Award No. 11713
Docket No. TE-10029

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Tennessee Central Railway, that:

1. Carrier violated the agreement when commencing August 6, 1956, inclusive, it blanked position of agent at Silver Point, Tennessee. (Carrier file 145-90.)

2. Carrier shall compensate senior, idle telegrapher (extra in preference) for one day (8 hours) at the agreed upon rate of pay for agent, Silver Point, Tennessee, for each and every day such position was blanked.

3. Carrier violated the agreement when commencing September 24, 1956 and continuing until November 16, 1956, inclusive, it blanked position of agent at Silver Point, Tennessee. (Carrier file 145-90.)

4. Carrier shall compensate senior, idle telegrapher (extra in preference) for one day (8 hours) at the agreed upon rate of pay for agent, Silver Point, Tennessee, for each and every day such position was blanked.

EMPLOYES' STATEMENT OF FACTS: There are in full force and effect collective bargaining Agreements entered into by and between Tennessee Central Railway Company, hereinafter referred to as Carrier or Management, and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The original Agreement was effective May 1, 1924, and has been amended in many respects. The Agreement, as amended, is on file with this Division and is, by reference, made a part of this submission as though set out herein word for word.

The dispute involved herein was handled on the property in the usual manner through the highest officer designated by Carrier to handle such disputes and failed of adjustment. Under the provisions of the Railway Labor Act, as amended, this Division has jurisdiction of the parties and the subject matter.

As the claim for the periods here involved was not presented by or in behalf of "the employe involved", as required by the clear and unequivocal language of this rule, it has no standing and should for that reason alone be dismissed. (Emphasis ours.)

Carrier further points out that the claim for the period September 24–November 16, 1956 (Parts 3 and 4 of Employes' Statement of Claim) was not filed until December 5, 1956 (Carrier's Exhibit No. B-1), more than 60 days following the occurrence commencing on September 24, 1956 — also a violation of said rule and an additional bar to that portion of the claim.

Carrier further submits that no showing has been made that any employe or employes have been deprived of any compensation or suffered any loss or damage which, according to Award No. 6288, involving same parties, is another sound reason for denial of a claim of this kind.

This cause is without merit from any standpoint and should be denied in its entirety.

Carrier is making this submission without having been furnished copy of Employes' petition and respectfully requests the privilege of filing a brief answering in detail the ex parte submission on any matters not already answered herein, and to answer any further or other matters advanced by the Petitioner in relation to such issue or issues.

All data submitted herein has been presented in substance to the duly authorized representatives of the Employes and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: E. E. Miller was regularly assigned to the position of Agent at Silver Point, Tennessee. From August 16 to August 26, 1956, Miller was assigned by Carrier to relieve the Agent at Carthage, Tennessee, who was on vacation. During the period of September 24 to November 16, 1956, Miller was assigned to relieve the Agents at Double Springs, Cookeville and Baxter, Tennessee, while the Agents at the latter stations were on vacation. During the above period, Miller's position at Silver Point was blanked.

A claim was filed in behalf of the "senior, idle telegrapher (extra in preference)" for each of the periods when the Agent position at Silver Point was blanked. On November 30, 1956, Carrier's Superintendent wrote to Petitioner's General Chairman, in part, as follows:

> "I have already given you the benefit of my reasons for considering that the agreement was not violated in the course of handling previous similar claims.
>
> "Furthermore, in my opinion, any pay claim is barred in this case because the employe or employes involved did not file claim and none was filed on behalf of any of them within the time limit prescribed in the agreement."

In a letter dated March 7, 1957, addressed to Petitioner's General Chairman, Carrier's highest appeal officer wrote, in part:

> "I do not find that the General Superintendent–Chief Engineer Manning questioned the right of your organization to represent the craft or to file a claim in behalf of a member thereof, but that he pointed out to you that claim had not been filed by or on behalf of the employe (or employes) involved, an absolute requirement of Article V, Section 1 (a) of the August 21, 1954 Agreement; and in using the term 'the employe involved' the parties patently intended to bar even those claims made by or on behalf of one who had no loss and was not involved in the occurrence."

That letter continues to say that no qualified, extra man was available and that Award No. 6288 was applicable to bar the claim.

The procedural question needs first consideration. Carrier primarily relies on Award 10458 (Wilson) which involved the same parties, the same Agreement, and a claim arising out of similar circumstances.

Petitioner filed three separate claims with this Division involving the same Carrier, the same Agreement and all of them arising out of the blanking of the Agent's position at Silver Point, Tennessee. The first claim involving an alleged violation commencing April 27, 1955 and continuing until October 24, 1955 was received by the Division on June 5, 1956 and bears Docket No. TE-8815. The second claim, the one here being considered, was received on November 21, 1957 and bears Docket No. TE-10029. The third claim involving alleged violations on February 16, 17, 20, 21, 23 and 24, 1956, and from April 2 to May 1, 1956 was received on January 28, 1958.

Award 10458, adopted on March 28, 1962, dismissed the claim in Docket No. 8815 because of procedural defects. We said in that Award:

> "In our opinion, the claim herein filed does not meet the requirements of Article V, Section 1 (a) of the National Agreement of August 21, 1954, effective between the parties in that the Claimants are not specifically named nor are they easily and clearly identifiable in this case. Therefore, the claim must be dismissed."

Carrier argues that this Award is res judicata, that the principle of stare decisis must apply and that, in any event, the claim here is defective and should be dismissed.

There is no question that the manner in which the claim now before us is presented is identical with the manner in which the claim in Award 10458 was presented. It is, indeed, unfortunate that all three Dockets were not assigned to the same Referee. Nevertheless, we must accept our responsibility for the decision in this claim alone and issue an Award thereon.

While parties, the Agreement and the circumstances which gave rise to this claim are the same as the claim in Award 10458, the dates of the alleged contract violations are not the same. The decision in Award 10458 is, therefore, not res judicata. The principle of res judicata applies only when the parties, the agreement and the violation which gave rise to the claim are identical. That is not the case here.

It is desirable that the principles enunciated in the Awards of this Division, as well as by the Board, be consistent. That, however, is not the case. And, perhaps, for good reason. Opinions are prepared by Referees with various backgrounds and experiences in labor-management relations. Like Judges

in courts of law, they apply to their opinions those principles and precedents which best express their objective interpretations, they accept those principles and precedents which, in their judgment, give meaning and intent to the provisions of the Agreement, and which best effectuate the purposes of the Railway Labor Act, the Board's Rules and the Agreement.

This Referee has previously accepted the principle and Board precedents which hold "that a claim is valid where the Claimants can be easily ascertained and are readily identifiable." (Awards 10515 and 11557.) See Awards 10059 (Daly), 10092 and 10122 (Carey), 10533 (Mitchell) and others. Award 10458 also recognizes this principle. The claim was dismissed not alone because the Claimants were not named, but because they were not "easily and clearly identifiable in this case."

The fact remains that the Carrier's operations are not extensive. It is, comparatively, a small railroad company. In Docket TE-8815, Petitioner has attached the Agents and Operators Seniority Rosters. As of January 1, 1956, there were only thirty six (36) employes on that seniority roster. While a seniority roster does not establish the identity of the Claimants, it does, however, serve as a basis from which the Claimant may "be easily ascertained and readily identifiable." There should be no difficulty to ascertain and identify the senior, qualified employe available, if any, on the alleged dates when the agent position at Silver Point was blanked.

The claim needs to be decided on its merits.

Carrier's contention on the merits of the claim is the same as in Award No. 11712. We have there discussed at some length all of the applicable arguments, including the question of employe qualification and Award 6288. Our conclusions are the same for this claim. There is no need to repeat that discussion. For the same reasons, we hold that there is merit to this claim.

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 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 5th day of September 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11713, DOCKET TE-10029

During the summer of 1955, carrier did not have sufficient qualified extra men to fill temporary vacancies and also relieve Agents and Operators for their scheduled vacations. In these circumstances, carrier applied the provisions of Rule 14 as well as Articles 10 and 12 of the Vacation Agreement. It used the regular agent at Silver Point, Tennessee, to perform relief work at other stations and blanked (closed) the one-man agency at Silver Point. The General Chairman could not find that carrier's action violated any rule or deprived an available qualified extra man of any work or compensation. Notwithstanding this, claim was filed in behalf of the "senior idle telegrapher (extra in preference)" for each day the Silver Point position was blanked. At all stages of handling, it was carrier's position that there was no violation of the agreement and that, in any event, the claim in behalf of unnamed claimants did not meet the requirements of Article V, Section 1(a) of the August 21, 1954 Agreement.

This dispute, covered by Docket TE-8815, was considered by the Division and the claim was properly dismissed by **Award 10458** (Referee Wilson) in which the majority held:

> "The claim in this case was originally filed on June 24, 1955 by the Committee of Division 64 of The Order of Railroad Telegraphers making claim for one day's pay for each Monday through Friday each week beginning April 27, 1955 and continued so long as the violation continues at the rate of $264.62 per month in behalf of the senior extra Employe idle who are covered by the seniority roster under the Agreement of the Tennessee Central Railway and The Order of Railroad Telegraphers. Organization's Statement of Claim requests Carrier be required to 'compensate senior, idle telegrapher (extra in preference) for one day (8 hours) at the agreed upon rate of pay for agent, . . .'
>
> "In our opinion the claim herein filed does not meet the requirements of Article V, Section 1 (a) of the National Agreement of August 21, 1954 effective between the parties in that the Claimants are not specifically named nor are they easily and clearly identifiable in this case. Therefore, the claim must be dismissed."

Docket TE-10029 (**Award 11713**) covered the same identical dispute, facts and circumstances for subsequent dates in 1956 when the agent at Silver Point was used to perform relief work at other stations. There again the General Chairman could not name an available qualified extra man who was adversely affected; i.e., "the employe involved" as required by Article V-1(a), and resorted to the vague and indefinite "senior idle telegrapher (extra in preference)" term in filing the claim. Thus, all elements of this dispute, including the respective contentions of the parties, were the same as those covered by Docket TE-8815.

It is apparent that the majority members in **Award 11713** have misconstrued the effective agreement and the basis of the decision in **Award 10458.** Rule 17 of the agreement provides that in filling temporary vacancies "the oldest available employe **on the extra board**" will be used, provided he is qualified. Obviously, there could be no violation of the agreement unless a qualified extra operator was in fact available and not used, in which event, the burden was on petitioner to prove the claim by naming and identifying the claimant

involved. No such proof was furnished in either docket. This essential element was the very crux of the issue, both as to Article V and the merits of the claim.

The identical situation in Docket TE-10029 clearly confirms the correctness of **Award 10458**. The General Chairman, in filing that claim, had full knowledge of carrier's position regarding the requirements of Article V in the prior claim, and thus he had every opportunity to identify the employe involved, but could not do so.

The majority makes no reference to recent **Award 11490** (Hall) between these same parties, which was cited in panel argument. In that case, the Board cited **Award 10458** and dismissed claim of "the senior idle telegrapher (extra in preference)." That case clearly reveals why strict compliance with the requirements of Article V, Section 1(a), is necessary. There, "the employe involved" was not identified within sixty days of the date of occurrence. After carrier had declined the claim, and long after the 60-day limit had expired, petitioner named an extra employe, who, carrier promptly pointed out, had declined extra work at points other than Nashville. (See, also, **Awards 10944, 11038, 11066, 11156, 11229-30, 11372**, 11450, 11499-504, and 11580, on "the employe involved.")

The claims in the two dockets are indistinguishable. **Award 10458** is not palpably wrong and has definitely not been shown to be patently erroneous. It has been cited and followed in subsequent Awards (**11066, 11490**), and particularly in this dispute it constituted a precedent which the majority should have followed.

For these reasons we dissent.

R. A. DeRossett
R. E. Black
W. F. Euker
G. L. Naylor
W. M. Roberts