

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19927
Docket Number CL-20113

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
((Formerly Transportation-Communication Division)
(
(George P. Baker, Richard C. Bond, and Jervis
(Langdon, Jr., Trustees of the Property of
(Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Penn Central Transportation Company, GL-7255, that:

1. The Carrier is constantly violating the TCU Agreement as long as it permits other crafts to do Operators work.
2. The Carrier shall now compensate Mr. J. Coulombe two calls of three (3) hours each on May 20 and 21st and single calls on May 24, June 12, 14, 15, 16, 17, 18, 19, 20, 22, 25, 26, 28, 29, 30, July 1 and 2, 1971, when other than operators copied train orders.

OPINION OF BOARD: The facts in this matter are not in dispute. On the dates set forth in the Claim, certain employees not covered by the applicable Agreement, copied train orders at Taunton Yard Office which had been received by telephone from the telegrapher on duty at Boston. Although no operators had been employed at the Taunton Yard Office there had been an operator assigned to Taunton Station, about three-quarters of a mile from the Yard Office; this station was closed about eight months prior to the initiation of this claim.

Petitioner relies on both the Scope Rule and Article 20. The Scope Rule is general in nature and no evidence was presented on the property establishing customary practice and history to support the Organizations's position; on the contrary, Carrier asserts that for over fifty years it has been the practice of conductors and trainmen to copy train orders received by telephone. This assertion was not denied by Petitioner.

Article 20, dealing with the handling of train orders reads as follows:

ARTICLE 20 HANDLING TRAIN ORDERS

"(a) No employ other than covered by this agreement and train dispatchers will be permitted to handle train orders except in cases of emergency.

"(b) If train orders are handled at stations or locations where an employee covered by this agreement is employed but not on duty, the employee, if available or can be promptly located, will be called to perform such duties and paid under the provisions of Article 7; if available and not called, the employee will be compensated as if he has been called."

This provision, and others similar to it on many Railroads, has been the subject of controversy and many awards of this Board over the years. It has also been the subject of negotiations by the present parties, but they have not seen fit to change it. Clearly we have no authority to re-write the Rules. The issue in this matter has been well defined by Petitioners as "whether Carrier is in violation of the Telegrapher's Agreement when it requires and/or allows employees of another craft to copy train orders at points where operators have never been employed." The Board's thinking on this issue is not clear; there have been awards in closely similar situations involving identical Rules holding both ways, and many of these awards have been cited in this case. After careful evaluation of prior thinking, we have come to the following conclusions:

1. The receipt and copying of train orders at blind sidings (where no telegraphers are employed) by train crews and similar personnel from telephone communications with dispatchers or telegraphers is not "handling" train orders as used in Article 20. (See Awards 7976, 1821, 9204, 8327 and others).
2. If train orders are handled at points where no covered employees are employed, under Article 20 they may be handled by other employees. (See Award 6863, 9956, 10442 and a long line of similar awards).
3. If either of the parties is dissatisfied with the impact of Article 20, they should raise the issue for negotiation rather than repeated submission to this Board. We cannot rewrite Rules.

In addition to the foregoing, Petitioner did not elect to file a rebuttal statement to Carrier's ex parte submission thus leaving material factual statements uncontroverted and undenied. See Award 19849 and First Division Awards 22230, 22231, and 19808.

Based on the reasoning above, the Claim must 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;

Award Number 19927
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Page 3

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.

LABOR MEMBER'S DISSENT TO AWARD 19927 (DOCKET NUMBER CL-20113)
Referee Lieberman

After citing Article 20, the provisions of the parties' Agreement on handling train orders, Referee Lieberman writes:

"This provision, and others similar to it on many Railroads, has been the subject of controversy and many awards of this Board over the years. * * * ."

Following this statement, Referee Lieberman could have saved himself a lot of useless rhetoric and issued a proper sustaining Award by adding a few sentences to the effect, "This provision has been the subject of an Award of this Board involving the same parties, and also was the subject of Decision of Special Board of Adjustment No. 306, also involving the same parties. Award 14495, Third Division, sustained the claim of the Organization; Award No. 12 of Special Board of Adjustment No. 306 did the same. Therefore, we will follow these Awards involving the same Agreement and the same parties and sustain the claim."

Careful examination of Award 14495, which should have been relied upon by the Referee instead of Award 7976 involving the Norfolk & Southern Railway Company, or Award 1821 involving the Wabash Railway Company, or Award 9204 involving the Delaware & Hudson Railway Company, or Award 8327 involving the Maine Central Railroad Company, indicates that every argument advanced by Carrier in the record in the instant grievance was effectively answered and dismissed. Also, the Referee's reliance on Awards 6863 involving the Boston & Maine, 9956 involving the Grand Trunk Western Railroad

Company, and 10442 involving the Seaboard Airline Railroad Company, is improper when the issue had heretofore been adjudicated by prior Award involving the same parties.

Award 19927 is a nullity. It is a nullity because it ignores precedent decision involving the same rule and the same parties. It is a nullity because in ignoring such precedent decision, it doesn't even extend the courtesy of explaining in what manner the Referee feels such precedent is wrong, or why it is not to be followed.

Referee Lieberman purports in his decision to generate a profound analysis on "the Board's thinking on this issue". He suggests that he has made careful evaluation of prior thinking. His decision demonstrates that this is not the case, as it ignores Awards:

<u>Award No.</u>	<u>Referee</u>	<u>Award No.</u>	<u>Referee</u>
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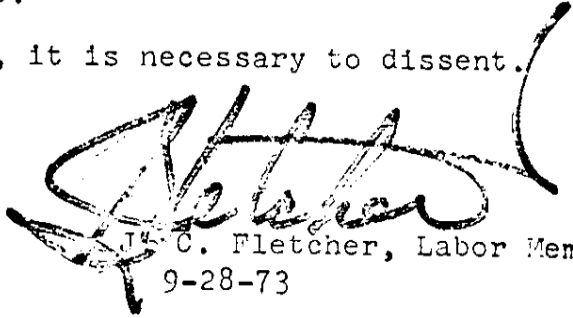
Woody
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Referee Lieberman's conclusions "after careful examination of prior thinking" are suspect when his Opinion ignores the above-cited Awards.

The final paragraph of Award 19927 cites three First Division Awards as authority on rebuttal statements. First Division Awards on procedure are inappropriate to Third Division procedure because the procedures between the two Divisions substantially differ. Any Referee with a cursory understanding of the variations in procedures between the four Divisions would, unless he was attempting to buttress a weak decision, be cautious about citing procedural Awards from one Division in cases arising at a different Division.

Inasmuch as Award 19927 ignores the well-reasoned decision in Award 14495; fact of the matter is, doesn't even mention Award 14495, Award 19927 must be considered an unsound maverick decision, and Award 14495 has to be considered as controlling in the application of the parties' Agreement.

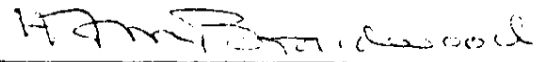
For the foregoing reasons, it is necessary to dissent.

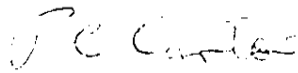

J. C. Fletcher, Labor Member
9-28-73

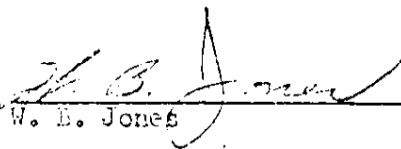
CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT
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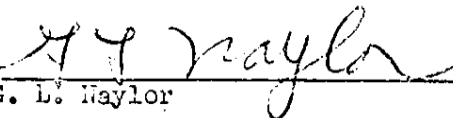
It is obvious from the Labor Member's dissent to Award No. 19927 that he is not conversant with the question in dispute. The Awards cited in the dissent are of no precedential value to the case in point. Referee Lieberman in his Award cited many previous Awards on point.

As to the Labor Member's dissent to the rebuttal question: Again it is evident that he, and not the Neutral, does not possess an understanding of the principles between the four divisions.


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P. C. Carter


W. B. Jones


G. L. Naylor


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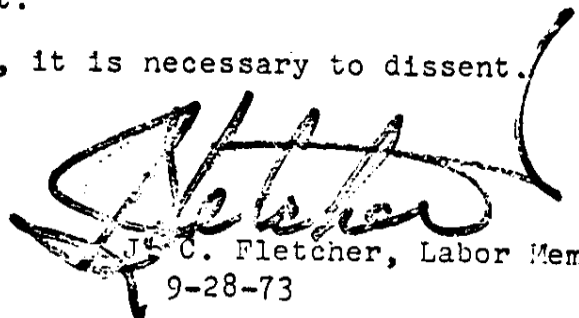
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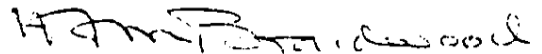
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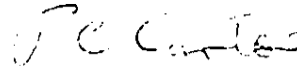
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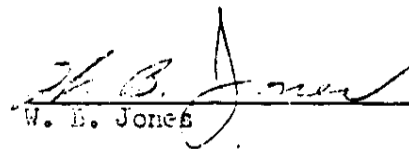
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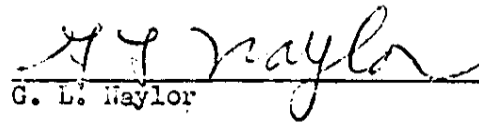
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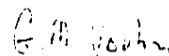
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