

Award No. 10548
Docket No. SG-9541

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA
BALTIMORE AND OHIO CHICAGO TERMINAL
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Baltimore and Ohio Chicago Terminal Railroad Company in behalf of:

Samuel Golden for additional four (4) hours pay at his respective pro rata rate of pay for services performed while relieving Signal Maintainer on his rest day, Tuesday, May 31, 1955.

BROTHERHOOD'S STATEMENT OF FACTS: Under date of July 2, 1955, claimant Samuel Golden wrote General Auditor Walter H. Schulz with corrected time sheets attached, explaining the time sheets, as follows:

"Enclosed please find two (2) corrected time sheets for May 31, 1955 and June 4, 1955. I mistakenly charged penalty rate for June 4th as my sixth day of the week instead of charging penalty rate for May 31st which is my regular assigned rest day."

Under date of July 6, 1955, General Auditor Schulz wrote claimant Golden advising that his claim was not allowed, as follows:

"Your time report of May 31 and June 4th 1955 from
6:30 A. M. to 2:30 A. M. on which
you claim time and one half for May 31st.

is declined by the undersigned for the following reasons: Claim has no merit. When you took Mr. Glen Hite's job, you also assumed the rest day of that job. Therefore Tuesday May 31st was a work day for you, not a rest day. You have been allowed 8 hours straight time for May 31st and June 4th."

Under date of August 2, 1955, General Chairman C. L. Siedschlag appealed the claim to Assistant Manager Labor Relations T. S. Woods, by letter, as follows:

"Claim of Samuel Golden for additional four hours pay for relieving maintainer Hite on his rest day, Tuesday May 31.

days of that particular position. However, under any circumstance, it was optional with the claimant if he desired to fill that particular position. He was the senior regular man available to fill the position.

In this Division's Award 6408 (ORT vs. New York, Chicago and St. Louis Railroad) (Referee Whiting) it was held in part as follows:

"Our Award 4592 denied a similar claim based upon rules similar to those existing here prior to the adoption of the Forty Hour Week Agreement, effective September 1, 1949, upon the basis that a regularly assigned employe diverted from his regular position and temporarily assigned to another position for emergency or relief work was then entitled to the rest days of the position occupied, not the rest days of the position from which diverted, because rest days are a condition of and attach to a position."

In this Division's Award 6503 (Clerks' vs. NP) (Referee Leiserson) claimed punitive rate was denied with the following holdings in part " * * * on January 6 and 7, 1951 there was a temporary vacancy on a regularly bulletined relief assignment due to the incumbent taking part of his vacation on those days. The assignment was for five working days beginning Saturday and ending Wednesday, with Thursday and Friday assigned as rest days. It is admitted that no extra or other unassigned employe was available and therefore the Carrier was required by Rule 5 of the June 10, 1949 Agreement to use the senior regular man available to fill the vacancy. Two regular men who were off on their rest days applied for the vacancy, and it is agreed that Claimant Jone was properly chosen because he was senior. He was paid the regular rate of the relief assignment on which the vacancy occurred. The claim is that he should have been paid at the punitive rate of time and one-half for the two days. * * * The facts in the case make plain that claimant did move from his regular assignment to fill a temporary vacancy on another assignment. His own assignment was to rest on January 6 and 7. He had the right to insist on those two days of rest by reason of his assignment; he did not have to accept the two days' work on the other assignment. He could have let the other applicant for the vacancy work the two days. Instead of choosing to rest, he chose to apply for the work on the other assignment. When he made that choice of his own accord, the Carrier was obligated by the seniority rules to give him that work. Having so chosen, he took the conditions, including the rate of pay, of the assignment on which he worked the two days. Had the temporary vacancy lasted five days, he would have been entitled to the rest days of this assignment. * * *."

When the claimant in this case filled the position of the vacationing employe, he accepted the conditions of that particular assignment. That is to say, when the claimant filled the position held by Leading Signal Maintainer William Hite, who was on vacation, he took the conditions of that position and forfeited his own rest days. Hite's position had Tuesday as an assigned work day. When the claimant worked that position on Tuesday, he qualified for the higher rate of pay but at straight time only. He did not qualify for overtime pay.

The Carrier submits that this claim is without merit and ought to be denied.

OPINION OF BOARD: Claimant Samuel Golden held a regular assignment as a signal maintainer working the second trick on Monday and the first

trick on Wednesday through Saturday at the 16th Street Bridge, Chicago, Illinois. His assigned rest days were Sunday and Tuesday.

Leading Signal Maintainer Glen Hite, who worked the first trick from Tuesday through Saturday, vacationed from Tuesday, May 31, 1955 through Friday, June 3, 1955 and the Claimant filled Mr. Hite's position from 6:30 A. M. to 2:30 P. M. on each of those days and received a Leading Signal Maintainer's rate of pay.

The Organization contends that the Claimant is entitled to an additional four hours pay for services performed on his rest day, Tuesday, May 31, 1955. However, the Organization states that merits of the claim are not before the Board for disposition; the only question to be determined by the Board is—whether or not the Carrier's alleged improper handling of the claim constituted a violation of the Article V, Section 1, August 21, 1954 Agreement.

The Carrier, on the other hand, maintains that the Organization's action was improper and violated the time limitations of the August 21, 1954 Agreement as well as Section 3, First (i) of the Railway Labor Act.

The pertinent rules cited by the parties read as follows:

Article V, Section 1, of the August 21, 1954 Agreement.

"1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

"(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such 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 employe 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 claims or grievances.

"(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

"(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding

officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to."

Railway Labor Act — Section 3, First (i) :

"The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The undisputed facts regarding the processing and progressing of the claim are as follows:

1. On July 6, 1955, the General Auditor declined the Claimant's time slip claim dated July 2, 1955;
2. On August 2, 1955, General Chairman C. L. Siedschlag appealed the claim to Mr. T. S. Woods, Assistant Manager of Labor Relations;
3. On April 10, 1956, Mr. Woods replied and advised Mr. Siedschlag that the matter was closed because written appeal was not made to the Division Engineer within sixty days of General Auditor's declination;
4. On April 20, 1956, Mr. Siedschlag, in substance, advised Mr. Woods as follows:
 - (a) That he (Woods) had not as yet declined the claim;
 - (b) That the General Chairman had followed past practice in progressing the claim;
 - (c) That the Organization would, in the future, comply with Mr. Woods' procedural steps in progressing claims;
 - (d) That Mr. Woods failed to comply with the sixty-day time limit as provided for in the August 21, 1954 Agreement;

(e) That the claim is, therefore, payable as presented.

5. On May 17, 1956, a conference took place between the Messrs. Woods and Siedschlag without the dispute being resolved;

6. On May 21, 1956, Mr. Woods, in substance, advised Mr. Siedschlag as follows:

(a) That he declined claim under date of April 10th because of Organization's failure to appeal claim to Division Engineer following General Auditor's declination;

(b) That past practice did not support the Organization's position;

(c) That for the future the Organization should be governed by the procedure outlined in detail in letter.

There is substantial support for the respective positions and contentions of the parties, but the greater weight of the believable evidence seems to support the Carrier's position.

According to the record, the Organization admits that, in the past some claims and grievances—but not all claims and grievances—had been handled with the Division Engineer.

The Organization puts great weight and emphasis on the following statement in the Carrier's letter of April 10, 1956:

"The usual manner for handling disputes arising under our agreement contemplates their initial presentation to the Accounting Department if in the form of a time slip or to the Division Engineer."

However, it is to be noted that the very next sentence in that letter—which reads:

"The rejection of a time slip by the Accounting Department should be appealed to the Division Engineer. . . ."

Clearly and unmistakably indicate that the prescribed appeal procedure was to the Division Engineer in a time slip claim. The instant case is, of course, a time slip claim.

Accordingly, we must conclude that the Organization failed to comply with the pertinent provisions of Article V of the August 21, 1954 Agreement—when it did not appeal this claim to the Division Engineer within sixty days of General Auditor's declination.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier did not violate the Agreement.

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 April 1962.

**LABOR MEMBER'S DISSENT TO AWARD 10548 —
DOCKET SG-9541**

The majority states:

"However, it is to be noted that the very next sentence in that letter — which reads:

"The rejection of a time slip by the Accounting Department should be appealed to the Division Engineer. . . ."

"Clearly and unmistakeably indicate that the prescribed appeal procedure was to the Division Engineer in a time slip claim. The instant case is, of course, a time slip claim."

The majority's quotation is an excerpt from a Carrier officer's letter dated April 10, 1956, some eight months **after** the claim had been presented to him. Why it should take said officer some eight months to inform the employees regarding the alleged faulty procedure is not explained in the record. In accepting this type of **ex post facto** instruction as evidence the majority has wilfully declined to interpret the rules in light of the facts or as contemplated by the Railway Labor Act. Therefore, I dissent.

/s/ W. W. Altus
W. W. Altus