Award No. 11591

Docket No. TE-9561

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY — COAST LINES —

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Atchison, Topeka and Santa Fe Railway; that

1. The Carrier violated the Agreement between the parties when it failed to place E. B. Elledge on his regularly assigned position at Hobart (Los Angeles), California, beginning July 20, 1955 and thereafter refused to compensate him as provided by the Agreement;

2. The Carrier shall now be required to pay Claimant at the rate of his position at Hobart for all service performed at Wingfoot subsequent to July 20, 1955 and in addition thereto pay him at the rate of his position at Hobart the equivalent of:

12 hours at the pro rata rate for July 20, 1955

4 hours for each day July 21 and 22, 1955

12 hours for July 23, 1955

8 hours for each day July 24 and 25, 1955

12 hours for each day July 26 and 27, 1955

4 hours for July 28, 1955; and

3. The Carrier, in addition to payment claimed in Item 2 above, shall be required to compensate Claimant Elledge for actual expenses incurred while required to work on a position other than that to which he was entitled in the amount of $64.50.

EMPLOYES' STATEMENT OF FACTS: An Agreement between the parties, bearing effective date of June 1, 1951, is in evidence.

In its yards at Los Angeles, California, the Carrier maintains a yard office designated as "Hobart". The positions at this yard office were inadvertently

he was titleholder at Hobart, it will be apparent that he lost nothing by reason of the handling complained of and the claim in his behalf should, like the penalty claims in Awards Nos. 6701 and 7309 be denied.

In conclusion, the Carrier respectfully asserts that the Employes' claim in the instant dispute is wholly without support under the agreement rules and should, for the reasons expressed herein, be either dismissed or denied in its entirety.

The Carrier is uninformed as to the arguments the Brotherhood will advance in their ex parte submission, and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are necessary in reply to the Brotherhood's ex parte submission or any subsequent oral argument or briefs presented by the Brotherhood in this dispute.

All that is contained herein has been both available and known to the Employes or their representatives.

OPINION OF BOARD: At the outset it is urged that this Board has no jurisdiction over the instant dispute since there was no timely appeal to the succeeding officer from the Superintendent's notice of disallowance. Article V procedures were not followed, it is argued, and therefore there was no compliance with provisions of Section 3, First (i) of the Railway Labor Act. The relevant facts are as follows:

1. On July 28, 1955 E. B. Elledge submitted to Superintendent A. K. Johnson "copies of time slips filed account used at Wingfoot station . . . off my regular assigned position at Hobart Yard . . ."

2. On August 1, 1955 Superintendent Johnson declined Elledge's claims for wages and other expenses.

3. On September 10, 1955 Local Chairman H. J. Heaney wrote the Superintendent with reference to Elledge's claim. After reviewing the facts and arguing the applicability of various contract clauses Heaney concluded, "Please advise whether or not you are now agreeable to making payment for time and expenses claimed."

4. On September 16, 1955 Superintendent Johnson responded, stating "I have yours of September 10th, submitting claim in behalf of E. B. Elledge, alleging violation of Agreement when he was used off his assigned position beginning July 19, 1955." After answering the Local Chairman's contentions, Superintendent Johnson wrote "Under the circumstances, I do not consider the schedule has been violated and the claim is declined."

5. On October 4, 1955 General Chairman J. F. Anderson submitted a written appeal to General Manager R. D. Shelton. He referred to and attached a copy of the claim filed by Local Chairman Heaney on September 10. He stated "Mr. Johnson, in his letter September 16 declined the claim; we therefore appeal to you with the request that you let us have your decision as early as convenient." (On October 11 receipt was acknowledged by Shelton who said he would write further after reviewing the facts.)

6. On November 21, 1955 General Manager Shelton sustained the Superintendent's decision (in response to the General Chairman's October 4 appeal). This letter, apparently, was never received and, on January 9, 1956, Anderson wrote Shelton that since the 60-day time limit had long passed he assumed

the claim would be paid. On January 17 Shelton replied that he had written on November 21 and enclosed a copy of that communication.

7. On January 30, 1956 General Chairman Anderson appealed to L. D. Comer, Carrier's Assistant to Vice President, referring at the outset to the Local Chairman's September 10, 1955 "claim letter", a copy of which he enclosed.

8. On March 23, 1956 Comer requested a 30 day extension of time in which to render his decision. This was granted.

9. On April 9, 1956 Comer rejected the Organization's appeal on the merits but, additionally, raised an Article V, Section 1-a objection. The Assistant to Vice President wrote:

> "I initially desire to point out that the claim described in the fourth and fifth paragraphs of your letter of January 30, 1956 was initially presented in your letter of October 4, 1955 to General Manager Shelton, and, since it differs from that presented by Local Chairman Heaney in his letter of September 10, 1955 to Superintendent Johnson and constitutes an entirely new claim which was never initiated and handled with the Superintendent as required by Article V, Section 1-a of the August 21, 1954 Agreement, your appeal claim is not a proper claim for my consideration and is barred by the provisions of the aforementioned Article V, Section 1-a."

10. On April 16, 1956 General Chairman Anderson replied, noting in part that "I filed no claim with the General Manager whatsoever — I appealed the claim letter that was filed by Local Chairman Heaney and gave an explanation as to our position with reference to that claim letter . . ."

11. On April 19, 1956 Comer responded, directing Anderson's attention to the differences between his appeals and the Local Chairman's September 10, 1955 claim which Comer quoted.

Thereafter, on December 21, 1956, the Organization submitted a claim on Elledge's behalf to this Board. Carrier's Ex Parte submission was tendered on April 16, 1957; its Hearing Statement was submitted on February 11, 1958; and its Reply to Employes' Hearing Statement was sent on April 14, 1958.

Was there a failure to comply with Article V? This rule provides, in relevant part, that

> (1) claims must be presented in writing, by or on behalf of the employe involved, to the authorized Carrier officer, within 60 days of the occurrence,
>
> (2) appeal of a disallowed claim must be taken within 60 days of the disallowance notice and failure to comply with this requirement shall close the matter.

It is now argued that the claim, in this case, was submitted on July 28, 1955 (by Elledge) and denied by the Superintendent on August 1, 1955. Since appeal was not taken until October 4, 1955 the 60-day time limitation was exceeded.

This argument, in our opinion, is not persuasive. It is clear that the parties themselves, while handling this case on the property and in their submissions to this Board, did not treat Elledge's July 28, 1955 letter and request for payments of various kinds as the Article V claim. While it is true that Carrier is not obligated to decline the same claim twice, there is no evidence here that Carrier ever considered Local Chairman Heaney's September 10, 1955 letter not to constitute the claim before it. This question could have been raised in September by Superintendent Johnson. Instead, he replied to the Organization's September 10th claim. On November 21, 1955 General Manager Shelton, in his denial letter, made no reference to a time lapse based on Article V. Carrier's highest appeal officer, in denying the appeal on April 9, 1956, did not raise this question although, significantly, he was then concerned with Article V (in a different respect, of course). Again, on April 19, 1956, when this appeals officer discussed Article V at great length (in a two-page single-spaced letter) he made no mention of a 60-day time limit lapse. Moreover, he referred specifically to "the claim initially submitted by the Local Chairman."

We also note that in none of its submissions to this Board (which totaled 51 single-spaced pages) did the Carrier suggest that the claim to be determined here was other than Local Chairman Heaney's September 10, 1955 claim.

Under all these circumstances it would be highly improper for the Board, under its own motion so to speak, to tell the parties they were mistaken in their mutual acceptance of September 10, 1955 as the date of claim. What considerations impelled them to recognize this as the controlling date we cannot say but, surely, it is much too late to open that question now.

We turn, then, to Item 1 of the Organization's claim. Did Carrier violate the Agreement between the parties when it failed to place Elledge on his regularly assigned position at Hobart beginning July 20, 1955? Did it refuse to compensate him properly thereafter as provided by the Agreement?

The factual background may be summarized as follows:

April 20, 1955.

Elledge was assigned to a temporary vacancy at Needles, California by virtue of his seniority and bidding rights.

April 25, 1955.

A permanent vacancy on a rest day relief position at Hobart (actually this is a yard office at Los Angeles) was advertised. When bids closed on May 2, Elledge turned out to be the senior applicant.

May 18, 1955.

Elledge relinquished his Needles position, in accordance with Article XX, Section 11-a, and took his place on the extra list. This provision states:

> "The successful applicant for a bulletined temporary vacancy may relinquish it at any time, but, unless the title holder of such position is displaced therefrom in force reduction, may only assume the position to which he is title holder at the completion of any succeeding ninety (90) day period following date of assignment to such temporary vacancy. If

such employe relinquishes the bulletined temporary vacancy prior to the completion of any such ninety (90) day period, he will take his place on the extra list and remain thereon pending the completion of such ninety (90) day period, following which he will be permitted to assume the position to which he is title holder as contemplated under the first sentence of this Section 11-a."

July 19, 1955.

On this day — the end of XX, 11-a's 90-day period — Elledge was assigned (from the extra list) to a temporary vacancy on a Telegrapher-Clerk position at Wingfoot, California. Since it was unable to obtain a replacement from the extra list, Carrier says, it kept Elledge on the Wingfoot job through July 28. He started his permanent Hobart assignment on July 30.

Thereafter claim was submitted based on the allegation that, under XX, 11-a, Management was obligated to place Elledge on the Hobart position immediately following expiration of the 90-day period.

Carrier argues in substance:

1. Had the parties intended XX, 11-a to require placement of an employe on his regular position immediately following expiration of the 90-day period they would have included the language necessary to accomplish that purpose. But they did not and 11-a does not specify the time within which the placement must be made.

2. Since no time is specified, a "reasonable time" should be inferred. Here, Carrier acted promptly (and reasonably) as soon as an extra man became available. While it knew for some time when the 90 days would expire, it could not be expected to know what the situation would be so far in advance.

3. When 11-a is construed in conjunction with XX, 12-a and XX, 6-a, so that these provisions are consistent, sensible and harmonious, it is evident that Carrier had 30 days from the end of the 90-day period within which to place Elledge on the Hobart job.

These arguments, in our judgment, are not convincing. The general rule with respect to placing men in bulletined jobs is found in XX, 6-a which provides in relevant part:

". . . when permanent vacancies occur, they will be promptly bulletined . . .; **the successful bidder to be promptly notified, and placed** on the position within 30 (thirty) days after close of bulletin . . ."

There are, however, exceptions to this general rule. The second sentence of XX, 12-a provides:

". . . an employe who bids in a permanent assignment while occupying a bulletined temporary vacancy will continue to protect the latter, subject to the provisions of Section 11-a of this Article XX."

(The first sentence of 12-a has no relevance here since it deals with "an employe who is displaced in force reduction from the position to which he is title holder . . ." There was no force reduction in the case at hand.)

Elledge's situation, then, came under the second sentence of 12-a which, in turn, invokes the provisions of 11-a cited above. The question now, simply, is this: does the second sentence of 11-a permit Carrier to delay placement beyond 90 days under the circumstances of this case?

The key phrase, of course, is:

> ". . . he will take his place on the extra list and remain thereon **pending the completion of such ninety (90) days period, following which he will be permitted to assume the position . . .**" (Emphasis ours.)

It seems apparent, particularly from the use of the phrase "be permitted" in this sentence (and a similar phrase — "may only assume the position" — in the previous sentence) that 11-a holds the successful applicant for a permanent assignment from his job not because Carrier is unable, normally, to fill vacancies (Section 6-a gives it only 30 days) but because the individual has actually been successful, within a relatively short period, in obtaining two different positions. Under such circumstances, 11-a says in effect, the employe must go through a longer waiting period.

It should also be noted that the employe is to remain on the extra list "**pending . . . completion** of" the 90-day period. According to Webster's New College Dictionary, "pending" means "during; through the continuance of; until." The same authority defines "until" as "up to the time of." These are rather precise concepts and, in our estimation, do provide grounds for concluding that the time period in 11-a is specific, contrary to Carrier's assertion. "Pending the completion of" 90 days, in other words, means until the end of 90 days — no more. (Emphasis ours.)

Furthermore, there is no reason to suppose that the parties intended an additional 30-day period to be imposed. Had they so intended, it would have been quite simple to refer — in the second sentence of 11-a or in the second sentence of 12-a to 6-a (the 30 day clause). Instead, the only reference is to the first sentence of 11-a which, as already noted, mentions only 90 days.

In light of the above analysis we find that Management violated the Agreement when it failed to place Elledge on his Hobart position starting July 20, 1955. What, then, should be the remedy?

There seems to be little doubt that the Organization's General Chairman, in his January 30, 1956 appeal to Carrier's Assistant to Vice President, expanded on the original monetary claim. We shall disregard such additional claims and limit our consideration to the claims made by Local Chairman Heaney which were duly processed through all stages of the grievance procedure. Heaney's September 10, 1955 letter, in effect, incorporated Elledge's own computations which, in substance, reflected the grievant's request that he be compensated in accordance with X, 2-a.

It is true, as Management points out, that XX, 11-a contains no specific penalty provision. This does not mean, however, that a violation should go unremedied, particularly where financial loss is involved.

What should be done in Elledge's case? Had he been transferred on July 20, 1955 he would have earned a higher hourly rate, he would not have incurred certain expenses, he would have worked (or been idle) on different days.

When he was required to remain in the Needles job he was in much the same position as the employe who, under XX, 6-a, is denied placement within the specified time. It is not necessary to read 6-a into 11-a in order to conclude that 6-a, and hence X, 2-a, contain the types of remedies which are appropriate in this case and which are not punitive. In brief, they entail the following:

> "The employe will be paid not less than a minimum day of eight (8) hours for each day he is assigned to work on his assigned position.
>
> If the employe is required to perform work on the rest day of his own regular assignment, he shall be paid therefor at time and one-half rate.
>
> Payment for time worked . . . will be at the higher rate of the two positions involved.
>
> If the relief work is outside of the city in which his regular assignment is located, payment will be at pro rata for time worked within the hours of his own regular assignment and time and one-half for time worked outside the hours of his own regular assignment.
>
> Actual necessary expenses will be allowed while away from the city in which his regular assignment is located."

The parts of the Organization's claim which would produce results in excess of those called for under the above formula, are denied. An actual listing of the hours due, based on the facts in the record, is set forth below in the Findings.

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 Item 1 of the Claim is sustained;

That Items 2 and 3 are sustained to the extent that Claimant shall

1. Be compensated in the amount of $64.50 for actual expenses;

2. Be compensated, at the rate of the Hobart position, as follows:

Date	Hours
For July 20, 1955	4
" 21	4
" 22	4
" 23	3½

Date	Hours
For July 24, 1955	8
" 25	8
" 26	4
" 27	4
" 28	4

AWARD

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July 1963.