Award No. 14208
Docket No. TE-14232

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, New Haven and Hartford Railroad, that:

CLAIM No. 1.

(a) Carrier violated the parties' Agreement on March 5, 1962 by permitting or requiring the conductor of Train Extra 0614 to handle (receive, copy, repeat and deliver) Train Order No. 426 at Central Village, Connecticut, at a time when the agent-operator, Mr. J. Gerstenlauer, was off duty, available for service, but not called.

(b) Carrier shall compensate Mr. J. Gerstenlauer in the amount of a call payment ($7.55). (Railroad Docket 9261.)

CLAIM No. 2.

(a) Carrier violated the parties' Agreement on March 5, 1962, by permitting or requiring the conductor of Work Extra 0614 North to handle (receive, copy, repeat and deliver) Train Orders Nos. 424 and 425 at North Danielson, Connecticut, at a time when the agent-operator, Mr. F. C. McDonnell, was off duty, available for service, but not called.

(b) Carrier shall compensate Mr. F. C. McDonnell in the amount of a call payment ($7.79). (Railroad Docket 9260.)

CLAIM No. 3.

(a) Carrier violated the parties' Agreement on February 18, 1962, by permitting or requiring the conductor of Extra 556 North

to handle (receive, copy, repeat and deliver) Train Order No. 407, and Clearance Form A, and block trains at Plainfield, Connecticut, at a time when employes under the Agreement were available for such service, but not assigned.

(b) Carrier shall pay Mr. E. E. Williams, regularly assigned agent-operator, Plainfield, a call payment, or compensate the senior available extra employe, Mr. C. A. Benard, or other qualified employes, extra in preference, a day's pay (8 hours) at the applicable rate. (Railroad Docket 9259.)

EMPLOYES' STATEMENT OF FACTS: The parties are not in disagreement as to the basic elements of fact relating to the occurrences which brought about the claims, nor is there disagreement that the train work handled by conductors is work under the Agreement and accruable to the Claimants named in each of the three claims.

As evidence of the accord expressed, we reproduce below, the letter written by Mr. J. J. Duffy, Director of Labor Relations and Personnel, dated July 25, 1962, which **correctly** outlines the factual situation and the contentions of both parties:

"This will refer to your letters of May 28, 1962, in the following cases:

Docket 9259. Claim of Agent-Operator E. E. Williams, Jr., for a 'call' account train order copied at Plainfield, Connecticut, February 18, 1962.

Docket 9260. Claim of Agent-Operator F. C. McDonnell for a 'call' account train order handled at Danielson, Connecticut March 5, 1962.

Docket 9261. Claim of Agent J. E. Gerstenlauer for a 'call' on March 5, 1962, account train order handled at Central Village, Connecticut.

All three claims involve essentially the same factual situation. In Docket 9259 train order copied at Plainfield, Connecticut, outside the assigned hours of the operator at that location. Claim was presented in behalf of Mr. E. E. Williams, the regular assigned agent-operator at Plainfield. This claim was denied by the superintendent on the basis that Mr. Williams had previously requested that he not be called for such work. (Re Claim No. 3 in Statement of Claim.)

In Docket 9260 the conductor of work extra 0614 copied a train order at Danielson, outside the assigned hours of the operator. The claim in behalf of the regular assigned agent-operator, Mr. F. C. McDonnell, was denied by the superintendent on the basis that Mr. McDonnell had requested that he not be called for such work. (Re Claim No. 2 in Statement of Claim.)

In Docket 9261 a train order was copied by the conductor of an extra freight at Central Village. The claim for a call in behalf of the assigned agent at Moosup, who regularly works at Central

carrier rendered its denial decision dated July 25, 1962, copy of which is attached and marked as Carrier's Exhibit D.

To the best of our knowledge and advice, the statements of Superintendent Gregg that the claimants in each case had specifically requested not to be called for service outside their assigned hours has never been disputed by the Organization. We, therefore, submit that it must be taken as an accepted fact that claimants did not wish to be called for such service.

Copy of the Agreement between the parties is on file and is by reference made a part of this submission.

OPINION OF BOARD: These are claims by three different Claimants.

Claim No. 1 is presented on behalf of Mr. J. Gerstenlauer, Agent-Telegrapher at Moosup, Connecticut, for compensation, for the date set out in paragraph "a" of the claim, for an alleged violation of the Agreement between the parties when the Carrier permitted or required the conductor of Train Extra 0614 to handle (receive, copy, repeat and deliver) train order Number 426 at Central Village, Connecticut, the Claimant not being on duty at the time, available for service, but not called and claims to be entitled to compensation for a call payment.

Claim No. 2 is presented on behalf of Mr. F. C. McDonnell, Agent-Operator, at North Danielson, Connecticut, for compensation, for the date set out in paragraph "a" of the claim, for an alleged violation of the Agreement between the parties when the Carrier permitted or required the conductor of Work Extra 0614 North to handle (receive, copy, repeat and deliver) train order Numbers 424 and 425 at North Danielson, Connecticut the Claimant not being on duty at the time, available for service, but not called and claims to be entitled to compensation for a call payment.

Claim No. 3 is presented on behalf of Mr. E. E. Williams, the regularly assigned agent-operator at Plainfield, Connecticut, or compensate the senior available extra employe, Mr. G. A. Benard, or other qualified employe, extra in preference, a day's pay (8 hours) at the applicable rate, for an alleged violation of the Agreement between the parties when the Carrier permitted or required the conductor of Extra 556 North to handle (receive, copy, repeat and deliver) train order No. 407 and Clearance Form A and block signals at Plainfield, Connecticut, at a time when employes under the Agreement were available for such service, but not assigned.

The Carrier's defense as to each of the claims presented is that each of the Claimants did refuse the service for which claim is made and did either orally or in writing place themselves on notice that they did not wish to be called for service outside their respective assigned hours, and thereby were not available for the service for which claim is now made. That with reference to Claim 3 it did endeavor to locate the nearest operator to perform the service but without any success.

Representative of the Labor Members of this Board argued at the panel discussion that assuming such requests were made by the individual Claimants whose claims are before us, such action on the part of the individual Claimants was not binding and could not alter or amend the Bargaining Agreement between the parties, citing Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U. S. 342-349.

The main issue confronting the Board in this dispute is one of contractual interpretation and/or construction. We are called upon to interpret and apply the meaning of the words "if available" contained in subdivision "b" of Article 20 of the agreement between the parties, entitled "HANDLING TRAIN ORDERS" which reads as follows:

> "(b) If train orders are handled at stations or locations where an employe covered by this agreement is employed but not on duty, the employe, if available or can be promptly located, will be called to perform such duties and paid under the provisions of Article 7; if available and not called, the employe will be compensated as if he has been called."

The parties have cited numerous awards to support their respective contentions as to the subject matter here, but we note that many, if not most of the citations are not applicable to the facts before us.

The rule of law governing the interpretation and construction of words and phrases in a contract is of long standing. The rule is very well stated in a leading New York Court of Appeals case, as follows:

> "The general rule is that words and phrases in a contract should be given their general use and meaning."
>
> Clark v. New York Life Insurance & Trust Co. 64 New York 33.

The term "available" and "availability" in a contract and/or statute have been interpreted by various Courts in many jurisdictions.

In the case of NEMO v. STATE — 178 Misc. (N. Y.) 286, the Court said:

> "Being available within the ordinary accepted meaning of the term is that one is accessible or at the disposal of the one requiring the service."

In the case of WALTON v. WILHELM — 91 N. E. 373 at 375, the Court said:

> ". . . a good faith offering of claimant's service is a prerequisite to availability **and a professed willingness to work, accompanied by or following conduct wholly inconsistent therewith, will not serve to establish availability.**" (Emphasis ours.)

In the case of VALENTINE v. BOARD OF REVIEW — 4 N. J. Super 162, the Court said:

> "The test of availability for work requires claimant at all times to be ready, able and willing to accept the work — which he does not have good cause to refuse."

In the case reported in 182 Pa. Super 146, the Court said:

> "Available means capable of being made use of, at one's disposal, within one's reach and **where one has asked to be excused he is not available.**" (Emphasis ours.)

In the case reported in 316 Mich. 468, the Court said:

"A person who limits his employment to certain hours of the day is not available for work, where the work he is qualified to perform is not likewise limited."

There is no disagreement by the parties to this dispute as to the material and basic elements of the facts in the record.

It is our opinion that in the instant case the respective Claimants have the burden of proving the charges on which the respective claims are based.

With reference to Claim No. 1, the only reference to the availability of the Claimant is the bare statement set forth in paragraph "a" of the claim. The Carrier refutes this statement by stating that the Claimant advised Train Dispatcher Flaherty that he did not desire to be called for work after 5:30 P.M. (See page 44 of record.) This statement by the Carrier is not disputed and/or controverted by the Claimant.

With reference to Claim No. 2 the only reference to the availability of the Claimant is the bare statement set forth in paragraph "a" of the claim. The Carrier refutes this statement by stating "There is a statement on file in the Chief Train Dispatcher's office from Mr. McDonnell that he does not want work after 5 P. M. on any date." (See Page 45 of Record.) This statement is not disputed and/or controverted by the Claimant.

With reference to Claim No. 3 the claim is made that the train order was taken care of by someone, "at a time when employes under the Agreement were available for such service, but not assigned." No reference is made to any specific employe who was available for such service. The Carrier refutes this statement by stating:

"There is a memorandum on file in the Chief Train Dispatcher's office from Agent Williams at Plainfield with a note from his doctor that he cannot be called for work outside his regular forty hour week because of his physical condition. Also, the regular second trick man at Plainfield L. W. Howell, had booked off further notice the previous day with a heart attack.

When it was found that an operator would be needed at Plainfield for the so-called Ford Extra, Acting Chief Dispatcher Plunkett called Operator J. Hogan, the nearest man account time getting short. Mr. Hogan's wife stated he was at church and would have him call as soon as he returned. Mr. Hogan called back at 12:45 P. M. but it was then too late for him to get to Plainfield as the extra was already out of Willimantic." (See Pages 46 and 47 of Record.)

This statement is not disputed and/or controverted by the Claimant.

The Claimants charge a violation of Article 20 of the Agreement between the parties. That article reads as follows:

"ARTICLE 20.

HANDLING TRAIN ORDERS

(a) No employe other than covered by this agreement and train dispatchers will be permitted to handle train orders except in cases of emergency.

(b) If train orders are handled at stations or locations where an employe covered by this agreement is employed but not on duty, the employe, if available or can be promptly located, will be called to perform such duties and paid under the provisions of Article 7; if available and not called, the employe will be compensated as if he has been called."

The article above quoted is free from ambiguity. It means what it says. It protects the rights of telegraphers and train dispatchers to handle train orders at places where they are employed. This protection, however, is not absolute. They must be (1) available or (2) can be promptly located. If either of these conditions are met, they must be "called to perform such duties and paid under the provisions of Article 7." However, the provisions of Subdivision "b" of Article 20 does not end at this point. The last sentence of this subdivision states:

"**if available** and not called, the employe will be compensated as if he had been called." (Emphasis ours.)

The record before us compels the conclusion that the Claimants were not available, as that word is interpreted in the cases herefore cited in this opinion, when the train orders were handled by someone other than the Claimants. Therefore, their respective claims must fail. See Award Nos. 2867 — Youngdahl; 12318 — Yagoda; 13934 — Dorsey; 3115 — Youngdahl; 11498 — Dorsey.

The Organization further contends that these Claimants cannot make individual contracts with the Carrier which would be in violation of the Master Agreement relying evidently on Order of Railroad Telegraphers v. Railway Express Agency 321 U.S. 342-349. With this contention we cannot agree. As we said in Award 11607 (Coburn):

"It is true that agreements entered into by those not authorized to negotiate the terms and conditions of the collectively-bargained agreement may not set aside or abrogate the rules of the **basic contract.** Whenever there is a conflict between the provisions of a local agreement or understanding and those of the **basic** agreement, the latter prevails. But local agreements and practices PER SE are not VOID; they are UNENFORCEABLE if and when found to conflict with the **basic rules.**" (Emphasis ours.)

The notification by the Claimants that they would not be available in our opinion, does not "set aside or abrogate the rules of the **basic contract.**" Article 20 does not say that the Claimants **must** be available. A proper interpretation of the Article is that the question of availability is left to the employe to determine as to whether or not he is or is not available. In this dispute, the respective Claimants advised the Carrier they were not available.

Th Organization in the panel argued that under the provisions of Article 20 it was incumbent on the Carrier to endeavor to ascertain as to whether or not the respective Claimants here were available. In view of their, the Claimants, notification that they would not be available, we hold it was not incumbent on the Carrier to make any effort to ascertain as to whether or not they would be available. The Carrier had the right to accept their statements at face value and to believe them when they said they would not be available. The law is well settled that a party to a contract is not obliged to perform a futile act.

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

That the Agreement was not violated.

AWARD

Claim No. 1 denied; Claim No. 2 denied; Claim No. 3 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.

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