

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20216
Docket Number TE-20096

Irving T. Bergman, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
((Formerly Transportation-Communication Division, BRAC

PARTIES TO DISPUTE:

(
(Bangor & Aroostook Railroad Company

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Bangor & Aroostook Railroad Company, TC-5868, that:

1. Carrier violated the terms of the Agreement between the parties when on the dates listed in the following paragraph Carrier instructed telegraphers to leave train orders in a box they (the Carrier) had provided, to be picked up by train crews.

2. Carrier shall now pay E. J. Gerard, 2 calls six hours at time and one-half rate, for Sunday March 7, 1971 train order No. 35 dated March 6, 1971.

R. A. Lausier, 1 call, three hours at time and one-half rate, for Sunday March 7, 1971 train order No. 226 dated March 6, 1971. R. A. Lausier, 1 call three hours at the time and one-half rate, for Sunday February 28, 1971 train order No. 217 dated February 27, 1971.

H. E. Roy, 2 calls, four hours at the time and one-half rate, for Tuesday March 9, 1971 train orders Nos. 222 & 223 dated March 9, 1971.
H. E. Roy, 1 call, two hours at the time and one-half rate, for Wednesday March 10, 1971 train order No. 206 1st 58.
H. E. Roy, 2 calls, four hours at the time and one-half rate for Thursday March 11, 1971 train orders Nos. 226 & 227.
2 calls six hours at the time and one-half rate for Friday March 12, 1971, Birthday Holiday, train orders Nos. 222 & 227.
2 calls, four hours at the time and one-half rate for Monday March 15, 1971 train orders Nos. 207, 223 & 224.
2 calls, four hours at the time and one-half rate for Tuesday March 16, 1971 train orders 224 & 235.
1 call, two hours at the time and one-half rate for Wednesday March 17, 1971 train order 236.
H. E. Roy, one call, two hours at the time and one-half rate for Wednesday March 17, 1971 train order 220 and 221.
2 calls, four hours at the time and one-half rate for Thursday March 18, 1971 train orders 227 and 228.
2 calls, four hours at time and one-half rate for Friday March 19, 1971 train orders for 1st 58 No. 83.
2 calls four hours at time and one-half rate for Monday March 22, 1971 train orders 204 - 222 & 223.
2 calls, four hours at time and one-half rate for Tuesday March 23, 1971 train orders 226 & 227.

1 call, two hours at time and one-half rate for Wednesday March 24, 1971 train order No. 227.

OPINION OF BOARD: Claimants are telegraphers who state that they were deprived of overtime or call pay when the Carrier issued Order No. 223 which established a new Operating Rule No. 210.

The Train Order Rule of the Agreement, Article 34, so far as it is material to the issue, reads as follows: "handling Train Orders, Etc. (a) No employee 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 19; if available and not called, the employee will be compensated as if he had been called."

Article 19 provides pay for overtime at time and one half rate in (a) thereof, and in (c) provides for a minimum of two hours at overtime rate and thereafter on a minute basis.

Operating Rule No. 210 sets forth in detail the method and manner of handling and transmitting train orders and, so far as this case is concerned, states: "NOTE:-When authorized by train dispatcher, a train order which does not restrict the superiority of the train addressed may be delivered at a point at which the office is closed, by leaving the order in a secure place, or under lock." The promulgation of Operating Rule No. 210 was implemented by a "CIRCULAR LETTER" to "TRAINMEN, ENGINEMEN, STATION AGENTS, OPERATORS, DISPATCHERS" which referred to the Operating Rule and the above quoted "NOTE". It provided further: "When '19' Orders are issued to more than one train at the same point or when another train crew will be using the register book, the train orders must be left in an envelope addressed to the conductor and engineer for whom the train orders and instructions are intended." It also stated: "So that all employees concerned will be familiar with the location where '19' orders and other instructions pertaining to train movements will be left, when an operator is not on duty, a box stencilled 'Train Register and Train Orders' equipped with a switch lock will be installed in the following locations:" This was followed by a list of specific places where the boxes would be installed.

The Organization has argued that the "handling" referred to in the Train Order has and still requires physical delivery of train orders by an operator to the train men or conductors and has submitted a list of prior Awards to sustain their position.

The Carrier has argued that "handling" covers all phases of the preparation of train orders to be performed only by those covered by the agreement up to but not necessarily including personal delivery of train orders to

train crews and has submitted a list of prior Awards in favor of this argument.

No emergency is involved. The issue is limited to whether or not "handling" requires the physical presence of the operator when the trainmen receive the orders in ordinary situations. In deciding the issue, we are confronted with the contention by both parties that the opinions and decisions of prior Awards should be followed. Since there are conflicting opinions and Awards holding both in favor of and opposed to the contentions of the parties, there is lacking a uniformity of thought for us to follow. Consequently, and to explain the reason for our choice, we have selected for comment those Awards which have covered this issue based on facts which are comparable with this case.

A comprehensive opinion favoring the Petitioner is found in Award 1680. In sustaining the claim that "handling" includes personal delivery to the traincrews the opinion reviewed prior sustaining Awards 1166, 1169, 1170 and 1422. Upon that review, it was found that the Carrier's arguments in the Awards cited were not persuasive and were the same as those presented in Award 1680; the facts in each of the cases were indistinguishable. In an accompanying memorandum, the Referee made it clear that he believed the principle had been determined by the prior Awards. In the interest of uniformity, it was desirable to follow the same reasoning to achieve the same result in a comparable situation.

Award 1680 has been followed in subsequent Awards, see 14674, 17233, 17234. Other Awards referred to by Petitioner as controlling are not similar in all cases because a class of employees not covered by the Agreement intervened between the preparation of the train order and the delivery either to a point for pickup or to the trainmen i.e. Awards 86, and 18111 in part.

Shortly after the decision in Award 1680, this Division decided in favor of the Carrier on the same facts and arguments in Award 1821. In that case it was said: "Clearly the rule was intended to embrace every incident of handling train orders at the particular telegraph office or station from receipt to delivery to train crew. It excluded any phase of handling by any one not covered by the schedule before it came into the hands of the train crew. The plain and simple fact here is that no single detail of handling train orders from inception of orders to the time they came into the hands of train crews was entrusted to anyone not covered by the rule in question."

Award 1821 was followed some years later in this Division on the same subject in Award 7343. After a long statement of reasoning, it was concluded that when the Carrier provided a place to deposit the train order for pick up by the train crew it had not resorted to sharp practice or subterfuge, "to escape the force of rules or established practice." Closely related to the present situation is the following rationale in that case: "The record before us is clear that delivery was made at a customary place and in an authorized manner. The Agent-Telegrapher was divested of dominion over and possession of the thing to be delivered, and surrender was complete when, as instructed by proper authority, he placed the train order on the register

to be picked up by the Conductor. Thereupon, he was relieved of any further responsibility for custody or safe keeping of the train order and as to him delivery was complete."

Later, Award 8327 decided in favor of the Carrier. A lengthy discussion of Awards pro and con clearly spelled out the differences in the reasons for deciding one way or the other. The material points made are: "It is a fundamental principle that whether to have work done or not is in the Carrier's sole discretion." Also, "To hold that the Rule requires the Carrier to permit a telegrapher to do work that the carrier does not want done,---. If we should so hold, then I suppose it would follow that where a telegrapher has in the past made 6 copies of the train order he is entitled in the future to make 6 copies even though the carrier only requires 4 copies." In addition, "An operating rule, since it is promulgated by the Carrier unilaterally, confers no rights on the employees. It may be voided or amended unilaterally. The rights of the employees are to be found in the Agreement alone." The conclusion was that: "neither the Scope Rule nor the Train Order Rule is violated except when some employee other than a telegrapher performs telegrapher's work."

"Train orders must be accurate and safely delivered to the addresses. The safe operation of the railroad requires this." This was stated in Award 10917 which denied the claim on the same issue. PLB NO. 520, Award NO. 49, in the last 12 months denied the claim in a comparable situation.

The record here does not disclose that the Petitioner disagrees with the Carrier's right to unilaterally promulgate Operating Rules. Nor does the Petitioner argue that the new Operating Rule 210 is a violation of the Agreement. We read the Petitioner's position to be that if the Carrier wants train orders to be delivered as provided therein, so be it. However, the operator must be paid as though he were to deliver it personally.

This brings us back to the consideration of the Train Order Rule, Article 34, (a) and (b), quoted above. Handling train orders in the manner set forth in great detail in the Operating Rule is the work of operators entrusted with a serious responsibility. That "handling" is completed when the Train Order is accurately set forth as required. The act of delivery is not covered by any Rule of the Agreement. It is ministerial and does not require a skill or accuracy other than to deposit it in the hands of a trainman or in a box or to attach it to a register.

In this case, the Carrier has specifically set forth the exact location of a box, to be stencilled thereon the prescribed words, to be equipped with a particular type of lock. If the carrier believes this to be a safe way to deliver train orders, then the operator's handling and responsibility has ended when he delivers the train orders into the box. If the Carrier should later decide to change the practice and require delivery to the train crew in person, then an operator will have to be there to do it. In either case, the operator personally would make delivery to a place or to a person. No employee other than those covered by the Agreement would be involved in the handling or in the delivery, regardless of how "handling" is to be defined.

Award 11473 in considering an agreement with the same provision for "handling" as in this case, and with no intervening agent, denied the claim. Prior Awards, Court Decisions, Findings of Presidential Boards, Congressional Records and Presidential Statements were fully explored in the Labor Member's Dissent and the Carrier Members' Answer to the Dissent. We agree with the Award and find ample support in the Carriers' Answer to the Dissent for the conclusion reached in this case.

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 Employee involved in this dispute are respectively Carrier and Employee 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. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1974.

LABOR MEMBER'S DISSENT TO AWARD 20216 (DOCKET TE-20096)
(Referee Bergman)

It has often been stated that an Award is no better than the reasoning behind it. If that reasoning is totally lacking in substance by failing to accept the true facts relating to authorities relied upon, or if it misapplies such authority to support a preconceived erroneous notion, then the Award will fall heir to criticism and overturn.

With this in mind, we now examine the reasoning expressed by Referee Bergman in Award 20216, involving a dispute arising under Article 34 of the Agreement being interpreted, the so-called "Standard Train Order Rule." The issue is whether, under this Rule provision, the Agreement is violated when an operator is required to copy train orders and leave them in a designated location to be picked up by the train crew to whom addressed after he goes off duty.

Referee Bergman states, as reason for his decision, that:

"Since there are conflicting opinions and awards holding both in favor of and opposed to the contentions of the parties, there is lacking a uniformity of thought for us to follow. Consequently, and to explain the reason of our choice, we have selected for comment those Awards which have covered this issue based on facts which are comparable with this case."

and:

"Other Awards referred to by Petitioner as controlling are not similar in all cases because a class of employees not covered by the Agreement intervened between the preparation of the train order and the delivery either to a point of pickup or to the trainmen, i.e. Awards 86 and 18111 in part."

We have no objection to the limitations imposed by Referee Bergman concerning only the Awards which have covered the issue based upon comparable facts and the same Rule. We would submit, however, that he should have applied the same objectivity to the authorities upon which he relies to support a denial Award, namely: Awards 1821 (Yeager), 7343 (Coffee), 8327 (McCoy), 10917 (Boyd), and Award No. 49 of Public Law Board No. 520 (Weston). We think this is a fair proposition if he desires to fulfill his commitment to the National Mediation Board, i.e., that he is unbiased between the parties.

In the denial Awards cited by the Referee, the train orders were left on the operator's desk (Award 1821); on the train register (7343, 8327); in the waybill box (10917); and in the doorway (Award 49, PLB #520). It is accepted, then, that the designated location - where the train orders are to be left by the operator before going off duty - is not a factor.

In applying only those Awards based upon comparable facts, the Dissenter has thoroughly reviewed the authorities cited to the Referee in the Submissions and states, as unrefutable fact, that the following Awards of the Third Division fall in that category:

<u>AWARD</u>	<u>YEAR</u>	<u>REFEREE</u>	<u>LOCATION OF ORDERS</u>
1166	1940	Hilliard	In locked box
1169	1940	Hilliard	On train register
1422	1941	Bushnell	On train register
1680	1942	Garrison	In waybill box
1879	1942	Bakke	In waybill box
2928	1945	Carter	In locked box
3611	1947	Rudolph	In waybill box
3612	1947	Rudolph	In waybill box
4057	1948	Fox	On train register and in waybill box
5013	1950	Parker	On train register
8657	1959	Guthrie	In locked box
9319	1960	Johnson	On clip board outside window
10239	1961	Gray	On window shelf
11653	1963	Hall	On train order rack
11788	1963	Dorsey	On train register
11807	1963	O'Gallagher	On train register
11822	1963	Christian	In waybill box
12240	1964	Coburn	On train register
12967	1964	Hamilton	On train register
13152	1964	McGovern	On train register
13160	1964	Zack	On train register
13712	1965	Dorsey	In waybill box
13713	1965	Dorsey	On train register
13714	1965	Dorsey	On operator's desk
13870	1965	Weston	In box in trainmen's room
14678	1966	Dorsey	On train register
14764	1966	Devine	On train register
14962	1966	Devine	In waybill box
15337	1967	Woody	On train register
15411	1967	McGovern	In waybill box
16616	1968	Zumas	On train register
17233	1969	Dugan	On train register
17234	1969	Dugan	On train register
18111	1970	Dorsey	On train register

Thus, there are thirty-four sustaining Awards rendered by twenty-three different referees, involving the same facts. The Referee has chosen to accept eight (8) of them and ignore twenty-six (26) of them. He discards Award 18111 (Dorsey) on the presumption that someone intervened. It is true that someone intervened in Claims Nos. 1 and 2; but, examination of Claims Nos. 3, 4, 5, 6 and 7 discloses that orders were "left on train register outside of office window at the end of tour of duty." It is ironic that a Referee would cite an Award as "not similar" because two-sevenths of the Award involved an intervening third person, and ignore the fact that five-sevenths was directly in point with the case at bar - did not have a third person involvement. This fact alone makes the Referee's reasoning suspect on two grounds - (a) he either failed to read the entire Award or (b) his predilections dictated his arbitrary exclusion of authorities favorable to Petitioner. It should be obvious, even to neophytes, that the Organization was citing to Referee Bergman Claims Nos. 3, 4, 5, 6 and 7 of Award 18111 for authority, and not Claims Nos. 1 and 2. The Referee's handling of Award 18111 demonstrates incompetence.

Turning to the denial authorities cited by Referee Bergman, four Awards cited have been most adequately dealt with by Referee Hall in Award 11653, from which we quote the following:

"In Award 11473, the Board, in denying the claims of the employes, relied principally on Award 8327 (McCoy) and Award 10917 (Boyd). In Award 8327 it appears there was a departure from the holdings of many prior awards. The Opinion in that award rested, primarily, on the premise that 'no human hand had intervened between the telegrapher and the train crew to whom the order was addressed.' In support of the Opinion expressed in Award 8327, the Referee cited prior Award 1821 (Yeager) and Award 7343 (Coffee). In Award 1821, which was, also, in opposition to the prior awards of this Division, we note the following:

'The easy, and perhaps, excusable, thing to do would be to follow the precedents set forth in Awards 1166, 1169, 1170 and 1422, * * *. My sincere conviction is that the decisions were predicated on a fallacious premise, * * *.'

"Nowhere in the Opinion is it indicated what the fallacious premise was. In a later Award 5872 (Yeager), the same Referee, though only the Scope Rule was involved, which did, however, include employes who are required to handle train orders, and under facts similar to those involved here, rendered a sustaining award in favor of the employes. In Award 9319 (Johnson) we find the following comment:

" 'In Award 1821, as here, the train order rule was involved; in Award 5872, it was not, but Referee Yeager held the difference immaterial and sustained the claim on the basis of the scope rule, thus, in effect, reversing his original opinion and wiping out the only early award denying such claim.'

"In Award 7343 the other Award relied upon in Award 8327 we find upon examination that it neither involved a train order rule nor is a train order rule ever mentioned. What the Board was here concerned with was a general Scope Rule reserving to the persons covered, all work which by custom, tradition and historical practice had become identified as work of the class. Thus, we find the only support for Award 8327 is Award 1821, which was reversed in a later award by the same referee who wrote the Opinion in Award 1821.

"Let us then turn to a consideration of Award 10917(Boyd), which has been cited by the referee in Award 11473 in support of his position. The query presented to the Board was whether Award 10400 (Mitchell) was palpably wrong and should be avoided as a precedent. It was stated in Award 10400:

'It is unnecessary to review in details the many awards which deal with the question of handling train orders, because there is a difference in the Agreement that confronts us in this case, and we are bound by the Agreement before us.'

"From the analysis of these prior awards we are forced to a conclusion that the only award that can be claimed as supporting Award 11473 is Award 8327."

Summating these facts: Award 1821 was later reversed by the same referee; 7343 did not involve a train order rule; 8327 relied upon 1821 and 7343, and Award 10917 placed a fallacious importance upon Award 10400 (Mitchell) in a dispute in which no train order rule was involved. (Referee Bergman does not cite Award 11473 as authority for denial Award 20216, and we presume it is adequately dealt with in Award 11653, Referee Hall, quoted, supra.)

Turning to the last authority relied upon by the Referee, Award No. 49 of Public Law Board No. 520, we note that PLB #520 was established to resolve telegrapher disputes arising on the former Pennsylvania Railroad, now part of the Penn Central Transportation Company (Referee Harold M. Weston). The rule provision

involved is Arbitration Award 153, copy of which is on file with the Board, and provides pertinently as follows:

"Except in emergencies, Train and Engine Service Employees shall not be required to copy train orders at points where, and during the hours when, Block or Telegraph or Telephone Operators are scheduled to be on duty, or at Block stations which have been closed or abolished since May 1, 1938, or at block limit stations which have been established since May 1, 1938 or which may hereafter be established."

Citing directly from Referee Weston's Findings in Award 49, the following is found:

"See Third Division Awards 10917 and 8327; unlike the situations in Awards 3670 and 5872, no rule applicable to the present dispute provides for personal delivery or handling of train orders by operators."

If there is the least doubt that Award 49 involved a dispute under a different rule than here involved, reference is made to Award 13870 of this Division with the same neutral participating (Referee Weston), and the same Rule involved, the Opinion reading in part:

"Substantially the same question and rule have been considered by this Board on numerous prior occasions during the past twenty-five years. With few exceptions (notably Awards 1821, 8327, and 11473), the awards have sustained the Organization's position that a 'call' must be paid under the facts and rule present here. (See, among many others, Awards 1168, 2928, 5013, 8657, 11653, 11788, 12240, 12967 and 13712.)"

It appears inane to us to cite Award 49 of PLB #520 as an authority to premise a denial of this claim where the author of the Award does not agree with such findings.


The last denial Award involving the same facts and rule provision was rendered by this Division in June, 1963. Subsequently, there have been twenty-one (21) sustaining Awards rendered involving the same facts and rule provision and the same arguments by thirteen different neutrals. There were thirteen sustaining Awards prior thereto. Obviously, either those authorities are - or Referee Bergman is - in palpable error in the conclusions reached.

Perhaps thirty-four sustaining Awards do not have a uniformity of thought to follow, as alleged by Referee Bergman. But, where one Referee asserts his reasoning is sounder than twenty-three others, it is time to question his qualifications.

All of the above sustaining Awards, involving identical facts, were cited to the Referee initially in Petitioner's Submissions. They were also cited and discussed with the Referee in panel discussion, and in re-argument following the release of his proposed decision. We would like to be charitable and presume that Awards favorable to Petitioner as set forth in the Submissions and cited to the Referee on two occasions were reviewed. Evidence that they were reviewed is lacking in the written decision as the Opinion, with the exception of the improper interpretation of Award 18111, fails to treat with thirty-four (34) sustaining awards rendered by twenty-three (23) different referees, involving the same facts.

It is unnecessary to state that Award 20216 is palpably in error, inconsistent with prior authority of this Board and completely without value, as the Award itself demonstrates this conclusion. Moreover, one finds it difficult to conclude that Award 20216 resulted from an honest mistake.

Award 20216 purely and simply debases the clear holdings of twenty-three referees in thirty-four cases, and requires vigorous dissent.


J. C. Fletcher
Labor Member
4-30-74

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT
TO
AWARD NO. 20216 (DOCKET TE-20096)

What is stated in the dissent is, primarily, a rehash of the arguments advanced by the dissenter to the referee on two occasions before the Award was adopted. The arguments were found wanting when presented, and repetition in the dissent with additional intemperate criticisms which have no place in the records of this Board, does not increase their validity, or detract from the award.

The Carrier Members knew of the numerous awards of the Divisions involving disputes of the nature involved herein; however, we pointed out, and correctly so, that none of the prior awards involved the parties to this dispute, i.e., the Bangor and Aroostock Railroad and its telegraphers, and that these parties were entitled to an interpretation of their Agreement, based upon the rules involved and the facts set forth in the record, in this dispute.

We also pointed out that the awards of the Division in disputes of this nature were not in harmony, which fact is recognized in Award 20216, and that there were awards supporting the action of the Carrier. Some of the so-called precedent awards relied upon by the Petitioner, and cited by the dissenter, were, on their face, arrived at through the simple process of counting, which, of course, is no substitute for reasoning and agreement interpretation.

Award 20216 is logical and well reasoned and responds to all issues presented.

We incorporate herein by reference the Carrier Members' Answer to Labor Member's Dissent to Award 11473, which Award, contrary to what the dissenter says, was cited and relied upon by Referee Bergman in the concluding paragraph of Award 20216.

P. C. Carter

W. B. Jones

G. M. Goulet

H. M. Brainerd

H. S. Taylor