

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19313
Docket Number TE-8373

Thomas L. Hayes, Referee

•(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(Formerly The Order of Railroad Telegraphers)

PARTIES TO DISPUTE:

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(The New York, New Haven and Hartford Railroad Company

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad
Telegraphers on The New York, New Haven and Hartford

Railroad that:

1. The Telegraphers' Agreement was violated when, commencing on or about May 15, 1954, Carrier improperly assigned to employees not subject to said Agreement, the duty of operating CTC machine in South Station, Boston, Mass.

2. The Centralized Traffic Control machine or machines placed in operation in South Station, Boston, Mass., on or about May 15, 1954, shall be operated by employees under the coverage of the Telegraphers' Agreement.

3. Until the violative condition is corrected by assignment of employees under the Telegraphers' Agreement to each of three eight (8) hour shifts, seven days per week, Carrier shall compensate each of three senior idle spare employees on a day-to-day basis, or if no spare employees available, to three senior idle regular employees, the equivalent of eight (8) hours (one day's) pay at the appropriate rate.

OPINION OF BOARD: On May 15, 1954, Carrier placed in operation a Centralized Traffic Control machine, commonly called a CTC machine, at South Station, Boston and assigned its operation to train dispatchers, employees outside the coverage of the Telegrapher's Agreement.

The O.R.T. contends that under the language of the scope rule of the Telegrapher's Agreement the Carrier is required to assign employees under that agreement to operate the machine and that Carrier is in violation of the provisions of the Agreement by assigning the operation of the CTC machine to employees outside the Telegrapher's Agreement.

The claim of the Telegraphers arising out of this dispute was denied by Carrier and the Organization appealed the claim to the Third Division, National Railroad Adjustment Board, where it was assigned Docket No. TE-8373.

In its presentation to the Board, Carrier argued that the case should have been subject to negotiation on the property among all parties concerned, i.e., Carrier, the Telegraphers and the Dispatchers. Carrier argued that the case should be dismissed for failure to give notice and opportunity to be heard to the Train Dispatchers. The Board declined to give notice to the Train Dispatchers or to send back the case to the property and Referee D. F. McMahon was appointed to sit with the Third Division and in Award 8773 handed down April 8, 1959, he sustained the claim of the Telegraphers.

Subsequently, Carrier instituted an action in Federal District Court to enjoin the enforcement of Award 8773 and to have it declared null and void.

On January 22, 1962, Chief Judge Campbell declared Award 8773 to be null and void and the Third Division was enjoined from proceeding further until due notice was given the Dispatchers. The Judge stated in part "the Board is further enjoined from proceeding with this jurisdictional dispute unless and until due notice is given the Dispatchers as required by statute".

On June 19, 1962 the Organization, O.R.T. requested that the National Railroad Adjustment Board reopen TE-8373, provide notice to the train dispatchers and hold a hearing on the matter.

On July 27, 1962 a labor member of the Board moved to reopen Docket TE-8373 but the motion was rejected and later, on April 11, 1963, the labor members of the Board requested the National Mediation Board to appoint a Referee to sit with the Third Division and make an award in Docket TE-8373. The Carrier members of the Board instructed the NMB of their opposition to the petition of the labor members of the National Railroad Adjustment Board and urged that the petition be denied on the basis of Judge Campbell's decree and alleged observance of the Telegrapher's failure to exhaust their administrative remedies.

On April 26, 1963 the National Mediation Board appointed D. F. McMahon as a Referee to sit with the Third Division in the matter of TE-8373.

In July of 1963, the Third Division, with Referee McMahon, issued an order to give notice to the Train Dispatchers and further decision was reserved until such notice could be given and the cause could be set for hearing.

Notice was given in the manner customary at the time and a hearing was held on October 8, 1963. The American Train Dispatchers Association refused to participate but some individual train dispatchers filed letters in agreement with the Carrier's position. All parties were afforded a chance to respond to material presented at the hearing and some did.

Attempts were made to have Referee McMahon return for panel argument but these were unsuccessful and the dispute was never finally disposed of.

The Supreme Court decision in the Union Pacific case required further changes in the Board's procedure and, after the Division complied with the new requirement, a further hearing was scheduled and notice was given to all parties. The Carrier and the O.R.T. decided to rely upon the record but the American Train Dispatchers Association filed a submission dated July 20, 1971.

Referee Thomas L. Hayes was appointed to sit with the Third Division because of its inability to secure a majority vote of the Division in Docket TE-8373 and a hearing before this Referee was held on May 23, 1972 for the purpose of orally reviewing the evidence already presented. Carrier and the American Train Dispatchers Association had representatives present but the O.R.T. relied on the record.

Subsequent to the decision of the Federal Court with respect to Award 8773, Carrier argued that the Board does not have jurisdiction of the instant dispute on a number of grounds including the allegation that jurisdiction was lacking because the employees failed to file a new submission pursuant to the Federal Court decree. In making this allegation, Carrier relied in part on the following language of the Court decree:

"It is clear that the Board has not yet rendered an award on the merits of Telegraphers' claim. Thus, if it sees fit, Telegraphers may file a new submission of this dispute with the Board. This decision in no way prejudices such a right."

Carrier is asserting in effect that the employees are required by the Court decision to file a brand new claim on the property and if the case is not resolved there, then they must file a submission of the dispute with the Board.

We think that Carrier misreads the language upon which it relies. We would point out that it is permissive in nature and states that "Telegraphers may file a new submission of this dispute with the Board". We do not construe this to be a mandate that the O.R.T. begin all over again and make its initial filing with the Carrier. Moreover, we would point out that

Chief Judge Campbell wrote "the Board is further enjoined from proceeding with this jurisdictional dispute unless and until due notice is given the Dispatchers as required by statute". To us this means that proceedings of the Board may commence after due notice; such notice was given and thereafter proceedings commenced.

This Board has reviewed the other contentions of Carrier to the effect that the Board does not have jurisdiction of the instant dispute and finds them to be without merit.

Furthermore, the Board has considered the argument of Carrier that the dispute should be dismissed because the claim is alleged to be so vague as to prevent the rendering of a valid award.

We see no difficulty in comprehending the claim which is before the Board. Payment has been requested, until the alleged violation is corrected, of a day's pay for seven days per week for:

- First; each of three idle spare (extra) employees on a day-to-day basis;
- Second; if no spare employees available, then payment is due to three senior idle regular employees;
- Third; at the appropriate rate for each.

It has been long held by the Division that where the Claimants can be ascertained and are identifiable, the claim will not fail because their names have not been given.

In our judgment, the Board has jurisdiction to consider this case on its merits and provide for its final disposition.

Returning to substantive arguments, we note that the O.R.T. contends that on May 15, 1954 when Carrier placed in operation a CTC machine at South Station, Boston, and assigned its operation to employees represented by the American Train Dispatchers Association that Carrier violated its agreement with the Telegraphers.

The record indicates that about 5 years before the instant dispute arose the O.R.T. and the Carrier added to the Scope Rule a new classification of work termed "CTC Machine Operators".

In earlier cases, it was held that Telegraphers did not have an exclusive right to operate CTC machines but in these cases none of the scope rules included the specific classification "CTC Machine Operators".

It is the view of the Board that the aforementioned change in the Telegrapher's Scope Rule constituted an agreement on the part of Carrier that the operation of CTC machines belonged to Telegraphers.

In their presentation to the Board, the Dispatchers assert that the scope rule of the Train Dispatcher's Agreement permits them to engage in CTC operation. We find upon examining the rule that there is no specific mention of CTC Machine Operators and we come to the question whether other language contained therein would reserve to Dispatchers the right of operating CTC machines.

The Dispatchers Agreement states in part that the terms, Trick Train Dispatcher, Relief Train Dispatcher and Extra Train Dispatcher "shall include positions in which it is the duty of incumbents to be primarily responsible for the movement of trains by train order, or otherwise..." The Dispatchers rely on the aforementioned words "or otherwise" as a basis for their alleged right to CTC machine operation. On the other hand, the Telegraphers suggest that the words "or otherwise" preserve the right of Dispatchers to the same extent it exists with respect to movement by train orders, when other means of controlling train movements are adopted and they say the Dispatchers Agreement does not conflict with the right of Telegraphers who have negotiated for the operation of CTC machines, specifically.

As was pointed out in panel argument, the Dispatchers in relying on the words "or otherwise", are in very much the same posture in which the Telegraphers found themselves, in Award 6224, when the O.R.T. felt the term "Levermen" gave them coverage of CTC machine operation. One panel member correctly stated:

"All of the awards on the subject of CTC operation make it clear that the only means by which operation of this specialized type of equipment can be brought under the coverage of an agreement is through negotiation."

In view of the foregoing, we find that the Carrier has violated the agreement by assigning the operation of a CTC machine to employes outside the Telegraphers Agreement, thereby depriving the claimants of the opportunity to perform such work for the period commencing May 15, 1954 until the violative

condition was corrected. Carrier is to compensate, for each day of the period of violation, each of the three senior idle spare employees on a day-to-day basis, or if no spare employees were available, then, in such event, the three senior idle regular employees, by paying the equivalent of eight hours pay at the appropriate rate.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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.

A W A R D

Claim sustained to the extent set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. G. Killen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1972.