

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware, Lackawanna & Western Railroad that:

A. The Carrier violated the Scope Rule and Rule 15 (a) of the Telegraphers' Agreement, when on June 24 and 25, 1946, it replaced the agent-operator at Elmira Heights with persons not covered by the Telegraphers' Agreement and required said agent-operator to perform relief service at Elmira Passenger Station 11:00 P. M., June 24 to 7:00 A. M., June 25, during which time the first and second trick operator-clerks at Elmira Passenger Station were available for overtime, and;

B. In consequence thereof, the first and second trick operator-clerks (E. F. Mann and L. W. Hammond) regularly assigned at Elmira Passenger Station, Elmira, New York, shall each be paid four (4) hours' overtime under the rules of the Telegraphers' Agreement when and because the Agent-operator at Elmira Heights was displaced from his position by persons not covered by the Telegraphers' Agreement and who was required to perform relief service at Elmira Passenger Station 11:00 P. M., June 24 to 7:00 A. M. June 25 (One eight (8) hour trick), instead of using each of the claimants four hours in addition to their regular assignment.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties, hereinafter referred to as the Telegraphers' Agreement, bearing effective dates of May 1, 1940 and May 22, 1946, as to rules and rates of pay, respectively, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Elmira Heights and Elmira Passenger Station are involved in this proceeding; the former is a one-man agent-operator position providing service to the public eight hours a day, or 7:00 A. M. to 4:00 P. M. one hour out for lunch; the latter location provides 24-hour service to the public. R. W. Haffet is the regular agent-operator at Elmira Heights. At Elmira Passenger Station the regular employees with their assignments are: E. F. Mann, 7:00 A. M. to 3:00 P. M.; L. W. Hammond, 3:00 P. M. to 11:00 P. M. and William Bloy 11:00 P. M. to 7:00 A. M.

Beginning June 19, 1946, L. E. Popeck, an extra employe, was temporarily assigned to and began the occupancy of the Elmira Heights position, relieving R. W. Haffet for a 12-day vacation.

Awards 2827 and 3488 have no application, since no man not covered by the Agreement was used on the job.

There is nothing in the Agreement that prescribes that the Carrier **must** work any clerk-operator beyond his normal hours. It must not be forgotten that the correct approach to the construction of these agreements is not what the agreement **permits** the carrier to do but what it **forbids**. Anything that is not granted to the employees is expressly reserved to the Carrier. This Board has so held:

"We can only interpret the contract as it is, and treat that as **reserved to the carrier** which is not granted to the employees by the agreement."

Award 2491—Third Division

It must be remembered that all agreements, of necessity, leave the carrier a wide field in which it must be left free to exercise judgment, and **this is particularly true where the Hours of Service Law is involved.**

"All agreements of necessity leave management a considerable zone of operation within which management has the right and duty to exercise judgment as to the best and most efficient way to run its business."

Award 311—Third Division

Moreover, the elementing principle that damages are awarded by way of indemnity not **enrichment** is the guiding rule in contract law, and even without regard to the Hours of Service Law both claimants were compensated in accordance with the rules of the agreement.

SUMMARY

1. There was no violation of the Agreement.
2. Neither claimant was **lawfully** available on the dates in question.
3. Had the Carrier worked either claimant excess hours it would have violated the Hours of Service Act, since a course was open to it to avoid such excess service.
4. Both claimants were fully paid in accordance with the Agreement.
5. Awards 2827 and 3488 are erroneous, contrary to law and should be overruled. Compliance with these awards would subject every carrier relying upon them to immediate prosecution for violation of the Hours of Service Act.
6. In any event those awards were predicated upon alleged violation of the Scope rule in that an employe not covered by the Agreement was used to perform the work. They are not controlling here, where no such question is involved.

Exhibits not reproduced.

OPINION OF BOARD: The parties are not entirely in accord as to all the facts but differences with respect thereto are trivial and do not affect the result. Therefore no reference will be made to such discrepancies in the following summarized factual statement.

Elmira Passenger Station at Elmira, New York, provides 24-hour service to the public. On all dates in question regularly assigned Clerk-Operators at that point were E. F. Mann, hours 8:00 A. M. to 4:00 P. M.; L. W. Hammond, hours 4:00 P. M. to 12:00 A. M.; and W. J. Bloy, hours 12:01 to 8:00 A. M.

Elmira Heights, Elmira, New York, is a one-man Agent-Operator position providing 8 hour service 7:00 A. M. to 4:00 P. M.

Clerk-Operator Bloy was absent from his position at Elmira Station June 23, 24 and 25, 1946, on account of illness. No extra operators were available. Mann and Hammond were each permitted to work 4 hours of Bloy's assignment on June 23 and June 24. June 25, 1946, L. E. Popeck who since June 19th preceding had been covering a relief vacation assignment at Elmira Heights, was diverted from such assignment to cover the third trick position at Elmira Station and his position at Elmira Heights was filled by the Carrier with two persons, neither of whom possessed any rights under or were covered by the current Telegraphers' Agreement.

The instant claim is for four hours overtime for both Mann and Hammond because Popeck, the then Agent-Operator at Elmira Heights, was displaced from his position by persons not covered by such agreement and required by the Carrier to fill the third trick position at Elmira Station in place of Hammond and Mann who had been used on the two preceding days and who are alleged to have been available for service and entitled to the work of such position on the third day, June 25.

In the main the Organization relies on Awards 2827, 3488 and 3609 to support its contention that Mann and Hammond should have been doubled to fill the June 25 (designated in the claim as June 24) vacancy. The Carrier asserts those Awards, holding that sickness constitutes an emergency such as to justify excess service under the Hours of Service Law where other operators are not available, should be over-ruled as erroneous. We adhere to what was held, and to the principles announced, in such Awards and were this a claim where the third trick vacancy in question had been filled by outsiders or persons not covered by the Agreement we would have no difficulty in sustaining it. However, such is not the situation and for that reason we do not regard the Awards relied on as controlling or decisive.

In passing we pause to note that we are not here concerned with any claim in behalf of Popeck for relief service performed. His claim on that account was made and allowed and is not therefore involved.

We agree that the work of Bloy's third trick position at Elmira Station was work belonging to the telegraphers and that an employe in some other service could not be used to fill the vacancy there existing on June 25. The trouble, from the Organization's standpoint, is that such vacancy was not filled by an outsider but by a person covered by the Telegraphers' Agreement. The all decisive question then is whether it was properly so filled.

Rule 15 (a) of the working Agreement in force and effect on the date of the incidents giving rise to this dispute, reads:

"Employes holding temporary or regular assignments will not be required to do relief work except in case of emergency."

That an emergency existed on June 25 at Elmira Station must be admitted. If not it must be so held. Indeed to hold otherwise would mean recovery could not be had under the precedents established by Awards 2827, 3488 and 3609, even if the vacancy in question had been filled by an outsider, for it will be remembered that such Awards were predicated upon the proposition that sickness constituted an emergency permitting recovery on the claims there involved.

Since there was an emergency, since the provisions of Rule 15 (a) expressly authorize relief work to be performed in case of emergency by employes holding temporary or regular assignments, and since the position in which the emergency existed was filled by a telegrapher, it necessarily follows the Carrier was within its rights in diverting Popeck from his relief assignment to fill the emergency vacancy in question and that in so doing it did not deprive either Mann or Hammond of any work to which they were entitled under the Agreement.

The fact, as the Organization points out, that the Carrier filled such vacancy on the two days preceding June 25 with Mann and Hammond is of

little or no consequence. It had a right to fill it with Popeck on the day in controversy and questions pertaining to why it did not do so on the two preceding days or whether on such dates it violated the Hours of Service Law in filling the position with the two individuals last named are immaterial.

In reaching our conclusion we have not overlooked the Organization's contention that if the practice indulged in by the Carrier is permitted it could always move a regularly assigned employe under the circumstances here involved, use a non-employe in the position from which the regular employe was diverted, and in that manner avoid compliance with its negotiated contract. We are not impressed with that argument. Neither do we agree any such result follows. In fact the Organization puts its finger on the fallacy of its position in that respect by its own statement to the effect the instant violation consists in using the non-employe to perform the work covered by the Agreement. With the last statement we are in full accord. What precludes allowance of the claim in its present form is that it is predicated on work lost from a position at Elmira Station which, as we have noted, was filled by a member of the telegraphers' craft under an Agreement specifically authorizing its performance. A claim based on work lost at Elmira Heights by reason of the Carrier having improperly filled the position at that point with persons not covered by the Telegraphers' Agreement would compel an entirely different conclusion.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 action of the Carrier in requiring the Agent-Operator at Elmira Heights to perform relief service at Elmira Passenger Station on June 25, 1946, from 12:01 A. M. to 8:00 A. M. did not constitute a violation of the current Agreement and does not permit the allowance of a claim founded upon the premise the first and second trick Clerk-Operators at such point were entitled to the work performed by such relief operator on that date.

AWARD

Claim denied in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of September, 1948.