

Award No. 11326

Docket No. CL-13547

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

**THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5193) that:

1. Carrier violated the Clerks' Agreement, particularly Rule 21 when it failed to render a decision in the following claim filed on February 20, 1961 within the sixty (60) day time limit provided:

Claim that Mr. Ralph A. Madaio be assigned to position of Crane Operator and Servicing of Heaters at Worcester Freight House and compensated for all time lost starting January 13, 1961.

2. Carrier shall not be required to allow the claim as presented, i.e., assign Mr. Ralph A. Madaio to position of Crane Operator and Servicing of Heaters at Worcester, Mass., and compensate him for all time lost starting January 13, 1961, and continuing until the violation is corrected.

NOTE: Reparation shall be determined by a joint check of Carrier's payroll and other records.

EMPLOYEES' STATEMENT OF FACTS: On Jan. 13, 1961, Bulletin #8 advertised for bid a position of Crane Operator and Servicing of Heaters, rate of pay \$2.29 per hour, assigned hours of service 8 A. M. to 5 P. M., meal period 12 Noon to 1 P. M.—days of rest, Saturday and Sunday. (EMPLOYEE'S EXHIBIT #1).

Francis A. Ciccone was awarded the position from the furloughed list at that point, on the same date, Jan. 13, 1961. (EMPLOYEES EXHIBIT #2).

On Feb. 20, 1961, Division Chairman Wm. McGee, filed claim with Mr. Wm. Cape, Acting Freight Agent, in favor of Mr. Ralph A. Madaio and/or his successor, for all time lost starting Jan. 13, 1961 and subsequent thereto,

(c) The doctrine of estoppel applies. The claimant, or his representatives on his behalf, cannot properly be permitted to advance two diametrically opposed contentions in order to extract an unjust money penalty from this Carrier.

(d) Under the circumstances of this dispute no valid claim of a violation of Rule 21, or any other rule of the schedule, can exist.

Carrier respectfully submits that, under the circumstances of this case, there is no violation of the Agreement between this Company and its employees represented by the Brotherhood of Railway Clerks.

The claim is without merit; it should be denied.

All of the facts and arguments contained herein have been affirmatively presented to the Employees' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim is for an alleged violation of Rule 37. Employees contend that Claimant rather than Francis A. Ciccone should have been awarded the position of Crane Operator and Servicing of Heaters contained in Bulletin No. 3, advertised for bid on January 13, 1961. Rule 37(c) reads:

"(c) When a position is bulletined under this rule and no bids are received from an employee in service in the seniority district where the vacancy occurs senior to those furloughed, the senior qualified furloughed employees in the seniority District where the position is bulletined will be notified in writing of such position and a copy of such notification shall be furnished to the Division and General Chairman. In the event the position is not filled in accordance with the foregoing or under other rules of this agreement, an appointment may be made. Notice of award will be posted as provided above."

It is agreed that no bid was "received from an employee in service in the seniority district," that both the Claimant and Ciccone were furloughed employees in the seniority district, and that Claimant was the senior employee. Carrier contends, however, that Claimant had disqualified himself and had waived the assignment.

A claim was presented on behalf of Claimant to the Acting Freight Agent on February 20, 1961. On February 25, 1961 the Acting Freight Agent wrote to the Employees' Local Chairman that the claim has "been referred to Mr. R. J. Duggan, Trainmaster, for consideration and discussion." No reply or notice of disallowance of that claim was received within the sixty days as provided in Rule 21 of the Agreement. Rule 21(a) reads:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (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 Company shall, within sixty (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 Company as to other similar claims or grievances."

On May 2, 1961 the Local Chairman wrote to the Acting Freight Agent as follows:

"Dear Sir:

Claim was made in your office on Feb. 20, 1961, on behalf of furloughed Crane Operator Mr. Ralph A. Madaio, and/or his or her successors for all time lost, starting Jan. 13, 1961 and subsequent thereto, on the position of Crane Operator and Servicing of Heaters at the Worcester Freight House.

I have received no notice to date, that this claim would not be allowed.

Will you please arrange to assign Mr. Ralph Madaio to this position of Crane Operator and Servicing of Heaters, and pay him for all time lost, from Jan. 13, 1961 as per Rule 21 (A) of our Agreement, notifying the interested parties, the amount and payrolls on which payment will be made as per para 8 of this same rule."

Again on May 24, 1961 the Local Chairman wrote to Carrier's Acting Superintendent as follows:

"Dear Sir:

Under date of Feb. 20, 1961 claim was made on behalf of Mr. Ralph A. Madaio, and/or his or her successors for all time lost, starting January 13, 1961 and subsequent thereto, on the position of Crane Operator and Servicing of Heaters at the Worcester Freight House.

In a letter dated Feb. 28, 1961, Acting Freight Agent William M. Cape, Jr., advised he had referred this claim to Trainmaster Richard J. Duggan, Jr., and he would advise me of time, date and place for a discussion. I received no further acknowledgement. May 2, 1961 I wrote Mr. W. M. Cape, Jr., notifying him the 60 days time limit on the above claim had expired. To date I have received no answer.

Will you please make arrangements to assign Mr. Ralph Madaio to his rightful position, and pay him for all time lost, from Jan. 13, 1961 as per Rule 21 (A) of our Agreement, notifying all concerned as per para 8 of this same rule?"

The record is conclusive that Carrier failed to disallow the claim within sixty days from the date it was filed.

The claim first presented to Carrier's Acting Freight Agent on February 20, 1961 was, in part, as follows:

"Under the terms of Rule 21 of our Agreement, claim is hereby made on behalf of furloughed Crane Operator Mr. Ralph A. Madaio, and/or his or her successors for all time lost, starting January 13, and subsequent thereto, on the position of Crane Operator and Servicing of Heaters at the Worcester Freight House."

It was not until June 23, 1961 that the claim was disallowed.

Rule 21 requires a decision by Carrier's proper officer within the sixty days therein provided. The claim was not disallowed within that time. The Rule is clear and unambiguous. Having thus failed to comply with Rule 21, the claim must be allowed. We cannot under these circumstances consider the merits of the claim.

Carrier member argues that an Award "based solely upon Carrier's violation of Rule 21(a) and the penalty therein provided, which is the automatic allowance of the claim without regard for the merits of the other violations claimed, would become final at the expiration of the sixty-day period." This would be April 21, 1961.

We have examined the Awards of this Board and of other Divisions. Unfortunately, there is no unanimity of opinion. In Award 10948 (Dorsey) we held that we are not limited to award relief "from the initial date of the continuing violation to the date the District Manager denied the claim." We held, instead, that the claim must be allowed as presented.

Our findings in Award 10948 does not represent the prevailing position of this Board. In Awards 11211 (Miller), 10644 (Bailer) and 10401 (Mitchell) we held that where a claim is allowed because of failure to make a timely denial, the claim should be allowed up to, but not including, "the date the authorized Carrier official actually declined the Claim." In this respect we are more persuaded to follow our precedents in Awards 11211, 10644 and 10401 than Interpretation No. 1 of Award 9578 where we held that relief should be granted up to the sixtieth day after the claim is presented. See also Award 18 of Special Adjustment Board No. 167, and Award 38 of Special Adjustment Board No. 259 which support the principle enunciated in Awards 11211, 10644 and 10401.

Carrier disallowed the claim now before the Board on June 23, 1961. Since we must uphold the claim not on its merits, but because of procedural failure, we are obliged to hold that the claim be allowed only from January 13, 1961 up to, but not including, June 23, 1961.

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 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 violated the Agreement as set out in the Opinion.

AWARD

Claim is sustained as set out in the Findings and in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1963.

**LABOR MEMBER'S DISSENT TO AWARD NUMBER 11326,
DOCKET NUMBER CL-13547**

My position as to the proper interpretation and application of rules identical with Rule 21 (a) was fully set forth in my Dissent to Award No. 11211 and need not be repeated here. For the reasons set forth therein, I dissent to the termination of Carrier's liability on January 13, 1961.

J. B. Haines

Labor Member