Award No. 10955

Docket No. TE-10097

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: *Claim of the General Committee of* The Order of Railroad Telegraphers on the Chicago, Milwaukee, St. Paul and Pacific Railroad, that:

1. Carrier violated the Agreement between the parties when, effective January 1, 1957 without conference or agreement, it reduced the monthly rate of pay for the agent's position at Mineral Point from $453.44 to an hourly rate of $2.149.

2. The Carrier shall, because of the violation set forth above, pay to B. L. Eller, regular occupant of the agent's position at Mineral Point, and/or his successor, the difference between the proper monthly rate for the position and the hourly rate paid.

EMPLOYES' STATEMENT OF FACTS: *There is in evidence an* agreement by and between the parties to this dispute effective September 1, 1949, as amended.

At Page 59 of the Agreement is listed:

*Mineral Point A $335.73

The meaning of the asterisk prefacing the station name is set forth at Page 37, under Rule 27, Wage Scale: We quote that passage:

(*) Indicates monthly rate, which applies to all service performed on other than assigned rest day, and Rules 8, 9 (a) (b) (c) (d), 10, 11, 12 and 16 will not apply on other than assigned rest day. Service on assigned rest day will be governed by the provisions of Rule 11, Section 3.

On October 1, 1956, as the Carrier has done in the past, it issued a bulletin notice to the employes in the class and craft on the Division reading as follows:

"All Agents & Operators

With respect to the employes position that Carrier's action in this case could only accomplished by agreement between the parties, Carrier respectfully directs the attention of the board to Carrier's Exhibit "T" which is copy of Mr. Downing's letter to ORT General Chairman Olson dated January 7, 1958. While we believe the contents of such letter to be self-explanatory, nevertheless, we wish to emphasize a few of the points expressed therein. First of all, it was understood during discussion of this case in the office of the undersigned on June 21, 1957 that the employes wanted to make a further investigation of the case after which a further discussion would be held. Carrier, during conference in this office on June 21, 1957, said to the employes that while it was Carrier's position that negotiation of the matter was not the required course, nevertheless, without waiving its position in that regard, Carrier would be agreeable to go over the case with the employes then (June 21, 1957) or after they had completed their further investigation with the thought of disposing of the case on the property by agreement with the employes on the basis of the merits of the case. Also on June 21, 1957 the Carrier advised the employes it would be agreeable to granting the employes an extension of time in accordance with the provisions of Article V, Section 1c of the August 21, 1954 agreement if additional time was needed by them to complete their further investigation. That was the last the Carrier heard from the employes in connection with this case until receipt of copy of ORT President G. E. Leighty's letter to the secretary of this division dated January 2, 1958 advising of notice of intent to submit this case to your board in ex parte. We believe the employes non-acceptance of Carrier's offer to dispose of the case on the property by agreement on the basis of the merits of the case to be significant.

(Exhibits not reproduced.)

OPINION OF BOARD: The Agreement negotiated by the parties which became effective September 1, 1949 contains job classifications, rates of pay and conditions of employment. Rule 27 of that Agreement sets forth the rates of pay for the following employes who are covered under the Scope Rule of the same Agreement:

A — Agent
TA — Ticket Agent
O — Operator (Telegrapher or Telephoner)
PO — Printer Machine (including teletype) Operator
S — Staffman
L — Leverman
CO — Chief Operator
ACO — Assistant Chief Operator
T — Towerman
TD — Train Director
D — Day
N — Night

Most of the rates of pay are hourly; some are on a monthly basis. Those which are monthly wage rates are preceded by an asterisk which Rule 27 explains as follows:

"(*) Indicates monthly rate, which applies to all service performed on other than assigned rest day, and Rules 8, 9 (a) (b) (c) (d), 10, 11, 12 and 16 will not apply on other than assigned rest day. Service on assigned rest day will be governed by the provisions of Rule 11, Section 3."

Among the job classifications and wage rates for District No. 11, there is only one monthly rated job noted in said Agreement and that is the following:

*Mineral Point	A	$335.73

On October 1, 1956 the Carrier issued the following bulletin:

"All Agents & Operators

Agency Mineral Point, 7:00 A.M. to 4:00 P.M. daily except Sundays, monthly rate $432.33 on bulletin permanent.

Applications will be received in this office for the above position up to 6:00 P.M. October 12th. Copy your application must be mailed to Local Chairman prior to time bulletin closes. Two copies of your application must be mailed to this office so they will be received prior to time bulletin closes in accordance with Telegraphers' schedule Rule 5."

The Claimant, B. L. Eller, applied for the position and he was appointed to it on October 15, 1956. It should be mentioned that the Agent's position at Mineral Point was then a six-day position. But it should also be noted that while the Carrier had the right to work the employe six days, the monthly rate was payable whether the employe worked five, five and one-half or six days. This is provided for in Section 3 of Rule 11 of the Agreement which says:

"Employes on monthly rated position shall be assigned one (1) regular rest day per week, Sunday if possible. Rules applicable to other employes shall apply to service on such assigned rest day. **Monthly rated employes may be used on the sixth day of the work week to the extent needed without additional compensation. If not worked on the sixth day, or if worked less than a full day on such sixth day, there shall be no reduction in compensation.** Service by monthly rated employes on other than the assigned rest day shall be compensated for under the rules applicable to such positions.

"Monthly rates comprehend 208⅔ hours per month. To determine the straight time hourly rate for monthly rated employes, divide the monthly rate by the hours comprehended in such rate. To determine the daily rate multiply the straight time hourly rate by eight." (Emphasis ours.)

The monthly rate was thereafter increased to $453.44 for 211 hours per month.

On December 24, 1956, a little over two months after Claimant Eller was assigned to the job, the Carrier notified him that effective "January 1, 1957, the Agency position at Mineral Point, Wisconsin, will be changed

from a six-day per week assignment Monday through Saturday to a five-day per week assignment Monday through Friday, retaining the same hourly rate of pay for five-day per week assignment as formerly received for a six-day per week assignment, i.e., a rate of $2.1490 per hour." A claim was filed by Eller on February 16, 1957 for $75.22 which is the difference between the monthly rate of $453.44 and the amount he received of $378.22. In his claim Eller said, in part:

> "The loss in earning during the month of January was due to instructions received from Superintendent K. R. Schwartz changing the monthly rate of pay to an hourly rate which is contrary to the rules of the current Telegraphers' Agreement."

Three days later, February 19, 1957, the General Chairman of the Organization wrote to Carrier's Vice President, C. P. Downing about this claim and, in part, said:

> "The agency position at Mineral Point is shown in the Wage Scale of our Agreement as a monthly rated position, the monthly rate effective November 1, 1956 was $453.44. The action taken by the Superintendent has resulted in a loss of earnings for Agent B. L. Eller of approximately $75.00 for the month of January. It is our contention that changing the Mineral Point position from a monthly rate to an hourly rate is in violation of Schedule Rule 2 (d) of the current Agreement. This notice to you that claim in behalf of Agent Eller will be filed in the usual manner."

Rule 2 (d) referred to by the Organization says:

> "(d) Positions (not employes) shall be rated. Change in classification of positions or rates of pay will be made only by agreement between the General Manager and the General Chairman."

On March 6, 1957, Claimant Eller filed an additional claim for $25.68 for difference in earnings between the monthly rate of $453.44 for the period between February 1st and 6th inclusive . . . and the hourly rate of $2.149 for the same period." Claimant Eller, voluntarily exercised his seniority and transferred to an hourly rated agency position at New Glarus, Wisconsin, effective February 7, 1957. Another employe accepted the agency position at Mineral Point effective February 7, 1957.

After Claimant Eller's claims were declined by the Carrier's Chief Dispatcher, the Organization's General Chairman wrote the Carrier's Assistant to Vice President under date of April 4, 1957 further appealing Eller's claim. In that letter the General Chairman also said:

> "Under the circumstances I respectfully request that the payment claimed be allowed for the month of January and that the monthly rate of $453.44 be reestablished, also, that all occupants of the Mineral Point agency position subsequent to January 31, 1957 be compensated on the basis of the monthly rate of $453.44."

The Carrier raises several jurisdictional questions which should first be considered:

1. It is the Carrier's position that there was no conference before the claim was submitted to the Board as required by the Railway Labor Act and under the Board's Rules of Procedure as contained in Circular No. 1. In support of its position the Carrier cites the letter dated January 7, 1958 from Carrier's Assistant Vice President to the Organization's General Chairman. It is pertinent that we quote part of that letter. Referring specifically to the subject of conference, it says:

> "As you will perhaps recall in accordance with requests contained in your letter of May 10, 1957, this case was discussed during conference in this office on June 21, 1957 at which time I understood you to say that you intend to look into the case further and as a result thereof, it was agreed there would be no further exchange of correspondence until after you had completed your investigation at which time we would again discuss the case."

Continuing further this letter says:

> "You will perhaps recall that during our last discussion of this case on June 21, 1957, I said to you that while it was my position that negotiation of this matter was not the required course, nevertheless without waiving my position in that regard, I would be most agreeable to go over the case with you either then or after you had completed your further investigation with the thought of disposing of the case on the property by agreement with you on the basis of its merits. In view of our not having a further discussion in this case and in view of Mr. Leighty's letter to the Third Division, NRAB, although I understand your position to be that the change made in the Mineral Point agency could only be accomplished by agreement under Rule 2 (d), apparently you do not wish to attempt to reach any agreement in that regard."

This letter specifically states that a conference was held on June 21, 1957. Whether or not the Organization representative "intended to look into the case further" and whether or not the Carrier was willing to discuss the matter further is irrelevant to the issue at hand. The fact that the parties did have a conference prior to the time this claim was first presented to the Board, is sufficient compliance with the requirements of The Railway Labor Act and specifically with Section 2 Second thereof.

The Awards cited by the Carrier are not in point. In Award 10769 (Ables) the "Carrier did not have an opportunity to request a conference before the claim was submitted to the Board." Here there was a conference. In Award 9003 (Murphy), the Organization first invited the Carrier to a conference on the claim and before it was held withdrew the invitation. In a letter to the Carrier the Organization refused to meet the Carrier in conference and discuss the issues. This is not the case here. There was a conference on June 21, 1957 and the issues were discussed.

2. The Carrier further contends that claims in behalf of unnamed employes are invalid. The claim here is in behalf of B. L. Eller, regular occupant of the position from January 1 to February 6, 1957 and in behalf of his successors.

Section 1 (a) of Article V of the National Agreement of August 21, 1954 requires that all "claims or grievances must be presented in writing by or on behalf of the employe involved." This Agreement has been subject to frequent examination by this Board and by the Courts. Innumer-

able Awards have been adopted which leaves much to be desired toward the establishment of clear and decisive policy. The better considered Awards hold that it is not the intent of the Railway Labor Act, the Rules of the Board and the Agreements entered into by the parties, that the administration be super-technical. It is, rather, the general consensus that claims should not be denied upon procedural grounds unless they unquestionably fail to comply with the Act, the Board's Rules or the Agreement of the parties. We have frequently sustained claims presented on behalf of an unnamed person, or class of employes whose identity is easily ascertainable by the Carrier. Awards 10801 (Kramer), 10675 (Ables), 10379 (Dolnick) and many others. The Claimants here, in addition to Eller, are easily identifiable and ascertainable.

3. It is also the contention of the Carrier that the only claim properly presented and processed in accordance with the provisions of Article V of the August 21, 1954 Agreement was that of B. L. Eller. The Carrier argues that the claim in behalf of Eller's successors was never submitted to the Chief Dispatcher. It should be noted that Eller's letters to the Chief Dispatcher on February 16, and on March 6, 1957, each requested pay for the difference between the monthly rate and the amount paid him on an hourly basis. In his letter of February 16, 1957, Claimant Eller specifically said that his claim "was due to instructions received from Superintendent K. R. Schwartz changing the monthly rate of pay to an hourly rate which is contrary to the rules of the current Telegraphers' Agreement." The same point was made in the letter dated December 24, 1956 from the General Chairman of the Organization to the Vice President of the Carrier which is quoted in this Opinion.

There is no merit to Carrier's position. They were well aware that the Organization's primary claim was that the Carrier had no right to change the rate of pay from monthly to hourly. If the Carrier does not have that right then the Organization is not required to present multiple claims initially to the Chief Dispatcher in behalf of all occupants of the position.

The jurisdictional and procedural questions having been disposed of, we now consider the merits of the claim.

Rule 2 (d) specifically says that no "rates of pay" will be changed except by agreement between the General Manager and the General Chairman. The argument that there "was only a change in method of pay, not the rate" is specious. The rate was $453.44 a month and when the Carrier unilaterally changed it to $2.149 an hour there was a change in the rate. Rule 2 (d) is not ambiguous and does not refer exclusively to hourly rates. Rule 27 of the Agreement sets out the rates which are both hourly and monthly. Rule 2 (d) must be read with Rule 27 and must be construed to include both hourly and monthly rates.

Rule 11, Section 3 does not modify the intent of Rule 2 (d). It merely describes how monthly rated jobs shall be scheduled and how the hourly rate of a monthly rated classification shall be ascertained. It does not modify or change the intent of Rule 2 (d). In Award 2584 (Shake—Second Division), cited by the Carrier, the Board held that "it is contemplated by the agreement that water service employes may be compensated on either an hourly or monthly basis." In that agreement one Rule provided the basis upon which hourly rated water service employes shall be paid and another Rule how the same employes shall be paid on a monthly

basis. No such condition exists here. The Agent at Mineral Point may only be paid on a monthly basis unless changed by agreement as provided in Rule 2 (d).

The Carrier also argues that monthly paid employes are not guaranteed any specific number of hours of work per week. For this reason the Carrier has the right to change the Agent's position at Mineral Point from a six-day to a five-day work week and accordingly change the monthly rate to an hourly rate. Several Awards are cited to support this position. It is well to examine them.

In Award 4849 (Carter) the Board held that an employe on a monthly rated job who was furloughed and required to exercise his seniority rights to displace another employe, takes the rate of the job of the employe he has displaced. The Board said: "The rate of a position is paid only so long as there is work of the position to be performed. When the work of the position disappears the Carrier can abolish the position without penalty." Obviously, this is not the situation before this Board. The Agent's position at Mineral Point was not abolished.

In Award 6236 (Stone) this Board held that the Carrier could change a monthly rated position to an hourly rate because "there came into effect the forty-hour week agreement, which brought with it independent of any action of Carrier changes in the working hours and the rate of pay of Claimant's position largely to the advantage of Claimant and the disadvantage of the Carrier." Here there was no change of the position "largely to the advantage of the Claimant . . ."

The circumstances in Award 5052 (Kelliher) are similar to the facts noted here in Award 4849. The Board denied a full month's pay because the position was abolished on the 14th of the month. The same facts are involved in Awards 5134 (Coffey) and 8680 (Lynch). In Awards 7296 (Carter) and 4060 (Carter) the question involved the construction of the words "hours comprehended by monthly rate" as used to apply a wage increase to monthly rated positions.

None of the Awards cited by the Carrier involves all of the provisions contained in Rule 2 (d) or in Section 3 of Rule 11. The latter specifically says that: Monthly rated employes **may be used on the sixth day of the work week without additional compensation.**" (Emphasis ours.) But it goes further and says that if such employes are not worked the sixth day or less than a full day of the sixth day that "there shall be no reduction in compensation." The fact that Carrier, because of economic reasons, found it necessary to reduce the work week of the Agent at Mineral Point from six days to five days is no justification for changing the position from a monthly to hourly rate.

Wage rates whether monthly or hourly that are not changed by agreement as provided for in Rule 2 (d) may only be modified in proceedings under the Railway Labor Act.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated the Agreement.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December 1962.

**DISSENT TO AWARD NUMBER 10955,
DOCKET NUMBER TE-10097**

This Award errs in sustaining the claim for Claimant Eller's successor. The claim was initially presented by the Claimant to the Chief Dispatcher by letter dated February 16, 1957 for loss of earnings during the month of January, and by letter dated March 6, 1957 for loss of earnings during a part of the month of February 1957.

The majority found that these claim letters coupled with a letter from the General Chairman to the Carrier's highest designated officer were adequate to make the Carrier "well aware" that it had no right to change the rate of pay. The letter of the General Chairman referred to is described in the Award as "dated December 24, 1956 * * * which is quoted in this Opinion". There is no such letter in the record bearing that date, so presumably the majority was referring to a letter dated February 19, 1957 or April 4, 1957, both of which were included in the Award in an apparent attempt to rectify the infirmity in Claimant's letters as to the expanded claim.

The letter of April 4, 1957 is described in the Opinion as an appeal. All Divisions of the Board have held that no claim may be amended, changed or expanded on appeal. The letter of February 19, 1957 was neither a claim nor an appeal. It was filed three days after Claimant Eller's first claim for January, and some sixteen days before his second claim for February. The General Chairman recognized it was out of the line of handling and could not affect the claim. He stated that "This is notice to you that claim in behalf of Agent Eller will be filed in the usual manner." Significantly, this letter referred only to a claim "for the month of January" and only "in behalf of Agent Eller."

Despite the fact that the majority was not persuaded by arguments concerning the unnamed Claimant defect, it must be noted that the claim

as initially filed was not even a claim for "successors", "subsequent occupants" or any of the other phrases used in such claims. It is clear the Organization knows how to file such a claim, since the amended claim as presented to the Board is for Eller and "his successor".

In short, the majority fully appreciated that no specific claim was ever presented to the Chief Dispatcher to reestablish the monthly rate of pay or to apply it to Agent Eller's successor. Therefore, there was no handling of such a claim on the initial level.

The Board has recognized in numerous Awards that Article V of the August 21, 1954 Agreement and the Railway Labor Act require an orderly processing of claims. Section 3, First (i) of the Railway Labor Act states that claims:

> "* * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; * * *."

There was no question in this Docket that the "usual manner" meant that claims must be presented initially to the Chief Dispatcher. In fact, the Carrier included a letter in the record dated December 1, 1954, designating the officers to receive claims and appeals reading in part:

> "* * * the officer of the Carrier authorized to receive same in the first instance shall be the Chief Dispatcher."

The Opinion recognizes this question as "jurisdictional" and as such it could not be waived: See **Award 10956** (Dolnick) and many others.

The Award finds that general references to rate of pay change being a violation of the Agreement, resulted in the Carrier being "well aware" of the expanded claim. Such references were obviously for purposes of identification and characterization of the claim and, to have a claim at all, it must be founded on an Agreement violation alleged by the moving party. It is submitted that to take such vague and general language and to stretch a specific claim for approximately one month's compensation to encompass other claims over a period of almost six years is to take liberties with the remedial portion of a claim that constitute the imposition of penalty and an unwarranted usurpation of power by the Board.

Congress recognized the importance of the remedy power of the Board and the unique status of a "money award" by providing in effect for judicial review only of such Awards through the medium of an enforcement action.

The test is not whether the majority assumes that the Carrier from certain general language must be "well aware" of what the claim really constitutes. The test is whether a specific claim is properly handled in the usual manner. This Board may not assume that Congress, or the parties in Article V, really meant that the "usual manner" is not significant if the Board concludes that the Carrier, as some kind of a collective entity, was "aware" of what the claim really encompassed. Particularly is this applicable where the "usual manner" is spelled out in detail. This approach can only encourage speculation and conjecture at the Board level in an area where it does not belong under the guise of interpretation of contracts.

The Board has no authority to expand a claim filed by an individual, obviously in his own behalf, to include other claimants under the guise of interpreting the claim as impliedly buttressed on higher levels. This converts a claim of one individual for a specified period into a running claim for others.

The majority essentially holds that we may impute constructive knowledge of the specifics of a claim to the "Carrier" collectively, and that this may be substituted for actual knowledge of the initial officer in the proper processing of claims in the "usual manner".

Award 10955 contravenes the Railway Labor Act, the applicable Agreement, as well as precedent, and seriously detracts from orderly procedures in grievance matters.

T. F. Strunck
P. C. Carter
R. A. Carroll
W. H. Castle
D. S. Dugan