

Award No. 11044
Docket No. TE-9354

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
PANHANDLE AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka & Santa Fe Railway that;

1. The Carrier violated and continues to violate the Agreement between the parties when, on July 15, 1955, in the absence of an emergency, it required telegraphers O. G. Riley and J. W. Fitzgerald to work off their regular assignments and thereafter refused and continues to refuse to compensate them as provided by said Agreement; and

2. The Carrier shall now be required to pay each of claimants named above the difference between the pro rata and time and one half rates for time worked outside their regularly assigned hours and in addition thereto the equivalent of 8 hours' pay at the pro rata rate established for their regularly assigned positions.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the parties, bearing effective date of June 1951, is in evidence.

The Carrier maintains a station at Canadian, Texas, in which, as indicated at page 76 of the Agreement, it employs three shifts of telegrapher-clerks in around the clock service. The assignment of the telegrapher-clerks at Canadian are as follows:

E. R. Johnson	First Shift	7:45A- 3:45P
	Rest Days	Sun-Mon
O. G. Riley	Second Shift	3:45P-11:45P
	Rest Days	Mon-Tues
J. W. Fitzgerald	Third Shift	11:45P- 7:45A
	Rest Days	Wed-Thurs

R. W. Fritzemeyer occupies a rest day relief position with the following assignment:

[1000]

Further confirmation of the Board's position with respect to such claims is reflected in Award 3132.

There can be no doubt that Carrier was faced with an emergency situation at Canadian June 15, 1955:

1. It was required to hold an investigation of the fatal accident that occurred June 10, 1955, previously described.
2. It had to have the testimony of Mr. E. R. Johnson in the investigation.
3. It could not "blank" any of the telegrapher-clerk positions at Canadian on June 15, 1955 (a telegrapher-clerk being required on duty at all times to manipulate switches and signals from the control station at Canadian).
4. It had no extra telegrapher available to send to Canadian June 15, 1955.
5. It was therefore forced to use other regularly assigned telegraphers, by moving them up to assignments other than their own.

Since the handling accorded is specifically permitted by a special rule of the Telegraphers' Agreement (Article X, Section 2-a) and claimants were paid for their services in strict conformity with that rule, Carrier again respectfully requests that this claim be dismissed, or denied in its entirety.

Furthermore, and without prejudice to or receding from its position set forth herein that the claim of the Employees in the instant dispute is wholly without support under the Agreement rules and should be either dismissed or denied, Carrier respectfully directs attention to the fact that Item 2 of the Employees' claim in this dispute contemplates the pyramiding of penalties, something which this Board has repeatedly held that it will not condone. See Third Division Awards 2346, 2695, 2823, 3444, 4109, 5333, 5423, 5548, 5549, 5638 and others.

The Carrier is uninformed as to the arguments the Organization will advance in its ex-parte submission and therefore reserves the right to submit such additional facts, evidence and argument as it may conclude are required in reply to the Organization's ex-parte submission or any subsequent oral argument or briefs presented by the Organization in this dispute.

All that is herein contained has been both known and available to the Employees and their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier argues that the claim is not properly before us because (1) the claim is based on a violation of the Agreement on July 15, 1955 while the alleged violation took place June 15, 1955 and (2) that the claim was not presented within the time limits provided in Article V, Section 1(a) of the August 21, 1954 Agreement.

We can promptly dismiss the first contention. The July 15, 1955 date in the claim is an obvious typographical error. It prejudiced no one. The Carrier has always been well aware of the basis of the claim and of the time of the occurrence of the alleged violation. The letter of the Local Chairman dated October 1, 1955 specifically refers to the claim arising on June 15, 1955.

Article V Section 1 (a) of the Agreement of August 21, 1954 says:

"All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

Carrier contends that it had no knowledge of the claim until October 4, 1955 when it received a letter from Employees' Local Chairman dated October 1, 1955. This was "108 days after the date of the occurrence upon which the claim was based." The Local Chairman's letter of October 1, 1955 reads as follows:

"Please favor me with reply to mine July 19, 1955 regarding O. G. Riley and J. W. Fitzgerald working other than their assigned hours at Canadian June 15, 1955."

The letter of October 1, 1955, enclosed a copy of the letter of July 19, 1955. Carrier's Superintendent replied on October 5, 1955, as follows:

"Referring to your letter October 1st with which you sent me a copy of your letter July 19th, concerning claim on behalf of Telegraphers O. G. Riley and J. W. Fitzgerald when used off their regular assignments at Canadian June 15, 1955.

"I have no record of having received your letter July 19th and had no information that any claim had been made in behalf of these employees. It is noted that the claim is premised on the basis that "no emergency existed". After investigating your claim I find that it was necessary to relieve First Trick Telegrapher E. R. Johnson to appear as a witness in formal investigation held at Amarillo 9 A.M. June 15th. There were no extra board telegraphers available and in order to relieve Mr. Johnson it was necessary to use Mr. Riley on first trick telegrapher position and Mr. Fitzgerald to relieve Mr. Riley.

"In this connection, you will recall that it was necessary to relieve you to appear as a representative for Mr. Johnson at the formal investigation, and in order to do this it was necessary to close the Miami station which conclusively shows that we had no extra telegraphers available to fill these positions.

"There was no violation of the agreement rules, and Messrs. Riley and Fitzgerald are not entitled to time as claimed."

Carrier's Superintendent did not reject the claim because it was not filed within the 60 days provision of Article V, Section 1 (a). He rejected the claim because "there was no violation of the agreement rules."

Procedural rules may be waived by the parties. Carrier's Superintendent clearly waived the only procedural defect which may have existed. We have repeatedly held that the parties may waive procedural requirements. See Awards 5140 (Coffey), 5147 (Boyd), 5227 (Robertson), 6769 (Shake) and 9492 (Rose). Carrier waived the alleged procedural requirement and the factual issue is properly before this Board for determination.

The factual issue is whether an "emergency" existed on June 15, 1955, within the meaning and intent of Article X, Section 2-a of the Agreement.

Carrier directed Telegrapher-Clerk, Johnson, regularly assigned to the first shift to appear as a witness at a formal investigation held on June 15, 1955. The presence of Johnson was necessary as a witness to a fatal accident that occurred on June 10, 1955. A telegrapher-clerk was required at all times at the Canadian station. No extra telegrapher was available on June 15, 1955. Carrier then directed Claimant, O. G. Riley, regularly assigned to the second shift to work the first shift, it directed Claimant, J. W. Fitzgerald, regularly assigned to the third shift to work the second shift, and it directed R. W. Fritzemeyer, who occupied the rest day relief position, to work the third shift. That was one of his rest days.

Claimants were each paid eight (8) hours at straight time for working as directed on June 15, 1955 and R. W. Fritzemeyer was paid eight (8) hours at the time and one-half rate for work he performed on one of his rest days.

Claimants request the difference between the pro-rata and time and one-half rates for the hours worked outside their regular assigned hours and in addition thereto eight (8) hours pay at the pro-rata rate for their regular assigned hours. Carrier denied the claims and argues that an emergency did exist on June 15, 1955.

We discussed this issue in greater detail in Docket TE-9353. Suffice it to say that "emergency" is defined as acts of God, possible loss or damage to property, occurrence of sudden occasion, of pressing necessity, a crisis, a critical situation requiring immediate relief by whatever means at hand or "an unforeseen combination of circumstance is requiring immediate action." Awards 7403 (Larkin), 4354 (Robertson) and 10839.

Carrier knew of the fatal accident that occurred on June 10, 1955. It was or should have been aware of the fact that an investigation would be made. It certainly had knowledge that Telegrapher-Clerk, Johnson would be a material witness at that investigation and that Johnson would have to be absent from his position on the date of the investigation. Since it was necessary to have a Telegrapher-Clerk on duty at all times, Carrier should have prepared a replacement for Johnson. The mere fact alone that there were no extra telegraphers available is not an "emergency" within the meaning of Article X, Section 2-a. There is no evidence in the record supporting the kind of sudden, unforeseen events

which would permit Carrier to reassign Claimants under that Article and Section of the Agreement.

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 the Carrier violated the Agreement.

AWARD

Claims are sustained.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of January 1963.