Arbitration Board, dated January 15, 1949, (N.M.B. Case A-2625, Arb. 106), contains the following:

"QUESTION 2.

Does the term 'train orders' in aforesaid Section (a) (of Article 22) embrace aforesaid Form M and proscribe the 'handling' of Form M permits by Carrier's employes other than telegraphers or train dispatchers 'except in cases of emergency'?

Although all three members of the Board agreed on the award and wording of Article 22, it now appears that different members of the Board have understood the wording differently.

In paragraph (a) of its awarded rule the Board found and awarded: 'No employe other than covered by this Agreement and train dispatchers will be permitted to handle train orders except in cases of emergency'.

In that awarded paragraph the Board removed certain limitations which were in the superseded rule and which are emphasized in the following question:

'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 employe will be paid for the call'.

In connection with this awarded paragraph (a), if the Board had defined the term 'handling train orders' as including the track motor car permit which is referred to in this Question, it is obvious that no employe other than a telegrapher or train dispatcher could obtain a permit at an outlying point where no telegrapher is employed, excepting in an emergency. But such a definition would make a nullity of the Board's statement:

'Obviously, the Carrier could not have a telegrapher on every track car * * *. It would merely impose a penalty which the Carrier would be unable to avoid'.

In making that statement the Board found that the record did not warrant the awarding of a rule which would require the carrier to have a telegrapher on hand at outlying points where the need might arise to 'handle' a Form M, which would result in the Carrier's being imposed with a penalty for merely a few minutes of work in the 'handling'.

The Board recognizes, however, that at points where a telegrapher is employed his work in handling Form M is not unlike what he does on train orders, and he should be used or called for such work.

When, however, a motor car operator at a location where no telegrapher is employed telephones to distant telegrapher that he has cleared the track by taking a car off, or that he wants permission to use a track, and he copies or fills in a Form M, this is permissible in connection with such telephone conversation, and should not subject the carrier to a penalty. Without attempting to define a train order, the Board intended that Form M could be used in this manner."

This interpretation was discussed and applied, in Award 4967, to a dispute basically similar to the present one, by this Board on July 31, 1950, relatively soon after the interpretation was rendered.

No further difference of opinion concerning this aspect of the rule appears to have arisen until the case decided by Award 14407, rendered on May 11, 1966. A portion of that dispute, dealt with in Part 3 of the Opinion of Board, involved the handling of Form M. The interpretation was again discussed and applied to that portion of the dispute.

From these interpretations and applications of the rule it is clear that the Form M communications are subject to the rule, but that the application to such work must be made in conformity with the official interpretation of the Arbitration Board.

That interpretation means that it is a violation of the rule to permit the handling of Form M in such a manner that telegraphers are eliminated from participation in the work. In the case decided by Award 4967 that is what occurred — the communication was between the dispatcher and section foreman direct. In the case decided by Award 14407 a telegrapher participated in the work.

Award 4967 found that direct handling between foreman and dispatcher violated the rule. Award 14407 found that participation by a telegrapher avoided violation of the rule.

Thus all of the prior decisions are in harmony. And since the present case involves direct handling of Form M between section foremen and dispatchers, we should have found that the agreement was violated.

In failing to apply the prior decisions to the real issue in dispute the majority has, after twenty years of consistency, created a conflict in Awards dealing directly with that issue, without explanation or even expressing disagreement with that consistent precedent.

Such an award is palpably erroneous; hence this dissent.

C. E. Kief
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 18300, DOCKET TE-18640

The dissent of the Labor Member is but a rehash of the arguments that were presented in the submission of the dispute to this Board and which were argued verbally during discussion of the dispute with the Referee. As is plainly indicated in the Award such argument was not a part of the handling of the claim on the property. In reaching his conclusions the Referee properly decided the dispute on the basis of the issue that was handled on the property.

Award 18300 is therefore entirely correct and proper in all respects, including prior decisions of this Board that the claim that may be presented to this Board is the claim that was handled on the property.

R. E. Black
P. C. Carter
W. B. Jones
G. L. Naylor
G. C. White

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