Award Number 13354
Docket No. TE-11884

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, Chicago and St. Louis Railroad, that the Carrier violated the agreement between the parties hereto,

1. When it refused to compensate T. R. Little, an idle extra telegrapher, ready, willing, and able to perform the work at Worstville, Ohio, on Saturday, February 21, 1959, which was performed by the Manager of Brady's Elevator, a person not covered by the Telegraphers' Agreement.

2. When it required or permitted employes at East Wayne Yard Office (Indiana) not covered by said agreement, to prepare waybills for the movement of cars NKP-13152 and 23089 from Worstville, Ohio, the preparation of which is assigned to and performed by the Agent-Operator at Payne, Ohio, and/or other employes under the Telegraphers' Agreement, and

3. When it permitted or required employes not covered by the parties' agreement at Fort Wayne, Indiana, to issue switching instructions for the movement of the cars (referred to in Item 2 above) to train crews, work assigned to and performed by the Agent-Operator at Payne, Ohio, and/or other employes under the Telegraphers' Agreement.

4. The Carrier shall, because of the violations set out above, compensate T. R. Little, one day's pay at the pro rata rate of the Agent-Operator's position at Payne, Ohio.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an agreement by and between the parties to this dispute, effective January 1, 1959, as amended.

At Page 88 of said agreement is listed the position existing at Payne, Ohio on the effective date of said agreement. The listing reads:

		Hourly Rate
"Payne	Agent-Opr	$2.31"

Particular attention is directed to the instances recited in Carrier's Statement of Facts when on January 4, 1958, Extra Operator Bakle, and on December 20 and 27, 1958, Extra Operator Little were paid a call on Saturday. This was due to the fact that on all three dates, Bakle and Little had taken the assignment of Jones who was off duty account personal reasons or on vacation; they had not been relieved from the assignment prior to the rest days and therefore took the conditions of such assignment, including any calls on rest days. But that condition did not obtain on February 21, 1959, and Agent Jones, not Extra Operator Little, was the occupant of the assignment on that date.

The facts in this case show that Payne, Ohio, is a one-man station and that the occupant of that position was not available for a call on February 21, 1959, and that the Carrier, unaware of his non-availability, made repeated efforts to call him. On the basis of those facts, claim is made for an extra operator who, on the date in question, had no connection with and did not occupy that assignment. The claim, in essence, contemplates that the Carrier be arbitrarily penalized to the extent of one day's pay on account of the assigned agent being unavailable for a call.

Without waiving any of its argument above set forth, the Carrier further maintains that the claimant was not available to perform the work in question for the simple reason that he was located at Green Springs, Ohio, some 90 miles away, even if he could have been reached.

The penalty claimed is without merit under the rules, or on any basis of equity or cmomon sense, and should be denied.

OPINION OF BOARD: This claim arose when Carrier used persons not subject to the Agreement to perform work in the movement of two grain cars, one from Payne, Ohio, and one from Worstville, Ohio. Payne, Ohio, is a one-man station under the regularly assigned agent, R. H. Jones, whose workdays are Monday through Friday with rest days on Saturday and Sunday. Worstville, Ohio, a pre-pay station, is also under the jurisdiction of the agent at Payne. On Saturday, February 21, 1959, the manager of H. M. Brady and Son, a company which operates grain elevators at both Payne and Worstville, had two cars to be billed out. After failing to contact the agent, Mr. Jones, to arrange for the movement of these cars, Carrier assigned the work to the manager of Brady elevator.

The Brotherhood contends that T. R. Little, an extra, idle telegrapher, should have been called to arrange for the movement of these cars. It relies upon Rule 15 (n) and the 40 Hour Week Agreement to sustain its position.

In its denial, Carrier argues that the work performed is not the exclusive work of the telegrapher agent. It asserts that the application of seals and the preparation of memo bills is work that other than telegraphers performed. Furthermore, Carrier states that the waybills which Claimant maintains he should have been called to fill out were actually prepared by Agent Jones when he returned to his duties on the following Monday; and, therefore, Mr. Little has no claim to this work. Carrier also denies that there were switching instructions issued as set forth in part 3 of the claim. It maintains that the manager of Brady elevator was assigned to the work only after several unsuccessful attempts to locate the regular agent. Furthermore, it states that since Claimant was 90 miles away, he could not have been available for the assignment.

We recognize that all station work in a one-man agency may not neces-

sarily belong exclusively to the agent; some of it may be essentially clerical as is the application of seals and the preparation of memo bills. Carrier and Claimant are in disagreement as to what work was performed on Saturday, February 21st and as to whether the work performed belongs exclusively to telegraphers. We find that some agency work was performed on that rest day.

The question of whether the work belongs exclusively to the telegraphers is not the determining factor in resolving this dispute. Significant, however, is the fact that the duties in question were performed by the regularly assigned agent when he was available on his rest days; and when he was not available, Carrier followed the practice of calling other employes covered by the Agreement to perform the work. In the instant case, in conformity with this practice, Carrier made efforts to contact Mr. Jones when agency work appeared on his rest day. Carrier concedes that, if reached, he would have been given a call in accordance with the Call Rule of the Agreement. Unable to contact him, Carrier assigned the work to a person not covered by the Agreement. It should have assigned an available, extra telegrapher with under 40 hours of work for that week as provided for by Rule 15 (n). Carrier made no effort to determine if such an extra, Mr. Little, was available. Furthermore, it cannot now raise the question of the availability of this extra employe because it did not challenge his availability on the Property.

For the reasons stated, we hold that Carrier violated the Agreement and that Claimant is entitled to compensation on a call basis.

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;

That the Carrier and the Employes 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

The Agreement of the parties was violated.

AWARD

Claim sustained in accordance with above Opinion.

NATIONAL RAIDROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1965.

DISSENT TO AWARD 13354, DOCKET TE-11884

I am in full agreement with the official finding of the majority—the Referee and Carrier Members—that "The agreement of the parties was violated."

Neither can I quarrel with the reduction of the reparation of a "call basis" in view of the discussion during panel argument of the propriety of such payment when an extra employe is in fact relieving a regular assigned employe who could be so compensated. This, however, is not to be taken as agreement that an extra employe can be used and paid a call under most circumstances. I insist that an extra employe required to work is entitled to a basic day's pay except where he is in fact relieving a regular assigned employe and assuming all the conditions of the position on which relief service is performed.

So, while I agree with the conclusions of the majority to the extent indicated, I disagree heartily with the road by which they reached those conclusions.

The only issue presented by the record before us was whether the Carrier was obliged, under Rule 15(n). to use the alternate employe—an extra man—if the employe it chose under the option given it—the regular employe—was not available. The rule plainly requires that the Carrier use one or the other of the employes designated. The Employes contended that when the employe chosen, the regular agent, could not be found the Carrier was not thereby relieved of the duty to use an employe covered by the agreement, the alternate or extra employe designated by the rule. The Carrier took the position that if the employe it chose was not available it had no further obligation under the agreement.

Instead of dealing with this simple issue the majority went into the tattered realm of the "exclusivity theory", making statements that were not only unnecessary to disposition of the issue at hand but are contrary to well settled principles.

The most glaring of these unfortunate and unreliable statements is this:

> "We recognize that all station work in a one-man agency may not necessarily belong exclusively to the agent; some of it may be essentially clerical as is the application of seals and the preparation of memo bills."

This statement is ridiculous on its face. It requires no great intellectual acuity to understand that if only one employe is provided at a station to perform all of the work there the basic concept of corollary right arising from such a requirement operates to give that one employe the right to continue performance of all the work. This is one example of the fundamental scope rule rights which have been the subject of so many of our awards.

Besides, it is contrary to a principle that has been approved by both Carrier and Labor Members of this Division of the Board for many years. Award 4392 was adopted by a majority consisting of the Referee and Carrier Members, just as was the case with Award 13354. That majority said:

> "This Division has decided many times that station work in one-man stations belongs to the Agent, a position under the Telegraphers' Agreement. It has also been decided that station work required to be performed outside of the assigned hours of the Agent at a one-man

station is work which belongs to the Agent. With these principles, we are in complete accord." (Emphasis supplied).

And in Award 5993, adopted by a majority consisting of another Referee and the Labor Members, the Board said:

> "There can be no question that at one-man stations as here involved all work of the station including clerical duties, come within Article I of the Telegraphers' Agreement. See Award 4392."

Since the dispute in Award 13354 required only an interpretation of Rule 15(n) all comment relative to other matters was not only erroneous as shown, but was mere surplusage.

For the reasons stated and to the extent indicated herein, I dissent.

J. W. WHITEHOUSE
Labor Member