

Award No. 9478

Docket No. TE-8555

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William E. Grady, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago and Eastern Illinois Railroads, that:

1. Carrier violated the terms of the Agreement between the parties when and because on September 3, 1954, it failed or refused to fill the Agent-Operator position at Goodwine, Illinois, with an employe from the Telegraphers' seniority roster, and required or permitted other employes to perform the duties of the Agent-Operator on that date.

2. Carrier shall now be required to compensate the senior idle telegrapher in the amount of one day's pay of eight (8) hours for the work of which he was deprived by the Carrier's violative action.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect a collective bargaining agreement between the Chicago and Eastern Illinois Railroad Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The Agreement was effective May 1, 1945 and is by reference made a part of this submission as though set out herein word for word.

This dispute was handled on the property in the usual manner through the highest officer designated by carrier to handle such claims and is submitted to this Board for award under the provisions of the Railway Labor Act as amended.

Mr. G. E. DeWitt, Agent-operator at Goodwine, Illinois on the second day of September, 1954 advised Mr. W. R. Johnson, Chief Dispatcher and Mr. C. G. Rodgers, Superintendent, Danville, that he would be unable to work on September 3 due to illness. The advice was contained in message as follows:

"Goodwine 4:30 P. M. September 2, 1954

CGR
WRJ
Danville

logical and just as well recognized that it is proper for the telegrapher to deliver the order to the train employe in the same manner—that is, by telephone. A contention that the operator must make personal and physical delivery of the order is wholly without foundation under the agreement rules and requires an exceedingly strained and contorted application of the English language and common sense.

In the circumstances involved in this docket it was absolutely necessary that the orders be transmitted to the train at the time and point where located. Until the proper orders had been received, the train could not move. Under these circumstances, physical delivery of the order to the conductor by the operator who received it from the dispatcher was an impossibility.

Accordingly, in conformity with past practice, the order was delivered by the operator to the train employe over the telephone. In the most restrictive application of the rules the order was handled by an employe subject to the agreement—and the agreement was not, therefore, violated. The claim is without merit and should be denied.

Carrier submits that Petitioner has failed to cite any rule which specifically supports this claim—that it has nowhere been shown that claimants made request for the work in question and that similar practices have not been protested at any time in the past.

Carrier affirmatively states that all data contained herein has been handled with the employes' representatives.

(Exhibits not reproduced)

OPINION OF BOARD: The issue is whether this dispute, in its present posture, should be determined on the basis of Rule 27 of the Agreement. The Labor member of the Board contends that it should. The Carrier member of the Board contends that Rule 27 has been advanced too late.

Rule 27 was not relied upon by the parties on the property, either by express reference or by necessary implication. It was not brought forward in the Organization's Ex Parte Submission of April 24, 1956 or in its Statement at Hearing of November 13, 1956. The first reference to Rule 27 appears in the Carrier's Reply of November 13, 1956. The Rule was referred to, not as supporting the Carrier's position on the merits of the controversy in chief, but as limiting the Carrier's liability to payment of a call rather than a day. The Organization's Reply of December 13, 1956 made no reference to this and did not invoke the Rule in support of the claim. The Carrier in its Reply of December 13, 1956, again referred to the Rule by way of mitigation of liability.

Rule 27 is now solely relied upon to support the claim.

We have had occasion in prior Awards to deal at some length with problems of cognizability. Such problems range over a wide spectrum. Here we need encounter only a question of discretion. We hold that Rule 27 should not be applied and therefore shall deny the claim.

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 Employe involved in this dispute are respec-

tively 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

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 28th day of June, 1960.