

Award No. 1091

Docket No. TE-1107

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Baltimore and Ohio Railroad that all employes under Telegraphers' Agreement at Milan, Osgood, Medora, Carlyle, Breese, O'Fallon, Hayden, Brownstown, Tunnelton, Huron, Wheatland, Sumner, Clay City and Xenia on the St. Louis Division who were temporarily relieved from service during certain periods in January and February, 1937, due to flood conditions, also all employes under said agreement regularly assigned to positions in territories in the flood areas, who were unable to perform service due to high water preventing them entering their respective offices during the same periods, thereby causing these employes to lose time through no fault of their own contrary to the provisions of Article 10 (e) of said agreement and contrary to Carrier's Circular Letter No. 253 of February 25, 1935, to all Superintendents, and Carrier's letter to the General Chairman of the Telegraphers' Committee, dated April 19, 1935, shall be paid for all time lost by them due to the above mentioned conditions and actions of Carrier."

JOINT STATEMENT OF FACTS: "On account of flood conditions in the Ohio River Valley and vicinity during January and February 1937, the chief dispatcher of the St. Louis Division issued the following notice on January 29, 1937:

'Effective today second and third trick offices Milan, Osgood, Medora, Carlyle, Breese, O'Fallon and second trick offices Hayden, Brownstown, Tunnelton, Huron, Wheatland, Sumner, Clay City and Xenia closed until further notice, operators affected assert seniority.'

"The offices above mentioned were not inundated but the positions were discontinued temporarily.

"Employes holding positions at other points on the railroad located in the flood area and inundated, also lost time on account of being unable to perform service due to high water preventing them from entering their respective offices."

POSITION OF EMPLOYES: "The Telegraphers' Agreement bearing effective date May 16, 1928, as to wages and July 1, 1928, as to rules and supplements thereto, governs in this dispute.

"Article 10, Paragraph E, of said Agreement provides that: 'Employes will not be required to suspend work during regular hours or to absorb overtime.'

"The Local Chairman representing the Clerks' Organization, having jurisdiction over the clerks, truckers and station forces, mentioned at the outset the provisions of the Clerks' Agreement providing a guarantee of six days per week, but was informed if it was the intention to make claim under the conditions prevailing, all assignments would be abolished and re-advertised again when they were restored. He did not want such action taken, and no claims for time lost were made by the Clerks' Organization, and had it been anticipated that the Telegraphers' Organization would submit claims that have been made in this case, instructions would have been issued when the offices were submerged, making operation impossible, abolishing the service at these points. An act of God brought about the condition and created an emergency that the Carrier was helpless to meet. As above explained, effort was made to give these men employment as far as possible under the abnormal conditions existing at that time and, as shown, a number of them were engaged in protecting their homes and property and were not available, while others did not care to take the temporary service offered.

"In view of the situation and circumstances as above described, we submit that there is no obligation under the rules nor in equity to support the claims of these employees, and respectfully request this Board to deny them."

OPINION OF BOARD: The agreed submission covers the facts, sufficiently sets forth the rules and other pronouncements upon which the parties rely, and their respective deductions in relation thereto. So far as there may be post interest other than in our formal conclusion, the matter preceding this "opinion" may be studied.

Briefly, its genesis considered, we think Circular Letter No. 253 has effect as if it were part of the formal printed rules of agreement, and that employees enjoying status of those here, subject, however, to the Circular modification that employment is not assured on any day during the six which is a holiday, were "on a six-day week" basis, hence within the terms of Article 10 (e), which reads: "Employees will not be required to suspend work during regular hours or to absorb overtime."

We are not disposed to the view of the Carrier that the positions involved were abolished in contemplation of the rules, or otherwise, or at all. They were not bulletined, nor were other steps taken which indicated the Carrier had discontinued, or purposed to discontinue, the work ordinarily being done at stations covered in the claim. Simply stated, a flooded condition obtained for a time at points on the Carrier's lines, before which, as well as after recession of the waters, the Carrier did, and continued to do, a volume of business necessitating the services of all who qualify as claimants; and, as before the flood, so afterward, the identical employees discharged their former duties at the same points. Whatever language it did use, or could have used, as we appraise the situation, in the Carrier's endeavor to separate claimants from the emoluments of their positions during a period when the Carrier was suffering the temporary embarrassment appearing, it is idle to think any responsible official of the Carrier ever considered abolishing the positions. The record considered, the suggestion in the Carrier's announcement that the "operators affected assert seniority" appears to have been an impotent gesture. That the Carrier relied on faith that the Telegraphers would permit the order to go unchallenged rather than on its legal effectiveness, is evidenced by what it says it did, and threatened to do, in relation to another organization of its employees. "The Local Chairman representing the Clerks' Organization," says the Carrier, "having jurisdiction over the clerks, truckers and station forces, mentioned at the outset the provisions of the Clerks' Agreement providing a guarantee of six days per week, but was informed if it was the intention to make claim under the conditions prevailing, all assignments would be abolished and re-advertised again when they were restored. He did not want such

action taken, and no claims for time lost were made by the Clerks' Organization, and had it been anticipated that the Telegraphers' Organization would submit claims that have been made in this case, instructions would have been issued when the offices were submerged, making operation impossible, abolishing the service at these points." What the Carrier did to silence the Clerks at the inception of the unusual situation, and regardless of views, by whomsoever entertained, as to the soundness of such an order in relation to assignments of the importance here, nothing of the kind took place between the Carrier and the Telegraphers. The Carrier may not, as we think, premise absolution from its contractual obligations to its Telegraphers on an arrangement which it made to that end with its Clerks, an organization seemingly willing to forego that which the one here insists upon. What might have been, but was not, done at the time of the flood by way of composition between the parties, is, of course, of no avail. Only formal action can effectuate abolishment of positions. Concededly, the Carrier introduced no such procedure in this instance. See, generally, Awards 79, 289, 621, 735, 827, this Division, and 3528 and 3529, First Division.

The contention that the Carrier's discomfiture was occasioned by an "act of God," and hence, as said, liability does not attend, has been held to be without application in similar situations. Awards, *supra*. In Award 827, where the rule "vis major" is analyzed, it is said, "This doctrine is limited * * * to cases involving the liability of a common carrier for the safe custody and transport of goods."

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 action of the Carrier was violative of the terms of the controlling agreement between the parties, perforce whereof recovery by those affected to the extent of net wage loss sustained is awarded.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1940.