Public Law Board No. 3943

Parties to Dispute

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees	)	Case No. 1
vs	)	Award No. 1
The Atchison, Topeka and Santa Fe Railway Company	)	

STATEMENT OF CLAIM

Case No. 1

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 24, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant H. W. Wittman, who is a qualified employee who should have handled the Train Order, three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day, as a result of such violation.

Case No. 2

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 24, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant H. W. Wittman, who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position, in addition to any other compensation Claimant may have received for this day, as a result of such violation.

Case No. 3

(a) Carrier violated the provision of the current Clerks' Agreement at Glendale, Arizona on March 24, 1983 when it required and/or permitted an employee not covered by the Agreement to handl a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant P. E. Burbank who is a qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day as a result of such violation.

Case No. 4

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 24, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant P.E. Burbank who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day, as a result of such violation.

Case No. 5

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 25, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant H. W. Wittman who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day as a result of such violation.

Case No. 6

(a) Carrier violated the provision of the current Clerks' Agreement at Glendale, Arizona on March 25, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant P. E. Burbank, who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day as a result of such violation.

Case No. 7

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 25, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant P.E. Burbank who is the qualifed employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day, as a result of such violation.

Case No. 8

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 25, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant R. C. Bechtel, who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day as a result of such violation.

Case No. 9

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 25, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant R. C. Bechtel, who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day as a result of such violation.

Case No. 10

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 26, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered bythe Agreement is assigned and avilable when no emergency existed, and

(b) Carrier shall now compensate Claimant H. W. Wittman, who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day as a result of such violation.

Case No. 11

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 26, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreementis assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant P. E. Burbank who is qualified and who should have handled the Train Order, three (3) pro rata hours' pay at the rate of his position, in addition to any other compensation Claimant may have received for this day, as a result of such violation.

Case No. 12

(a) Carrier violated the provisions of the current Clerks' Agreement at Glendale, Arizona on March 26, 1983 when it required and/or permitted an employee not covered by the Agreement to handle a Train Order at an office of communication where an employee covered by the Agreement is assigned and available when no emergency existed, and

(b) Carrier shall now compensate Claimant R. C. Bechtel who is the qualified employee who should have handled the Train Order three (3) pro rata hours' pay at the rate of his position in addition to any other compensation Claimant may have received for this day as a result of such violation.

BACKGROUND

On May 18, 1983 a pay claim was filed by the Organization's Division Chairman, Albuquerque for Claimant H.W. Wittman. The claim alleged violation of the operant Agreement on March 24, 1983 when the Carrier "...required and/or permitted an employee not covered by the Agreement to handle a train order at an office of communication where

an employee covered by the Agreement is assigned and available when no emergency existed...".

The claim was denied by the Carrier and appeal was made by the Organization up to and including the highest Carrier officer designated to hear such. Subsequent claims filed by the Organization for Claimant Wittman, and Claimants P.E. Burbank and R. C. Bechtel for alleged Agreement violations dealing with the same question, on various dates, were combined into one case which is now before this Board.

On May 31, 1984 the Organization notified the Third Division of the National Railroad Adjustment Board of its intention to file an ex parte submission on the dispute involving claims by the three Claimants stated in the foregoing. The case was docketed as CL-25829 before the Third Division. At the request of the Carrier the case was withdrawn from the National Railroad Adjustment Board.

On September 3, 1985 an Agreement was signed between the General Chairman of the Organization and the Carrier's Vice President of Personnel and Labor Relations where it was agreed, in accordance with the provisions of Public Law 89-456,to set up a Public Law Board to adjudicate the matter formerly docketed as CL-25829 before the National Railroad Adjustment Board.

On September 13, 1985 a request to establish such Public Law Board was made to the National Mediation Board by the President of the Organization, with International Vice President F. T. Lynch designated as Organization member.

On October 16, 1985 the National Mediation Board informed the parties that the Public Law Board would be designated PLB 3943, with the instant case designated by the parties as Case No. 1.

On October 21, 1985 the parties informed the National Mediation Board that Assistant to the Vice President-Labor Relations B. J. East had been designated as Carrier Member of the Board and that the undersigned arbitrator had been mutually chosen by the parties as Chairman and Neutral Member.

On November 15, 1985 the National Mediation Board advised both partisan members of the Board that the undersigned had agreed to serve as Chairman and Neutral Member. Under date of November 19, 1985 he was advised of his appointment by the National Mediation Board.

On November 26, 1985 a copy of the Organization's ex parte submission was received by the neutral member of the Board.

On December 4,1985 the neutral was presented with three dates in February of 1986 as potential dates for holding a hearing on the dispute at bar. On December 6, 1985 the date of February 26, 1986 was confirmed, by telephone, as date for the hearing. This was later confirmed in writing by correspondence dated December 10, 1985.

On January 29, 1986 request was made by the partisan members of the Board to the neutral that the hearing be re-scheduled for April 2, 1986. Postponement was confirmed by the neutral and he changed his calendar accordingly.

On March 18, 1986, some two weeks before the scheduled hearing, the neutral was informed by the parties that "...the hearing originally

scheduled for April 2, 1986....has been postponed..." indefinitely by the partisan members of the Board. The neutral struck that date from his calendar.

On July 16, 1986 the parties again requested of the neutral that a hearing on the matter be re-scheduled. Another date was given by the neutral. By correspondence dated July 22, 1986 it was confirmed by all parties that the hearing would be held on October 1, 1986.

On July 30, 1986 the Organization member of the Board informed the neutral and the Carrier member that because of pressing business the week of September 29, 1986 and thereafter he would not be able to attend the scheduled October 1, 1986 hearing. Mr. John Lieb, Director of the Organization's Passenger Service, was designated as the new Employee member of the Board by the president of the Organization.

The October 1, 1986 hearing was cancelled. The neutral member of the Board was informed by the National Mediation Board on September 23, 1986 that it was honoring no prior commitments to hold hearings on Section 3 disputes of the Railway Labor Act "...until further notice". The neutral member of the Board informed the partisan members accordingly and the neutral struck the October 1, 1986 date from his calendar.

On October 10, 1986 the neutral was advised by the Organization that Mr. Lieb would remain partisan member for the employees on the Board.

The hearing was re-scheduled for January 21, 1987 and the case was heard on that date.

THE ISSUE

Despite various and complex arguments presented by both sides which will be presented below, the issue before this Board can be stated fairly succinctly: is a track warrant a train order, yes or no? According to the Organization, a "...track warrant...is simply another form of a train order". Its answer to the above querry, therefore, is: yes. According to the Carrier, a "...track warrant is not a train order, but rather a message of record". Its answer to the above querry, therefore, is: no. Therein lies the problem in this case.

POSITION OF THE PARTIES

The record before the Board on this case is fairly voluminous and, at points, considerably complex. The Board has studied closely both the exchanges on property, and the submissions by the parties to this Board. The Board notes, at points, information and arguments found in one or the other submission which adds to or augments that which is contained in the exchanges of record. The parties are, therefore, advised as a preliminary point that,in accordance with Circular No. 1 and the articulation of the doctrine therein by many subsequent Awards from the National Railroad Adjustment Board, information which is not part of the record per se cannot be utilized when formulating conclusions in this case (Third Division 20841, 21463, 22054; Fourth Division 4132, 4136, 4137). The positions of the parties outlined in that part of this Award which immediately follows, therefore, will at all times be consistent with those arguments proffered by the parties when the claims to this case were being handled on property. The neutral member of this Board has been particularly attentive to

the time-lines surrounding this case as noted in the Background portion of this Award, and has recorded them in the Award itself. He has done so for a number of reasons. First of all, the examination of such will permit interested parties, and most assuredly the Claimants themselves, to have a better understanding of why it took so long for these claims to get from the date of filing to the date of final resolution. There were a number of reasons for this and most, if not all, could be interpreted to be legitimate ones given the manner in which Section 3 disputes are resolved in the railroad industry. Certainly there were attempts by the parties to resolve the claims prior to arbitration at a number of identifiable points in the time-frame: prior to the submission of the claims by the Organization to the Third Division of the National Railroad Adjustment Board, and after the first date of hearing had been set before this arbitrator after the case had been withdrawn from the NRAB and docketed before this PLB. Subsequent delays, from postponing hearing dates to delay in issuing the final Award lie with certain idiosyncracies of implementing Section 3 of the Railway Labor Act at this particular point in its history. Such details may be of little consolation to the Claimants, but they may at the least provide information on how the current imperfect process works. The second, and certainly most important reason why the neutral member of the Board has paid particular attention to the time-lines of this case is because, at the hearing held on January 21, 1987 the parties alluded to a prior Award on the Southern Pacific Transportation Company property between that Carrier and this same Organization wherein a comparable issue to the one here at bar was adjudicated and wherein the claims were

denied. This Award was listed in the Carrier's submission as Attachment "B". The Organization responded at the hearing that it had written a dissent to this Award which it had not attempted to introduce into the record but which it would forward to the neutral member of the Board upon request. Upon so requesting this dissent was forwarded to the neutral by the Employee member under date of January 28, 1987. Further study of the time-lines of this case, with the date of that Award and its dissent, persuaded the neutral that both the Award and dissent fell under the strictures of Circular No. 1 and associated Awards in this industry and neither that Award nor the dissent were studied by the neutral since they both represented inappropriate, proposed evidence for consideration by this Board. The instant Award must, therefore, stand on its own merits without reference to precedent other than that presented in the record prior to the docketing of this case before the National Railroad Adjustment Board on May 31, 1984. If the parties remanded the case to "on property" status after the Carrier requested that the case be removed from the NRAB's docket prior to petition for the establishment of this Public Law Board for further consideration of the case it is unclear from the record when or how they did that. In effect, therefore, the evidentiary record is that which was established prior to May 31, 1984 and it is that which will form the basis for the conclusions and rationale of the instant Award.

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(I) POSITION OF THE ORGANIZATION

It is the position of the Organization that the Carrier violated the "...intent and provisions of the..Agreement" when it required or permitted an employee not covered by the contract to handle a train order at an office of communication where an employee covered by the Agreement was assigned, available and able to be promptly located. According to the Organization such violations took place on the dates of March 24-26, 1983 at Glendale, Arizona when it permitted other than covered employees to handle train orders at an office of communication when no emergency existed. When the first claim was denied by the Carrier on property it was done so not on the basis that a message had not been issued, but that what had been issued was not a train order. In the terms of the Carrier's Superintendent at Winslow, Arizona the message "...allegedly issued (at Glendale)..may (be) confused with a track warrant". The Organization's Division Chairman's response to this, as noted in the foregoing, was that there was no confusion, in his estimation, since a track warrant "...is simply another form of a train order" and he reiterated request that the first claim and all subsequent ones be honored as filed.

In filing claims on this issue on property the Organization states that it relies upon the entire Agreement for support but that the Carrier's attention is directed more specifically to a number of Rules from the Agreement, which includes Rules 1,2,3,5,6,32,47 and 60. In its exchanges with the Carrier on property, however, the Organization

makes it clear that the main thrust of its arguments on this question seek support particularly from a number of provisions found in Rule 3 and they will be quoted here for the record.

> Rule 3(A)
>
> No employee other than covered by this Agreement and train dispatchers will be permitted to handle Train Orders at offices of communications where an employee covered by this Agreement is assigned and is available or can be promptly located. At such locations, when Train Orders are not handled as outlined in this Rule 3(A), except in cases of emergencies as defined in Rule a(B), the qualified employee who should have handled the Train Order will be paid a call.
>
> .....
>
> Rule 3(C)
>
> It is understood there is no violation of any Agreement rules when Train Orders are copied by train and/or engine service employees, however, when Train Orders referred to in Rule 3(B) are not relayed through an employee covered by the Agreement, except in emergencies, the senior idle regularly assigned employee who handles Train Orders at the nearest location to the point on the seniority district where the Train Order is received will be paid three pro rata hours at $9.62 per hour effective January 1, 1981 (subject to subdequent general wage adjustments), except that no more than one such payment shall be allowed if more than one Train Order is received at the same location during a consecutive eight hour period. An employee shall not be considered eligible for payment within the meaning of this Rule 3(C) if on authorized absence or vacation. In each instance wherein payment is due under this Rule 3(C) the Chief Dispatcher will arrange for payment to be made and will notify the employee entitled to payment.

Rule 3(B) which is not quoted by the Organization in its correspondence with the Carrier during the exchange on property need not be quoted here either since that provision of the Agreement but operationalizes the meaning of an emergency. There has never been any contention in

this case that the disputed communications in question were the result of such. It is of some importance here to also note that the versions of Rule 3 cited above come from the parties' Agreement effective January 1, 1980 and not from an earlier one. Both Agreements are at the disposition of this Board as public documents.

According to the Organization the above provisions were violated when the Carrier issued track warrants at the times and at the places in question as outlined in the Statement of Claim. The General Chairman states in correspondence to the Carrier's Assistant to Vice President-Labor Relations under date of August 5, 1983, which argument is subsequently repeated with subsequent claims filed, that "...a casual perusal of Carrier's Form 1714-Standard (Authority to Occupy Main Track in Track Warrant Control Limits) and the information contained thereon leaves no doubt that the form intends to convey authority to occupy certain limits within specified times, exactly the same as train orders". The General Chairman then states what may be considered the Organization's argument in its most concise form: "...the purpose of the communication, rather than its title, will determine its function". The Organization continues: "...it is apparent that Carrier is attempting to circumvent the provisions of the Agreement by adjusting nomenclature and leaving untouched the functional quality of the so-called Track Warrants". In other words, if it looks, acts and quacks like a duck, it is probably a duck and not some other type of beast, as was underlined by the Organization when this case was in hearing.

(II) POSITION OF THE CARRIER

The Carrier's most succinct statement of its position is found in the denial of the original Wittman claim of May 18, 1983. In that denial letter the Carrier's Superintendent at Winslow, Arizona states that a track warrant is a message of record and a train order is not. Of some interest here also is that the Superintendent states in that letter of denial, which is repeated throughout the record with respect to the denial of the other claims dealing with this question, that "...messages of record were eliminated from the Clerks' Agreement on January 1, 1980". Where? The Board has closely studied that Agreement and particularly Rule 3. The Board has found that there is reference by the parties to both train orders and "...messages of record", as the language of the parties puts it, in that earlier Agreement. The pre-1980 Agreement has provisions (A) through (G) as sub-sections under Rule 3. In those provisions the parties make extensive reference to "...messages of record" and use this phrase, by actual count, six (6) different times in that Rule 3. The re-negotiated Rule 3 in the 1980 Agreement has only provisions (A) through (D) as sub-sections. All reference to "...messages of record" was elited by the parties when they re-negotiated this Rule for the 1980 Agreement. The 1980 version of Rule 3 references only train orders.

In 1981 the Carrier signed a Memorandum of Agreement with the United Transportation Union whereby it was agreed, effective January 1, 1980 that the former "...exclusivity associated with

the handling of train orders was removed from the...BRAC Agreement... in an effort to resolve the question of copying train orders by a member(s) of a train crew...". While that has no direct bearing on this case, as far as the Board can determine, what may is the fact that this same Organization amended this 1981 Memorandum in 1983 whereby the means of communication known as track warrants were the subject of further negotiations. In his letter to Local Chairman the UTU General Chairman stated, under date of March 25, 1983, the following:

> "It was agreed (between this Organization and the Carrier) that Track Warrants would be treated (in the future) in the same manner as Train Orders and payment for filling out a track warrant form will be made on the basis of the Train Order Agreement".

In the Agreement signed in 1983, at provision (2) it is stated that "...Tract Warrants are currently covered by Operating Rules 400 to 411 inclusive, Rule of the Operating Department". The latter, referenced on property, state the following with respect to communications within so-called Track Warrant Control (TWC) limits.

> Rule 400
>
> Where designated by Special Instructions, use of main track will be authorized by issuance of Track Warrant, under the direction and over the signature of the Train Dispatcher.
>
> Track Warrants must be numbered consecutively from the beginning of each calendar date. They will be the only authority for train or engine movements issued within TWC territory, except the main track may be used as prescribed by Rule 93 or Rule 94.
>
> There is no superiority of trains within TWC territory.

Rule 401

The limits of the Track Warrant must be designated by specifying exact points such as switches, mile posts or identifiable points, except station names may be used.

When a station name is used to designate the first named point, the authority will extend from the last siding switch for from the station sign if no siding.

When a station name is used to designate the second named point, the authority will extend to the first siding switch or to the station sign if there is no siding. At the second named point authority will extend to the last siding switch when specific instructions include 'hold main track at last named point'.

Rule 402

Employee requesting Track Warrant must advise the dispatcher of the movements to be made and, when applicable, tracks to be used and time required.

Rule 403

The conductor and the engineer must have a copy of the Track Warrant, addressed to their train or engine showing date, location, name of employee who copied it and any specific instructions issued. All information and instructions must be entered on Track Warrant form provided and repeated to the train dispatcher who will check and, if correct, will give 'OK' and the time. The OK and time will be entered on the Track Warrant and repeated to the train dispatcher. The Track Warrant must not be considered in effect until OK time is shown on it.

If the Track Warrant restricts authority previously granted, it must not be considered in effect by the train dispatcher until acknowledgment of the OK has been received.

Track Warrants may be relayed by employees, who must make record on Track Warrant form.

Rule 404

Track Warrants will include specific instructions as indicated on prescribed form which must be complied with by those to whom the Track Warrant is addressed.

Rule 405

When a Track Warrant is in effect and it is desired to change the limits or instructions, a new Track Warrant must be issued with the desired instructions and include the words 'Track Warrant No. _____ is void' giving the number of the Track Warrant being changed. The previous Track Warrant mentioned will no longer be in effect.

Rule 406

Track Warrant authorizes the train or engine addressed to occupy the main track within designated limits without flag protection.

Movement must be made as follows:

1. When authorized to proceed from one point to another, movement must be made ONLY in the direction specified.
2. When authorized to 'WORK BETWEEN' two specific points, movement may be made in either direction between those points.
3. Train or engine must not foul a switch at either end of the limits which may be used by an opposing train or engine to clear the main track.

Rule 407

Not more than one train or engine may be permitted to occupy the same or loverlapping limits of a Track Warrant at the same time except two or more crews performing switching or work service may be authorized within the same or overlapping limits. Each Track Warrant must so indicate, and all movements must be made at restricted speed.

Rule 408

A Track Warrant, once in effect, is in effect until crew member has reported clear of the limits, it has become void or time limit has expired. Crew members must report to the train dispatcher when they have cleared the limits.

If a time limit is shown on the Track Warrant, train or engine must be clear of the limits by the time specified, or protection provided in both directions as prescribed by Rule 99 unless another Track Warrant has been obtained.

Rule 409

The word VOID must be written legibly through the number of each copy of the Track Warrant when:

1. Crew member has reported train or engine clear of the limits;
2. Time limit specified has expired; or,
3. Track Warrant has been changed as prescribed by Rule 405.

Rule 410

A Track Warrant must be issued in the same manner as to trains or engines to permit man or machines to occupy or perform maintenance of way track without other protection. Employees in charge requesting Track Warrant must copy and repear it in manner prescribed by Rule 403 and must report to the train dispatcher when they have cleared the limits.

A Track Warrant must not be issued to protect men or machines within the same or overlapping limits with a train or engine unless:

1. All trains authorized to occupy the same or overlapping limits have been authorized to move in one direction only and such trains have passed men and machines; or
2. Trains or engines authorized to occupy the same or overlapping limits have been notified of the authority granted men or machines and have been instructed to make all movements at restricted speed and to stop short of men or machines on or fouling track.

Rule 411

All rules not modified by these rules remain in effect. 1/

1/ The Board notes, in comparing the Rules of the Carrier's Operating Department, effective January 5, 1975 from which the above are quoted and which are referenced by the Carrier on property in its correspondence to the Organization which is dated September 27, 1983, that the exact wording of Rules 400 through 411 change somewhat in the Rules effective April 28, 1985. Because of the date of the later Code it is that of 1975, in either case, which is more specifically applicable to this case. See Footnote 2/ below for comments on the difference in definitions found in the earlier and later Code.

The Carrier argues that the locale of the dispute, which is the Fourth District on the Albuquerque Division, is one which is main track. It is the position of the Carrier that "...the designation of the manner of controlling train movements over particular portions of track is a management prerogative". Effective March 21, 1983 the Carrier discontinued using "...train orders...yard limits (were) redesignated and a new method of controlling train movements was placed into effect from Glendale to and including Sereno known as Track Warrant Control (TWC)". The Carrier continues its argument that "...while the use of train orders on the territory involved herein is no longer required, the operator at Glendale is still required to issue Clearance Cards (as well as slow orders) as prescribed by the time table". The location of track in dispute involves the track between Phoenix and Williams Junction. A map of the locale has been provided by the Organization in its submission under designation of Employees' Exhibit 14 and this is reproduced on the following page as illustration. While arguing, therefore, that there are methods, "...other than train orders which advance the movement of trains", the Carrier concludes that "...track warrants fall in(to) this category". In other words, all those other messages of record outlined in Rules 400-411 under title of track warrants and Track Warrant Control (TWC) represent alternative types of communication to control movement of trains. In its correspondence dated September 27, 1983 to the Organization the Carrier cites General Code of Operating Rules' definitions dealing with the issues of Main Track, Track Warrant Contol and Yard Limits and those

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are cited here for the record.

> Main Track
>
> A track, other than an auxiliary track, extending through yards and between stations which trains or engines are operated and movements authorized by block signals, time table or train order or the use of which is governed by rules or special instructions.
>
> Track Warrant Control
>
> A method of authorizing movement of trains or engines or protecting gangs or machines on a main track within specified limits in territory designated by special instructions.
>
> Yard Limits
>
> A portion of track, designated by yard limit signs and a special rule in the time table, which trains and engines may use as prescribed by Rule 93. 2/

Since, according to the Carrier, TWC is a "...method of authorizing movement of trains....etc.", it necessarily implies a communication of some type, and the type in question is a message of record. The track in question is main track and by both the definitions of Main

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2/ These definitions are taken from the pre-1985 General Code of Operating Rules of the Carrier. Those found in the October, 1985 Code vary somewhat from the above. As noted in Footnote 1/,however, with respect to the Rules cited at that point in this Award, it is the Code in effect at the time that the claims were filed which properly apply to this case. The Board has closely studied the differences here applicable when comparing the pre and post 1985 Code in order to have a better understanding of all aspects of this case.

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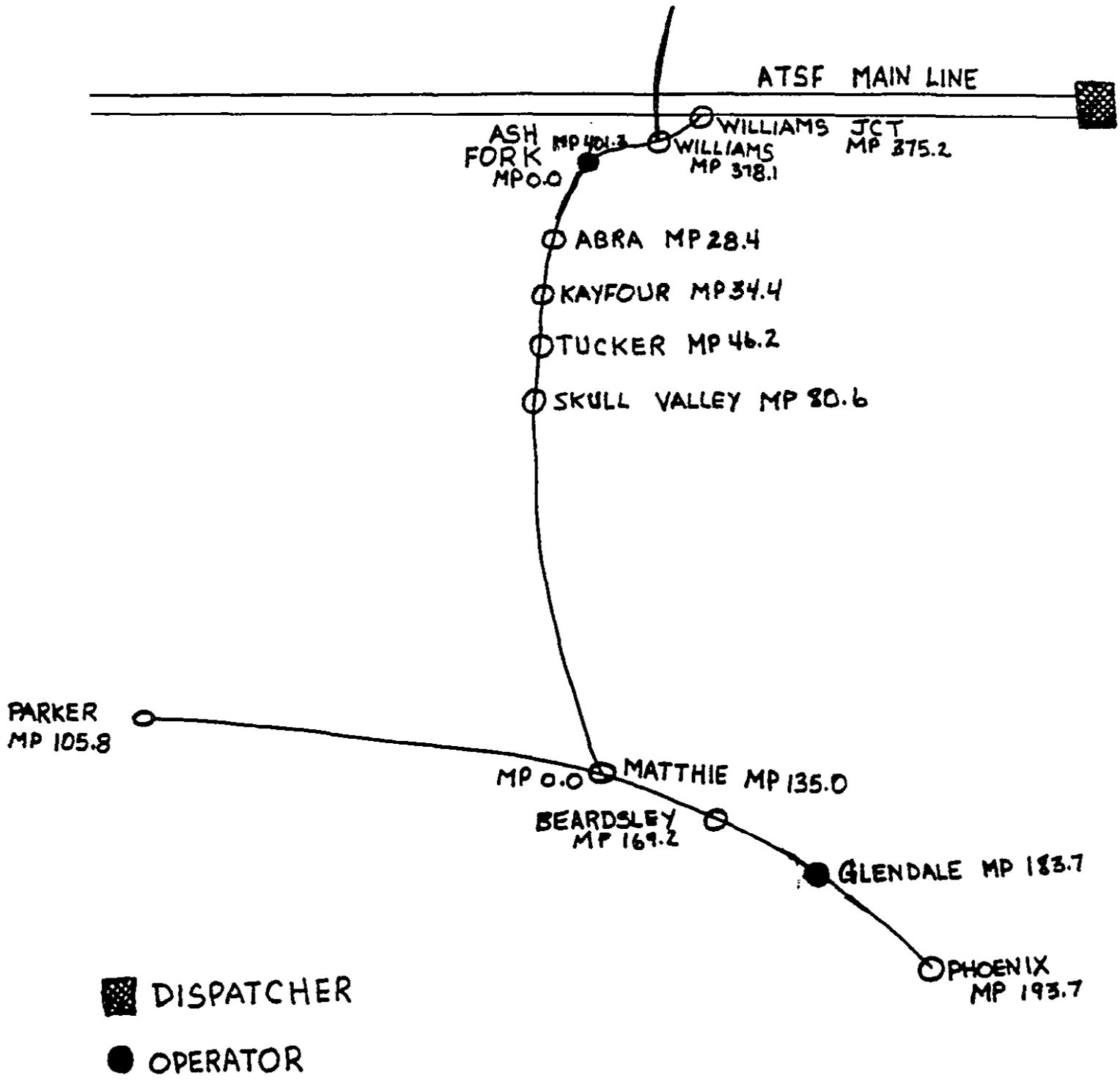

EMPLOYES' EXHIBIT 14

Track and Track Warrant Control in the Code the Organization should have been familiar with the fact, the Carrier argues, that the Carrier had other options besides train orders when "...authorizing the movement of trains..." on the track shown on Employees' Exhibit 14 (p. 20 of Award).

Going back to the question of the changes negotiated in Rule 3 effective January 1, 1980 the Carrier states that it had paid numerous claims in the past, prior to that date, dealing with both train orders and messages of record but that it stopped doing so after 1980 because of the change in the language of that Rule. In fact, according to the Carrier, the Organization itself had referenced messages of record, when it was a question of these pre-1980 claims, as "...a message that directs or advances the movement of trains". When Rule 3 was amended by the parties, effective January 1, 1980 the nomenclature of "...message of record" was eliminated from that Rule as noted in the foregoing. Since both train orders and messages of record were types of communications dealing with the movement of trains the parties made an attempt, according to the Carrier, to clarify what they meant by the distinction between the two. That attempt was a document listing examples of messages of record which were not train orders, which according to the Carrier was initialed by both parties in November of 1979 while they were re-negotiating the Agreement which became effective on January 1st of the following year. The parties agreed that the examples found on this list would not represent a violation of the old Agreement, as amended. For the sake of the record that list is included verbatim in this Award under title of Employees' Exhibit 19.

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Whenever any of the following types of messages of record and/or information is sent to or received from train and/or engine service employes or anyone else, at any location, by any person, by any means of communications, it is not a violation of the November 1. 1972 Clerks' Agreement, as amended.

(1) Time and location of other trains.

(2) Pickups or setouts to be made, including engines or units to be exchanged.

(3) Switching to be performed.

(4) Inquiry as to location of a train.

(5) Information concerning excess dimension cars, including information to correct or insert engine number in Blue Form 1468.

(6) Messages cancelling emergency messages account emergency no longer exists.

(7) When Soltus Turn, Parker Local or other train and/or engine crews converse with dispatcher direct, for information at working, turning or crossover points, but only when such crews go beyond what is contemplated in Rule 3-C of the November 1, 1972 Agreement by getting line-up on number of trains in excess of those needed in order to perform switching, turning or crossing over at point from which crew is conversing.

(8) When conversations occur between train, yard or engine crews with or without an employe subject to the Agreement of November 1, 1972, relaying same or direct between such employe and member of train, yard or engine crew at Redondo Junction Interlocking or on Harbor or Redondo Districts, all of which territory is operated under Rule 93-Yard Limits.

(9) When additional time and location relayed to train and/or engine crews even though message may also state "clear" train or trains.

(10) When instructions are relayed to cancel pick-ups, set-outs or switching, including engines or units.

(11) Telephone or radio conversation about work performed or to be performed, about obtaining permission to cross over from one track to another or to flag block, or about the probable arriving time of other trains.

(12) At junction points or points where spur tracks join main tracks train and engine service employes may obtain telephone or radio check on overdue trains.

(13) The use of the radio or any other means of communications is not a violation of the rules of the November 1, 1972 Clerks' Agreement, as amended.

(14) Use of TCS phone.

(15) Allow another train to pass their train.

(16) Take siding to permit another train or trains to pass including extreme dimension loads.

(17) Control speed of their train or reason of safety or track condition.

(18) Cancel previously relayed instructions.

(19) When track supervisors, train and/or engine crews OS trains.

(20) Conversation with train and/or engine crews regarding yarding instructions.

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The Carrier argues that "...the track warrants issued by the Train Dispatcher to the train crews outlined in your claims, parallel many of the types of 'messages of record' listed on (Employees' Exhibit 19), therefore, it is not understood why you have progressed the instant claims".

The Carrier answers the claim by the Organization that the information contained on the track warrant form is the same as that found in train orders by stating the following: "...(a) review of Form 1714 reveals that track warrants are no different than track and time limit permits which also convey authority to occupy certain limits within specified times and they are not considered (to be) train orders. Of equal importance is the fact that track and time limit permits have been issued to Maintenance of Way Employees as well as train and engine crews over the TCS phone for many years without complaint or claim by the Organization". Lastly, in its correspondence under date of May 3, 1984 the Carrier states that an operational difference between train orders and track warrants is that the latter "...do not require the issuance over the signature of the superintendent as do train orders".

FINDINGS

This is a contract interpretation dispute. The burden of proof, therefore, lies with the Organization as moving party (Second Division 5526, 6054; Third Division 22180, 22760, 25575). The petitioner here must prove, by means of substantial evidence, that its claims have merit. Substantial evidence has been defined as

such "...relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229).

A review of the record shows that the parties to this dispute were both sensitive to the distinction between train orders and messages of record as far back as the 1972 Agreement. Historically, they may have been sensitive to the distinction prior to that time although the record before this Board centers on that operant Agreement, the Code of Operating Rules of the Carrier of 1975 and a number of other amendments, Memorandums of Understanding and Agreement sidebars from those dates until the claims were filed in 1983.

It is also clear from the record that the parties had an unambiguous understanding in Rule 3 of the pre-1980 Agreement that there was this distinction and that the Organization, up to the effective date of the new 1980 Agreement, possessed rights over both train orders and messages of record. It is not really clear from the record if the Organization had jurisdiction over all messages of record prior to 1980 but it is clear that they had jurisdiction over, and filed claims over, and were paid for those claims over some messages of record. The Carrier admits that and this is not disputed. The distinction between all messages of record, and some messages of record made here by the Board appears to be an important one because the Carrier states, which the Organization does not dispute, that track and time-limit permits, for example, which certainly must be considered messages of record, were issued to BMWE and it appears to both BLE and UTU employees in the

past without claims being filed by the Organization. Thus, the Organization had accepted the proposition that some (or certain types) of messages of record which authorized the movement of trains were permitted without infringement upon their Agreement.

It is also clear, from the difference in language in Rule 3 and its sub-sections as one compares the pre-1980 and the 1980 Agreements that the Organization formally lost authority over "...messages of record" because such language was stricken from the contract. The Board is not privy to what the Organization gained in return as a trade-off but it no doubt did gain something in return during that round of negotiations.

Shortly after the Carrier's Agreement with the Organization became effective on January 1, 1980 it also signed another Agreement with another union, the United Transportation Union. That particular Memorandum of Agreement dealt with the UTU's members' rights when filling out train order forms and this latter was signed between the UTU and the Carrier in 1981. Two years later, the same principle was applied to track warrants. In his April 12, 1984 correspondence to the Carrier the Organization's General Chairman addresses this question of the new (1983) Agreement between the UTU and the Carrier and he states the following: "...In fact, as was pointed out in (the) April (1984) conference, Carrier has entered into an agreement with the United Transportation Union dated March 28, 1983 which defines that an arbitrary will be paid the members of that union, subject to certain qualifications, whenever they are required to copy track warrants. In fact, by cover letter dated March 25, 1983 which was posted on Carrier

bulletin boards, the General Chairman of that Organization on the Coast Lines, J. L. Easley, stated that '(i)t was agreed that track warrants would be treated in the same manner as train orders and payment for filling out a track warrant form will be made on the basis of the Train Order Agreement (of 1981)'". The Organization argues in that letter, and reiterates this argument in its submission, that this March 25, 1983 letter proves its point that "...there is no difference between a train order and a track warrant". The Board has studied the language of both this cover letter and the Memorandums in question and it is its opinion that the General Chairman drew conclusions which extended beyond the evidence at hand relative to this particular point. The Board is not prepared to go so far as to opine that the cover letter permits exactly the contrary conclusion than that drawn by the General Chairman. But when the UTU General Chairman states that track warrants would be treated in the same manner (emphasis added above) as train orders in the future such language in itself does not permit the conclusion that they are identical.

The Organization's General Chairman is perfectly correct when he underlines that the parties are having problems with nomenclature. Why? Because there is no strict definition on this property for either a train order or a track warrant that this Board has ever been apprised of. None is found in the record. None was given at the hearing. None is found in any Agreement this Board has examined and none is found in the Code of Operating Rules. Nor, to make matters more complicated, do the parties have a strict definition of message of record. The Board

will not speculate on why this is the case. What is clear, however, is that all three deal with communications related to the movement of trains.

Does an Agreement in the record before the Board require the Carrier to authorize all movement of trains by means of train orders? The Board can find none. Does any Agreement prevent the Carrier from using track warrants to authorize movement of trains on the Fourth District on the Albuquerque Division's main track after it started to do so in 1983? The Board can find none. Code Rules 400-411 cited in the foregoing outline the use of these communications in TWC limits. Further, the Carrier's definition of Main Track at the time the claims were filed, also found in its Code, explicitly states that movements of trains or engines on such track can be authorized in a number of ways which include block signals, time table, train order or by other rules or special instructions. The record as a whole before the Board permits it no other conclusion than that all of these other ways besides train orders are messages of record. The Code's Main Track definition addresses the issue of "...special instructions". So does, in the Code, the definition of TWC. Such is a method of "...authorizing movement of trains...by special instructions". The Agreement made the distinction prior to 1980 between train orders and messages of record but gave the Organization rights over both. After 1980 this was stopped. It is the position of the Carrier that track warrants are messages of record which fall under "...other rules or special instructions". Such conclusion is supported by the record.

The parties did attempt to distinguish train orders from messages of record during the 1979 negotiations which led to the 1980 Agreement and the change of the language of Rule 3 by coming up with some examples of what constitutes messages of record and these examples are found on pp. 21-22 of this Award under title of Employees' Exhibit 19. It appears reasonable to conclude that such supporting evidence reinforces the conclusion that track warrants, which share characteristics of some of these examples, fall under the more general category of messages of record.

The Carrier also states that the status of track warrants are different than train orders since track warrants do not require the issuance over the "...signature of the superintendent as do train orders" The Organization does not deny this in the record.

The Organization cites precedent from arbitral Awards issued in this industry to support its claim that the purpose of a communication rather than its title determines a communication's function. These earlier Awards issued by the Third Division of the National Railroad Adjustment Board include Nos. 8260, 10435, 10526, 10534, 10699, 11111 and 11298. The problem with these Awards, which the Board has closely studied, is that they deal only with the question of train orders and not with also messages of record as they are understood on this property. The latter are recognized, and accepted, means of authorizing the

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3/ The Carrier states that this list of examples was initialed by both parties in November of 1979. As an evidentiary point the copy found in the record is not initialed. The Organization has not challenged the authenticity of this document, however, and includes it as an exhibit in its compilation of exhibits for this Board. Absent any evidence to the contrary, therefore, the Board has accepted the evidentiary status of this exhibit.

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movement of trains under the 1980 Agreement and associated Rules of the Code of the Carrier at the time the claims were filed. The record supports the conclusion that track warrants are messages of record, and not the same as train orders.

On merits the claims cannot be sustained.

AWARD

The claims are denied.

Edward L. Suntrup, Neutral Member

B. J. East, Carrier Member

J. A. Lieb, Employee Member

Date: 4-7-88

9/87

* Dissent not available at this time.