

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) Carrier violated Rule 1, 2, and other related rules of the Telegraphers Agreement and/or Rule 1, Rule 12(b) and other related rules of the current Clerical Agreement when beginning March 21, 1984, and continuing, the Carrier required and/or permitted employees (Chief Dispatcher's Office) not covered by the scope of either agreement to transmit messages previously done by employees covered by the scope of these two agreements.

(2) Carrier shall now be required to pay the senior available furloughed employee eight (8) hours pay at the pro-rata rate each day that the violation occurs beginning March 21, 1984, and continuing until corrected, and, if non-available, then;

(3) Carrier shall be required to compensate 'DC' office employee, Jim Chavies, two (2) hours pay at the punitive rate of pay for each violation beginning March 21, 1984, and continuing until corrected."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Prior to March 1984, Carrier, the Denver and Rio Grande Western Railroad Company, assigned telegraphers to relay messages relating to train operations from its general offices, known as "DC", to other locations in the system. In March 1984, Carrier installed a computer system and, thereafter,

Train Dispatchers used the computer system to send such messages. The Organization filed a Claim on Claimant's behalf, challenging Carrier's use of Dispatchers to perform this work.

This Board has reviewed the evidence in this case, and we initially state that the Train Dispatchers were given a third-party notice and elected not to participate in the case.

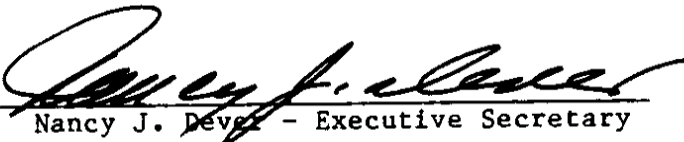
With respect to the merits, this Board finds that the Organization has met its burden of proof that the work in question historically exclusively belonged to members of their Organization. Although the work in question involves new technology, the Organization has shown that its members performed reasonably similar work under the old technology. Moreover, historically, this Organization had exclusive rights over Dispatchers in handling messages of record. The Organization has provided convincing proof that the messages involved in this case were messages of record. Therefore, the Claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of August 1988.

DISSENT OF CARRIER MEMBERS
TO
AWARD 27329 (DOCKET CL-26605)
REFEREE MEYERS

The claim filed with this Board asserted that:

"Carrier required....employees (Chief Dispatcher's Office)
....to transmit messages previously done by employees
covered by the scope...."

All that was changed was the relay function. Due to technological equipment, the need to RELAY messages from the dispatcher was no longer necessary. The train dispatcher issued the message and he did nothing different that accrued to the operator. Absent evidence that the train dispatcher was doing other than what he always did, the claim should have been denied for lack of evidence.

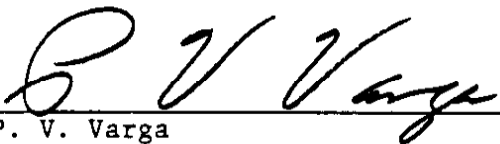
Further, under the Agreement in effect on this property, in order for a message to be exclusively reserved to the telegraphers, the communication must relate to the control of transportation and, accordingly, a record is required to be preserved. Throughout the handling of this claim, on the property, it was pointed out, without rebuttal evidence, that the messages were merely informational and that they were not preserved. As such, they were not messages of record. In Award 23847, we pointed out:


"From a long line of Third Division cases, a two part test has evolved to determine the character of a communication. To bring the conveyance of any of the messages within the exclusive province of the operators, the Organization must prove that: 1) the primary purpose of the communication was to control or directly affect transportation, and 2) the nature of the message inherently required that a record has been or should have been preserved. Third Division Awards No. 5181 (Boyd); No. 10454 (Wilson); No. 12116 (Dolnick); No. 15738 (Kenan); No. 16685 (Dugan); No. 16898 (Franden); and No. 21858 (Scearce)."

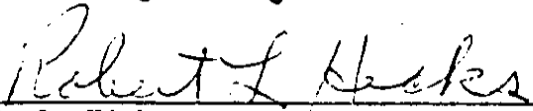
The Majority does not address either of the foregoing arguments in its decision.


The Majority simply concludes, without any reference to the evidence of record or to specific rule provisions, that "the work in question historically exclusively belonged to members of their Organization." Such a conclusion is deficient, and is not supported by the factual record.

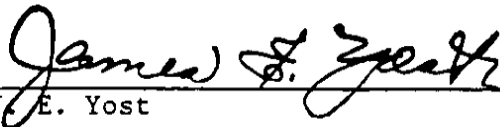
We Dissent.


P. V. Varga


M. W. Fingerhut


R. L. Hicks


M. C. Lesnik


J. E. Yost

LABOR MEMBER'S RESPONSE

TO

CARRIER'S DISSENT OF AWARD 27329 (DOCKET CL-26605)

(REFEREE MEYERS)

The Minority Dissent continues to express a misunderstanding of the Award and the governing rule of the Agreement. The applicable portion of Rule 2 states:

" . . . Past practices with respect to employers covered by Telegraphers' Agreement handling messages of record governing train operation will be continued."

The record stands undisputed that Telegraphers were always assigned the duty of relaying messages relating to train operations from the Carrier's general office to other points throughout the system. In March 1984, the Carrier installed a computer system and then assigned the aforementioned duties to Train Dispatchers.

The Majority correctly concluded that the work in question historically and exclusively belonged to the Organization members. And furthermore, just because the Carrier changed the technology for transmitting the messages did not eliminate that duty from the proper bargaining unit. The work was not eliminated, but instead was transferred.


The Minority is correct when they state that while the claim was on the property the Carrier argued that the messages in dispute were informational rather than related to the operation of train movement, but the Minority is incorrect when they state the following:

" . . . Throughout the handling of this claim, on the property, it was pointed out, without rebuttal evidence, that the messages were merely informational and that they were not preserved. As such, they were not messages of record. . ."

The record refutes that assertion. It is clear, not once while the claim was on the property did the Carrier ever argue that the messages of record were not preserved. Probably the most obvious reason why is because the Organization furnished the Carrier copies of their preserved record. It wasn't until the dispute came to this tribunal that the Carrier offered such a De Novo argument which was properly rejected.

The Carrier Advocate eloquently argued that the messages in question were general information rather than messages of record effecting train movement. Nonetheless, even his skill could not overcome the furnished and preserved message of record which clearly gave instruction for switching cars, picking up cars and other instructions affecting train movement. (See BRAC Exhibit No. 1 pages 1-13)

The Majority correctly concluded that the messages in question were messages of record and that the Organization members had exclusive rights to the handling of that work. The Minority Dissent does not detract from Award 27329 which is directly on point with many other fine Awards such as Third Division Awards 8260, 10435, 10526, 10534, 10699, 11111, 11198, and 27096. The Minority simply continues to ignore the factual record which sustained the Organization's position. We disagree with the Carrier Member's Dissent.


William R. Miller
Labor Member

October 12, 1988
Date