

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY

Buffalo and East

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad, Buffalo and East, that—

John H. Day, who was regularly assigned to a telegraph position at Weehawken, New Jersey, June 28, 1945, through August 31, 1946, except on May 14, 1946, when he held position at Orangeburg, N. Y., and who was required by the carrier to vacate such regular position to perform relief service at the stations and the dates named in the Employees' Statement of Facts, shall be paid waiting and travel time in accordance with the provisions of Rule 13 of the Telegraphers' Agreement.

EMPLOYEES' STATEMENT OF FACTS: An agreement, hereinafter referred to as the Telegraphers' Agreement, by and between the parties, bearing effective date of January 1, 1940, is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

June 28, 1945 through August 31, 1946, John H. Day was regularly assigned to a telegraph position in Weehawken, New Jersey, except on May 14, 1946, when his home station was Orangeburg, New York.

Mr. Day on the following dates (Column 1), was required by the carrier to vacate his regular position to perform relief service at various locations (Column 3) which involved waiting and travel time as indicated in Column 4.

Date	Home Station	Emergency Station	Waiting & Travel Time
June 28, 1945	Weehawken, N. J.	Newburg, N. Y.	9 Hrs. 15 Mins.
June 29, 1945	Weehawken, N. J.	Newburg, N. Y.	9 Hrs. 15 Mins.
June 30, 1945	Weehawken, N. J.	Newburg, N. Y.	9 Hrs. 15 Mins.
Oct. 4, 1945	Weehawken, N. J.	North Bergen, N. J.	1 Hr. 32 Mins.
Oct. 11, 1945	Weehawken, N. J.	North Bergen, N. J.	1 Hr. 32 Mins.
Nov. 24, 1945	Weehawken, N. J.	North Bergen, N. J.	5 Hrs. 41 Mins.
Dec. 14, 1945	Weehawken, N. J.	North Bergen, N. J.	8 Hrs. 10 Mins.
Jan. 12, 1946	Weehawken, N. J.	Cornwall, N. Y.	6 Hrs. 10 Mins.
Jan. 26, 1946	Weehawken, N. J.	Cornwall, N. Y.	6 Hrs. 10 Mins.
Feb. 2, 1946	Weehawken, N. J.	Cornwall, N. Y.	6 Hrs. 10 Mins.
May 3, 1946	Weehawken, N. J.	W. Haverstraw, N. Y.	9 Hrs. 21 Mins.
May 4, 1946	Weehawken, N. J.	W. Haverstraw, N. Y.	12 Hrs. 10 Mins.

OPINION OF BOARD: A question arose on Carrier's property with respect to certain claims for waiting and travel time in accordance with the provisions of Rule 13 of the Telegraphers' Agreement. On August 7, 1947, the General Chairman and Carrier officials met to consider the same and it was agreed to pay the claims, but that no claims would be recognized for service prior to October 16, 1945. The named Claimant had submitted time slips for pay for traveling and waiting time but left Carrier service on February 28, 1947.

Carrier contends that the General Chairman, when informed that Claimant Day had resigned, agreed that Mr. Day had no claim as he (Day) had left the service. Employees assert that it was agreed the Day claim be set aside on account of Claimant's whereabouts being unknown.

Unfortunately, there is no written Agreement with respect to what disposition of the Day claim was made by the parties in the August 7, 1947 conference. Doubtless it was discussed and it was of the same nature as those which were settled at the time. It is clear from the record that both parties came away from the meeting with differing concepts of what the result thereof was.

Nowhere in the record does Carrier deny the validity of Mr. Day's claim. As a matter of fact, they point up the issue herein as being whether the agreement alleged by it as having been reached at meeting of August 7, 1947, with respect to the disposition of Day's claim should be disregarded. In effect, then, the Carrier's assertion of an agreement waiving the Day claim is in the nature of an affirmative defense. Thus, the burden of establishing the agreement waiving the claim is upon it. In other words, the evidence must preponderate in favor of a finding that such an agreement was made. Beyond the affirmative assertions of the Carrier and the denial of the Employees we find nothing in the record, nor from the facts and circumstances surrounding the disposition of the other claims, from which we can reasonably draw inferences favoring either contention. Accordingly, we hold that a sustaining award is in order with respect to this claim. However, as there is no doubt that claim for service prior to October 16, 1945, was waived by agreement, no money payment shall be awarded beyond that date.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of July, 1949.