

Award No. 4975
Docket No. TE-4871

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE NEW YORK CENTRAL RAILROAD COMPANY
(LINE WEST OF BUFFALO)**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad (Line West of Buffalo), that W. H. Dunfee, is entitled under Article 29(b) of the Telegraphers' Agreement to one day's pay he lost on May 4, 1948, to avoid violation of the Federal Hours of Service Act when transferred from the 11:00 P.M.-7:00 A.M. position at "BK" Corning, to accept a position he secured on bulletin on the 3:00 P.M.-11:00 P.M. position in the same office.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an agreement between the parties bearing effective date of July 1, 1946, as to rules of working conditions, copy of which is on file with the Board and by reference is made a part of this Statement of Facts. At page 44 of the agreement on District No. 10 are listed the positions of 1st, 2nd and 3rd trick telegrapher at Corning "BK", Ohio.

Account strike of coal miners in spring of 1948 all three positions at Corning "BK" were abolished and as a result operator W. H. Dunfee the claimant in this case was forced to the extra list as he had insufficient seniority to hold a regular position. When the strike ended all positions at Corning "BK" were reestablished and Dunfee was ordered to work 3rd trick at that point which he did pending outcome of bulletin dated April 23, 1948 advertising all jobs. Dunfee did not request filling the 3rd trick temporary vacancy at "BK". Dunfee bid on and was awarded the bulletined 2nd trick position at Corning "BK". He last worked on the 3rd trick assignment at "BK" starting at 11:00 P.M., May 3 and finished working it at 7:00 A.M., May 4. He commenced work on the 2nd trick at 3:00 P.M., May 6. May 5 was the regular rest day of the 2nd trick position and under the rules Dunfee assumed the rest day of the position he bid in and, therefore, had no rights to it on that day. This claim is for time lost on May 4.

POSITION OF EMPLOYEES: In denying this claim the carrier said:

"Operator Dunfee finished working extra on the 11:00 P.M.-7:00 A.M. position at 7:00 A.M. May 4th. Because of the operation of the Hours of Service Law he could not assume the 3:00 P.M.-11:00 P.M. position as his regular assignment that same afternoon. . . ."

This very same carrier denied a similar claim in 1924 which this Organization appealed to the United States Railroad Labor Board. That Tribunal in

difference in his own rate and dispatcher's rate of pay for specified days on which he was not worked as extra dispatcher; the Carrier claimed that to permit him to do so would have violated the Hours of Service Act.

The following statements in Opinion of Board in Award 3849 are pertinent to the circumstances of the claim now before the Board:

"A reasonable statement in this connection is that agreements must be construed with reference to validly enacted laws under the police power for the protection of the safety of the public.

It could not be reasonably required that the Carrier should knowingly disregard the prohibition of the statute and exact a seven hour violation at Bakersfield".

It is fully anticipated that the ex parte submission of the employes will contend that the claim of Operator Dunfee is supported by previous decisions of the U. S. Labor Board and awards of the Third Division, N.R.A.B.

The Carrier submits, however, that previous sustaining Awards such as USRRLB Decision 3871, Third Division, N.R.A.B. Awards Nos. 242, 1468, 2989 etc. involved employes who held an assignment when they were transferred from one position to another and did not deal with circumstances analogous with those pertinent to the claim now under consideration; also would point out that the applicable rules in such sustaining awards contained different terminology than the rule—Article 29(b)—cited by the employes here.

CONCLUSION

The carrier has conclusively shown that:

1—Neither the spirit nor the letter of any Agreement rule was violated;

2—When no emergency exists as contemplated by the exception to the Hours of Service Law, the Carrier is not required to work employes overtime in violation of the Hours of Service Law which is designed not only to protect property and persons transported by the railroad but to protect the health and well-being of the employes;

3—The Carrier should not be penalized by reason of Claimant Dunfee making free use of his seniority rights in bidding for a bulletined position;

4—Claimant Dunfee held no assignment from 7 A.M. May 4th to 3 P.M. May 6, 1948 and was not in transit and making transfer as contemplated by Article 29(b) on the day—May 4, 1948—for which payment is demanded in the instant claim;

5—Awards of the Third Division, N.R.A.B. support the position of the Carrier;

6—The claim is wholly without merit on any reasonable or equitable premise and should be denied.

OPINION OF BOARD: The claimant was on the extra list and was working the third trick temporary vacancy at "BK", hours 11:00 P.M. to 7:00 A.M. The second and third tricks at "BK" were bulletined and an employe senior to claimant bid in and was awarded the third trick. The claimant bid in and was awarded the second trick, hours 3:00 P.M. to 11:00 P.M. Operator Hines, who had bid the third trick, was assigned the job commencing 11:00 P.M., May 3; and the claimant was assigned to the second trick at 3:00 P.M. on May 6. The claimant covered the third trick from 11:00 P.M., May 3 to 7:00 A.M. May 4. He was not able to assume his new position at 3:00 P.M. on the 4th

because of the Hours of Service Law. The 5th was the regular relief day for the second trick. Claim is made under Article 29 (b) of the current Agreement. This paragraph provides that employees who accept a bulletined position will be allowed pay for time lost while making the transfer.

The claim is valid if the claimant lost any time to which he had a right under the Agreement. On the 4th he could have started on his new assignment at 3:00 P.M. but to have done so would have subjected the Carrier to the penalty provided in the Hours of Service Law, a Federal statute. Agreements must be construed with reference to validly enacted laws under the police power for protection of the safety of the public (Award 3849). The enforcement of a provision of a contract must yield to the superior authority of the law; and if the Carrier was forbidden by law to work the claimant at 3:00 P. M. on the 4th, then the claimant has not lost "time" as contemplated by Article 29(b) on that day. It is agreed that he could not work the position on the 5th as that is the relief day for the position to which he transferred.

Therefore, when Article 29(b) is examined in reference to a valid and existing law and in reference to other provisions relative to relief day, we must conclude that the claimant did not lose time to which he had a valid right under the contract.

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 Employee involved in this dispute are respectively carrier and employee 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

The Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 31st day of July, 1950.