Award No. 16098
Docket No. TE-14591

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

1. Carrier violated Rule 31 of the Agreement on Wednesday, May 30, 1962, when it required or permitted Conductor on Train No. 81 at Maplesville, Alabama, to handle Train Order No. 209.

2. Carrier will compensate Mr. O. C. Smitherman for one call of two (2) hours and forty (40) minutes at time and one-half rate for violation on May 30, 1962.

EMPLOYES' STATEMENT OF FACTS: On Wednesday, May 30, 1962, the following train order was copied and handled by Conductor on Train No. 81 at Maplesville, Alabama:

"Order No. 209 addressed to C&E No. 81.

No. 154 one fifty four Eng. 6716 meet No. 81 eighty one. Eng. 4164 at Fremont. Made complete at 2:46 A. M."

Mr. O. C. Smitherman is the regular assigned Telegrapher at Maplesville, Alabama, with assigned hours of 8:00 A. M. until 5:00 P. M. with one hour off for lunch. His assigned work week begins on Monday with rest days of Saturday and Sunday.

Carrier acknowledges that Conductor of Train No. 81 copied Order No. 209 on the date in question, but takes the position that it had a private agreement with Agent Smitherman to refuse this call.

Employes contended that claimant was available and should have been called to perform the work and is entitled to the payment of a call under the rules of this Agreement. Claim was appealed to the highest officer designated to handle claims, and declined by him. Claim is now properly before your Board for final adjudication.

"'RULE 31.

HANDLING TRAIN ORDERS

No employe other than covered by this agreement and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed **and is available or can be promptly located,** except in emergency, in which case the operator will be so advised by the Chief Dispatcher and will be paid for the call. At offices where two or more shifts are worked, the operator whose tour of duty is nearest the time such orders were handled will be entitled to the call.

NOTE: See letter of October 19, 1929 on page 42, relative to use of telephones by conductors." (Emphasis ours.)

(Exhibits not reproduced.)

OPINION OF BOARD: On May 30, 1962, a conductor copied a train order at Maplesville, Alabama, where Claimant was the regularly assigned operator, but was not on duty, it being outside his regular hours. Claimant had previously requested that Carrier not call him after his regular working hours because he felt it was best for his health (he had had a heart attack) not to make any extra drives from his home to Maplesville, a distance of some 25 miles. Carrier concedes that no effort was made to call Claimant on May 30th, and argues that his request not to be called was proof that he was unavailable without any call being made.

We have found in many cases that a defense based on non-availability was precluded by Carrier's failure to call or to try to reach a claimant; the reasoning behind such findings is well and briefly expressed in Award 14052 (Dorsey):

". . . Article 21(b) requires Carrier to make a good faith and reasonable effort to communicate with the not on duty employe covered by the Agreement to determine whether he is available."

But failure by a Carrier to make a call is not automatic proof that a claimant was available or could be promptly located. In Award 11498 (Dorsey) we held that an Operating Rule which required that an operator off duty leave a card in the station window showing where he could be located must be complied with as a condition precedent to a prima facie assumption that the off duty operator was available or could be promptly located; the effect in that case was that we agreed that the Operating Rule could be used as a communication tool to determine non-availability of an employe without Carrier otherwise trying to communicate with the employe.

Where we have precluded a defense based on non-availability because a Carrier failed to call or try to reach a claimant, we have generally specified that Carrier's conclusion that claimant was unavailable was not adequately based on facts from which Carrier could determine with certainty that claimant involved was unavailable or could not be promptly located.

Under the Train Order Rule, a Carrier which uses other than operators or dispatchers to handle train orders without attempting to call or to locate the off duty operator to determine whether he is available, does so at its peril; but, if, in fact, that determination has already been made, as, for instance, in the case where the off duty employe has already communicated to Carrier that he is not available, or will not be available, then to require Carrier to make the

call to determine what has already been determined would be to require an exercise in empty gestures. We find no evidence in the record or in our previous awards that the Agreement was intended to require such meaningless acts.

Organization argues that Claimant's request not to be called and Carrier's consent to it constituted an agreement between them in conflict with and in abrogation of terms of the collective Agreement, and that no individual agreement may be used to relieve Carrier of its obligation to carry out the terms of the collective Agreement. We agree that no agreement may be made by an individual employe and Carrier to modify or abrogate any term of the collective Agreement or to relieve an employe or Carrier of their obligations under the collective Agreement. And there can be cases where, by making an agreement with a Carrier that he would not be available, an employe might improperly give away the right of Organization to work reserved to it by the collective Agreement; but such a claim would have to be proved by the evidence and facts in that case; its validity would not be assumed simply from the fact of a Carrier's accession to an employe's request not to be called.

The question first to be determined in this case is whether Claimant's request not to be called and Carrier's compliance with it was an agreement between them to modify or to waive a provision of the collective Agreement, or whether it was, as argued by Carrier, simply an advance announcement by Claimant of his unavailability and an acknowledgment of it by Carrier. Was it, in other words, any more of an agreement than if Carrier had called at the time the involved work came up and Claimant had then told Carrier that he was not available because he wasn't feeling up to coming in and Carrier had accepted that statement?

In this case we find evidence only that Claimant did inform Carrier in advance of the involved incident that he did not wish to be called after his regular hours, giving reasons on the basis of which Carrier properly concluded that he was not available. There is no evidence which shows that his request and Carrier's compliance with it constituted an agreement to subvert or to alter the collective Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of February 1968.

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