

NATIONAL RAILROAD ADJUSTMENT BOARD**THIRD DIVISION**

Edward A. Lynch, Referee

PARTIES TO DISPUTE:**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)****NORFOLK SOUTHERN RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Norfolk Southern Railway Company, that:

1. Carrier violated the Agreement (National Agreement of August 19, 1960, adopted by Norfolk Southern Railway Co., September 14, 1960) when by your letter of January 11, 1961, addressed to Operator-Clerk E. W. Yountz you decline his time claim for holiday pay for November 24, 1960.

2. Carrier shall now compensate E. W. Yountz for 8 hours at the straight time pro rata hourly rate of pay, as provided in Article III of the August 19, 1960 Agreement, Section 3, subsection (ii).

EMPLOYEES' STATEMENT OF FACTS: Claimant, E. W. Yountz, is an extra man and works under direction of Carrier's Chief Dispatcher. Extra men, generally, work as substitutes for other employees (under the Agreement) who are absent for various reasons such as illness, vacations, and other temporary vacancies as they occur; also they perform service as rest day relief employees when rest day relief work is not included in a regular relief assignment. They receive their assignments from the Chief Dispatcher. They are compensated only for what work they perform. Regulation 24 (d) provides:

"Temporary vacancies of ninety (90) days' duration or less will be filled by the senior qualified available extra employee."

Claimant finished an assignment at Charlotte, N. C., at 4:30 A. M., Tuesday, November 22, 1960. He thereupon contacted the Night Chief Dispatcher and inquired of him if the Chief Dispatcher had left a work message for him. He was informed there was none. He then informed the Night Chief Dispatcher that if he was needed he would be at home and that if he heard nothing in the meantime that he (Yountz) would return to Charlotte and protect the relief assignment Saturday, November 26. The Chief Dispatcher did not make any contact with the Claimant during this period.

Thursday, November 24, 1960, was Thanksgiving Day, a holiday under the Agreement between the parties.

"Raleigh, North Carolina
October 9, 1961
File: ORT 61-1

Mr. W. D. Yates, General Chairman
Order of Railroad Telegraphers
N. S. System Division No. 86
1217 Mordecai Drive
Raleigh, North Carolina

Dear Mr. Yates:

This will confirm conference we had on Friday, October 6, 1961, in which we discussed the claim of E. W. Yountz for holiday pay on November 24, 1960.

In this conference, I reaffirmed the position taken in my letter of May 25, 1961, and again declined the claim.

Yours very truly,

/s/ R. I. Bowles
Director of Personnel"

CARRIER'S STATEMENT OF FACTS: E. W. Yountz was employed as an extra employee. He worked rest days of November 19, 20, and 21 at Charlotte, North Carolina, after which he was told by the Chief Dispatcher, H. R. Parrott, that there was other work available for him at Durham, Colon or Senter, North Carolina, which was being performed by men junior to him. Mr. Yountz stated that he did not want this work but preferred to go home, draw unemployment for two (2) days and return to Charlotte for the three (3) rest days of the following weekend. He did not say that he would be at home for a call for other work. He did not work November 22, 23, 24, or 25.

OPINION OF BOARD: The position of the Organization here is that the Claimant, after completing 3 days of rest-day relief work at Charlotte Yard on November 20, 1960.

"... checked with the Chief Dispatcher at Raleigh to ascertain if needed for further extra service, and being advised he was not needed he advised the Chief that he would be available for call at his residence (his home station) ready for call to service, but if not called during the week that he would again protect the rest-day relief work at Charlotte Yard the following weekend, it being a common practice to so arrange."

In response, the Carrier states the General Chairman's statement of facts is:

"correct insofar as the agreement goes, but is not absolutely correct, insofar as Yountz (Claimant) is concerned.

He (General Chairman) states Yountz was advised HE WAS NOT NEEDED, which is not correct. Yountz was told of this other work available for him, and he stated that HE DID NOT WANT IT, but preferred to go home, draw unemployment two days and return to Charlotte for the 3 rest days the following weekend.

He did not say he would be at home for a call for other work. He stated definitely that he would be at home, and WANTED THE THREE DAYS at Charlotte following weekend. * * * "

There is thus evident a sharp conflict between these parties as to the facts.

Under the circumstances, we will follow that line of prior awards of this Board that hold that we have no power to resolve such conflicts.

The claim will be dismissed.

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 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 the Claim should be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1966.

DISSENT TO AWARD 14809, DOCKET NO. TE-13259

The majority correctly observes that there was "sharp conflict between these parties as to the facts." But it erred in dismissing the claim on a holding "that we have no power to resolve such conflicts."

Dismissal on such a holding is proper only when resolution of such conflict is necessary to a decision. No such requirement was present here.

Claimant was entitled, prima facie, to the payment claimed unless it could be shown as a fact that he "lays off of his own accord or does not respond to a call, pursuant to the rules of the applicable agreement, for service."

The burden of showing such to be a fact was upon the Carrier, under the well known rule that the proponent of an affirmative defense assumes the burden of proving it. Awards 2491, 4701, 4920, 6199, 6548, 7836, 11540, 11856, 11881, 12096, for example. Stated another way, the rule requires the party who relies upon a provision of the agreement to prove that the facts make the provision applicable.

Carrier relied upon that portion of the agreement which excuses payment if the extra employe declines available work in the manner specified. Carrier asserted that the claimant did so decline work. Claimant denied it. The burden thus was on Carrier to prove its asserted facts.

When the Carrier failed to meet its burden the claim should have been sustained. Failure to do so constitutes error, and I dissent.

J. W. Whitehouse
Labor Member