Award No. 14211
Docket No. TE-14149

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

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

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Boston and Maine Railroad, that:

CASE No. 1.

1. Carrier violated the Agreement between the parties when it failed to call C. R. Murphy to perform work during the regular hours of his position on December 25, 1961.

2. Because of this violation Carrier shall compensate C. R. Murphy in the amount of eight (8) hours' pay at the time and one-half rate.

CASE No. 2.

1. Carrier violated the Agreement between the parties when it failed to call M. J. West to perform work during the regular hours of his position on January 1, 1962.

2. Because of this violation Carrier shall compensate M. J. West in the amount of eight (8) hours' pay at the time and one-half rate.

3. Carrier violated the Agreement between the parties when it failed to call H. K. Raybold to perform work during the regular hours of his position on January 1, 1962.

4. Because of this violation Carrier shall compensate H. K. Raybold in the amount of eight (8) hours' pay at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, effective August 1, 1950, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

The rest days of the positions are worked by a regular relief employe with the following assignments:

Tuesday and Wednesday — Third shift Lawrence Tower.

Thursday — Third shift Train Director at Lowell Junction Tower, Lowell, Massachusetts.

Friday — Rest Day.

Saturday — First shift, Lawrence Tower.

Sunday — Rest day.

Monday — Second shift, Lawrence Tower.

H. K. Raybold is regularly assigned to the second shift position and M. J. West to the third shift.

Superintendent Estey of the Boston Division issued Bulletin No. 215 on December 19, 1961, instructing that all shifts at Lawrence would be canceled on December 25, 1961 and January 1, 1962.

On January 1, 1962, it became necessary that service be performed on the second and third shifts at Lawrence. Carrier, however, called neither Raybold nor West, but instead, used C. F. Sumski, a spare employe, from 6:15 P. M., January 1 to 2:15 A. M., January 2. The District Chairman presented to the Superintendent a claim in behalf of H. K. Raybold and a claim in behalf of M. J. West, each for eight hours' pay at the time and one-half rate. The claims were handled concurrently on the property and this handling is depicted in ORT Exhibits 11 through 20. Here again, it is noteworthy that Carrier offered to settle these claims on a compromise basis. This offer was declined by the General Chairman. (Please see ORT Exhibit 18.) Handling of the claims was in the usual manner up to and including the highest officer of the Carrier and were denied.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: At the time of claim, C. R. Murphy was regularly assigned as first-trick towerman (7:00 A. M. to 3:00 P. M.) at Exchange Street Tower, Worcester, Massachusetts. On Christmas Day, December 25, 1961, claimant's position was not scheduled to work, train service being severely curtailed on the holiday. Claimant qualified for and was allowed eight hours holiday pay under Article II of the August 21, 1954, national agreement.

During the night of December 24-25, Worcester had a snow fall of fourteen inches. It was essential to move a weed burner into Worcester yard to clean switches, the moves requiring use of the Exchange Street interlocking. Transportation and communications were snarled by the storm, and in order to avoid delay the third trick towerman was held on duty until after the moves were completed, working until 9:45 A. M.

The contention is claimant should have been called for the work.

OPINION OF BOARD: Claim is made by the Organization on behalf of employe Murphy, Case No. 1 and West and Raybold Case No. 2, for a day's pay at the rate of time and one-half for the failure of the Carrier to call

the said employes to perform work on the regular assigned hours of their respective positions, to wit, Murphy on December 25, 1961 and West and Raybold on January 1, 1962, all in violation of the Agreement between the parties.

Carrier contends that because of a severe snow storm, Case No. 1 and an accident, Case No. 2, a bona fide emergency existed, as that term is defined and recognized under and by virtue of the terms of the Agreement, and that under the circumstances that existed in each case, the respective actions taken by the Carrier were justified.

CASE No. 1.

There is no dispute in the record that Claimant Murphy was the regularly assigned first trick towerman at Exchange Street Tower, in Worcester, Massachusetts, Monday through Friday, with rest days of Saturday and Sunday, the hours of the trick being 7:00 A. M. to 3:00 P. M., a seven day position.

December 25, 1961, Christmas Day, fell on a Monday, a regular assigned work day of the first trick.

On December 19, 1961, the Carrier issued Bulletin No. 215, addressed to all concerned, advising that the first trick at Exchange Street Tower would be canceled on December 25, 1961 and on January 1, 1962, by reason of the fact that train service on these days, they being holidays, would be severely curtailed. Claimant Murphy qualified for and was allowed eight hours holiday pay pursuant to the terms of the Agreement between the parties.

The record discloses that during the night of December 24, 1961, and carrying over into December 25, 1961, Worcester had a snow fall of approximately 14 inches; that by reason of the large amount of snow fall, transportation and communications were snarled and it was essential and necessary to move a weed burner into Worcester to clean the switches, this move requiring the use of the Exchange Street interlocking.

The record further discloses that the third trick towerman, Courchaine, went on duty on December 24, 1961, at 11:00 P. M., the hours of his trick being from 11:00 P. M. to 7:00 A. M. of December 25, 1961. That at or about the hour of 4:00 A. M. of the morning of December 25, 1961, Courchaine was directed to suspend work on his position until 6:45 A. M. and then report back to his position, which he evidently did. After reporting back to his position he remained for the balance of the time of his position and was held over, on duty until 9:45 A. M. of December 25, 1961. In other words he completed 15 minutes of the third trick and worked 2 hours and 45 minutes of the first trick, Claimant Murphy, the first trick regularly assigned towerman was not called and/or contacted by the Carrier to perform the work during the regular assigned hours of his position on Monday, December 25, 1961.

The Organization contends that the Carrier, even though an emergency existed, had no authority, under the terms of the Agreement, to use an employe other than Murphy, the incumbent of the position during the hours of his position and that in using someone other than Murphy, the Carrier violated the terms of the Agreement and should therefore compensate Murphy for such violation.

The Carrier contends that the situation that existed, at the time, required prompt and immediate action; that there was 14 inches of fresh snow on the ground; that division forces were advised that the main highways were passable only with great difficulty and delay and that the streets of the City of Worcester were impassable; that an employe in order to reach the tower would of necessity have to use an automobile and drive through the side streets of Worcester; that emergency conditions existed and for that reason the usual manner of assigning work was departed from and the third trick towerman, Courchaine, kept on duty; and further that Claimant Murphy, by reason of the emergency conditions that existed, was unavailable for the work, although he did live in Worcester.

We have held in a great number of previous awards that when an emergency does exist, the Carrier does have broader latitude in naming employes to perform the work required to alleviate the condition than in a normal situation.

In Award 9394 (Hornbeck) we said:

> "As we understand, the Awards of this and other Divisions of the Board recognize that the Carrier in an emergency has broader latitude in naming employes than in a normal situation. In an emergency it may assign such employes as good judgment in the situation dictates and it will not be obligated to exercise that care and thoughtfulness in its action which would under ordinary conditions be required."

In Award 12777 (Hamilton) we said:

> "Emergencies do not always appear as black or white. Certainly hindsight allows one to be more perceptive than he is at the time of the specific occurrence. However, we should allow certain latitude in judgment, for a person making a quick decision when faced with a situation which appears to him, at the time, to be an emergency."

The questions that present themselves and to be determined by this Board are:

1. Whether or not, in view of the situation that existed at the time, did an emergency exist, as claimed by the Carrier, and

2. Did the Carrier act properly in this matter when it directed the third trick towerman, Courchaine, to suspend his work at 4:00 A. M. to return at 6:45 A. M. and then to have him remain on the position until 9:45 A. M. within the hours of the first trick, without making any effort to call and/or contact Claimant Murphy.

We have no doubt that the 14 inch snow fall snarled transportation and communications and that it was essential and necessary to clean the switches, but it is the opinion of this Board that the Carrier had ample knowledge of the situation that existed, at 4:00 A. M., and the possibility that conditions would continue unless prompt action was taken to alleviate the situation. The Carrier admits that it requested the third trick towerman to suspend his work at 4:00 A. M. and to return at 6:45 A. M., which he did. It also admits that when the third trick towerman returned at 6:45 A. M. he completed 15 minutes of his time and continued to work until 9:45 A. M. of December 25, 1961, which was 2 hours and 45 minutes of time of the first trick.

It is evident from the facts in this record that between the hours of 4:00 A. M. and 6:45 A. M., the Carrier took no steps and no action was taken to clean the switches and that the Carrier made its decision to commence the work to clean the switches at 6:45 A. M., when it requested the third trick towerman to return to his position and had him continue until 9:45 A. M. Bearing in mind that Claimant Murphy, the first trick towerman who was entitled to the assignment beginning at 7:00 A. M. and who lived in Worcester, it is our opinion that he could have been called by the Carrier in ample time to take the assignment. Had the Carrier called Claimant Murphy at 4:00 A. M. instead of doing what it did, the fair inference is that Claimant Murphy would and could have ample time to arrive at his position by 7:00 A. M. But the record is clear that the Carrier made no effort to call and/or contact Claimant Murphy.

We hold therefore that (1) no emergency existed; (2) the Carrier has violated the provisions of the Agreement, by its failure to call and/or contact Claimant Murphy, and has shown no proper justification for its action. The claim will be sustained.

CASE No. 2.

There is no dispute in the record that Claimant N. J. West was the regularly assigned third trick towerman at Lawrence Tower, Lawrence, Massachusetts, Thursday through Monday, with rest days of Tuesday and Wednesday, the hours of the trick being 11:00 P. M. to 7:00 A. M., a seven day position.

Lawrence, Massachusetts, is located on the Carrier's double track main line between Boston, Massachusetts and Portland, Maine. The interlocking and traffic control tower at this point is manned by a train director on the first trick, by a six day week on the second trick and a seven day week on the third trick.

January 1, 1962, New Year's Day, fell on a Monday, a regular assigned work day of the third trick. On December 19, 1961, the Carrier issued Bulletin No. 215 addressed to all concerned that read in part "Lawrence Tower all tricks canceled December 25, 1961 and January 1, 1962." Claimant West qualified for and was allowed eight hours holiday pay pursuant to the terms of the Agreement between the parties.

On January 1, 1962, at or about the hour of 5:50 P. M. regularly scheduled passenger train No. 8, which was southbound from Portland to Boston, collided with an automobile at a grade crossing located between Lawrence, Massachusetts and Newton Junction, New Hampshire. That the accident was a serious one is evident from a reading of the accident report set forth on Page 42 of the record.

At or about the time of the collision and/or accident, in addition to train No. 8, which was involved in the accident, passenger train No. 9 and through freight trains BR-1, RW-1 and MR-2 were in the vicinity. Two other trains, passenger train No. 12 and freight train No. RM-1 later became involved, all being held up by reason of the accident. There can be no question but that in order to alleviate the situation and condition that existed and in order that the various trains could proceed to their respective destinations, train orders and radio communication work was required and necessary at the earliest possible moment. Lawrence Tower was the nearest communicating point.

Faced with this emergency situation and in order to expedite matters the Carrier called spare operator G. Sumski, who resided only one block from the tower. He reported at 6:15 P. M. within 20 minutes after the accident and worked until 2:15 A. M. of the next morning.

The Organization contends that the Carrier, even though an emergency did exist, had no authority to use an employe other than West, the incumbent of the position, and that in using someone other than West, the Carrier violated the terms of the Agreement and should therefore compensate West for such violation.

Carrier contends that the situation that existed at the time required prompt and immediate action, and further that West was ineligible for service under the Hours of Service Law until 11:00 P. M., since he had worked his regular assignment the preceding night, December 31, 1961. The Carrier further contends that emergency conditions existed and for that reason the usual manner of assigning work was departed from and the first and nearest available employe was called to do the work necessary to alleviate the situation in order that the various trains that were held up could be released in order that they might proceed to their respective destinations.

Based on the facts in the record before us and in accordance with the language of Subdivision "c" of Article 21 of the Agreement, which defines what constitutes an emergency, we hold that an emergency did exist in this case.

We repeat here what we said in Case No. 1, with reference to the broad latitude a Carrier has in naming employes to perform work required when an emergency exists in order that the condition might be corrected and eliminated as soon as practicable.

In Award 12777 (Hamilton) we said:

> "We are of the opinion that the situation which existed justified the Carrier's actions in this case, and we will not attempt to say now whether such was the most expedient decision at the time. Since the Carrier had the discretion and latitude to act as it did, the claim will be denied."

We hold therefore, as to this case, the Carrier did not violate the agreement, and that as to Raybold, his claim is not supported by the agreement provisions.

The Organization alleges a violation of Article 4 — Guarantee Rule, by the Carrier. Based on the facts in the record before us with reference to this claim we find that the Carrier did not violate the agreement and that this matter has been disposed of by our decision in the respective cases herein.

The Organization in its submission to the Board lays stress on the fact that the Carrier offered to settle these claims on a "compromise basis."

This Board on any number of occasions passed on this issue and has uniformly held that offers of compromise and settlement are not evidence of anything and not admissible in evidence. This is also the rule in Courts of Law.

See Awards 12951, 9190, 5662, 3345, 10836, 1395, 2589, 9639, 7362, 8206, 9946, 11708.

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 Carrier has violated the Agreement as alleged in Case No. 1, and the claim should be sustained.

That the Carrier did not violate the Agreement as alleged in Case No. 2 and the claims should be denied.

AWARD

Case No. 1 — Claim sustained.

Case No. 2 — Claims are 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.

CARRIER MEMBERS' CONCURRING OPINION TO AWARD 14211, DOCKET TE-14149 (Referee Perelson)

The Referee properly found that "when an emergency does exist, the Carrier does have broader latitude in naming employes to perform the work required to alleviate the condition than in a normal situation" and on that basis, properly denied Claim No. 2. We concur in this finding. However, in Claim No. 1, after finding as a fact that "the 14 inch snowfall snarled transportation and communications" the Referee erroneously concluded that "the fair inference is that Claimant Murphy would and could have ample time to arrive at his position by 7:00 A. M." We have often stated we cannot make a decision which relies upon speculation or conjecture. **Awards 11116 and 12823.**

For this reason, we dissent to the findings in Claim No. 1.

W. F. Euker
R. A. DeRossett
C. H. Manoogian
G. L. Naylor
W. M. Roberts

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