

Award Number 17972

Docket Number TE-17996

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEE UNION
ERIE LACKAWANNA RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Erie-Lackawanna Railroad, that:

1. Carrier continues to violate the parties agreement by assigning employees holding no rights under the parties agreement to handle train orders at Gowanda, New York.
2. Carrier shall be required to make a joint check of the records commencing April 20, 1963 and compensate Mr. O. W. Bixby or his replacement for a "call" payment for each violation existing from that day forward. In the event Mr. Bixby or his replacement is found to be unavailable for such service, Carrier shall compensate Mr. W. N. Neubeck because of such violations.

EMPLOYEES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

An Agreement between the Erie Railroad Company and this Union, effective March 4, 1957, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

This claim was timely filed, progressed in accordance with the provisions of the Agreement, including conference with the highest officer designated by the Carrier to receive appeals and has been declined. The Employees therefore appeal to your Honorable Board for adjudication.

This claim arose out of a long established practice by the Carrier to permit and/or require employees not covered by the Telegraphers' Agreement to copy, repeat, complete, prepare and deliver train orders at Gowanda, New York. This station is manned by an Agent-Operator whose hours are 8:00 A.M. to 5:00 P.M. with one hour deducted for the noon meal period. The train orders, the subject of this claim, were copied after the assigned hours of this employee.

(b) ISSUE

Employees not covered by the Telegraphers' Agreement being required to copy, receive and deliver train orders at locations where a telegrapher is employed.

(e) AUTHORITIES RELIED ON

AWARDS OF THE THIRD DIVISION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD: 14679, 12712, 12126, 10379, 3785, 5924, 8711, 7255, 2611, 5793, 10575, 14067, and 3416.

CARRIER'S STATEMENT OF FACTS: During the period of claim O. W. Bixby, hereinafter referred to as claimant, was regularly assigned as Agent, Gowanda, New York, hours of service 8:30 A.M. to 4:30 P.M., Monday through Friday, rest days Saturday and Sunday.

On each date of alleged violation, claimant Bixby was called by telephone after his regularly assigned hours of service to handle the involved train orders at Gowanda. Claimant advised on each occasion he was not available, and, therefore, was necessary for the train service employee to copy the train orders.

Under date of May 8, 1967 (Carrier Exhibit A) claim was instituted with Superintendent Wogan by the General Chairman, alleging a violation of the applicable agreement, which was denied under date of July 5, 1967 (Carrier Exhibit B). Claim was thereafter appealed to Carrier's highest designated officer to handle such matters on August 18, 1967 (Carrier Exhibit C) where it was discussed in conference on September 20, 1967 and denied with denial confirmed on October 9, 1967 (Carrier Exhibit D). Subsequent exchanges of correspondence is evidenced by the following Exhibits:

- Carrier Exhibit E—General Chairman's letter to Superintendent July 8, 1967.
- Carrier Exhibit F—Superintendent's letter to General Chairman August 18, 1967.
- Carrier Exhibit G—General Chairman's letter to Superintendent Sept. 1, 1967.
- Carrier Exhibit H—Superintendent's letter to General Chairman October 9, 1967.
- Carrier Exhibit I—General Chairman's Letter to GM-LR October 16, 1967.
- Carrier Exhibit J—GM-LR letter to General Chairman November 21, 1967.
- Carrier Exhibit K—General Chairman's letter to GM-LR April 29, 1968.
- Carrier Exhibit L—GM-LR letter to General Chairman May 23, 1968.

Alleged violations for March 7 and 8, 1967 are not properly before this Board for consideration account not filed within 60-days as prescribed under Article V of the August 21, 1954 National Agreement (Rule 36). In addition, the additional lists of alleged violations submitted under dates of July 8 and September 1, 1967 (Carrier Exhibits E and G) are not properly before this Board for consideration as the instant dispute is not a proper continuing claim as alleged by the Organization, see Carrier Exhibit I.

(Exhibits Not Reproduced)

OPINION OF BOARD: For some period of time the Carrier required or permitted employes not covered by the Telegraphers' Agreement to handle train orders at Gowanda, N.Y. when O. W. Bixby, the Agent-Operator at that station was not on duty. Such action became the basis of a claim initiated by the Organization in the year 1961 in behalf of Agent-Operator Bixby. That claim was terminated in April 1963 and the Carrier subsequently paid for a call for each occasion that a violation of the Agreement was agreed to have occurred. Carrier states it paid the claims for the reason that the Agent-Operator had not been called to perform the work.

Sometime after the termination of the claim in April 1963 it developed that the practice was resumed or had continued in effect without change as a result of which this claim has been presented by the Organization in behalf of the Agent-Operator and others. This claim was presented on May 8, 1967, retroactive 60 days, alleging that the claim filed in 1961 was a continuing one and requesting a joint check of Carrier records back to April 1963 when the previous claim terminated. As to the claim here presented the Carrier asserts that in each instance Agent-Operator Bixby was called and that he refused to answer the telephone or otherwise indicated his unavailability to perform the required work.

The rule involved reads as follows insofar as here pertinent:

"Rule 2:

(a) No employes other than covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call as provided in Rule 9."

With respect to such a rule we stated as follows in our Award 14052:

" . . . Article 21(b) requires Carrier to make a good faith and reasonable effort to communicate with the not on duty employe covered by the Agreement to determine whether he is available. . . ."

The record before us indicates that Carrier made such an effort by attempting to call the incumbent of the position on each occasion that his services were required and that in each instance he made himself unavailable. Under such circumstances we have held that the Carrier has met its obligation under the rule and have denied the claims. See Awards 12318, 13934, 16098.

The Organization alleges the Carrier was in "cahoots" with Agent-Operator Bixby to circumvent the provisions of the Agreement, and that this constituted an agreement between them contrary to the terms of the collective bargaining Agreement. No probative evidence is offered in support of the allegation. We can only find that the Carrier attempted to call Agent-Operator Bixby on each occasion and that he made himself unavailable. See Awards 11607, 14208, 16098.

Claim is also submitted in behalf of the replacement for Agent-Operator Bixby on such days as he may have been absent for any reason or in the event of leaving the position. The record contains no evidence that such a replacement ever occurred. This portion of the claim must be denied for the reason that no showing of any rule violation has been made.

Additionally, claim is also submitted on behalf of W. N. Neubeck, a telegrapher employed at an adjacent station, on any occasion that the regularly assigned incumbent of the position at Gowanda or his replacement is not available. We hold to the view that the compensatory provision of Rule 2(a) has application only to "the" telegrapher employed at the telegraph or telephone office where the order is handled and to no others. (Award 13390)

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;