

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5591) that:

(a) The Carrier violated the Agreement between the parties when it failed to call Machine Dispatcher (Coder) B. H. Roberts for work on his rest day on the 4:00 P. M. to 12:00 Midnight shift, Friday, August 23, 1963; and,

(b) The Carrier pay B. H. Roberts 8 hours at one and one-half times the rate of Machine Dispatcher (Coder) to make him whole for pay lost.

EMPLOYEES' STATEMENT OF FACTS: Claimant B. H. Roberts is a regularly assigned Machine Dispatcher (Coder) with hours of service 4:00 P. M. to 12:00 Midnight, Thursday and Friday rest days. James Calvin is a Relief Machine Dispatcher (Coder) assigned to relief of Coders on the 4:00 P. M. to 12:00 Midnight shift, also having Thursday and Friday as rest days.

The date of the claim, Friday, August 23, 1963, was a rest day for the claimant and Calvin. Seniority dates are — Roberts, May 4, 1949; Calvin, March 28, 1950.

Hereinafter Mail Dispatchers (Coders) will be referred to as Coders.

As of the date of the claim there were 10 positions of Coders assigned 4:00 P. M. to 12:00 Midnight and 2 positions assigned 7:00 P. M. to 3:00 A. M. All other employees, including Mail Handlers, having a starting time Noon to Midnight had shifts 3:30 P. M. to 12:00 Midnight and 5:00 P. M. to 1:30 A. M.

On the claim date there was a need upon the part of the Carrier to call regular assigned employees having Friday as rest days to work as Mail Handlers to fill up the quota of Mail Handlers (short vacancies) in accordance with the terms of Article II, Section (d), of a Memorandum Agreement signed April 25, 1957, amended, also identified as Appendix H of the printed general agreement between the parties effective October 1, 1942, as

of the N.R.A.B. have consistently held to the principle that the penalty for service not performed is payable at the straight time rate and that overtime rates apply only when work is actually performed.

This claim is wholly unwarranted and unsupported by contract rules. It should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant is a regularly assigned Machine Dispatcher (Coder) with hours of service 4:00 P.M. to 12:00 Midnight, Thursday and Friday rest days. His seniority in the classification dates from May 4, 1949.

James Calvin is a Relief Machine Dispatcher (Coder) assigned to relief of Coders on the 4:00 P.M. to 12:00 Midnight shift, Thursday and Friday rest days. His seniority in the classification dates from March 28, 1950.

On the date of the alleged violation of the Agreement — Friday, August 23, 1963 — the extra board for Mail Handlers having been exhausted, Carrier called Claimant to work in that classification, on his rest day, on the 3:30 P.M. to 12:00 Midnight shift. Claimant declined the call. Carrier then called Calvin who accepted the assignment. Calvin worked from 3:30 P.M. until about 6:00 P.M. as a Mail Handler at which time he was assigned the position of absent Coder A. L. O'Flaherty.

Claimant avers that when Carrier found need to fill O'Flaherty's position of Coder he should have been called and he would have accepted. Further, the assignment of Calvin to the position was in violation of Claimant's seniority rights. Clerks say, in addition, that the Claim should be sustained because the defense proffered by Carrier is "incredible."

Carrier contends O'Flaherty was given permission for a tardy reporting to work on August 23. However, when the work requirements compelled it to fill the Coder position it was faced with an emergency which it met by assignment of Calvin to the position. Further, it says: (1) when Claimant declined the call to work as Mail Handler he was not thereafter "available" on his rest day within the contemplation of the Agreement; and (2) Clerks have failed to prove that the action taken violated the Agreement.

In our adjudicatory process we do not reach consideration of the defense unless Petitioner has made a *prima facie* case. Assuming that the defense is "incredible," this is not evidence of the merits of the Claim.

The crucial question, confronting us, is whether under the facts herein Claimant was "available" and therefore entitled to a call to fill O'Flaherty's Coder's position. An affirmative finding is indispensable to Clerks establishment of a *prima facie* case.

Clerks have not favored us with evidence of practice on the property or other evidence which would give meaning to the word "available" under the circumstances. We, therefore, are unable to make a finding as to whether Claimant was "available" or "unavailable" within the contemplation of the Agreement. As a consequence we must dismiss the Claim for failure of proof.

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 Claim fails for lack of proof.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1965.