

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (Clayton L. Hallmark (Employee)
(Norfolk and Western Railway Company

Dispute: Claim of Employees:

Claim on behalf of Clayton Hallmark as follows:

1. Restore or add my name to the radio-telephone maintainer roster with a date of seniority of March 3, 1980.
2. Agree that I am entitled to exercise my seniority rights to displace Mr. Lee Wilshire or any other junior employee on the radio-telephone roster.
3. Pay the difference between what I actually earn as an employee of Norfolk and Western and what I would have earned as a radio-telephone maintainer from April 10, 1981, to the date this grievance is settled.
4. Agree that I not be discriminated against for exercising my grievance rights under the IBEW contract and the Railway Labor Act.
5. Make me whole with respect to any and all losses arising from the above-stated violations of the IBEW agreement.

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 employes 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 were given due notice of hearing thereon.

The Claimant was furloughed from his position as Gang Lineman on March 27, 1981. On April 9, 1981, the Claimant wrote to the Carrier indicating his desire to "exercise...seniority rights to displace junior employee Lee Wilshire in the Bellevue, Ohio, radio shop". On April 16, 1981 the Regional Engineer responded to the Claimant that "you do not have any seniority as a Class I Communication Electronics Technician. Therefore it would be impossible for you to displace Lee Wilshire...".

By date of June 1, 1981, the Claimant wrote to the Assistant Division Engineer to present a "grievance under rule 17 of my labor contract" based on his exchange of correspondence with the Regional Engineer as noted above. This is the claim quoted above which is now before the Board for review.

On August 28, 1981, the General Chairman wrote to the Regional Engineer (the next step in the claims handling progression) as follows:

"Please find enclosed claim dated June 1, 1981 submitted by Mr. Clayton Hallmark. It is being presented to you for your consideration and satisfactory settlement. However, we find that Mr. Herr has failed to respond to the letter of June 1, 1981, in accordance with the grievance procedure and, therefore, the claim should be allowed as presented by default."

Rule 17 (a) reads as follows:

"Should any claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claim or grievances."

The Claimant argues that his June 1, 1981 claim received no response within the specified 60 days and must therefore be "allowed as presented".

The Carrier does not disagree that the claim was not answered within 60 days after June 1, 1981. The Carrier argues, however, that the claim should be dismissed on either of two other procedural grounds.

The first of these is that seniority rosters were sent to all employees, presumably including the Claimant, on January 24, 1981. This roster showed the Claimant as holding seniority only as gang Lineman. If he wished to protest the failure of the Carrier to carry his seniority as Radio-Telephone Maintainer, a claim should have been filed within 60 days of the receipt of the seniority roster. To ask to "restore or add" his name to the Radio-Telephone Maintainer roster five months later is untimely.

The second procedural matter raised by the Carrier is that the Claimant had initiated another claim prior to June 1, 1981 involving his seniority rights both as a Section Lineman and as a Radio-Telephone Maintainer and that this matter was in adjudication before a Public Law Board at the time the present claim was filed. Thus, according to the Carrier, it had no obligation to respond to such a "duplicate claim".

The Board finds that the Carrier's procedural defenses are insufficient to defeat the mandatory language of Rule 17 (a). The claim, here under review arose concerning a specific incident -- the failure of the Carrier to grant a displacement right to the Claimant subsequent to his furlough on March 27, 1981. He raised a timely claim on this incident on June 1, 1981. Regardless of whether or not it had any merit, Rule 17 (a) requires a response within 60 days. There is no automatic obligation on an employee to respond to a seniority listing showing him as holding seniority as Gang Lineman (which in fact he did hold). He was already contesting his status as Radio-Telephone Maintainer. As to the other pending claim, this reads as follows:

"1. Reinstatement C.L. Hallmark to the position of section lineman at Creston, Ohio, or if that job is abolished, reinstate him to the position of radio-telephone maintainer at Bellevue, Ohio.

2. Remit back pay for the period Claimant was laid off, July 3 to August 13, 1980, at the section Lineman's rate of pay, \$2,149 per month.

3. Pay the difference between what Claimant actually earns and what Claimant would have earned as a section Lineman or radio-telephone-maintainer, whichever amount is greater, from August 14, 1980, to the date of Claimant's reinstatement to the job of section Lineman (or if that job is abolished, to the position of radio-telephone maintainer at Bellevue.

4. Restore Claimant to the position (that is, ranking) Claimant occupied on the section Lineman and radio-telephone maintainer rosters before Claimant was removed from the rosters.

5. Agree that Claimant's service on the railroad has not been interrupted and that Claimant will sustain no loss of time for vacation, retirement, sick pay, or any other purpose.

6. Agree that Claimant will not be discriminated against for exercising his grievance rights under the Railway Labor Act.

7. That Claimant was unjustly assessed a 30-day deferred suspension following a hearing on September 30, 1980. Accordingly, his record should be cleared of all reference to the investigation and suspension."

While the matter is indeed similar, it can be readily perceived that this claim concerned events in 1980 quite separate and apart from the Claimant's furlough in March 1981 and his subsequent claim of displacement rights. (The earlier claim, to be referred to further below, was not the subject of a Public Law Board Award dated August 12, 1981 -- two-and-a-half months after the new claim was initiated.)

The Board thus finds that, while the Carrier's procedural comments may in fact go to the merits of the dispute, there is no basis here for the Carrier's failure to respond to the June 1, 1981 claim. Rule 17 (a) is precise and provides a self-effectuating remedy. As the Board noted in Award No. 9930 (in which a claim was found to be untimely and therefore was dismissed: "The parties...have bargained precise limits in claims handling applicable to both the Organization and the Carrier. The Board has no authority to bend or relax these requirements."

Of necessity, therefore, the Board must find that the claim must be "allowed as presented". However, in effectuating such award, the Board is clearly limited by two other awards of claims filed by the same Claimant. This claim cannot provide a remedy which would negate such other awards.

Award No. 9904 concerned the Claimant's protest of the Carrier's revocation of "any and all...seniority" with the Carrier, as a result of his failure to make a timely response to the Carrier's letter of July 2, 1981 calling him back to work from furlough. Award No. 9904 denied the claim, thus sustaining the termination of the Claimant's seniority as of July 2, 1981. The Board has no basis to reconsider the result of Award No. 9904, and so remedy here, if any, must be limited to the period prior to July 2, 1981.

The Board now turns to the other claim, mentioned above, which was pending at the time this claim was initiated. The result of that claim is found in Public Law Board 2120, Award No. 35. Claim No. 4 within that award concerned, in part, the Radio-Telephone Maintainer roster, and that claim was left unresolved by the Public Law Board in its award, as follows:

"Claim 4- There is little evidence in the record on this and we remand it to the parties. It should be simple to determine whether or not he would be entitled to seniority as a radio-telephone maintainer by the working of the contract. He is not entitled to seniority as a section Lineman as outlined in the decision on Claim 1."

Within the parameters of these two awards, therefore, the Board is now required to see that the claim is "allowed as presented". Since the Claimant has no seniority status from July 1981 forward (Award No. 9904) and since the Claimant's Radio-Telephone Maintainer seniority was left unresolved (Public Law Board 2120, Award No. 35), the Board finds that the only portion of the claim which may still be "allowed as presented" is Claim No. 3 -- but only up to July 6, 1981, the date on which he was instructed to report to work but failed to do so.

To repeat for emphasis, this finding is based solely on the provisions of Rule 17 (a) and does not make any determination as to the Claimant's qualification, etc.

A W A R D

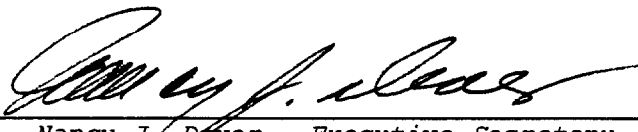
Claim No. 3 sustained in accordance with the Findings.

Claim Nos. 1, 2, 4, 5 denied, as discussed in the Findings.

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Award No. 10173
Docket No. 9620-I
2-N&W-I-'85

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of January 1985.