

Award No. 4460

Docket No. TE-4486

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE 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 Company that:

(a) The Carrier violated the Telegraphers' Agreement when and because beginning July 2, 1947, and continuing through August 26, 1947, it permitted or required an employe (Clerk Lyle Seymour) not covered by the said Telegraphers' Agreement to occupy the agent-operator position at Minetto, New York; and

(b) in consequence of said violation the senior idle extra employe on the days involved shall now be paid by the Carrier what he would have earned (which includes express commissions) had he occupied the agent-operator position at Minetto, less what he was paid as an extra employe during the same period of time.

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

At Page 27 of the Telegraphers' Agreement the following position is listed:

Minetto Agent-Operator \$191.32 per month

The rate has been progressively increased since May 1, 1940, to the extent that on the dates involved in this claim the rate of pay was \$267.82 for a 204-hour month.

Beginning with July 2, 1947, and continuing through August 26, 1947, so far as this claim is concerned, the Carrier required or permitted an employe (Clerk Lyle Seymour) not covered by the Telegraphers' Agreement to occupy the agent-operator position at Minetto in the absence of regular Agent-Operator Benway who was off duty account illness.

The Organization filed claim on behalf of the senior idle extra employe for a wage loss in the amount said extra employe would have earned had he occupied the position. The Carrier denied the claim.

POSITION OF EMPLOYEES: As indicated by the Employees' Statement of Facts, regular Agent-Operator Benway, Minetto, New York, was absent from

claimed such employe was entitled to the work. The Carrier, without benefit of such information, is not in a position to adjudicate a claim as broad as the one upon which the Employees are now asking your Board to settle.

Claim should be denied for the following reasons:

- (1) The Employees have failed to show the name and availability of a single claimant in order for the Carrier to check its records and adjudicate the claim to cover the period claimed.
- (2) The Carrier violated no agreement rule and the practice on the property is to use qualified personnel on positions covered by the Telegraphers' Agreement when vacant and there is no idle extra qualified men available to cover the vacancy.

OPINION OF BOARD: The record shows that Agent-Operator Benway, Minetto, New York, was absent from his position from July 2 through August 26, 1947. The vacancy was filled by an employe not covered by the Telegraphers Agreement. The Organization makes claim for one day's pay for each day the violation occurred within the scope of the claim on behalf of the senior extra board employe qualified and available to do the work.

The Telegraphers are entitled to perform all the work encompassed by the scope rule of their Agreement. If, therefore, an extra board employe under the Telegraphers' Agreement was qualified and available to do the work here involved, he has a superior right to its performance as against one not covered by the Agreement.

It is contended by the Carrier that there was no available extra man. The Organization contends that there was, but is unable to designate him or them for the reason, as it claims, that Carrier has refused to provide the information or make its records available to the Employees. In this connection, parties are required to present all the facts within their possession and, where either party refuses to do so, a remand ordinarily results if such evidence is necessary to a decision. Consequently, this case will be remanded for a joint check of Carrier's records. If it appears that there was a qualified and available extra employe on one or more of the days stated in the claim, the claim is sustained as to such employe for the days lost. If there was no extra employe available, the position of the Carrier is correct.

The Carrier complains that the claim is not proper for the reason that the employe suffering loss is not named in the claim. This is not fatal to the claim. The Organization can under such circumstances secure the elimination of a contract violation, but before a monetary award can be allowed, the employe suffering loss must be established with sufficient certainty for the Carrier to comply with the award made.

The parties do not agree as to the extent of the seniority district from which the Carrier is required to use extra board employes. Carrier contends that the Syracuse and Utica Branch was at the time of the claimed violation a separate seniority district. The evidence shows that from January 1, 1942 to November 1, 1947, the Syracuse and Utica Branch was a part of the Scranton seniority district. The Carrier also contends that employes on the Scranton end of the seniority district did not want to work on the Syracuse end. This is not a defense, of course, unless it is based upon a valid agreement with the Organization. None such has been shown.

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 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 claim is remanded for a joint check of Carrier's records to determine the number of days, if any, that the Agreement was violated.

AWARD

Claim remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of July, 1949.