Award No. 14656
Docket No. TE-12714

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David H. Brown, Referee

PARTIES TO DISPUTE:

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

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri-Kansas-Texas Railroad that:

1. The Carrier violated the agreement between the parties when at 11:07 A. M., Saturday, August 6, 1960, at Kincaid, Kansas, it permitted or required an employe not covered by the Telegraphers' Agreement to copy and deliver Train Order No. 98, together with Clearance Card, to Train No. 5 at that point.

2. The Carrier shall now be required to compensate Agent-Telegrapher F. F. Sweet, Kincaid, Kansas, a day's pay at the minimum telegraphers' rate set forth in the agreement plus regular rate.

EMPLOYES' STATEMENT OF FACTS: At 11:07 A. M., August 6, 1960, Saturday, at Kincaid, Kansas, one E. H. Rouch, an employe not covered by the Telegraphers' Agreement, copied and delivered the following train order:

"Train Order No. 98 August 6, 1960
To C&E 5
At Kincaid

No. Five Eng 55A wait at Erie until 12:15 P. M. for Extra 70C North.

C.C.

Made Complete Time 11:07 A. M. Rouch — Opr."

Rouch also prepared a Clearance Card, Form 118, made out at 11:08 A. M., bearing his signature, certifying that he had one order for this train and that such order was No. 98.

Rouch is identified as a passenger conductor in the employ of the Carrier. He lives at Kincaid but works out of Parsons, Kansas, 54 miles to the south. He was not on duty as a train conductor at the time of his handling this order and clearance. Rouch delivered the train order and clearance to Train

Exhibit No. 8 dated August 13, 1937
Exhibit No. 9 dated August 23, 1941
Exhibit No. 10 dated November 13, 1950
Exhibit No. 40 dated March 25, 1949
Exhibit No. 41 dated June 29, 1950
Exhibit No. 42 dated September 21, 1951
Exhibit No. 58 dated February 27, 1952
Exhibit No. 60 dated January 12, 1953
Exhibit No. 61 dated July 13, 1950
Exhibit No. 63 dated October 15, 1953
Exhibit No. 64 dated September 26, 1955
Exhibit No. 65 dated November 4, 1955
Exhibit No. 66 dated February 1, 1956

With all the evidence in these exhibits which you know to be true, if it is not convincing proof of our claim, you just simply don't want to be convinced and we will have to refer it to Adjustment Board for adjudication.

Please advise your wishes in the matter."

CARRIER'S STATEMENT OF FACTS: Saturday, August 6, 1960, train No. 5 departed Paola fifteen minutes later than the train had been sighted off of the Frisco to our train dispatcher.

Conductor E. H. Rouch copied or handled Train Order No. 98 at Kincaid for Train No. 5 at 11:07 A. M. August 6.

Claimant was off duty Saturday, August 6, 1960 as that was one of his rest days and he resided in Parker, Kansas, 21.2 rail miles from Kincaid.

The correspondence of the handling of this alleged claim on the property is attached hereto and made a part hereof, Carrier's Exhibit A.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are undisputed. On Saturday, August 6, 1960, an employe not affiliated with the ORT, at a time when Claimant F. F. Sweet (the regularly assigned Agent-Operator) was off duty, entered the station at Kincaid, Kansas, copied a train order and delivered it subsequently to the engineer and conductor on Train No. 5.

A host of decisions, some recent ones being in Awards 14300, 13505 and 13499, support Claimant's contention this is the exclusive work of telegraphers. In correspondence on the property (George to Thompson, 8-22-60 on Page 5 of the Record) Carrier admits liability provided Claimant Sweet proves his availability on the occasion in question. In support of its contention apropos this issue Carrier cite Award No. 38 of Special Board of Adjustment No. 226, the claim there involving these same parties in a similar dispute. We have been furnished with the Findings supporting such

awards, but insufficient facts are available relative to that case for us to be able to interpret the decision therein. We shall assume that such Special Board 226 intended its decision to apply only to the facts of that case and did not intend to over-rule the authority of numerous prior cases which place on Carrier the burden of making a reasonable effort to call Claimant before lack of availability can be offered in defense of the claim. See Awards 3880 (Yeager), 4200 (Carter) and 8260 (Guthrie). More recent decisions to the same effect are Award 9204 (Stone) and 10063 (Daly), 13264 (Moore) and 14052 (Dorsey). The distance of a claimant's home from the station, as was the case in the aforemention Award 38 of Special Board 226, may in many cases be a compelling factor, but Carrier will not be permitted to rely on distance alone, making no showing of either an attempted call or a time element making a call patently unavailing.

Carrier is correct in its contention that Rule 1(e) rather than Rule 1(d) applies here. Claimant is entitled to a call, not to a day's pay.

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 violated.

AWARD

Claim sustained in conformity with opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of July 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14656
DOCKET TE-12714 (Referee Brown)

We concur with the Majority in finding that Rule 1(e) (Standard Train Order Rule) and not Rule 1(d) is applicable at stations where an agent-telegrapher is employed and not on duty but who is available or can be promptly located.

We dissent to that portion of the award allowing a call to the claimants and rejecting carrier's defense of unavailability or that claimants could not be promptly located.

Rule 1(e) was promulgated by the United States Railroad Labor Board in 1922. In 1925 that Board denied claims in Decision No. 3826 by a telegrapher account train and engine service employes transmitted or received train orders on 45 occasions, where the claimant resided only 3½ blocks from the station.

The same Board in its Decision No. 3917 denied a claim by an employe who lived ¾ of a mile from the station, stating he was not available within the meaning and intent of Rule 16 which is Rule 1(e) here.

There was no indication of an effort by carrier in those cases to call or otherwise locate the claimants. These decisions were clear authority for denying the claim.

Special Board of Adjustment No. 226 held in Award 38 involving these parties:

> "It is self-evident that a telegrapher residing 27.2 rail miles from the station where it is needed to perform train order service is neither 'available' nor can he be 'promptly located' to answer a 'call' for train order service when he is off duty."

It is recognized that Special Board of Adjustment awards have the same force and effect as Awards of the National Railroad Adjustment Board, however, in the case of Special Board of Adjustment No. 226 the parties expressly agreed their awards were to be so treated in paragraph (g) of their agreement establishing that Board.

Award 38 was a binding interpretation and should have been followed. Awards 14427, 14227, 13623.

The Majority assumes, without basis, that Special Board of Adjustment No. 226 intended for Award 38 to apply only to the facts of that case. There is absolutely no indication of such an intent. In those cases where Special Board of Adjustment No. 226 intended their award to be limited to the facts of the particular case, it so indicated in the award. For example in Award 3 of SBA No. 226, it was stated:

> "This finding, however, is limited to this case and is not intended to be a precedent for future cases of this kind."

In any event, no compensation should have been allowed on the basis of Rule 1(e). The organization did not present and progress a claim based on that rule. In fact, they steadfastedly avoided relying on Rule 1(e).

This Division has consistently refused to consider a rule in support of a claim that is not advanced on the property. Awards 13741, 14081, 14118, 13082, 13344, 12646 and others.

Award 14656 is in error, and we dissent.

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