

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

ORDER OF RAILROAD TELEGRAPHERS

**THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware, Lackawanna & Western Railroad, that the first and third trick clerk-operators assigned at the Bath, New York Station on April 24, 1943, be paid four hours' overtime each under the rules of the Telegraphers' Agreement because, when the second trick clerk-operator at that station was unable to protect his hours of service on April 24, 1943, an employee not covered by said agreement was substituted, instead of using each of the Claimants four hours in addition to their regular assignments on that day.

EMPLOYEES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of May 1, 1940 is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

Prior to, on, and subsequent to April 24, 1943, three clerk-operator positions were operative at Bath, N. Y., constituting three 8-hour tricks, namely, 8:00 A. M. to 4:00 P. M., 4:00 P. M. to 12 Midnight, and 12 Midnight to 8:00 A. M.

Account illness, on April 24, 1943, the 4:00 P. M. clerk-operator could not protect his assignment. The Carrier, instead of doubling (working 4 hours overtime each) the 1st and 3rd trick clerk-operator, reached outside of the scope of the telegraphers' agreement for an employee to protect the 2nd trick vacancy. Mr. Forester, the person who substituted on the 2nd trick vacancy, had previously performed 8 hours' service on his regular position at the freight house.

The Organization filed claim in behalf of the 1st and 3rd trick clerk-operators for four hours overtime each in payment for work denied them. The Carrier denied the claim.

POSITION OF EMPLOYEES: As indicated in the Organization's Statement of Facts, Bath station on the date involved (April 24, 1943) employed three clerk-operators. On April 24, 1943 the 4:00 P. M. clerk-operator was unable to protect his position because of illness. The first and third trick employees were available for four hours overtime each. The Carrier chose to disregard the provisions of the telegraphers' agreement by requiring a person not covered by said agreement to protect the second trick one-day vacancy.

The dispute was handled on the property in regular form and in the following manner by correspondence. Letters are quoted:

OPINION OF BOARD: On April 24, 1943, three clerk-operators at Bath, New York, were working three eight hour tricks: 8:00 A. M. to 4:00 P. M., 4:00 P. M. to 12:00 Midnight; and 12:00 Midnight to 8:00 A. M. On this date, the second trick operator could not protect his assignment because of illness and Carrier used an employe outside the scope of the Telegraphers' Agreement. The Organization contends that the Carrier should have used the first and third trick operators each for four hours at the overtime rate.

The work was clearly within the scope of the Telegraphers' Agreement and there were no extra telegraph operators available for the work. The general rule is that a carrier may not properly assign work falling within an agreement to one outside the scope of such agreement. Awards 3271, 3193. The Carrier contends, however, that it was prohibited by the Hours of Service Law from assigning the work to these claimants. This requires a discussion of the situation as it applies to that Act.

The applicable portion of the Hours of Service Law is:

"PROVIDED, That no operator, train dispatcher, or other employe who by use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period for not exceeding three days in any week."

Mention is made by the Carrier of a much more restrictive State law in New York. The applicability of the New York Act can be disposed of by the statement that it has no application whatever in the field of Interstate Commerce when the field, as here, has been occupied by the Federal Congress.

The Hours of Service Law also contains a provision that it does not apply "in any case of casualty or unavoidable accident or the act of God." It is evident, therefore, that the proviso in this quoted portion of the Act that "except in case of emergency when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period for not exceeding three days in any week", was intended to mean something different than casualty, unavoidable accident or an act of God. It is not disputed in the present case that the second trick telegraph operator was off duty because of a disabling illness. This, we think, constitutes the situation an emergency within the meaning of the Act where no other telegraphers are available. This is the reasoning advanced in Award 2827, a case similar in principle and to which we adhere.

We are obliged to give effect to the collective agreement in every way possible except where it is in direct conflict with the Hours of Service Act. Where, as here, a law permits a greater latitude of action under certain specified conditions, parties subject to the Act may properly contract in the field where such specified conditions exist. We think that the collective Agreement is controlling in the confronting case, the specified conditions having been shown to exist which would permit Claimants to perform the work in question.

The claim will be sustained at the pro rata rate of the position in accordance with the rule announced in Award 3193.

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 Carrier violated the Agreement.

AWARD

Claim sustained at the pro rata rates of the positions.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of March, 1947.