

Award No. 18331
Docket No. TE-18603

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC
NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Norfolk and Western Railway (Lake Region), that:

1. Carrier violated the Agreement between the parties when, on October 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 31, and November 1, 2, and 3, 1968, it diverted H. D. Bean, owner of Relief Position No. 23, from his regular assignment to perform relief work in the absence of an emergency.
2. Carrier shall, as a result, compensate Claimant Bean eight (8) hours' pay at the rate of his regular assignment for each day improperly diverted as set forth above.

CARRIER DOCKET: 30-24-735 — BU-13730-18

EMPLOYEES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties, dated January 1, 1969, as amended and supplemented, is on file with your Board and by this reference is made a part hereof.

Originally entered into by the New York, Chicago and St. Louis Railroad and its employes on the Nickel Plate, Lake Erie and Western and Clover Leaf Districts represented by The Order of Railroad Telegraphers, the Carrier subsequently merged with the Norfolk and Western Railway and the Organization became the T-C Division, Brotherhood of Railway and Airline Clerks. The Agreement has remained in full force and effect, the Norfolk and Western assuming all obligations thereunder as though it was an original party as a condition of merging the two Carriers.

Claim was timely presented, progressed, including conference with the highest officer designated by the Carrier to receive appeals, and has remained declined. The Employes, therefore, appeal to your Honorable Board for adjudication.

Exhibit "M" - June 26, 1969—Conference confirmed and denial of February 14, 1968 affirmed.

Exhibit "N" - July 3, 1969—Rejection of denial - General Chairman to Manager Labor Relations.

(Exhibits not reproduced.)

OPINION OF BOARD: Petitioner contends that Claimant, in violation of the Agreement, was diverted from his regular assignment in order to fill a temporary vacancy in another assignment; and, therefore, he is contractually entitled to a day's pay for each claim date in addition to what he was paid. In support it cites:

RULE 18 - REGULARLY ASSIGNED EMPLOYEES DIVERTED TO OTHER THAN THEIR REGULAR POSITIONS

(a) Regularly assigned employees will not be required to perform service on other than their regular positions except in case of emergency. When they are required to perform service on other than their positions, they will be paid the rate of the position relieved or the rate of their regular positions, whichever is higher, and will be allowed actual necessary expenses while required to be away from their regular assigned station. (Emphasis ours.)

The facts are not in dispute.

Claimant was regularly assigned to a relief position working as follows:

Third trick - Coffeen, Illinois - Thursday
Third trick - Ramsey, Illinois - Friday
Third trick - Coffeen, Illinois - Saturday
Third trick - A&S Tower, Illinois - Sunday
Third trick - Madison Yard, Illinois - Monday
Thursday and Friday - Rest Days

An Operator, regularly assigned to third trick Madison Yard, died on October 7, 1968. Carrier did not have in its employ an available extra employee to fill the resultant vacancy. It diverted Claimant from his regular relief assignment and required him to fill the vacancy on the dates specified in the Claim. (NOTE: On Monday's Claimant's regular assignment included relief on third trick Madison Yard.) The regularly assigned employees holding positions to which Claimant was regularly assigned as relief were required to work their rest days.

Carrier's defenses are: (1) the diverting of Claimant was in conformity with past practice on the property; and (2) the death of the regularly assigned Operator created an "emergency" within the contemplation of the exception prescribed in Rule 18 (a) *supra*.

Past practice is material and relevant in the interpretation and application of a Rule only when the Rule as written is ambiguous. The first sentence of Rule 18 (a), *supra*, is not ambiguous. Therefore, Carrier's defense of past practice is without merit.

Carriers, understandably, jealously guard their legally recognized inherent prerogative to fix the number of their employees in the absence of statutory

or contractual mandates, neither of which is found in the instant case. But, that right has a concomitant liability should a Carrier—in the exercise of the unfettered right—fail to have in its employ sufficient employes to satisfy the needs of the service. Such a failure in and of itself does not free Carrier from its employer-employee contractual commitments.

Rule 18 (a) prescribes only one exception to Carrier being contractually restrained from requiring a regularly assigned employe to perform service on other than his regular position: "in case of an emergency." No other exceptions may be implied. When Carrier pleads "emergency" it is an affirmative defense as to which Carrier bears the burden of proof.

The death of an employe, standing alone as it does in this record, no more creates an emergency than a vacancy in a position created by the illness or unavailability of a regularly assigned employe for good reason such as, for example, jury duty or statutory limitations on hours of service. The *in futuro* occurrences of such contingencies are foreseeable. It is Carrier's responsibility to include and weigh such factors in its exclusive self determined number of employes required to satisfy the needs of the service. Should Carrier make an error in judgment it cannot be construed as an "emergency" within the contemplation of that term as used in Rule 18 (a).

This Board is cognizant of the practical necessity for Carrier having taken the complained of action under the circumstances set forth in the record. It, however, is without jurisdiction to vary the proscription of the Agreement and the liabilities which attach to violation.

No issues concerning either the measure of damages or the basis on which the payment was predicated having been raised in the handling in the usual manner on the property; and, for the foregoing reasons, we will sustain the Claim.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1970.

CARRIER MEMBERS' DISSENT TO AWARD 18331, DOCKET TE-18603
(Referee Dorsey)

Award 18331 is erroneous and we dissent.

The majority erred in holding that the word "emergency" did not encompass situations where, as in this case, the death of a telegrapher, resulted in insufficient extra men to fill vacant positions. The majority not only failed to recognize that Rule 18 was written for no other purpose than to provide some orderly procedure to follow in filling vacancies in situations where some unusual circumstance has caused a shortage of extra men, but also he contradicted his own findings in Award No. 10965 wherein it was held:

* * * * *

The Carrier being faced with an emergency, arising from Martin's illness, was free to take such good faith action as it deemed necessary under the circumstances.

* * * * * (Emphasis ours.)

An emergency is defined in Webster's Seventh New Collegiate Dictionary, published in 1963, as

1. an unforeseen combination of circumstances or the resulting state that calls for immediate action."

(Compare Awards 14109 (Hall), 14452 (Ives), 16918 (McGovern), 16935 (Mesigh), among others.)

The majority also chose to disregard past practice on the improper premise that Rule 18 was not in effect ambiguous, notwithstanding the fact that a disagreement as to its interpretation was the sole basis for the dispute. The word "ambiguous" has been defined as

"capable of being understood in either of two or more possible senses."

There is, therefore, no doubt that the phrase "except in case of emergency" as used in Rule 18 (a) is in fact ambiguous. The past practice, which was documented by the Carrier in the record, clearly showed that prior to the instant case both parties had interpreted the rule by applying it over the years to any situation where sufficient extra employees were not available to fill vacancies. The documentation used by the Carrier included only data which was contained in the Organization's file.

Award 18331, moreover, solved nothing insofar as the future application of Rule 18 is concerned, since the majority made no attempt to define an "emergency," holding simply that the situation (death of a telegrapher) which brought about the necessity to divert the Claimant was not an emergency.

The decision is counter to Awards 10965, 14109, 14452, 16918 and 16935, among others.

For the above reasons, we dissent.

R. E. Black
R. E. Black

P. C. Carter
P. C. Carter

W. B. Jones
W. B. Jones

G. L. Naylor
G. L. Naylor

H. F. M. Braidwood
H. F. M. Braidwood

**ANSWER TO CARRIER MEMBERS' DISSENT TO
AWARD 18331, DOCKET TE-18603**

The dissenters' confusion of "death" with "some unusual circumstance" has led them, rather than the majority into error.

Grim though it may be to consider, the fact of death is no "unusual circumstance." It comes once, inexorably, to all—and employes of the Carrier are not excepted. It follows that it was not the death of the employe that caused a shortage of extra employes. That shortage resulted solely from Carrier's failure to provide a sufficient force to meet "usual circumstances," including "death" at its normal rate of occurrence.

The Award correctly dealt with the dispute at hand, and the dissenters' peering into the future is beside the point.

**C. E. Kief
Labor Member**