

Award No. 17041

Docket No. TE-16003

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

(Supplemental)

Gene T. Ritter, Referee

## PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

**STATEMENT OF CLAIM:** Claim of the General Committee of the Transportation-Communication Employees Union on the Missouri-Kansas-Texas Railroad, that:

1. Carrier violated Rules 1(a) and 1(e) of the Telegraphers' Agreement when on Saturday, October 24, 1964, at 9:20 P. M., it caused, allowed or permitted an employee not covered by the Agreement to receive and record a train order on the dispatcher's telephone from the train dispatcher at St. Charles, Missouri, while the agent-telegrapher was off duty and the office was closed.

2. Carrier shall be required to compensate Marie M. Turner, telegrapher, in the amount of a two-hour call at overtime rate as per Rules 1(e) and 9(e).

**EMPLOYEES' STATEMENT OF FACTS:** Claimant on the date of claim was the regularly assigned rest day relief telegrapher at Baden and St. Charles, Missouri, on the following basis:

Saturday	7:30 A. M. to 4:30 P. M.	St. Charles
Sunday and Monday	7:00 A. M. to 3:00 P. M.	Baden
Tuesday and Wednesday	4:00 P. M. to 11:59 P. M.	Baden
Thursday and Friday	Rest Days	

The two stations named above, along with various others, are located on Carrier's Eastern Subdivision as follows:

	Miles from St. Louis
St. Louis (Union Station) (on TRRA rails)	0.0
Baden (on CB&Q rails)	8.7
Machens (on CB&Q-MKT rails)	26.9
St. Charles	39.2
Augusta	66.4
Mokane	125.1
Franklin	189.1

Claimant resides in St. Louis, about twenty (20) highway miles from the telegraph office in St. Charles, and the regular assigned Agent-telegrapher at St. Charles resides in Augusta, Missouri, 27.2 rail miles from St. Charles.

Saturday, October 24, 1964, freight train No. 53 departed Baden (freight terminal St. Louis) at 7:05 P.M. with train order No. 105 requiring this train to wait at Hartsburg until 12:10 A.M., Easley until 12:20 A.M., for freight train No. 52. About 9:20 P.M., a member of the train crew on No. 53 at St. Charles advised train dispatcher on telephone that they were setting out a bad order car with broken train line. Train dispatcher then issued train order No. 127 directing train No. 53 to meet No. 52 at Mokane. This order was made complete at 9:20 P.M.

Claim for two-hour minimum call was made by Telegrapher Turner account Conductor on train No. 53 copying train order No. 127 at St. Charles, completed 9:20 P.M., October 24, 1964. The Carrier declined the claim as indicated in copy of correspondence attached as Carrier's Exhibit A.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The involved rule in this dispute is Rule 1(e) of the Agreement, which is:

"No employe other than covered by this Agreement and Train Dispatchers will be permitted to handle train orders at Telegraph or Telephone offices where a Telegrapher is employed and is available, or can be promptly located except in an emergency, in which case the telegrapher will be paid for the call (and the dispatcher will notify the Superintendent so proper record and allowance will be made)."

The record discloses that on Saturday, October 24, 1964 at 9:20 P.M., Carrier permitted a Conductor to receive and copy a train order. Claimant was the regularly assigned rest day relief telegrapher at the point involved. Carrier attempts to justify its action in this dispute by first asserting that Claimant lived a substantial distance from the duty station, and was thus not available; and, secondly, urging this Board to find that the Organization did not present a prima facie case for the reason that no proof or evidence was introduced showing that Claimant was available. This Board cannot uphold Carrier's position in this dispute.

The language in Rule 1(e) of the Agreement is couched in clear and unequivocal terms. It, therefore, cannot be subjected to more than one interpretation. The Awards cited by the Organization make it abundantly clear that Carrier has a duty to, at the very least, make an attempt to locate the regularly assigned employee. The record in this dispute is absolutely void of evidence of any attempt to locate this Claimant being made. The burden of proving an attempt to locate the employee is on the Carrier. The Organization does not have the burden of proving availability of an employee unless Carrier can show a good faith attempt was made to locate such employee. Absent any showing that a reasonable effort was made by Carrier to call the employee, the defense of "availability" to a Claim such as this cannot be asserted. The distance an employee lives from a duty station is not pertinent to this dispute for the reason that it has not been made a subject or part of the Agreement. This Board is without power to add to the Agreement a

qualification that does not exist. This is in keeping with the well established principles set out in Third Division Awards Nos. 8260, 11520, 14052, 15717, and 15730; also Third Division (Supplemental) Awards Nos. 11464, 13267, 14656, 14657, and 14658. Accordingly, this Claim will be sustained.

**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 was violated.

#### AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1969.