

The Second Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

Parties to Dispute:

{ International Association of Machinists  
and Aerospace Workers

{ Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employees:

1. That under the terms of the controlling Agreement, Machinist Ronald Bain, employed by Elgin, Joliet and Eastern Railway Company at Joliet, Illinois was unjustly deprived of his right to fill a newly created position as provided for in Rule 18 of the controlling Agreement.
2. That Machinist Bain be compensated at the straight time rate of pay for February 2, 16, 17, 23 and 24 and March 2 and 3, 1971 because of being denied the right to work those dates by being compelled to remain on improper rest days as a result of Carrier's violation of Rule 18.
3. That Machinist Bain be compensated at time and one-half rate of pay and double time rate of pay, as applicable, because of being compelled to work on the rest days of the position improperly denied him as a result of the Carrier's violation of Rule 18. Those dates being February 20, 21, 27 and 28 and March 6 and 7, 1971.
4. That payment as set forth in paragraphs 2 and 3 above be continued while the claim is being progressed.
5. That the Carrier violated the time limit provision of Article V of the August 21, 1954 Agreement when it failed to respond to Local Chairman's claim of March 22, 1971 setting forth the items of claim as outlined in paragraphs 2, 3 and 4 above.

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.

On March 6, 1971 Petitioner filed a claim with Carrier's General Foreman on behalf of claimant who, Petitioner alleges, was not allowed to exercise his seniority to a newly created machinist position at the locomotive repair shop in Joliet, Ill. The claim was denied on March 10, 1971, and appealed to Mr. Downes, Superintendent of Motive Power on March 22, 1971. On June 7, 1971 Local Chairman Sako wrote to Mr. Downes requesting payment of the claim due to the latter's violation of Article V of the August 21, 1954 Agreement account he failed to answer the claim within 60 days of March 22, 1971, the date same was filed with him. Conference was held on June 23 and on June 24. Mr. Downes wrote to Mr. Sako advising him that he had in fact violated the applicable time limits involved. Consequently, he agreed to pay the claim for the specified dates save February 20, 1971 on which date claimant had laid off. Under date of June 25, Mr. Sako wrote to Mr. Downes that his partial settlement was not acceptable and that the claim would be appealed. On September 24, 1971, General Chairman Cooksey wrote Chief Mechanical Officer Seipler requesting when the payment agreed to with Mr. Downes would be paid. Mr. Seipler construed this to be an appeal from Mr. Downes' settlement dated June 24 and on October 18, 1971, he declined same as not being timely filed pursuant to Article V of the 1954 Agreement.

Petitioner urges that the claim, including paragraph (c) thereof, the continuing aspect, be allowed as presented since Mr. Downes never disallowed same in writing within 60 days from the date it was filed as required by Article V of the August 21, 1954 Agreement. Carrier poses several procedural objections, namely, that Petitioner failed to timely appeal Mr. Downes' declination of June 24; Petitioner expanded its original claim; Petitioner by-passed a stage in the appellate procedure; and a variance exists in the claim as handled on the property and the one appealed to this Board. We do not find any of these arguments persuasive.

It is undisputed that disposition of the present claim hinges on the application of Article V of the August 21, 1954 Agreement, establishing time limits for the presentation and appeal of claims or grievances. The provisions thereof are mandatory requiring that should any claim be disallowed, the Carrier shall within 60 days from the date same is filed, notify Petitioner in writing of the reason for such disallowance. And if not so notified, the claim shall be allowed as presented. There is nothing in the record before us revealing where Mr. Downes notified Petitioner, in writing, that any part of the claim, save the date of February 20, was disallowed. It is irrelevant that he might have disallowed paragraph (c) of the claim while conference was held with Petitioner on June 23. Article V of the 1954 Agreement requires that such disallowance be given in writing and such was not done. Mr. Downes' letter of June 24 failed to even mention paragraph (c) nor can we infer therefrom that he disallowed paragraph (c). In fact paragraph (c) was never declined in writing until Mr. Seipler's letter of October 18, 1971.

Carrier admits that Mr. Downes failed to mention paragraph (c) in his June 24 letter but contends this was not fatal since, in his opinion, that part of the claim was so vague and uncertain that it could not be considered as a valid claim, therefore it did not require an answer. We do not consider paragraph (c) of the claim appealed to Mr. Downes to be vague and indefinite as Carrier contends. It was merely the continuing aspect of paragraphs (a) and (b) of the same claim. Even if we accept Carrier's argument, merely because part of a claim is vague, this does not relieve Carrier of its obligation to make a timely denial as required by

Article V. See Third Division Award 19361. Consequently, when Mr. Downes failed to timely disallow the claim it became payable as presented, inclusive of paragraph (c).

We do not find merit to Carrier's argument that Petitioner failed to timely appeal Carrier's declination of June 24, 1971. We have no reason to dismiss Petitioner's contention that all it had appealed was the exclusion of the February 20 date as a valid claim date. When Petitioner discovered that claimant had, in fact, laid off on February 20, appeal for this date was dropped. Mr. Cooksey's letter of September 24, 1971 was never intended to be an appeal of Mr. Downes' letter of June 24, 1971 since Mr. Downes never denied the claim, and but for February 20, there was nothing to appeal. We must accept Petitioner's contention that it was merely requesting when the claim would be allowed as agreed to with Mr. Downes. We thus conclude that Petitioner has not violated Article V of the 1954 Agreement.

We find no merit to the procedural objections raised by Carrier and we are hereby compelled to sustain the claim, including paragraph 4 thereof for the dates after March 6 up to June 24 when Carrier agreed to allow the claim. Paragraphs 2 and 3 of the claim are now moot since payment has been made for these dates.

It is to be noted that the Award herein is premised on violation of Article V of the August 21, 1954 Agreement, and in no way reflects on the merits of the dispute, they not having been handled in the usual manner on the property.

A W A R D

Claim sustained to the extent indicated, supra, in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of January, 1974.

