NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20358
Docket Number CL-20298

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline & Steamship
(Clerks, Freight Handlers, Express and
(Station Employes
((Formerly Transportation-Communication Division, BRAC)
(
(Norfolk and Western Railway Company (Lake Region)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Norfolk and Western Railway (Lake Region), GL-7316, that:

1. Carrier violated and continues to violate the Agreement between the parties when, commencing August 11, 1971, it requires and permits trainmen and other employees to use the telephone for the purpose of blocking trains and handling train orders at stations or locations as hereinafter shown.

2. Carrier shall compensate G. A. Leath, Operator at Canton Yard, a two hour call payment in accordance with Paragraph (A) of Mediation Agreement of February 23, 1962, for each occurrence that trainmen use the telephone for the purpose set forth above at Canton Yard, commencing August 11, 1971.

3. Carrier shall also compensate the first-out, idle extra telegrapher, or the senior idle telegrapher observing his rest day in case no extra telegrapher is idle, payments in accordance with Paragraph (D) of Mediation Agreement of February 23, 1962, for occurrences at locations other than Canton Yard where trainmen or other employees use the telephone for the purpose set forth above, commencing August 11, 1971.
CARRIER DOCKET TC-CAN-71-3 COMM. DOCKET C-71-9

OPINION OF BOARD: Prior to August 11, 1971 Carrier had maintained three seven day telegrapher positions at its Canton Yard. These positions included the responsibility for using the telephone for relaying instructions to block trains, handle train orders and other messages involving train movements throughout the Canton Terminal. This activity was all under the instruction of the Yardmaster who had the responsibility under Time Table Rules for all such movements. This manner of operating had begun in January 1932 when the Operators were instructed by Carrier to relay the Yardmaster's instructions to the appropriate train crews, and continued uninterrupted until August 11, 1971. On that date Carrier abolished the second, third and relief Operator positions at Canton Yard and reduced the first shift position to six days per week, with assigned hours of 7:00 A.M. to 4:00 P.M. Thereafter the first Shift Operator continued to function as in the past issuing instructions by telephone to train crews with authority for movements within the Terminal; for all train movements outside of the Operator's assigned hours the Yardmasters issued instructions by telephone to the train crews. This latter activity is the basis of the dispute herein.

The Petitioner relies principally on Rule 26 which deals with handling of train orders, but also cites Rule 1 and the Mediation Agreement of February 23, 1962. Those rules read as follows:

> "RULE 1 - SCOPE
>
> This agreement will govern the working conditions and rates of pay of telegraphers, agents, telephone operators (except telephone switchboard operators), agent-telegraphers, agent-telephoners, manager-telegrapher, telegrapher-clerks, levermen, towermen, tower and train directors, block operators, staffmen, operators of mechanical telegraph machines, and other combined classifications listed in the accompanying wage scale, all of whom are hereinafter referred to as 'employes'."
>
> "RULE 26 - HANDLING TRAIN ORDER
>
> It is not the disposition of the Railroad to displace employes covered by this agreement by having trainmen or other employes operate the telephone for the purpose of blocking trains, handling train orders or messages. This does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with the operator."
>
> "MEDIATION AGREEMENT OF FEBRUARY 23, 1962
>
> In the application of Rule 26 it is agreed when such service is performed on any day by an employe not covered by this agreement (except Train Dispatchers) the following shall apply:
>
> (a) At a station or location where telegraphers are employed, a call (Rule 5) will be paid to the off-duty telegrapher assigned at the location whose tour of duty is nearest (either beginning or ending) to the time of the occurrence and at one man stations such call shall be paid to the <u>telegrapher assigned thereto.</u>
>
> * * * * * * *

"(d) At a location where a telegrapher position has never been established the first-out extra telegrapher shall be allowed three (3) hours' pay at the minimum telegrapher's rate for each occasion except if two or more occurrences are within a three (3) hour period, only three (3) hours' pay will be allowed. If this occurs on more than three (3) days at any location in any period of seven (7) consecutive days commencing 12:01 AM each Monday, a minimum of eight (8) hours' pay for each day shall be allowed. If no extra telegrapher is idle on that date then payment shall be allowed to the senior idle telegrapher who is observing his rest day on that date.

It is further agreed that the minimum telegrapher's rate for the purposes of applying Articles (B), (C) and (D) of this agreement is $2.425 per hour.

NOTE: The above provisions shall not apply under emergency conditions defined as follows:

Severe weather disturbances; unforeseen track conditions or obstructions; failure of fixed signals; engine or equipment failures which interfere with the normal operation of trains; unusual delays which could not have been foreseen when train was at previous telegraph office; casualties; accidents; or any unforeseen situations arising where life or property may be in jeopardy requiring immediate attention, which could not have been anticipated when train was at previous telegraph office."

Petitioner's arguments are based in part on the proposed Award of Public Law Board No. 431 and the settlement of the cases before that Board in the agreement reached on August 18, 1970. The settlement of Case No. 1 of that docket sets forth that: "Carrier is violating the Rules 1 (Scope), 2 (A) and 26 of the Telegrapher's Agreement by requiring and/or permitting employees not covered thereby to operate the telephone at Mingo Yard, Ohio, for the purpose of sending and/or receiving messages." With respect to Rule 26, Petitioner argues:

"Rule 26, is clear and free of ambiguity. It provides that the Carrier will not displace employees covered by the Agreement by having trainmen or other employees operate the telephone for the purpose of blocking trains, handling train orders or messages. It also provides that this does not apply to train crews using the telephone at the ends of passing sidings or spur tracks in communicating with THE OPERATOR. For more than forty years the parties have recognized that the "use of the telephone by trainmen within the Canton Terminal to communicate with the Operator at Canton Yard, was within the exception of Rule 26. But, it is clearly in violation thereof when the trainmen use the telephone for the purpose of blocking trains in communicating with the yardmaster. If this were not the case, this work would not have been assigned to the Operators at Canton Yard more than two decades ago."

Carrier presents a number of arguments to justify its actions. First, Carrier states that the work in question is usually and historically performed by Yardmasters, is not work belonging exclusively to operators, and is not work reserved to Operators by the Scope Rule. Carrier further urges that the proposed Awards in Public Law Board No. 431 were never adopted and should be ignored and further that the Awards in Public Law Board No. 782 dealing with a related issue and the same parties should not be considered since they deal with a holiday question and may be distinguished from this dispute. Carrier argues that the movements involved in this case are all within the Terminal Yard limits under the complete authority of the Yardmaster and no road territory movements are involved. Carrier states that the decrease in yard activity made it both feasible and economical in August of 1971 to eliminate the second and third trick and relief operator positions at the Canton Yard; this simply removed the unnecessary intermediate positions which relayed verbal yard movement instructions from the Yardmasters to crews of yard engines or trainmen.

Both parties to this dispute have submitted numerous Awards in support of their arguments. A study of these Awards does not reveal a consistent pattern of reasoning which supports either position; either the Awards deal with tangential issues or are in diametric opposition. (e. g.: Award 13222 versus Award 11667) In view of the history of the dispute on this property in previous cases, we believe it would be appropriate to evaluate this case on its merits, since there are no clear specific controlling precedents.

The Scope Rule in the Agreement is general and would under most circumstances require proof that the work involved has been performed historically and customarily system-wide by employes covered by the Agreement, to establish exclusivity. In this dispute, however, Rule 26 is a special Rule which supercedes the Scope Rule with respect to the issues in dispute, thus making system-wide proof unnecessary. Rule 26 contains language which seems abundently clear and unambiguous; the last sentence in particular applies to the issue in dispute. The Carrier appears to agree with the Organization's interpretation by virtue of the language agreed to in the settlement of Case No. 1 of the docket assigned to Public Law Board No. 431, which is quoted above. Furthermore, Carrier has made assertions but has presented no evidence whatever to support its contention that trainmen and yardmen have always used the telephone to obtain instructions from the Yardmaster as to their movements in yard limits, not only at Canton but at other yards. To the contrary, the only evidence contained in the record supports the thesis that at Canton and at least at Mingo Yard such was not the case.

Carrier argues that in the activity of the Operators there was no "blocking" of trains; we do not find that this distinction is significant in view of the language of Rule 26 which contains the word "messages". We concur in Carrier's position that the Mediation Agreement of February 23, 1962 does not interpret Rule 26; in our view it provides implementing language for Rule 26.

Carrier argues that Part 3 of the Claim should not be allowed since Carrier should not be required to develop Claims for unnamed Claimants on unspecified dates through a check of its records. The thesis is correct but it is only partly applicable to this dispute. This dispute comprises a continuing claim and as such does not require specificity beyond that provided in the original documents handled on the property. However the phrase "...for occurrences at locations other than Canton Yard where trainmen or other employees use the telephone for the purpose set forth above...." is too open ended and vague. Part 3 of the Claim must be restricted to those locations other than Canton Yard specified in the letter dated September 1, 1971.

Our conclusion therefore is that the Claim must be sustained. Carrier may not with impunity remove work which is reserved to employes covered by the Agreement and assign such work to other non-agreement employes. Although we can understand and sympathize with the desire of Carrier to reduce its overhead in the face of decreasing traffic, it can do so only within the bounds of the Agreement - or by agreement with the Organizations involved.

<u>FINDINGS</u>: 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 violated.

A W A R D

Claim sustained with the proviso indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of August 1974.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20358 -
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The operations within a yard, as here involved, are under the direct supervision of a yardmaster. This is distinguished from train orders issued by train dispatchers governing train movements on line of road.

Also, it is abundantly clear from the record that messages - which is not even mentioned in the "Statement of Claim" - did not constitute "messages of record" as that term is commonly understood in railroad usage and the employes were unable to show that the transmission of this type of message, which would not be involved in yard operations as reiterated many times by the Carrier in this record, was by history, custom and tradition reserved exclusively to telegraphers.

In this case, the operators merely assisted the yardmaster and the organization itself admitted he was the authority.

The issuance of verbal instructions to train and yard crews for movements within yard limits is a historical function of yardmasters, and the only function of the operators, whose positions were abolished, was to assist the yardmasters in this work until, due to diminished train and yard movements, such assistance was no longer necessary.

We have many well-reasoned and sound Awards as to the right of the Carrier to abolish positions.

The majority erred in this Award and no precedential value whatsoever can be attached to the Award.

We dissent.

H F M Braidwood
H. F. M. Braidwood

P. C. Carter
P. C. Carter

W. B. Jones
W. B. Jones

G. L. Naylor
G. L. Naylor

G M Youhn
G. M. Youhn

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 20358

DOCKET NO. CL-20298

NAME OF ORGANIZATION: Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employes (Formerly Transportation-Communication Division, BRAC)

NAME OF CARRIER: Norfolk and Western Railway Company (Lake Region)

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The request made for interpretation in this dispute involves the question of the continuing liability of Carrier and whether or not such liability was terminated by the new Agreement entered into effective April 1, 1973. Additionally, the Organization is raising, for the first time, the issue of interest on the sums due to the various Claimants. The Organization also insists that Carrier has been dilatory in complying with the Award and Order in this dispute. On the latter point, it must be noted that although this Board has no enforcement authority, prompt compliance with awards is always expected.

Petitioner argues that the new 1973 Agreement did not change the basic work relative to train orders and messages but merely provided for interchange between clerks and telegraphers. It is contended that Carrier's practice is a violation of the April 1973 Agreement as well as the previous Agreement with respect to the work at issue in this case. The Carrier argues that Rule 26 in the old Agreement has been replaced by Rule 66 which is significantly different and hence the liability of Carrier was terminated effective April 1, 1973.

The new Agreement, by its terms, Rule 70, superceded all former Agreements. An examination of Rule 66 indicates that it pertains to the handling of train orders and clearance forms whereas the Rule in the previous Agreement pertained to employees operating the telephone "....for the purpose of blocking trains, handling train orders or messages." We deem this new language to constitute a material departure from that contained in the former Agreement since it deals only with train orders and clearance forms. In the light of the reasoning expressed in the Award herein, it must be concluded that Carrier's liability terminated on April 1, 1973. For this reason Carrier is not required to restore the work to employees, except insofar as it may be required by the April 1, 1973 Agreement but is required to make the employees whole as provided in the Award (up to April 1, 1973). Although we sympathize with the request for prompt compliance with our Award, we cannot authorize the payment of interest as a pressure device or for any other purpose under the terms of the applicable Agreements (See Awards 18433, 19336, 19744 and many others).

Referee Irwin M. Lieberman, who sat with the Division, as a neutral member, when Award No. 20358 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1975.