NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20126
THIRD DIVISION Docket Number CL-20036

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7192) that:

1. Carrier violated the Telegraphers' Agreement (TCU) and in particular, Paragraph 2 of the May 20, 1970 Memorandum Agreement, when, on December 9, 1970, it required the Engineer of Extra No. 644 South, an employe who is not covered by the Telegraphers' Agreement (TCU), to handle Train Order No. 208, to be delivered to Extra No. 426 South, on line between Taylor and San Antonio, Texas, at a location and/or point where no Telegrapher is employed, and then failed and refused to compensate Claimant J. R. Cowan as required by Paragraph 2 of the May 20, 1970 Memorandum Agreement.

2. Carrier shall now be required to compensate Mr. J. R. Cowan, Telegrapher, three hours at pro rata rate, as required by the May 20, 1970 Memorandum Agreement.

OPINION OF BOARD: On December 9, 1970, a telegraph operator at Taylor, Texas, copied Train Order #208. The order, which was to be executed by the crew of Extra 426 South, was addressed to the Conductor and Engineer (C&E) of Extra 426 South "in care of" the Engineer of Extra 644 South. The telegrapher gave the order to the Engineer of 644 South who thereafter delivered the order to the C&E of Extra 426 South at McNeil, Texas. No employee covered by the applicable agreement (the T-C Division, BRAC Agreement) is employed at McNeil.

Petitioner BRAC concedes that Carrier is permitted to do what it did in the instant facts, subject, however, to the Carrier's obligation to make payment for a call as provided in an Agreement dated May 20, 1970. The Carrier refused to pay the call and Petitioner therefore alleges that Carrier violated the 1970 Agreement. Carrier asserts that the facts here are consistent with its practice of handling "in care of" train orders under Operating Rule 217 and, further, that the 1970 Agreement is not applicable to the instant facts.

Operating Rule 217, and the pertinent agreement provisions, read as follows:

Operating Rule 217

"Delivery Orders.--Unless otherwise provided, a train order to be delivered to a train at a point not a train order office, or at which the office is closed, must be addressed to 'C&E' (train) at (or between) (station or stations) care of _____, showing title of employe in whose care the order is addressed and who is responsible for its delivery.

When delivery is to be made by another train, the train order must be addressed in care of conductor or engineer of delivering train." (Emphasis supplied.)

"Rule 2

HANDLING TRAIN ORDERS, ETC.

(a) Only in the event of accident or similar emergency will an employe other than covered by this agreement be permitted to receive train orders at telegraph or telephone offices where an operator is employed. If operator is available he will be paid for a call.

(b) If instructed by train dispatcher, or other authority, to clear train or trains before going off duty, leaving clearance cards or orders in some specified place for those to whom addressed, employes shall be paid under the provisions of the call and overtime rule.

(c) Train dispatchers will not be required nor permitted to transmit train orders or handle block by telephone or telegraph to train and engine service employes, except in emergency; nor will train and engine service employes be required or permitted to take train orders or to block, or report, trains by telephone or telegraph, except in emergency. Emergency is defined as follows:

> Casualty or accident, engine failure, wreck, obstructions on track through collision, failure to block signals, washouts, tornadoes, slides or unusual delay due to hot box or break-in-two that could not have been anticipated by dispatcher when train was at previous telegraph office, which would result in serious delay to traffic.

"(d) When orders and/or clearance cards are copied at one point and sent for delivery to a train at a point, where telegraph or telephone service is maintained, the employe at such point will be paid for a call."

"May 20, 1970 Agreement

* * * * * * *

2. When train orders, or communications which serve the purpose of train orders, are handled by persons other than covered by this agreement and train dispatchers at locations where no employe covered by the T-C Div. BRAC Agreement is employed, other than under the exceptions set forth in Rule 1(b) (a) (Missouri Pacific); Rule 2(c) (Texas and Louisiana); and Rule 2(d-4) (Missouri-Illinois), a telegrapher designated by the district chairman will be allowed a call - three hours at the minimum telegrapher pro rata rate applicable on the seniority district."

Let us first say that Operating Rule 217 concerns a method of handling train orders which Carrier has devised to expedite the movement of its trains and equipment. However, this operating rule is not paramount to the Agreement, Award 12371 (Dolnick) and, consequently, if the use of Rule 217 results in a violation of the Agreement, the Carrier can be held to account for such violation.

We now turn to the 1970 Agreement which requires Carrier to pay for a call in the instant dispute unless, as Carrier contends, the term "handle" in the Agreement does not encompass the "delivery" of train orders to the crew that is to execute them. (There was no employee covered by the Agreement employed at the point of delivery, so this part of the 1970 Agreement has been satisfied.) The Carrier makes its argument that "handle" should be construed so as to exclude "delivery" by tracing the history of present Rule 2 (HANDLING TRAIN ORDERS, ETC) and the negotiations preceeding the 1970 Agreement, and by the citation of Awards No. 13, Special Board of Adjustment No. 506, No. 88, Public Law Board No. 706, and Third Division Awards 16270 (Zack) and 16271 (Zack). In large measure, both this history and the cited Awards make a showing that Rule 2(d) does not prohibit the Carrier from doing what it did in this situation, i.e., having a non-Agreement employee deliver a train order at a location where no Agreement covered employee is employed. While this showing is obviously correct, because Rule 2(d) is specifically addressed to delivery at locations where such an employee is employed, we are now confronted with the 1970 Agreement which, on its face, deals with subject matter different than Rule 2(d). Moreover, although the history, not surprisingly, shows that Rule 2 has been the subject of much

contention between the parties, it does not provide any evidence that "handle" in the 1970 Agreement excludes "delivery" of train orders to the executing crew. Also, although the cited Awards show that claims have been denied where Carrier's actions were not violative of the Agreement, the Awards in no way show that "delivery" is excluded from the 1970 Agreement. Thus, we find neither the history nor the Awards to be persuasive on the issues presented here. On the other hand, Awards 12371 (Dolnick) and 18436 (Rosenbloom), called to our attention by Petitioner, deal with the precise question of whether the term "handle" includes "delivery" when the former term is used in a train order rule similar to the text of the 1970 Agreement. In Award 12371, after comprehensive treatment and analysis of conflicting Awards on the issue, a well reasoned decision was made that "handle" includes "delivery". Subsequently, in reaching the same result in Award 18436, this Board stated the following:

> "The threshold issue herein is whether the physical delivery of train orders to the train crews who will execute them is encompassed by the term 'handle' as it appears in the Train Order Rule. This precise issue has been before this Board many times but, as Referee Dolnick observed in Award 12371, there is considerable conflict in the decisions of the Board on the subject. In that Award, Referee Dolnick made a comprehensive review and analysis of decisions dealing with the issue and rendered a well-reasoned determination which in our view correctly resolves the question. We adopt the findings of Award No. 12371 and hold that the physical delivery of train orders to the train crews who will execute them is an integral part of the work reserved to telegraphers under their Agreement and may not be assigned to employes not covered by that Agreement."

See also Award No. 8, Public Law Board No. 713.

From our study of the Awards cited by the parties, and from our study of the 1970 Agreement, including its relationship to Rule 2, we conclude that "handle" in the 1970 Agreement includes "delivery" of a train order to the train crew that is to execute the order. Accordingly, though the 1970 Agreement does not prohibit Carrier from effecting delivery as it did in this case, when the Carrier does effect delivery in such manner, the Agreement requires Carrier, upon request, to pay for a call to a telegrapher designated by the District Chairman. In arriving at this conclusion we have also studied the Carrier's overall argument which is that, apart from the delivery issue, the 1970 Agreement was intended by the parties to have a narrow construction. For example, in speaking about the negotiations preceeding the 1970 Agreement, the Carrier's Submission states that:

> "...it was the Employes' Assessment that the cost of the rule could be controlled by the Carrier, because their proposal related solely to resticting the use of the radio and/or telephone by train dispatchers to transmit train orders to

"employes other than telegraphers at locations where no telegrapher was employed under other than emergency conditions as defined in the various rules."

The above passage indicates that the sole object of the 1970 Agreement was to restrict train dispatchers (except in emergencies) from transmitting train orders by radio or telephone to non-Agreement employees at locations not having a telegraph operator. In contrast, the 1970 text refers to "...train orders, or communications which serve the purpose of train orders..." This text obviously refers to all train orders, written, phoned, or radioed, and we are not authorized to reduce the text only to orders which are transmitted by phone or radio. To do so would amount to rewriting the Agreement which the parties themselves negotiated and executed, and this we are not authorized to do.

In view of the foregoing, and on the whole record, we shall sustain the claim.

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

The Carrier violated the May 20, 1970 Agreement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Lewis
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1974.

CARRIER MEMBERS' DISSENT TO AWARD 20126, DOCKET CL-20036
(Referee Frederick R. Blackwell)

The majority guided us through a maize of rationale designed to support and/or justify a decision contrary to the intent of the Agreement and rejected previous decisions involving the train order rule on this property that related to the question of "delivery." The majority also rejected more than fifty years of practice under Operating Rule 217 that heretofore had not been found to be in conflict with any rule of the Agreement.

The Carrier cited Award No. 13 of Special Board No. 506 involving this Carrier and train order rule and, as the dispute related to Operating Rule 217, the Board there held in part:

> " . . . This rule has been in use for many years and we can find no specific provision of the Agreement in conflict with it."
> (Underscoring added.)

Obviously Board No. 506 examined all pertinent rules of the Agreement and correctly found that none were in conflict with Operating Rule 217.

In arriving at this decision, the majority also rejected all evidence and argument supporting Carrier's position that on this property the issue of "delivery" had always been dealt with specifically. The parties to the Agreement specifically provided for "delivery" in paragraph (h), subsequently paragraph (d), of the Train Order Rule reading:

> "(d) When orders and/or clearance cards are copied at one point and sent for delivery to a train at a point, where telegraph or telephone service is maintained, the employe at such point will be paid for a call." (Emphasis supplied.)

Paragraph (d) supra, first appeared as paragraph (h) in the Agreement in 1940. Had the parties intended that the Train Order Rule include "delivery" they could have so stated in the rule and paragraph (d) quoted above would have been superfluous. The parties having failed to do so, this Board is without authority to now amend the rule under the guise of interpretation. All elements of the Carrier's argument clearly pointed out the fact that the parties had not heretofore considered "delivery" in the abstract. What manner of logic would lead one to the conclusion that the parties to the May 1970 Agreement would now treat "delivery" in the abstract if, in fact, "delivery" or messenger service was to be included within the Agreement.

The May 17, 1970 Agreement is not a modification or extension of paragraph (d) of the Train Order Rule for application at points where no telegrapher was employed, but rather a settlement of a dispute concerning the use of the radio for transmitting train orders. The majority clearly understood the Carrier's point as evidenced by the first sentence of the penultimate paragraph of the award making reference to a quotation from the Carrier's submission:

"The above passage indicates that the sole object of the 1970 Agreement was to restrict train dispatchers (except in emergencies) from transmitting train orders by radio or telephone to non-Agreement employees at locations not having a telegraph operator . . ."

Why would the Carrier make such a statement? Let's refer to the introductory paragraph and paragraph No. 1 of the 1970 Agreement that addresses itself to the intent and purpose of the Agreement; that part of the Agreement that was not quoted within the body of this award reading as follows:

"In full and final settlement of all issues and disputes covered by the Organization's notice of . . . , concerning the use of radio facilities,

IT IS AGREED:

1. It is recognized that radio facilities constitute another media of communication similar to the telephone, and that this agreement applies regardless of the method of communication used."

(Underscoring added.)

The 1970 Agreement certainly did not refer to or cover "delivery" or "messenger" service which the majority has now included by the interpretation process.

There is no logical support for the decision of the majority in this case. Going to other properties for awards to justify the decision and rejecting awards issued on this property serves no good purpose, but serves to perpetuate disputes already settled by due process. Accordingly, we dissent and recommend no precedent value be attached to this award.

W. B. Jones

P. C. Carter

G. L. Naylor

H. F. M. Braidwood

G. M. Youhn

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 20126

(Referee Blackwell)

The Carrier Members' Dissent warrants an answer - not upon what it says but, rather, upon what it ignores.

The Dissent refers to but one Award - Award 13 of Special Board No. 506, issued about six and a half years prior to the May 20, 1970 Memorandum Agreement being negotiated between the parties, which is the Agreement involved in this dispute.

It is understandable that the Dissent ignores voluminous Awards of this Board which uphold the principle that when a Carrier elects to use a rule of its Uniform Code of Operating Rules - Rule 217 in this dispute - which is not consistent with rules of the extant Agreement and, if the use of such an operating rule results in a violation of the Agreement, the Carrier is held accountable for the violation.

The logic of such Awards, including Award 20126, is axiomatic, i.e., the Carrier can change its operating rules at its whim without consulting or negotiating with the Employes' Representative. However, in changing its operating rules, it must do so in such a way as to not circumvent the negotiated collective bargaining agreement.

The Dissent registered to Award 20126 presents contrary and erroneous views, ignoring the many Awards previously rendered by the Board, for example: 86, 1096, 1167, 1168, 1170, 1304, 1456, 1489, 1878, 2071, 2087, 2926, 2927, 2929, 2930, 5087, 5122,

5124, 5871, 6678, 7770, 8661, 10063, 11464, 13343, 14043, and 14307, which firmly establish that a Carrier's operating rules are superceded by the rules of the agreement mutually entered into by the parties.

Award 20126 is correct and is in complete conformity with the above-cited precedent Awards of the Third Division. The Dissent does not detract from the sound decision reached in this Award.

L. O. Fletcher
Labor Member
3-18-74