Award No. 9949

Dock No. CL-8129

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Raymond E. LaDriere, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly the Scope and Rule 7-B-1 (c), when it assigned M. of E. employes, not covered by the Clerks' Rules Agreement, to perform duties accruing to Group 2 employes at the Storeroom, Logansport, Indiana, Chicago Division, and when it failed to allow this claim as provided in Rule 7-B-1 (c).

(b) E. L. Kitchel and twelve other named Group 2 employes should be allowed sixteen hours' pay as a penalty for each day involved commencing January 1, 1952, and continuing until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimants in this case hold positions and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimants named by the Brotherhood in this case, are all Group 2 employes in the Stores Department, Logansport, Indiana, Chicago Division, and have seniority dates on the seniority roster of the Chicago Division in Group 2. They are, F. J. Dietl, E. L. Kitchell, W. E. Strode, H. Erwin, J. Wright, R. L. Randolph, L. F. Weaver, R. P. Shidler, W. R. Griffith, E. C. Humes, J. P. Renkenberger, C. E. Petrie and J. Kleplinger.

OPINION OF BOARD: The claim was originally filed March 31, 1952, with the Engine House Foreman who neither allowed nor denied the same. Appeal was taken to the Superintendent who discussed it with the Division Chairman March 3, 1953, and denied the claim in writing on August 5, 1953.

Joint submission was arranged to the General Manager, the Chief Operating Officer designated to handle such disputes, September 30, 1953, as appears from Exhibit A to Employes Submission and to Carrier's Submission, and the claim is there set out as follows:

> "Subject: Claim of the Employes of the M. of E. Stores Department of the Logansport Enginehouse and the Division Committee of the Brotherhood that:
>
> (a) The Carrier violates the Master Rules Agreement, dated May 1st, 1942 and amended Sept. 1st, 1949, especially the Scope, when they assign Employes of the Pennsylvania Railroad Company not governed by this effective Rules Agreement to perform duties accruing to Employes of the M. & E. Stores Department.
>
> (b) The Carrier establish positions of Stores Attendants for each of the first, second and third tricks at the Logansport Enginehouse (Oil House) to protect the work accruing to Employes governed by this effective Rules Agreement.
>
> (c) The Carrier compensate the proper and available Employes in accordance with Rule 4-A-6 of the Master Rules Agreement, retroactive to January 1st, 1952.
>
> (d) The Carrier advertise and Award in accordance with Rules 2-A-1 and 2-A-2 two (2) positions of Stores Attendants on second and third tricks and reassign Mr. Frank Dietl to the Stores Attendant position on the first trick at the Oil House.
>
> (note: no paragraph (e))
>
> (f) The Division Chairman claims that this claim is payable due to the Management failure to comply with Rule 7-B-1 paragraph (c) of the Master Rules Agreement."

The General Manager and the Works Manager denied the claim February 23, 1955.

Notice of appeal to this Board is dated September 14, 1955 and the claim set-out there, and in Claimants' submission October 17, 1955 is as copied in two paragraphs at the beginning of this award.

The Employes urge that under Rule 7-B-1 (c), there having been no notice to the Claimants within "thirty days from the date * * * claim was presented", the claim should be allowed.

Carrier in answer thereto asserts:

> "It is the Carrier's position that the claim between the parties may not be one thing on the property and then something else entirely different before your Honorable Board."

In other words the Carrier insists that the claim heard on the property, including failure to comply with Rule 7, ended there because no appeal was taken therein,—and that the one now before the Board is a new claim and has nothing to do, and no continuity with the one heard on the property.

At the time of the notice of filing appeal, September 14, 1955, the Employes abandoned Section (b) which prayed for establishment of Stores Attendants and Section (d) that Carrier advertise the two positions as Store Attendants, etc. The subject of the claim together with Section (a) and Section (f) having to do with Rule 7 were cast into a new Statement of Claim and of Section (a); old Section (c) (see previous page) was eliminated entirely and a new Section (b) formed instead thereof which reads:

> "E. L. Kitchell and twelve other named Group 2 employes should be allowed sixteen hours' pay as a penalty for each day involved commencing January 1, 1952, and continuing until the violation is corrected."

Evidently Employes take the view that such objection by Carrier cannot be brought for the first time before the Board (notwithstanding the change was made here) and also that it has been waived by failing to raise same at the earliest possible time after the change appeared. (Parenthetically, it appears that the time elapsed until the objection was made was from notice of claim September 14, 1955 to May 14, 1956, when the second brief was filed by Carrier after its submission; the Employes had also filed two.)

It should not be necessary to state that this Board neither approves nor condones but, on the other hand, condemns (a) any deliberate filing here of a claim not progressed and reviewed on the property; or (b) any deliberate withholding of objection beyond the first available opportunity presented to register the same in the record before the Board.

From the Awards cited it is clear that changes in subject matter at the Board level are disapproved but more liberality is shown where such alterations have to do with the monetary phase of claims though even then the Board has approved only where "no prejudice to the Carrier appears to have resulted". For applications of the principles please see Award 5502 (Whiting), Award 8858 (Bakke), Award 8676 (Vokoun), Award 8060 (McCoy), Award 8686 (Lynch), Award 8772 (McMahon), Award 5077 (Coffey), Award 6692 (Leiserson), Awards 6140 and 7077 (Whiting), Award 5469 (Carter), Award 3256 (Carter), Award 5330 (Robertson), Award 6016 (Parker), Award 6260 (Wenke), Award 5078 (Coffey), Award 6115 (Messmore) and numerous others.

Though these awards embrace the general principles in the claim, none has been found with precisely the factual situation we have here. On the property there was a failure of Carrier to deny the claim within the provisions of Rule 7 which authorizes the same to be allowed. Appeal was then taken and the modest claim on the property burgeoned into the one presented to the Board which could be for as much as (and this is not denied in the Record) sixteen hours a day for each of thirteen men, a total of 208 hours a day, covering an accrued period of over nine years, or over half a million hours at the prevailing hourly rate of pay.

So far as we can find this is the first time that, after the "Cut-off" Rule has been applied, an attempt has been made to pyramid the amount of the claim when it reached the Board.

It is one thing to hold a party has defaulted on a certain known, modest claim which perhaps should be allowed, but it is something entirely different to enforce such a default and meanwhile permit the claim to be so changed before the Board (when Carrier can assert no defense) that the amount of the obligation is increased enormously. This would be grossly prejudicial to the Carrier and contrary to the decisions of this Board.

Other questions raised by the parties need not be considered. Since the claim is not properly before the Board and cannot be considered by it on the merits, the same will be dismissed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Claim should be dismissed in accordance with the Opinion.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May, 1961.

LABOR MEMBER'S DISSENT TO AWARD NO. 9949, DOCKET NO. CL-8129

The erroneous conclusions reached by the author of this Award, are presumptuous and preposterous. The record shows that his judgment was warped by the untimely and sophistical argumentation presented by Respondent Carrier.

The denial of the Employes' claim is predicated primarily upon the false premise that because the claim was changed upon appeal to the Board, a modest claim had been pyramided into an enormous amount, which "would be grossly prejudicial to the Carrier and contrary to the decisions of this Board."

A review of the "Statement of Claim" and claim quoted under "Opinion of Board" will show how grossly inaccurate this assumption is. In the first place Carrier defaulted on a claim that required the Carrier to establish three positions of Store Attendants, one on each of the first, second and third tricks (b). Further, that Carrier compensate the proper and available Employes in accordance with Rule 4-A-6 (c). Such employes (13 in all) having been named in the Joint Submission (Employes' Exhibit A), a fact that the author failed to mention in the "Opinion of Board".

Therefore, the original claim, upon which the Carrier defaulted under Rule 7-B-1, required it to establish three eight hour per day positions and compensate thirteen named employes under the "Notified or Called" Rule for a minimum of 36 hours per day at the pro rata rate (Rule 4-A-6), covering a period of 24 hours each day, retroactive from date the conditions were corrected.

However, on appeal to the Board, the Employes reduced the claim from 36 hours to 16 hours per day for each day the violation continued, the compensation therefor to be divided among the same 13 named claimants. Petitioners also eliminated the requirement for the establishment of the three positions of Store Attendants. Therefore, it is hard to understand by what stretch of the imagination the Referee could come to the erroneous conclusion that:

> "It is one thing to hold a party has defaulted on a certain known, modest claim which perhaps should be allowed, but it is something entirely different to enforce such a default and meanwhile permit the claim to be so changed before the Board (when Carrier can assert no defense) that the amount of the obligation is increased enormously. This would be grossly prejudicial to the Carrier and contrary to the decisions of this Board."

This is rather strange logic indeed when viewed in the light of the facts. What the author is here saying is that a claim for 36 hours compensation per day is modest; while a claim for 16 hours compensation per day has been "increased enormously" over the "modest" sum which is "grossly prejudicial to the Carrier and contrary to the decisions of this Board. Such a holding is clearly erroneous and an abuse of sound discretion. Apparently, the Referee is not familiar with the principles that constitute "prejudicial" acts of one party against another, nor, is he aware of the decisions of this Board on the subject. This Board has never held previously that the reduction in the amount of compensation due, when claim is submitted to the Board, would be "grossly prejudicial to the Carrier". Quite the contrary. In Award 322, Referee Corwin ruled:

> "Carrier further urges that the claim has been changed since it was first presented. Originally the demand was made that: First, claimants be restored to the positions of which they have been deprived in contravention of the rules; second, that they should be compensated for wages lost; and third, that the employes who replaced them should be removed from service in the seniority districts to which they were transferred. In the dispute as it is submitted to this Division the third element is omitted. **We can see no reason why a claimant should not be permitted to abandon any part of his claim so long as the adverse party is not prejudiced and we can see no possible prejudice in such abandonment in this instance.** All that is required is that no issue shall be submitted to the Adjustment Board which the parties have not had an opportunity of adjusting before it is submitted for final determination." (Emphasis ours)

That Carrier was not taken by surprise here, is evidenced by the fact that it was put on notice that the claim had been reduced when it received the Organization's letter of intent to file, dated September 14, 1955, an ex parte submission with the Third Division covering the subject claim, again when it was officially notified by the Executive Secretary of the Division. In Carrier's Ex Parte Submission, dated January 12, 1956, approximately 4 months after it was placed on notice, it contended:

"There is absolutely no support in any rule in the agreement for the payment of a penalty of 'sixteen hours * * * for each day involved' to the claimants, **as is requested in the claim filed with your Honorable Board.**" (Emphasis ours)

In the Carrier's next brief, titled "Carrier's Oral Argument", in Answer to Employes' Ex Parte Submission", it stated:

"The facts in this case are set forth on pages 2 and 3 of the Carrier's Ex Parte Submission and will not be repeated here. **The claim is for 16 hours' pay as a penalty for each date involved, such penalty to be divided among 13 claimants.**" (Emphasis ours)

The above quotes conclusively show that Carrier was fully aware of the change in the claim and what it provided for and it offered no objections thereto up to this stage of handling before the Board. That there was no conflict between the parties as to what was involved, is made self-evident from the fact that the Employes did not dispute these Carrier statements.

It was not until Carrier's third brief, titled "Carrier's Reply to Employes Rebuttal Brief", dated May 14, 1956, that it made the erroneous statement that:

"* * *. Up to this point in the case, the Carrier was of the opinion that the Employes' claim as presented to the Board was for sixteen (16) hours' pay as a penalty for each day involved, such penalty payment to be divided among the thirteen (13) Claimants. (see page 1 of Carrier's Oral Argument). However, it is now apparent that the Employes hope to take advantage of the Carrier's admission that the Enginehouse Foreman failed to comply with provisions of Rule 7-B-1(c) **and they are attempting to expand their claim beyond that handled on the property and beyond the bounds of reasonableness.**" (Emphasis ours)

Carrier's claim that the Employes were now attempting to expand their claim arose solely from its fertile imagination, as the Employes furnish no basis for such allegation. The Carrier does not explain how the Employes were attempting to expand their claim from that filed with the Board at the time this untenable allegation was made, i.e., eight months after it was put on notice. This statement was nothing more than an afterthought, raised for no other reason than to confuse the issue, which clearly had the desired effect as the Referee made this the sole basis for denial of claim.

It should also be remembered that the statement under consideration, was not made in answer to anything stated by the Employes in either their Ex Parte Submission or Rebuttal Brief, although Carrier's brief is headed "Carrier's Reply to Employes' Rebuttal Brief". That such a statement was inadmissible and entitled to no consideration is clear from the Board's Circular No. 1, Rules of Procedure, providing:

"The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."

Also, under date of March 13, 1956, the Executive Secretary of the Third Division advised both parties that they were granted until May 14 to "make written reply to oral argument of the other presented at the hearing". Carrier's

exaggerated statement was not in reply to any argument presented by the Employes and for that reason, violated the procedural requirements of this Board.

The Referee attempts to bolster his lack of proper judgment in predicating his entire conclusions on an isolated, unrelated and farfetched assumption made by the Carrier, by stating that such statement "was not denied in the Record". In order to set the record straight, it must be pointed out that the Employes did not deny the two previous statements by the Carrier that: "The claim is for 16 hours' pay as a penalty for each day involved, such penalty payment to be divided among 13 claimants." It would, therefore, follow that the parties were in agreement up to May 14, 1956, as to what the claim was for. **It was the Carrier who attempted to expand the claim, not the employes.**

It should also be stated that the Employes' did not file a reply to Carrier's brief of May 14, 1956, in which the absurd contention is made. It would be logical to assume that having failed to take issue with two previous statements made by Carrier, that the Employes conceded that only 16 hours per day was involved and any answer to carrier's flight of fancy would be unnecessary and irrelevant. At least, their failure to deny an assumption, that was absurd on its face, could not logically be held to support such an allegation, as the Referee appears to imply.

That the Referee also indulged in mental flights of the fantasy, is clear from his speculation that the claim "could be for as much as sixteen hours a day for each of thirteen men, a total of 208 hours a day, covering an accrued period of over nine years, or over half a million hours at the prevailing hourly rate of pay." That the claim is not subject to such speculation, appears to have been overlooked.

It should also be remembered that it was the Carrier who allowed the damages to increase by failure to allow the claim as presented in accordance with Rule 7-B-1(c), when the Enginehouse Foreman failed to deny claim within the specified period in 1953. The nine years delay referred to was because of Carrier's failure to comply with the clear and unambiguous requirements of Rule 7-B-1. See Awards 7713, 9578 and 9579. However, the Referee would have us believe that it was the Employes who were responsible for any delay as they "expanded" the claim on appeal to this Board.

It is crystal clear that the Referee was either unable to properly analyze the relevant factors involved, or he was unduly impressed with the amount of money that it would cost the Carrier should he properly sustain the claim in accordance with a long line of Awards of this Division. See Awards 3280, 6361, 7713, 8101, 8318, 8412, 9205, 9578, 9579.

The Award is not based on fact, but rather upon figments of the imagination bordering on the fantastic. It was conceived in absurdity, disseminated in error and dressed up in the tinsel garb of antithetical phrases. For that reason, I dissent.

/s/ J. B. Haines

J. B. Haines
Labor Member