

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas C. Begley, 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 and Western Railroad Company that:

1. E. A. Orcutt regularly assigned second trick clerk-operator, Bath, New York, shall be compensated at time and one-half rate of his regular position for each hour he performed service as agent-operator at Bath, New York, outside of his regular assignment as clerk-operator at Bath, New York, July 15, through July 31, 1946, plus straight time rate for each hour he was suspended from his regular position during the same period of time, less compensation previously allowed for these days; and,

2. Extra Employee C. F. Howe be compensated at time and one-half rate of the Bath agent-operator position for each hour he performed service as second trick clerk-operator at Bath outside of the hours assigned to the agent-operator position and straight time rate for each hour he was suspended from the agent-operator position at Bath July 15 through July 31, 1946, less the compensation previously allowed for these days.

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

Bath, New York, is an around-the-clock station. Agent-Operator L. C. Ward is assigned 8 A.M. to 4 P.M., Operator-Clerk E. A. Orcutt 4 P.M. to 12 Midnight, and Operator-Clerk "X" 12 Midnight to 8 A.M. Operator-Clerk C. F. Howe is an extra employee.

On July 14, 1946 E. A. Orcutt ended a 12-day vacation period. During his absence the second trick operator-clerk position was protected by C. F. Howe.

Beginning July 15, 1946, Agent-Operator L. C. Ward began a 12-day vacation period and, in addition, requested and was granted permission to be off duty until September 16, 1946.

Carrier required or permitted E. A. Orcutt to protect Ward's agent-operator position despite that extra employee Howe was available, qualified and stood to catch that relief work. Carrier required Howe to protect Orcutt's second trick operator-clerk position.

It will be noted from Exhibit "A" and Exhibit "B" that the Agent-Operator (Ward) and the claimant (Orcutt) understood that there was no violation of the Agreement. Orcutt affirmatively applied for the work, and is therefore estopped from now claiming that he suffered any damage by his own action. Where an employee applies for a position and is used thereon, he cannot thereafter assert a claim against the Carrier that he should have been used elsewhere. (See Award 3782 of this Board.)

Finally, the General Chairman wrote to the Carrier on June 10, 1947:

"We were and are willing to permit the Natola-McCormack dispute, now before the National Railroad Adjustment Board, to decide the issue but since it is your position that the disputes are dissimilar we see no point in holding this case in abeyance * * *."

This was a recognition or admission by the Organization that if the "Natola-McCormack dispute" was decided adversely to the Organization that the present claim would likewise be without merit. This Board decided the "Natola-McCormack" case against the Organization in Award 3692. Of course, since the Organization is now aware that its position was not sustained in Award 3692, it will no doubt attempt to stultify its original position that it was willing to let the present case be governed by the decision in Award 3692.

III

The agreement was not violated in the circumstances here presented and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are that Bath, New York, is a three trick office with the following around-the-clock service:

1st Trick	8:00 A.M. to 4:00 P.M.	L. C. Ward, Agent-Operator
2nd Trick	4:00 P.M. to 12 Midnight	E. A. Orcutt, Operator-Clerk
3rd Trick	12 Midnight to 8:00 A.M.	Mr. "X," Operator-Clerk

C. F. Howe during the period of this claim was an extra operator.

On June 29, 1946, L. C. Ward wrote his superior as follows:

"Bath, N.Y., June 29th, 1946

"Mr. C. H. Youst, Supt.
Buffalo, N.Y.

Exchange letters: It is my desire to get away by July 15th, and until I feel able to return to work. Operator Orcutt wanted to be away July 6th to 14th, he could do this and be back in time to relieve me. It is necessary that I know in order that I may make reservations, as I expect to west for rest.

In event Orcutt does not take over my trick, Operator Goodrich would be willing to do so.

(Sgd.) L. C. Ward

cc: D.M.L."

On June 27, 1946, Orcutt wrote his superior as follows:

"Bath, N. Y. 6/27

"D. M. L.

Understand Agent Ward planning on taking his vacation and probably some more time starting about July 15th. Would like to be

off starting Saturday, July 6th, until the 14th, and then work the 1st trick in Ward's place while he is away.

Advise.

Yours truly,

(Sgd) E. A. Orcutt"

From the reading of Orcutt's letter, he knew that Ward was taking a vacation from July 15th through July 26th and that due to the leave of absence which would be granted Ward, his position would be vacant from July 27th until he returned to work in September.

Under the National Vacation Agreement, Article 12 (b) reads:

"As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

Under this Article there was no vacancy of Ward's position from July 15th through July 26th, and it should have been filled by using extra employe Howe. The Carrier violated the Agreement by not using Howe and allowing Orcutt to occupy said position.

From July 27th through July 31st, when the position was occupied by Orcutt, he had known there would be a vacancy, he had applied for the vacancy and he had complied with Rule 17 (a) which reads as follows:

"When a position is vacant five (5) days it will be given to the senior qualified applicant. Applicant must make his intention known at least twenty-four (24) hours before starting time.

Incumbents of temporary vacancies may be displaced by a senior incumbent of a temporary vacancy that has terminated, otherwise a senior employe may exercise displacement rights only after each five (5) day period of the temporary vacancy."

It was not necessary for him to wait five (5) days after July 26th before occupying said position. He knew the vacancy was going to exist on June 29th, the Carrier knew it was going to exist and if it were a violation by the Carrier, it was a super technical violation of the Agreement, but one not contemplated by the parties when they drew the Agreement.

As to the monetary claims filed by the Employees: Orcutt asked to fill Ward's position and was given the position, he was placed in the position by his own action and cannot now be heard to complain. Orcutt lulled the Carrier into a breach of the Agreement and is now estopped to make a claim for being held off of his own position. This Board, however, does not approve individual negotiations contrary to the terms of the Agreement. Claim (1) will be denied. Award 3782.

As to part (2) of the claim, C. F. Howe should be compensated by the Carrier the difference in pay he received from July 15th through July 26th and the amount he would have received if the Carrier had allowed him to fill Ward's position, under the rules of the Agreement, 1st trick, 8:00 A.M. to 4:00 P.M., as Agent-Operator at the pro rata rate.

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 Carrier violated the Agreement as per Opinion.

AWARD

Claim (1) denied; claim (2) sustained as per Findings and Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of July, 1950.