Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6993
Docket No. 6853
2-PCT-MA-'76

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: ( International Association of Machinists and Aerospace Workers
( Penn Central Transportation Company

Dispute: Claim of Employes:

1. That the Carrier violated the controlling agreement when it failed to apply the provisions of Rule 2-A-1(e), fourth paragraph, in the handling of vacancies occurring in the Machinists' positions on May 10, 11, 12, 13, 14, 1971.

2. That the Carrier violated the controlling agreement on September 27, 1971, when it failed to comply with the provisions of Rule 4-0-1, (A)-(B)-(C) (the provisions of this Rule are in fact, Article V of the National Agreement, dated August 21, 1954), when at the second level of the grievance procedure, the grievance was denied on form letter AW 859, which gives no reason in writing.

3. That the Carrier be required to compensate the designated Claimant for three (3) hours pay at the Grade "E" rate for May 10, 11, 12, 13, 14, 1971.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

While the instant claim was pending before this Board, the Carrier by letter dated February 5, 1975 (Carrier's Exhibit "A") advised the General Chairman that:

> "After further consideration, and without prejudice to our position in this or any similar case, we are arranging to dispose of the claim by allowing same as presented."

The Claimant was paid the full amount of compensation due him under the claim, on March 25, 1975. The Employees contend that the Carrier has no right under the Railway Labor Act and the Agreement of the Parties to unilaterally pay the claim without prejudice to the merits of the dispute on the property when the dispute was properly pending before this Board.

Since the Claimant has been paid in full, we find the issues now presented to this Board to be moot and we therefore will dismiss the claim. See Second Division Award 6143 and Third Division Award 18908.

A W A R D

Claim dismissed.

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 23rd day of January, 1976.

LABOR MEMBERS' DISSENT TO AWARD NO. 6993

DOCKET NO. 6853

The neutral in this instant dismissal award has dodged his responsibilities flowing from his acceptance of deadlocked cases which carry the Railway Labor Act mandate for adjudication.

The award dictum on this issue states:

> "While the instant claim was pending before this Board, the Carrier by letter dated February 5, 1975 (Carrier's Exhibit "A") advised the General Chairman that:
>
> > "After further consideration, and without prejudice to our position in this or any similar case, we are arranging to dispose of the claim by allowing same as presented."

It was pointed out to this neutral that the petitioner's Notice of Intent letter was filed with the Board on November 22, 1974 which was some 2½ months before the Carrier engaged in their deviousness now rewarded by this neutral. It will be noted that in the above quote the Carrier allowed the claim without prejudice or, in plain words, it was not paid on merits. The Employees would not accept this sharpness and so the next chapter of Carrier's deviousness shows in their submission wherein they state:

> "That upon further review of the claim, it was determined that the claim had merit and therefore would be allowed as presented."

So now the "claim had merit" which is directly opposite of what their letter said as herein before quoted.

The next chapter of deviousness unfolded before the Board when the Carrier Representative took the position that the claim was allowed because the Carrier had not properly answered within the 60 day time limits. Supposedly this oral admission would cover Item 2 of the dispute which was:

> "2. That the Carrier violated the controlling agreement on September 27, 1971, when it failed to comply with the provisions of Rule 4-0-1, (A)-(B)-(C) (the provisions of this Rule are in fact, Article V of the National Agreement, dated August 21, 1954), when at the second level of the grievance procedure, the grievance was denied on form letter AW 859, which gives no reason in writing."

If this were the reason for payment then again the claim was not allowed on merit but on a technicality.

This deviousness and deceit was traced and outlined for the neutral along with the Employees' position of its right and duty to police the agreement as sustained by legal tenets and precedents from all Divisions of this Board.

The Employees' claim was in three parts with the other two reading:

> "1. That the Carrier violated the controlling agreement when it failed to apply the provisions of Rule 2-A-1(e), fourth paragraph, in the handling of vacancies occurring in the Machinists' positions on May 10, 11, 12, 13, 14, 1971."

> "3. That the Carrier be required to compensate the designated Claimant for three (3) hours pay at the Grade "E" rate for May 10, 11, 12, 13, 14, 1971."

So it is clearly discernible that at the most only Item 3 had been allowed and was therefore moot before this Division. This Referee had

a duty to adjudicate the other two parts of this claim as mandated by the Railway Labor Act and rules of this Division. By not doing so he has illegally and improperly denied the Petitioners the rights of due process.

The erroneous award dictum on this issue was:

> "The Claimant was paid the full amount of compensation due him under the claim, on March 25, 1975. The Employees contend that the Carrier has no right under the Railway Labor Act and the Agreement of the Parties to unilaterally pay the claim without prejudice to the merits of the dispute on the property when the dispute was properly pending before this Board.
>
> Since the Claimant has been paid in full, we find the issues now presented to this Board to be moot and we therefore will dismiss the claim. See Second Division Award 6143 and Third Division Award 18908."

This denial of rights flies in the face of prior sound precedents from this Board as was pointed out to the neutral. Third Division Award No. 20237 is very much in point wherein is stated by Referee Eischen:

> "We have carefully considered the arguments marshalled and the awards cited by the respective parties on the question of mootness and individual settlements. We are not unaware of the divergent awards and conflicting policy considerations on this question, but upon reflection we are convinced that the sounder principle is the one upholding the Organization's right, indeed its duty, to police the Agreements it has negotiated, irrespective of individual employe settlements. It appears self-evident that this principle is most compelling in cases such as the instant one where not just a monetary claim is at stake but alleged violations of the negotiated procedural safeguards surrounding the imposition of employe discipline. Accordingly, we hold that notwithstanding the purported settlement on the property, this claim is properly presented for consideration by the Board. See Awards 3416, 4461, 5793, 5834, 5924, 6324, 6958."

Also very much in point is Second Division Award No. 6557 negating this neutral's holdings that the monetary portion payment makes the issue moot. In pertinent part Referee Lieberman held therein:

> "Carrier next advances the argument that the Claim should be dismissed since there is no claim for money involved and there is no identifiable claimant. We do not find that the awards cited by Carrier in support of this argument are relevant to the dispute involved herein. A reading of Section 2 of the Railway Labor Act and Circular 1 of the National Railroad Adjustment Board indicate that this Board has the authority to deal with disputes "concerning rates of pay, rules or working conditions". Rule 129 is a Rule of the Agreement and deals with working conditions; yet no interpretation or application of this rule could conceivably deal with a claim for money. We do not find that the Board is stopped from handling disputes involving rules such as this (see Awards 1393, 1424, 1462, 1466, 6034, 6051 and others)."

The Petitioner vigorously dissents to this illegal and improper denial of rights to have our disputes adjudicated.

G. R. DeHague

G. R. DeHague
Labor Member