

Award No. 14583
Docket No. TE-13594

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

CANADIAN NATIONAL RAILWAY COMPANY
(St. Lawrence Region Lines in the United States)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Canadian National Railways, that:

1. Carrier violated the parties' Agreement because, commencing May 1, 1961 and continuing thereafter, it failed and refused to assign Operator J. V. Leclerc to the handling of train order work to which entitled at Portland, Maine.

2. Carrier shall be required to compensate Mr. Leclerc five hours and thirty minutes overtime for May 1, 1961, and said amount for each day thereafter that the violation exists, subject to adjustment in instances where claimant did work overtime on claim dates. (Carrier's file 8005-45.)

EMPLOYEES' STATEMENT OF FACTS: The wage scale of the parties' Agreement, effective March 1, 1956, lists two operator positions at Portland, Maine (page 75). The positions were assigned to work first and third tricks. The first trick position was in the 6-day category, with one rest day protected by a regular relief position, and the third trick position was in the 7-day category, both rest days being protected by relief. On September 30, 1958, Carrier abolished the third trick.

The remaining first trick position is occupied by Operator J. V. Leclerc, who works same from 6:15 A. M. to 2:15 P. M., Monday through Friday, with Saturday and Sunday rest days, the Saturday being covered by a swing relief man.

Portland, Maine is located 165 miles from the Canadian border on a line owned and operated by the Canadian National Railways from Montreal, which is commonly referred to as the New England Line and runs through the states of Vermont, New Hampshire and Maine. This line has two scheduled passenger trains, Nos. 16 and 17. No. 16 is due to arrive at Portland at 4:25 P. M., and No. 17 due to leave Portland at 7:45 A. M.

The claimant, Mr. J. V. Leclerc, is an employe of the Carrier and was regularly assigned as an Operator at Portland, Maine, with assigned hours from 6:15 A. M. to 2:15 P. M. Monday to Friday inclusive.

Operator Leclerc submitted time tickets claiming an average of five hours and thirty minutes per day for the seventy-four days on which he was on duty and on which Train No. 17 did not operate. He claims that he should have been retained on duty from 2:15 P. M., the time of his release, until 7:45 P. M., the time on which the schedule of Train No. 17 would expire under Rule 82 of the Uniform Code of Operating Rules. His claim is for 412 hours and 30 minutes at punitive rates.

OPINION OF BOARD: Article 10(h) of the agreement provides:

"Telegraphers will not be released from duty until all train orders held by them have been delivered, or annulled, except bulletin orders and/or slow orders."

Train No. 17 was scheduled to leave Portland, Maine, at 7:45 A. M. daily except Sunday for Island Pond, Vermont. On the dates involved in this claim, the run was annulled by a Form K train order issued almost daily. Claimant was assigned as Operator at Portland, 6:15 A. M. to 2:15 P. M. He urges that he should have been retained on duty from 2:15 P. M., the time of his release, until 7:45 P. M., the time the schedule of Train No. 17 would expire.

The single question in this case is whether the Carrier can prove that the Form K train order comes within the exception and is therefore classified and considered a bulletin order.

The Organization maintains that the Carrier has only made certain assertions and allegations concerning the past practice on this railroad. It urges that the Carrier has failed to meet the burden of proof required to sustain such allegations, and thereby bring the case within the exception of said rule.

The Organization further affirmatively denies that Form K orders are included in bulletin orders.

In the handling on the property the Carrier said:

"As Train Order No. 304 (Form K Train Order, annulment of schedule or section) did not provide for train movement, it is not in the category specified in the foregoing paragraph. It is considered therefore that it did not have to be annulled by the Train Dispatcher before the Train Order office at Portland was closed. This has been the recognized practice not only on our lines in New England but also on our lines in Canada. For this reason, it has always been the procedure for Form K Orders to be treated the same as any other bulletins or slow orders which are listed on a transfer for the operator coming on duty when office is again opened. When a Form K Order is no longer in effect under Rule 82, it is filed."

and:

"This subject has been reviewed throughout the whole Canadian National and we find that the consensus of opinion is that the method

used on these occasions were the same practice that is used on other Regions of the System. It is therefore difficult to reconcile the stand taken by your Committee in requesting that this case be taken to the National Railway Adjustment Board 3rd Division for adjudication."

Also, in the handling on the property, the Organization said:

"Annulling a train to allow other inferior trains to move is not a slow or bulletin order."

and:

"We cannot agree with the position you have taken. As train orders such as these deal directly with train movements, as they have the effect of annulling a scheduled train which permits inferior trains to operate, we feel these claims are justified and should be settled."

The record is barren of any probative evidence to support the allegations made in regard to the past practice.

It would appear to the Board, that since the Carrier had the burden of bringing the case within the exception to Article 10 (h), it would have submitted evidence in the form of examples wherein this practice had occurred on the railroad. It is significant that not one single example is presented to support the position of the Carrier.

We believe that the Organization has created a claim in this case out of what amounts to a real paradox as far as the Carrier is concerned. At the time Claimant went off duty, the order was not annulled because the operating rules preclude its annulment. The rules provide:

"The schedule or section annulled becomes void between the points designated and cannot be restored."

Therefore, when Train No. 17 was annulled, on a given date, the order annulling it could not be "annulled," but simply had to expire at the end of the twelve hour period governing the operation of said train.

Therefore, the only avenue of defense available to the Carrier is to prove that the Form K order is a bulletin order.

This is apparently a case of first impression, and we truly regret that there is not some substantial evidence in the record to illustrate what the past practice has been on this railroad.

It appears that the Carrier herein is a victim of one of its own much used defenses; to-wit: failure to satisfy the burden of proof. It should be readily apparent that the Board is not in complete sympathy with the claim presented by the Organization. However, this is not a Board of equity, and we are bound tightly to the record and the applicable rules. Therefore, we must conclude that the Carrier has failed, in the handling on the property, to meet the burden of proof which would be necessary to sustain the allegations presented as a defense to the claim.

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 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 Agreement was violated.

AWARD

Claim sustained.

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

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 22nd day of June 1966.