

Award No. 16081
Docket No. TE-15032

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Claude S. Woody, Referee

PARTIES TO DISPUTE:

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

ERIE-LACKAWANNA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Erie-Lackawanna Railroad (Erie District), that:

On April 21, 1962, a carload of Iron Pipe Fittings — Car Sp-672499 was released at Blossburg, Pennsylvania, without waybill for The Kiener Company, Los Angeles, California routing Erie-Lima — NKP-SSW-SP.

Waybill was made out at Gang Mills, New York, thus depriving work from L. W. Bennett regular assigned Agent-Operator at Blossburg.

Carrier should allow Mr. Bennett a call (3 hours at the time and one-half rate of his position for Volitive Act. Total compensation due Mr. Bennett \$11.28.)

EMPLOYEES' STATEMENT OF FACTS: The parties are not in disagreement as to the incident giving rise to this claim. Mr. L. W. Bennett is the occupant of the Agent-Operator position at Blossburg, Pennsylvania; a one-man station. Mr. Bennett's regular work week is Monday through Friday. For many years prior to the date forming the basis for this claim, or until some five months preceding such date, Mr. Bennett was required to work a call on each and every Saturday.

On Saturday, April 21, 1962 the Ward Foundries decided to ship a carload of pipe fittings and called the Chief Train Dispatcher at Hornell, New York, so advising. Instead of attempting to call the Agent, Mr. Bennett, to handle the billing of the car, etc., Carrier instructed Wards to notify the train crew on the Tioga Run to wait for the car of pipe fittings until it was ready, and take the car to Corning, New York, where the billing would be handled. Wards released the car to the train crew, sans a waybill. A memo running bill was made out at Gang Mills, New York.

Claim was filed by General Chairman Matthews on May 12, 1962 wherein charge of Agreement violation was lodged and payment request for a call in

favor of Mr. Bennett was entered. Carrier denied payment and the dispute remained unsettled through further appeal handling. Correspondence exchanged between the parties in the property handling of this claim is attached hereto and marked ORT Exhibit Nos. 1 through 12.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: This dispute involves the movement of a carload of iron pipe fittings on April 21, 1962 in SP 672499 from Blossburg, Pa., a community of about 2000 people located on Carrier's Tioga Branch, 37.1 miles from its main line connection at Gang Mills (Corning), N. Y., via EL to Lima, Ohio for interchange.

At Blossburg the Agent-Operator works five days per week, from 8:00 A. M. to 5:00 P. M., with one hour for lunch, rest days, Saturday and Sunday. The station is closed on Saturdays and Sundays and no relief is provided.

On April 21, 1962, the J. P. Ward Foundry at Blossburg attempted to locate claimant concerning movement of car SP 672499 and being unable to do so contacted Carrier's dispatcher at Hornell, N. Y. The Dispatcher contacted the crew working on the Blossburg Branch and ordered the car moved to Gang Mills where the agency force prepared a memo bill for movement of the car to its destination. A copy of the memo bill was sent to the claimant at Blossburg and revenue waybill was prepared by him during the normal tour of duty on Monday, April 23, 1962 and sent to the destination agent.

On May 12, 1962, the General Chairman filed a claim with the Chief Dispatcher at Hornell, N. Y., alleging violation of agreement when memo bill was prepared by the agency force at Corning. Claim was denied by the Chief Dispatcher on May 30, 1962. Thereafter the matter was handled on appeal within the time limit provisions up to and including Carrier's highest officer, where it was discussed in conference on September 25, 1963 and denied, denial confirmed in letter to the General Chairman dated October 15, 1963. Under date of February 29, 1964, Carrier was advised by the Organization that they were arranging to handle the matter further. Carrier acknowledged the General Chairman's letter on June 16, 1964. Exchanges of correspondence covering the handling of this dispute on the property are attached as Carrier Exhibits A through J.

(Exhibits not reproduced.)

OPINION OF BOARD: On Saturday, April 21, 1962, a carload of pipe fittings was released at Blossburg, Pennsylvania, without waybill, for delivery to Los Angeles, California. The waybill was made out at Gang Mills, New York. Claimant is the regular assigned Agent-Operator at Blossburg, a one-man station, and contends he was deprived of a call to perform the service of making out the waybill. Carrier denied the claim, contending claimant was not available for service and was not exclusively entitled to the work.

This Board has adopted a general rule that the Carrier is required to attempt to call the employe for service antecedent to asserting the defense of unavailability. The burden of proof is not upon the employe to prove availability unless the aforementioned condition precedent is met. The record before us reflects no admissible evidence that the Carrier attempted to call the Claimant.

At page 32 of the record, appears the following letter, written by the Claimant to his superintendent, to wit:

"Blossburg, Pa.
9/16/62

J D M Supt.
E/L RR Co.
Hornell, N. Y. File: ORT 4 62

Refer claim L. W. Bennet for a call April 21, 1962:

On 4/21/62 the J. P. Ward Fdry worked on Saturday. Nothing said to me beforehand and on Friday night after work my family and myself drove to Uniondale, Pa. and was out of town Saturday. On Saturday morning when the crew was doing switching Mr. Bell of the J. P. Ward Fdry received permission from dispatcher to move this carload pipe fittings 60835 pounds, 1539.12 charges prepaid. Car SP 672499 billed to Kiener Co. at Los Angeles, Calif. on letter without rev. waybill. A memo running waybill was made at Gang Mills. I did not know of this until Monday morning and I then issued revenue waybill and forwarding by mail to cover this carload.

/s/ L. W. Bennett"

We must not overlook the rationale of the aforementioned general rule. To depart therefrom, without careful consideration, would lead to its abolition and encourage the Carrier to evade its responsibility to the employee. Recognizing the principle and intent of the rule, we are nevertheless not obliged to shut our eyes to demands of justice and apply the rule under facts and circumstances which would render our decision arbitrary and capricious.

In the law of Contracts, we find acceptance of a principle peculiarly applicable to the facts in the instant case, to wit:

"A tender or offer of performance is unnecessary, even though it might otherwise be required, if it appears that it would be a vain and useless thing, and it has been held that the uselessness of tender may be indicated by a refusal to perform or where the other party has incapacitated himself to perform. 17 American Jurisprudence 358. (Emphasis ours.)

In the instant case, an attempt to call the Claimant to service on the day in question, would have been a vain and useless act by virtue of the Claimant's admission that he was out of town. We must agree with the Carrier's position relative to the defense of unavailability.

Having denied the claim on the ground that Claimant was in fact not available, we have not considered other contentions of the parties.

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 Agreement of the parties was not violated.

AWARD

Claim denied in accordance with the above Opinion.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of February 1968.