Award No. 12895
Docket No. TE-11662

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY
(Western District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York Central Railroad (Western District) that:

1. The Carrier violated the parties' Agreement when it failed to call A. L. Bird, the regular occupant of the third shift Towerman's position at Tower K, Toledo, Ohio, to fill a rest day vacancy on his position in the absence of the regularly assigned rest day relief employe, and instead used a regularly assigned junior employe from another position, idle on his rest day, to fill the vacancy.

2. The Carrier shall, because of the violation set out above, compensate A. L. Bird, a day's pay at the time and one-half rate for Thursday, November 13, 1958.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement by and between the parties to this dispute effective January 1, 1955, as amended.

The facts in this case are: A. L. Bird, Claimant, was on November 13, 1958, the regularly assigned occupant of the third shift Towerman's position at "K" Tower, Toledo, Ohio. Assigned hours 11:55 P. M. to 7:55 A. M.

Thursday, November 13th was one of Claimants two rest days. Both rest days of his position were part of a regular rest day relief assignment designated as Relief Assignment No. 21.

On November 11, 1958, Claimant Bird received the following message:

"Unless otherwise advised arrange to work your day off Thursday, November 13th. Answer."

At or about 11:00 A. M. November 12th, the rest day employe holding Relief Position No. 21, due to relieve the Claimant on the third shift Novem-

"While it may be disputed that an emergency existed, we do not believe employee has shown availability so as to render Carrier liable for a call under the circumstances of this case."

In Award 3845 the Board stated that if there was an "urgent and immediate need" the Carrier would be justified in considering an employe unavailable in a proper case. See also Award 8016.

The Carrier therefore submits that the Awards of this Board fully support its position and that the claim of Bird should be denied.

CONCLUSION:

The Carrier has shown that:

1. The Telegraphers' Agreement does not support this claim.
2. An emergency situation existed to fill the third shift Operator position at Tower K on November 13, 1958.
3. Claimant Bird was not available to fill this vacancy.
4. Awards of the Third Division support the Carrier's position.
5. The claim is wholly without merit and should be denied.

OPINION OF BOARD: There is no conflict between the parties as to the following facts:

The Claimant, A. L. Bird, was assigned as Towerman on the third trick, hours 11:55 P. M. to 7:55 A. M. at Tower "K", Toledo, Ohio, with Thursday and Friday as rest days. On his rest days Claimants position is filled by a regular relief employe.

On Tuesday, November 11, 1958, Carrier advised Claimant to work his day off on Thursday, November 13. At about 11:00 A. M. on Wednesday, November 12, the regular relief employe advised Carrier he would work, upon receipt of which advice Carrier cancelled it's instructions for Claimant to work. At 10:55 P. M. on Thursday, November 13, one hour before the regular relief employe was scheduled to report for work, the latter notified the Carrier that he was ill and not able to work.

Claimant resides at Bryan, fifty-eight miles from Tower "K". The usual and customary running time between his home and his point of work is approximately one hour and twenty minutes, via the Ohio Turnpike, and if he had been home and was called at 11:00 P. M., the earliest he could have been on the job was not before 12:30 A. M., a matter of some 35 minutes past the starting time of the third trick assignment. Carrier did not call Claimant but called another regular employe who was idle on his rest day and lived within walking distance of Tower "K".

The Rule with which we are concerned in this controversy is Article 10, Section 1 (e) 7 which provides, as follows:

"When an employee performing rest day relief service, as contemplated by Section 1 (e) 1 of this article, is absent and no extra employee is available to work on such day(s), requiring some regu-

larly assigned employee idle on his rest day(s) to fill the vacancy at time and one-half rate, the employee who would have been relieved by the absentee on such day(s) shall, if available, have prior rights to work such rest day(s) (sic) regardless of relative seniority status of other employees who are idle on their rest day(s) or who request the rest day relief work as a temporary (sic) vacancy."

Carrier contends that the issue involved in this matter is whether or not Carrier was required, under Article 10, Section 1 (e) 7 to call Claimant in an emergency when he, admittedly, could not get from his home to the point until thirty-five minutes after the scheduled starting time of the assignment.

Claimant, however, contends that Carrier may not successfully plead unavailability unless it has actually made an effort to determine whether the proper employe was available; that had Carrier's representative called Claimant's home he would have learned that Claimant was on that evening only a short distance from Tower "K" and could have gotten there early enough in time to take care of the assignment.

There can be little dispute but that an employe's laying off on short notice due to illness may be deemed an emergency. When the regular relief employe notified the Carrier at 10:55 P. M., November 13, that he was ill and unable to work it created an emergency in which Carrier had but one hour to make someone available for the assignment. Carrier knew from experience that Claimant could not make it from his home to Tower "K" by the scheduled reporting time of the asignment (this is admitted in the record). Carrier had indicated it's willingness to use Claimant on his rest days as herebefore indicated in this opinion. It should not be required later to do what would be considered vain and useless in the emergency situation with which it was confronted.

Claimant contends that had Carrier's representative called Claimant's home, he would have been given a Toledo telephone number to call in which event he could have been on the job in twenty-five minutes. Carrier urges that this is something Carrier had no way of knowing anything about until it was brought up afterwards to sustain the claim and that Claimant's contention in this regarrd is based on supposition and conjecture.

Claimant has cited a number of awards supporting the principle that Carrier must make a reasonable effort to reach an employe entitled to work before it can properly offer unavailability as a defense. With these awards, under the facts and circumstances set forth in them, we have no quarrel. It is interesting to note, however, that in two of the later awards cited — Award 11464 — Rose and Award 11520 — Webster there is comment that no evidence had been submitted that there was an emergency.

In Award 9394 (Hornbeck) it is asserted that Carrier "in an emergency" may assign such employes as good judgment in the situation dictates.

The Carrier being faced with an emergency, arising from the sudden illness of the regular relief employe, was free to take such good faith action as it deemed necessary under the circumstances. That it might have done something other than it did is immaterial in that it conclusively appears that Carrier was not motivated by an intent to circumvent the terms of the Agreement. It is our conclusion that, in this specific factual situation, Claimant was not in the "available" status contemplated by Article 10, Section 1 (e) 7

of the Agreement and Carrier cannot be held to have violated the Agreement. See Award 9968 — Weston; Award 10965 — Dorsey.

Having arrived at this conclusion on the specific facts and circumstances presented here, this is not to be considered as a precedent Award.

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;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September 1964.