Award No. 6860
Docket No. TE-6772

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Central Railroad of New Jersey, that

(1) The Carrier violated the agreement between the parties when it improperly compensated Messrs. Downes, Kennedy and Farrell (two occasions) on certain days for services performed off their regular assignments; and

(2) The Carrier shall compensate each claimant for the difference between the straight time rate paid and the time and one-half rate due for services performed on their assigned rest days as follows:

Downes—July 15, 16, 22, 23, 29, 30; August 5, 6, 12, 13, 19, 20, 27; September 2, 3, 9, 10, 16, 17, 23, 24, 30; October 1, 7, 8, 14, 15, 21, 22, 29; November 4, 5, 11, 12, 18, 19, 25, 26; December 2, 3, 9, 1951.

Kennedy—January 12, 13, 19, 20, 26, 27; February 2, 3, 1952.

Farrell—August 8, 15, 22, 29; September 5, 12, 19, 26; October 3, 10, 17, 24, 31; November 7, 14, 28; December 5, 1951; January 21, 22, 28, 29; February 4, 5, 1952.

(3) The Carrier shall compensate each claimant for eight hours at the straight time rate for each day they were suspended from duty on their regular assignments as follows:

Downes—July 17, 24, 25, 31; August 1; September 4, 5, 11, 12, 19, 25; November 6, 7, 20, 21, 27, 28; December 4, 5, 1951.

Kennedy—January 14, 15, 21, 22, 28, 29, 1952.

Farrell—August 13, 20, 27; September 3, 10, 17, 24; October 1, 8, 15, 22, 29; November 5, 12, 19, 22; December 3, 1951; January 23, 30, 1952.

they were the successful applicants. An examination of the dates claimed for each claimant compared with the date of the assignment bulletin, indicates that this is also the understanding of claimants.

Upon the expiration of the fifteen days, Article 6(c) provides that the complete penalty to which claimants are entitled shall be the application of Article 22. As the claims submitted to date do not conform to the penalty provided for in the governing rule, they were denied.

In progressing these claims to this Board the Organization is asking this Board to exceed the powers granted it under the Railway Labor Act, as to sustain the claims as presented would be, in effect, writing a new rule. This was recognized in almost identical cases in Awards 3633 and 3551 of this Division. It was also recognized by this Division in Awards 2263 and 2818 wherein the Board, in similar cases, sustained the claims as made because of no specific penalty being provided in the comparable rule.

In the instant case we have a specific rule dealing with this specific circumstance which includes a specific penalty. To assess any additional penalty upon this Carrier would be beyond the authority of this Board as prescribed by the Railway Labor Act, as amended.

For the reasons stated above, the claims as presented should be denied in their entirety.

The Carrier affirmatively states all data contained herein has been presented to the employe representatives.

OPINION OF BOARD: The facts giving rise to this controversy are set forth at length in the respective submissions and not in dispute, hence reference thereto will be brief and highly summarized.

For the factual picture, as well as all other purposes, essential to disposition of the questions presented it suffices to say that the three involved Claimants were each assigned by bulletin to seven day levermen positions, at Carrier's Interlocking Tower "A", Jersey City, N. J., but were not placed on such positions within fifteen days after expiration of such bulletin because of Carrier's action in requiring them to remain on seven day levermen positions, theretofore occupied by them at such point, for the period of time covered by the dates set forth in the claim; that during such period, because of differences in rest days of the positions assigned and those worked, Claimants Downes and Kennedy, while filling the latter positions, worked the two regularly assigned rest days of the positions assigned by bulletin and were off work on two of the regularly assigned working days of such positions; and that due to the fact Tuesday was an assigned rest day for each of the positions in which he is interested Claimant Farrell, worked on but one of the rest days of the position to which he had been assigned by bulletin and was deprived of work on only one of its working days.

The Claimants state, and correctly so, that in view of the foregoing factual situation the dispute resolves itself in the application of pertinent rules of the Agreement. Two of such rules referred to in the Agreement as Articles, are conceded by both parties to be involved and applicable. One of these is subsection (c) of Article 6. The entire Article deals generally with bulletins and assignments. However, subsection (c) thereof is all that is here important. It reads:

> "Successful applicant will be placed on position within fifteen days after expiration of the bulletin. If not so placed, Article 22 will apply."

The second rule conceded to have application is Article 22 which, so far as pertinent, reads:

"Regularly assigned employes will not be required to perform service on other than their regular positions except in emergencies. When they are required to perform service on other than their regular positions they will be paid the rates of the positions they fill but not less than their regular rate, and in all cases will be allowed actual necessary expenses while away from their regularly assigned position, and will be paid on a pro rata basis at the rate paid for the day for all actual traveling time to and returning from the temporary assignment, not to exceed the traveling time required from regularly assigned location to the temporary assignment. Except for travel time, if any such employe would receive time and one-half rate through the application of Article 21, on any day such service is performed, the time and one-half rate shall apply on that day or days."

Claimants insist, while the Carrier denies, that the following rules are also applicable. Article 21(m) providing:

"**Service on Rest Days**

Employes required to perform service on their assigned rest days within the hours of their regular week day assignment shall be paid on the following basis:

On seven-day positions:

At the rate of time and one-half with a minimum of eight (8) hours."

and Article 25(d) which reads:

"Employes will not be required to suspend work during regularly assigned hours or suspend work to absorb overtime."

When analyzed the gist of Claimants' position is that by reason of the first three of the foregoing quotations from the Agreement they were entitled to be compensated under the provisions of Article 22 at the rate of time and one-half for working the rest days of the positions to which they were assigned by bulletin and should have been working on the dates in question; and that in addition, under and by virtue of the provisions of Article 25(d) as quoted, they were entitled to be paid eight hours at the straight time rate for being suspended from the positions to which they had been assigned by the bulletin when they were off work on the assigned rest days of the positions they were required to work.

Supplementing what has just been stated and pinning Claimants' position with their own language we quote from their ex parte submission where the following statement appears:

". . . In other words, this instant claim merely covers a request that each of the claimants named in this case be paid as if they had worked the positions to which they were assigned by bulletin, and that means that they be paid at the time and one-half rate for working the rest days of their rightful positions under Article 21, plus pay for such days that they were forced to take as rest days, being actually suspended from work on these days contrary to Article 25(d), also that they be paid the higher rate of pay, in addition to travel time as well as other necessary expenses as provided in Article 22."

Highly summarized the crux of Carrier's position is that Article 6(c) provides that the complete penalty for its failure to place Claimants on the positions to which they were assigned by the bulletin within fifteen days

after its expiration shall be the application of Article 22; that 25(d) has no application; that the provisions of Article 21 have no application under the facts of record; and that the claims as presented should be denied in their entirety.

The parties have been diligent in citing decisions of this Division on which they rely as supporting their respective positions. Upon careful review and consideration of all such decisions it may be said that no one of them deals with the force and effect to be given rules identical with Articles 6(c) and 22 here involved. The result, without detracting anything from what is there said and held, is that such decisions are of no value as controlling precedents in determining the proper construction to be given such Articles.

Turning to Article 6(c) no one can dispute that its language is clear and unambiguous. Beyond doubt the first sentence requires that a successful applicant will be placed on the position he has bid in within fifteen days after expiration of the bulletin. If the rule stopped at this point as in the rule involved in Award No. 3437, on which Claimants rely, there might be sound basis for giving that Award some weight as a controlling precedent. But it does not do so. Instead, the next and last sentence of such Article goes on to say "If not so placed, Article 22 will apply." To elaborate, this clear and unmistakable language is susceptible of but one construction. That, in our opinion, is that if the Carrier fails to place a successful applicant on a position as required by the first sentence of such Article then, and in that event the price or penalty it will be required to pay for failing to do so is that fixed by the terms and provisions of Article 22.

Thus we come to the construction to be placed on Article 22. Viewed in the light of the rule which makes it applicable it is our opinion this Article must be construed to mean that when an employe, who has not been placed on a position in conformity with Article 6(c), is required to perform service on a position other than the one on which he should have been placed he must be paid (1) the rate of the position to which he is entitled and on which he should have been placed or the rate of pay of the position filled, whichever is the higher; (2) the expenses contemplated by the terms of Article 22, if any such expenses have been incurred; and (3) the time and one-half rate, prescribed by Article 21, for all rest days of the position on which he should have been placed which he worked on the position he was required to fill.

Inasmuch as Articles 6(c) and 22 are to be regarded as complete in themselves and fix the price and/or penalty to be paid for failure to place a successful applicant on a position within fifteen days after the expiration of the bulletin we are forced to the conclusion there is no sound ground for holding that Article 25(d) has application under the facts and circumstances of record. Our view that Article 21 does have application, contrary to contentions advanced by the Carrier, has been previously indicated.

What has been heretofore stated requires a decision that Claim 1 be sustained; that Claim 2 be sustained in toto except as to January 22 and 29 1952, and February 5, 1952, which dates are now conceded by Claimant to have no support in the record; and that Claim 3 be denied.

With respect to Claim 4 Claimants insist, and Carrier does not deny, that requests for travel time and other expenses contemplated by Article 22 were asserted on the property. There is little in the record on this point. However, Carrier admits that all Claims were denied below because they did not conform to the penalty provided for in the governing rule. This as we have seen, was erroneous. In view of these circumstances we believe it is only just that Claim 4 be remanded to the property for further consideration by the parties on matters of travel time and other expenses contemplated by Article 22, if any, with permission to bring such phas