

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

MACON, DUBLIN & SAVANNAH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Macon, Dublin and Savannah Railroad Company, that R. L. Powell, regularly assigned clerk-operator at Dublin, Ga., hours 8:00 A.M. to 5:00 P.M., with one hour allowed for meals, February 13, 1945 through February 14, 1946, shall be paid a call in each instance on each of the days within that period, as named in the following Statement of Facts, on which train orders were received and copied at Dublin by telephone direct from the train dispatcher by conductors or other employees not under the telegraphers' agreement at a time when clerk-operator Powell was not on duty but was available for call.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date February 1, 1941, as to rates of pay and working conditions is in effect between the parties to this dispute.

During the period February 13, 1945, through February 14, 1945, there was but one employe assigned at Dublin, Ga., station to receive and copy train orders and perform communications service by telephone, and that employe was clerk-operator R. L. Powell, hours 8:00 A.M. to 5:00 P.M., with one hour allowed for meals. On the days listed below, at a time when clerk-operator Powell was not on duty but available and subject to call under Rule 8 of the telegraphers' agreement, the Carrier permitted or required conductors or others not under the telegraphers' agreement at Dublin to receive and copy train orders by telephone direct from the train dispatcher located at Macon, Ga., for the movement of their own trains. Clerk-Operator Powell was readily available for call on the days involved for the purpose of performing the communications service of receiving and copying train orders at his station outside of his assigned hours, but was not called by the Carrier.

Conductors or others received and copied train orders at the Dublin station at a time when Clerk-Operator Powell was not on duty and was not called, as listed below.

Date	Train Order Number Copied by Conductor	Time	Calls Entitled
2/13/45	3	3:54 A.M.	1
2/16/45	3 & 4	4:53 A.M.	1
2/18/45	18	8:59 P.M.	1
2/19/45	9	5:20 A.M.	1
2/19/45	20	6:05 P.M.	1
2/21/45	11	6:37 P.M.	1
2/22/45	3	3:05 A.M.	1
2/22/45	7	7:24 A.M.	1

statements nor charges unsupported by proof are sufficient to justify this Division in making an affirmative Award. (Emphasis supplied)

"The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance. We have read and reread the record for the purpose of determining whether there is sufficient concrete evidence to be found there to enable us to say the petitioner has established to our satisfaction its claim that as a result of the abolishment of the night chief dispatcher's position at Muskogee work properly belonging to such position has been given or transferred to or required of the car distributor's position. No necessity exists for a detailed statement of what the record reveals or fails to reveal. It will suffice to say that careful as our search has been we have failed to find sufficient evidence to permit us to arrive at any such conclusion and are required to conclude the claim must be denied for failure of proof." (Emphasis supplied)

7. The claims should be denied.

(Exhibits not reproduced.)

Carrier respectfully submits that for the reasons hereinbefore stated, the claims as presented in this docket should be denied.

OPINION OF BOARD: In Award 3602 a claim of the Employees on behalf of the above-mentioned claimant was sustained. Carrier paid the claimant for a call on February 2, 9, 10 and 11, 1945 which were specific dates mentioned in the claim therein. No payment was made under the portion of that claim reading as follows, "additionally shall be paid a call in each instance for subsequent orders copied at Dublin, by conductors or other parties not covered by the Telegraphers' Agreement at a time Clerk-Operator Powell was not on duty but available for call." Upon an application for interpretation of Award 3602, it was held that disputed questions of fact with respect to Mr. Powell's availability were presented thereby. In effect, the Board refused to pass upon those fact questions under the guise of an interpretation. The present claim, therefore, is for payment for call on days subsequent to those specifically mentioned in Award 3602.

The Employees contend that claimant was available on the date listed in its submission and claim should be allowed therefor. Carrier's position justifying its refusal to pay may be summed up briefly in three contentions: (1) that Award 3602 was wrong in holding that the Agreement was violated; (2) that the claims were not timely filed; and (3) that claimant was not available for service on the dates claimed.

With respect to Carrier's first contention, Award 3602 is clearly what is legally termed *res adjudicata* with respect to the Agreement violation. In effect, therefore, we are precluded from a review of that Award. Hence, we find no merit in that contention of Carrier. With respect to Carrier's second contention, Rule 17 of the applicable Agreement reads as follows:

"No claims for time or grievance matters will be considered under this schedule unless submitted to proper officer within ten (10) days from date of occurrence."

This is a continuing claim. On February 24, 1945, Employees on appeal to Carrier's Vice-President after denial by the Superintendent for September 2, 9, 10 and 11, 1945, filed a statement of claim for said dates and stated further that claim is additionally made for "call" in each instance of subsequent orders copied by conductors, or other parties not covered by the Telegraphers' Agreement, to the date settlement of claim is made. This was a sufficient compliance with Rule 17 so long as a continuing claim was involved. In view of Carrier's refusal to allow the claim, it would have been a vain and futile act for claimant to file a separate claim based on the same factual situation every ten days, for Carrier had already indicated its disposition to deny the same. By the language used in the statement of claim to the appeal officer,

Carrier was put on sufficient notice of the pendency of claims for each violation. It is worthy of note that such a contention was not advanced by Carrier in its submission to this Board in the docket upon which Award 3602 was based. To some extent, that is an indication that Carrier did not consider that Rule 17 was involved.

We think that the evidence of record in this docket preponderates in favor of the conclusion that the claimant was available. He had a telephone in his home. The number was on file with the Carrier's office. As a matter of fact, he had previously been called at his residence for other telegraphic service. If, as contended by Carrier, claimant did not post a notice on the window of the telegraph office in compliance with its Operating Rule 1063, the fault is equally the Carrier's. The record shows clearly that its Superintendent knew that claimant had posted a notice of some sort (the exact language of the same is in dispute) and had discussed the same with claimant. Surely, the Superintendent would or should be just as much concerned with seeing to it that Operating Rules are complied with as a Clerk-Operator. It having been clearly established that train orders were copied on the dates indicated in the Employees' submission and there being no affirmative proof to indicate that the claimant was not available, had he been called, the claim will be sustained for such days.

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

That the parties waived oral hearing thereon;

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 as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of March, 1950.