NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20074
THIRD DIVISION Docket Number TE-20030

Burl E. Hays, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
((formerly Transportation-Communication Division, BRAC)
(
(Maine Central Railroad Company
(Portland Terminal Company

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Maine Central Railroad, TC-5867, that:

CLAIM NO. 1

1. Carrier violated Article 21, Paragraph (a) when they allowed an employee not coming within the Scope of the January 1, 1951 Agreement to handle train order No. 7 dated October 7, 1971 from Tower "X" Portland, Maine to Bartlett, N.H.

2. Carrier shall be required to compensate Mr. W. C. Carkins a two hour call at punitive rate in accordance with Article 21 Paragraph (b) and Article 7.

3. Carrier shall also allow the mileage and deadhead time he would have received had he been called.

CLAIM NO. 2

1. Carrier violated Article 21 Paragraph (a) when they allowed an employee not coming within the Scope of the January 1, 1951 Agreement to handle train order Nos. 7 and 9, both dated October 8, 1971 from Tower "X" Portland, Maine to Bartlett, N.H.

2. Carrier shall be required to compensate Mr. W. C. Carkins a two hour call at punitive rate in accordance with Article 21 Paragraph (b) and Article 7.

3. Carrier shall also allow the mileage and deadhead time he would have received had he been called.

OPINION OF BOARD: The facts regarding this case are that on the nights of October 6 and 7, 1971, train orders were handled by the Third Trick Operator at Tower "X" in Portland, Maine, addressed to C&E Engine 569, care of a Mr. Jackson at Bartlett, New Hampshire. An Engineer Department Supervisor delivered these orders by automobile to the train at Bartlett, a distance of approximately 70 or 80 miles. Claimant Carkins was the regularly assigned agent at South Windham, Maine, and his working hours were 7:00 a.m. to 4:00 p.m. Bartlett, New Hampshire is within this jurisdiction and is some 60 to 65 miles from South Windham, Maine.

Two claims are presented but, since the facts are basically the same, with the exception of train order numbers and dates, they were presented as one and will be considered as one, insofar as our decision is concerned.

Employees contend Carrier violated the Agreement effective January 1, 1951, and particularly Article 21 (a) which reads as follows:

> "No employe other than covered by this Agreement and Train Dispatchers will be permitted to handle train orders except in cases of emergency."

The question of an emergency is really not an issue here.

Employees request that Claimant be paid for a two hour call, in each claim, at punitive rate in accordance with Paragraph (b) of Article 21 of the Agreement, which reads:

> "If train orders are handled at stations or locations where an employe covered by this Agreement is employed but not on duty, the employe, 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 employe will be compensated as if he had been called."

Part three of these claims ask that Claimant be allowed mileage and deadhead time which he would have received had he been called to perform this service. In their statement of the case Employees say they rely on the entire Agreement in support of their position but specifically cite the Call Rule, Article 7, and Award of Arbitration Board No. 298. They admit the specific rule was not cited on the property in support of claim for mileage and deadhead time. To rely for support in this instance on Award 298 Claimant would have had to actually make the trip from South Windham to Bartlett, which he did not do. In view of these circumstances the Board must deny Part three of these claims without further reference to same.

Employees point out that at the time the Agreement was made effective (January 1, 1951), telegraphers were employed at Bartlett, where these train orders were delivered, but that these positions had long since been abolished "on the pretext that there was no need for such employees." (R.p34). Employees disagree with the alleged reasons for abolishment of these positions, and state (R.p36):

"The only question in dispute is the question of 'was the agreement violated, when the train orders were handled at a point where there were telegraphers at one time, by a non-covered employee.'"

Carrier submits that the question in dispute should be stated as follows (R.p89):

"Was the Work Rules Agreement violated when Train Orders on the dates in question for Work Extra at Bartlett were issued and handled by a Telegrapher at Tower X, the nearest open Train Order Office, 67 miles distant, and then hand-carried by Employee not covered by the Telegraphers' Agreement to Bartlett, a Non-Train Order Office where Telegraphers have not been employed for 10 years, all in conformity with Operating Rules and the Working Agreement and the longstanding practice thereunder as documented by these Carriers in their Exhibit K attached hereto?"

Employees cite Award 12852 by Referee Coburn, and rely heavily upon it to establish the principle that handling of train orders is work belonging exclusively to employees covered by the Telegraphers' Agreement. We find no fault with this opinion, which is supported by a long line of Awards, both before and after Award 12853 was written. However, in that case the Telegrapher copied the Train Order and it was delivered by a Clerk-Messenger to a train in another part of the same yard. (Underlining ours). This is not the situation in the instant case. Thus, the decision is not quite in point.

Employees contend that Article 21 of the Agreement supersedes Operating Rule 217 of the Carrier, and cites many Awards in support of the proposition that where an Operating Rule conflicts with a provision of an Agreement, the Agreement shall prevail. (Awards 2017-Tipton, 5871-Yeager, 6678-Bakke, 10063-Daly, and many others.) Neither can we find fault with this line of reasoning, generally speaking. However, there are two determining factors in the instant case. First, an interpretation of subsections (a) and (b) of Article 21 is necessary. After careful study of all the Awards presented by the parties on this point, we are inclined to agree with the opinion in Award 6863 by Referee Parker in which it was said:

"The paramount and decisive factor precluding a sustaining Award in the instant case is to be found in the terminology of Article 21 itself. True subsection (a) thereof provides that no employee other than covered by the Agreement, and train dispatchers, will be permitted to handle train orders except in case of emergency. But that is not all. Nevertheless, and notwithstanding, in the next breath so to speak, subsection (b) of the same Article, which we repeat for reasons of emphasis, provides:

'If train orders are handled at stations or locations where an employe covered by this Agreement is employed but not on duty, the employe, 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 employe will be compensated as if he had been called.'

"When proper consideration is given to everything that has been heretofore stated, and due note is taken of its form and position as incorporated in Article 21, there can be little doubt that subsection (b) supra, must be regarded as qualifying the force and effect to be given the provisions of subsection (a), supra, which precedes it. So regarded we believe that inherent in such subsection, and certainly if not inherent clearly implied therein, is the proposition that -- so far as the particular agreement now in force and effect on the involved property is concerned - if train orders are handled at stations where no member of the craft is employed they may be handled by other employes ...."

The second controlling factor in this case is the matter of long standing practice by Carrier in handling "in care of" train orders by delivering such Orders to the point where they were to be placed in effect, where there was no telegrapher employed, by an employee other than a Telegrapher. (Underlining ours.) Employees do not agree that this has been a long standing practice but the preponderance of evidence submitted by Carrier leads us to believe that such was the case.

We are aware of the long history of conflicting awards adopted by this Division relative to "past practices". On this point in this case we believe that Employees were aware of such practice over a long period of time but have never properly challenged it in an effort to prove that such assignments were reserved exclusively to Telegraphers.

For the foregoing reasons the claims should be denied in their entirety.

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.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of December 1973.