

Award No. 5073

Docket No. 4178

2-EL-FT-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 78, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Federated Trades)**

ERIE-LACKAWANNA RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the Current Agreement, particularly Article III of the August 19, 1960 agreement the Carrier improperly denied the Shop Craft employees listed in Exhibit A, attached hereto, holiday pay for Christmas Day, December 26, 1960 and New Years Day, January 2, 1961.

2. That accordingly, the Carrier be ordered to compensate each employee listed in Exhibit A attached hereto, 8 hours per day at the applicable pro rata rate for two days, Christmas Day, December 26, 1960 and New Years Day, January 2, 1961.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Carrier raises in this claim the jurisdictional question in regard to Article V (a) of the August 21, 1954 Agreement, and alleges that the claim involving 44 of the 73 claimants herein was not handled in accordance with said Article V (a) and, therefore, Carrier argues that the claim of 44 of the 73 claimants must be dismissed.

Article V 1(b), the pertinent provisions thereof, reads as follows:

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of

notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed. . . ."

Carrier in its Statement of Facts refers to Assistant Vice President F. Diegtel's letter to General Chairman Black of the Sheet Metal Workers and General Chairman Murphy of the Electrical Workers, dated June 21, 1961, the pertinent provisions of which are as follows:

"This claim has not been handled in accordance with the provisions of agreement rules as you allege. Under the provisions of paragraph (b) of Article V of the August 21, 1954 Agreement, it dictates that 'If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed * * *.' Accordingly, the claim for the following listed employes should be considered closed for the reason that Local Chairman Frank Owcarz failed to advise Division Car Foreman Reed Haag that the denial decision contained in the Division Car Foreman's letter of February 18, 1961 was not acceptable and that the matter was to be appealed.

Lombardi, Joseph	Fitzgerald, Francis
Peters, Walter	Davies, Vernon
Gasper, Victor	Kerekes, William
Patelunas, Martin	Golonke, Nicholas
Viselli, Emilio	Pronitis, Peter
Giavannoni, Vincent	Macko, Michael
Savage, Joseph	Jacoby, Jacob
Tarantini, Frank	Owcarz, Frank
Minkel, William	Szabad, Julius
Compton, Theodore	Kosty, George
Perrick, Andrew	Marinchak, George, Sr.
Moschorak, Michael	Cottinilli, Joseph
Gaydula, Michael	Hvasta, Carl
Ayers, Elmer	Coolick, Michael
Szabad, Louis	Horvath, Frank
Baker, Stanley	Sinclair, John
Wozney, John	Worrell, Herbert
Chamberlain, Roy	Tugend, Carl
Riedmiller, George	Charlesworth, Russell
Beaver, Cloyd	McGinley, Sylvester
Schimelfenig, Edward	Stancavich, Clement
Miller, Peter	Peffer, Stanley"

The Organization in its rebuttal to Carrier's submission does not deny the procedural defect alleged by Carrier as to the 44 claimants listed above.

In order for this Board to have jurisdiction of the claim of the above named 44 claimants, it is mandatory that, in this instance, the provisions of Article V (b) of the '54 Agreement be complied with by said claimants. Inasmuch as the claim of the 44 claimants, listed above, was not processed

in accord with said mandatory requirements, of Article V (b) of '54 Agreement, the claim of these said 44 claimants must therefore be dismissed.

Carrier objects to the claim of A. Matalus and P. Needham for the reason that claim for these two claimants are being made for the first time before this Board, and therefore Article V of August 21, 1954 Agreement is violated. The Organization, in its rebuttal to Carrier's submission, agrees that these two employees were not shown on the initial claim and the Organization concludes that the claim for these two employees is withdrawn. Therefore, the claim of A. Matalus and P. Needham is dismissed.

In regard to the merits of the claim of the remaining claimants for Christmas and New Year's holiday pay, Carrier alleges that said claimants cannot be considered as "available for service" within the intent and meaning of Section 3 (ii) and the "Note" therein of Article III of the '60 Agreement for failure to comply with Article IV of the '54 Agreement. This objection was found by this Division in Award 5061, to be without merit and therefore must be rejected.

Also, Carrier contends that by virtue of Rules 16, 17 and 18 of the agreement with International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, and Rules 22, 23, 24, and 25 of the Agreement with System Federation No. 78, said rules prevented claimants from being considered "available for service" on the workday immediately preceding and following each holiday. This Board has previously rejected the test to determine "available for service" as requiring an employee to respond to a call for service, and we have pointed out that the test in so determining "available for service" within the intent and meaning of Section 3 (ii) and the "Note" therein of Article III of the '60 Agreement is whether or not Carrier called an employee, such as claimants herein for service, and whether said employee did or did not respond to such call for service from Carrier. There is no contention in this dispute that Carrier called Claimants for service and thus these other claimants herein were "available for service" within the intent and meaning of said Section 3, Article III of the '60 Agreement.

It is therefore the opinion of this Division that the claim of claimants herein (other than the 44 claimants listed above, whose claim was dismissed for failure to comply with Article V (b) of '54 Agreement), must be sustained.

AWARD

- (a) Claim of 44 claimants specifically named in the Award dismissed for failure to comply with Article V (b) of August 21, 1954.
- (b) Claim of A. Matalus and P. Needham dismissed.
- (c) Claim of all other claimants herein sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March, 1967.

[See Award 5061 for Carrier Members' dissent.]

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