Award No. 11798
Docket No. CL-11546

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Agreement between the parties dated August 21, 1954 when the General Storekeeper failed to decline, within 60 days from the date filed, claim in behalf of Store Department Employes R. Wittig, E. Tarnow, Sr., E. Jensen, S. Laday, J. Thekan and E. Murawski at Milwaukee, Wisconsin, filed with him on appeal from the decision of District Storekeeper W. C. Lummer.

2. Carrier shall be required to allow the claim as presented.

EMPLOYES' STATEMENT OF FACTS: On January 29, 1958 Vice General Chairman Hopper addressed a letter to General Storekeeper G. V. Ireland, informing him that it was his understanding that Mr. Ireland had established an Assistant District Storekeeper position at Milwaukee Shops and that Mr. T. H. Reidy, the occupant of that position, was acting more or less in the capacity of an Assistant General Foreman; and Mr. Hopper requested that the position be bulletined and assigned to employes in Seniority District No. 118 in accordance with the rules.

On February 19, 1958 Mr. Ireland replied to Mr. Hopper, disagreeing with his contention and stated: "Therefore, your request is respectfully declined."

On March 11th Mr. Hopper again wrote Mr. Ireland calling attention to the work that Mr. Reidy has performed on some occasions and Mr. Hopper stated: ". . . if after reviewing facts you are still of the opinion that the Carrier is within its rights to establish a position of Assistant District Storekeeper such as that occupied by Employe T. H. Reidy for the purpose of general supervision of the employes and their work and will so advise, I will arrange to progress the matter through the regular channels." There still had been no claim filed by the Organization.

In conclusion, we respectfully submit that the evidence of record clearly establishes the fact that the positions of Assistant District Storekeeper have always been official positions, as contemplated by Rule 3 (c) and totally excepted from the scope and application of any and all schedule agreements. The employes' contention in the instant dispute with respect to the alleged performance of work within the Agreement by Assistant District Storekeeper Reidy at Milwaukee is without foundation or factual support. We, therefore, request that the claim be denied in its entirety.

All data contained herein has been made known to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The only issue before us is whether the claim should be allowed because Carrier allegedly failed to deny the claim within the time limits provided in Article V of the August 21, 1954 Agreement.

On January 29, 1958 Petitioner's Vice General Chairman, H. C. Hopper, wrote Carrier's General Storekeeper, G. V. Ireland, stating that it was his understanding that "T. H. Reidy was appointed to a newly established position of Assistant District Storekeeper at the Milwaukee Shops and that since that time he has acted more or less in the capacity of an Assistant General Foreman directly supervising employes of the main store." Mr. Hopper concluded his letter by saying:

> "Therefore, it is respectfully requested that the position occupied by Employe T. H. Reidy be bulletined and assigned in accordance with the provisions of the Clerks' Rules Agreement to employes of the Store Department in Seniority District No. 118."

Mr. Ireland replied on February 19, 1958. He fully discussed the position in question and stated that Mr. Reidy at no time acted in the capacity of Assistant General Foreman and that at no time did he perform the duties of a chief clerk. Mr. Ireland concluded by saying:

> "In regard to your request that the position occupied by Mr. Reidy, which is a position that is completely outside of the schedule, be bulletined and assigned in accordance with the provisions of the Clerks' Rules Agreement, there is no evidence whatsoever that the action on the carrier's part in regard to the duties of the present assigned position of Mr. Reidy as Assistant District Storekeeper is in violation of the Agreement. Therefore, your request is respectfully declined."

On March 11, 1958 Mr. Hopper again wrote to Mr. Ireland that "if after reviewing the facts you are still of the opinion that the Carrier is within its rights to establish a position of Assistant District Storekeeper such as that occupied by Employe T. H. Reidy for the purpose of general supervision of the employes and their work and will so advise, I will arrange to progress the matter through the regular channels." Mr. Ireland replied on March 17, 1958 stating that Mr. Reidy's position did not come within the scope of the Agreement, and concluded as follows:

> "I think that if you care to visit with me sometime in the near future, we can discuss this matter and I am sure that you will be satisfied with the results of our discussion."

Mr. Ireland again wrote to Mr. Hopper on May 2, 1958 and referring to the letter of March 17, 1958, said:

> "To date I have not received a reply to this letter, and, therefore, this is to advise that I do not agree that there is any violation of the Clerks' Schedule in appointing Mr. Reidy to this official position.
>
> "Therefore, any claim on the part of the Organization with respect to this case is respectfully declined."

In the meantime, on April 18, 1958, Petitioner filed a claim with Carrier's District Storekeeper in behalf of:

> ". . . employes R. Wittig, E. Tarnow, Sr., E. Jensen, S. Laday, J. Thekan and E. Murawski for a day's pay at their respective rates of their supervisory positions for each day subsequent to February 28, 1958, which positions were abolished on January 10 and February 28, 1958, allegedly due to the establishment of position of Assistant District Storekeeper."

Carrier's District Storekeeper declined the claim on April 25, 1958 and Petitioner rejected the declination on May 2, 1958.

Petitioner appealed the claim of April 18, 1958 to Carrier's General Storekeeper, Mr. Ireland, on May 12, 1958. Having received no reply, Petitioner wrote to Carrier on July 16, 1958, in part, as follows:

> "Inasmuch as you have not declined the claim within the time limitations of the Agreement, it is expected therefore, in accordance with the provisions of the Agreement, that you will allow the claim as presented; and I will appreciate your advising that you are so arranging."

On May 12, 1958 Mr. Hopper wrote to Mr. Ireland, stating that his letters of January 29 and March 11, 1958, "were for the purpose of calling your attention to the violation with respect to the use of Employe Reidy as Assistant District Storekeeper for the performance of general supervision and also for relief purposes." Referring to Mr. Ireland's letter of March 17, 1958, Mr. Hopper continued:

> "When I talked to you on the telephone shortly after March 17th, I advised you I had received your letter and would arrange to come to the shops and discuss the matter with you. I was advised you were on vacation at the time I wanted to meet with you to discuss the matter and it was not until April 25th that I did meet with you to discuss this matter . . . Inasmuch as it was apparent that you were not agreeable to correcting the violation, a claim was presented to District Storekeeper W. C. Lummer on April 18, 1958 in accordance with the August 21, 1954 Agreement and the claim was subsequently appealed to you May 6, 1958.
>
> "Therefore, it would appear that your letter of May 2, 1958 is premature, for it is our intent to follow the procedure as outlined by Mr. Downing to comply with the provisions of Article V of the August 21, 1954 Agreement."

Mr. Ireland replied on July 31, 1958 reviewing all of the previous correspondence and concluded as follows:

"Therefore, the claim presented in your letter of January 29, 1958 was declined by me on February 19, 1958 which was certainly within the 60 day period. The claim presented again in your letter of March 11, 1958 was again declined by me on May 2, 1958 which was again within the 60 day period and in that letter I stated 'any claim on the part of the Organization with respect to this case is respectfully declined.'

"There is no question whatever about the fact that any claim presented in connection with the Assistant District Storekeeper position occupied by Mr. Reidy has been declined by me within the 60 day period and I cannot agree that because of the manner in which you chose to handle the claim that I am under an obligation to decline it again."

Carrier contends that: "Careful analysis of each letter reveals that all deal with but one chain of events constituting an alleged violation, namely, carrier's action in establishing a position of Assistant District Storekeeper, assignment of T. H. Reidy thereto, and performance of supervisory duties belonging to employes covered by the agreement." They argue that Carrier's several letters denying the claim are sufficient and that the claim contained in Petitioner's letter of April 18, 1958 is identical with the claim in Petitioner's letters of January 29, 1958 and March 11, 1958.

In the first place, Petitioner's letters of January 29 and March 11, 1958 were not formal claim presentations. They did not strictly conform with the requirements of Article V of the August 21, 1954 Agreement. They did not name the claimants, nor indicate the damages, if any, due them. The claim of April 18, 1958 did so comply.

Secondly, informal discussions of pending grievances should be encouraged. The parties may, thus, be able to resolve many of them before they become formal claims. The letters of January 29 and March 11, 1958, were informal presentations of a disputed matter. They were not presented to the proper officer of the Carrier in the initial step.

Thirdly, Petitioner specifically stated in the letter of March 11, 1958 that if Carrier disagreed with Petitioner's position, that Petitioner "will arrange to progress the matter through the regular channels."

Finally, Petitioner's letter of May 12, 1958, certainly put the Carrier on notice that Petitioner intended to process the claim in all of the prescribed steps. This letter was written to Carrier's representative about six weeks before Carrier's reply to Petitioner's appeal dated May 6, 1958. In no sense can Carrier's letter of May 2, 1958 be considered a denial of the claims presented to the District Storekeeper on April 18, 1958.

Claimants are entitled relief only up to the date the claim was actually denied which was on July 31, 1958. Awards 11326 (Dolnick), 11211 (Miller) and others.

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 Carrier failed to comply with Article V of the Agreement of August 21, 1954.

AWARD

Claim is sustained in accordance with the terms set out in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1963.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO AWARD NO. 11798, DOCKET CL-11546

In Award 11798, the Referee quite properly held:

"That Carrier failed to comply with Article V of the Agreement of August 21, 1954."

In that Finding, the Employes wholeheartedly concur.

For the Majority to limit Carrier's absolute obligation, however, is inexcusable. The Referee ignored the clear and unambiguous terms of Article V 1 (a) reading:

"* * * If not so notified, **the claim or grievance shall be allowed as presented** * * *." (Emphasis ours.)

The language emphasized above is so clear and unambiguous it is not subject to construction, and most certainly should be given its proper meaning as was done in Award 11496, adopted June 13, 1963, in which Referee John H. Dorsey, speaking for the Majority, properly held:

"* * * we must, by mandate of Article V 1, sustain the claim 'as presented'."

In the instant case the Referee relied on Awards 11326 (Dolnick), 11211 (Miller) "and others." Understandably, the Referee relied on his own prior Award, and another equally erroneous; but, to refer to an old maxim, "Two wrongs do not make a right."

This Award is in error in that it does not assign the proper meaning to the language of Article V, which orders that "the claim or grievance shall be allowed as presented."

Because of the clearly erroneous misapplication of Article V 1 (a) by the Majority, I dissent.

D. E. Watkins

Serial No. 226

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Interpretation No. 1 to Award No. 11798

Docket No. CL-11546

Name of Organization:

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

Name of Carrier:

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Upon application of the representatives of the Employes involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The Award sustained the claim "in accordance with the terms set out in the opinion." The Opinion found that the Carrier did not decline the claim within sixty (60) days after appeal was presented to Carrier's General Storekeeper (a designated appeal officer) and since the claim was finally declined on July 31, 1958, that "Claimants are entitled to relief only up to the date the claim was actually denied, which was on July 31, 1958 . . ."

Employes' Statement of Claim before this Division at the time Award 11798 was adopted reads as follows:

"Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Agreement between the parties dated August 21, 1954 when the General Storekeeper failed to decline, within 60 days from the date filed, claim in behalf of Store Department Employes R. Wittig, E. Tarnow, Sr., E. Jensen, S. Laday, J. Thekan and E. Murawski at Milwaukee, Wisconsin, filed with him on appeal from the decision of District Storekeeper W. C. Lummer.

2. Carrier shall be required to allow the claim as presented." (Emphasis ours.)

Under date of April 18, 1958, the Employes filed a formal claim with Carrier's District Storekeeper, W. C. Lummer, which read as follows:

"Claim of System Committee of the Brotherhood that:

1. The Carrier violated and continues to violate the Clerks' Rules Agreement when it arbitrarily established and designated a position of Assistant District Storekeeper in the Store Department at Milwaukee Shops, Milwaukee, Wisconsin, without negotiation or agreement, excepting the position from the application of the schedule rules, and assigned the occupant to general supervisory work regularly assigned to and performed by positions fully covered by the Rules Agreement.

2. The Carrier shall now be required to properly bulletin and assign the position of Assistant District Storekeeper, presently occupied by Employe T. H. Reidy, in the Store Department at Milwaukee Shops, Milwaukee, Wisconsin to employes in Seniority District No. 118 in accordance with the provisions of the Clerks' Rules Agreement.

3. The Carrier shall now be required to compensate the following employes for a day's pay at their respective rates of their supervisory positions, which were abolished on January 10 and February 28, for each day subsequent to February 28, 1958 that Employe T. H. Reidy performs supervisory work covered by the Clerks' Rules Agreement:

R. Wittig	S. Laday
E. Tarnow, Sr.	J. Thekan
E. Jensen	E. Murawski"

It is the position of the Employes "that to fully comply with Award No. 11798, the **Carrier must allow the claim as presented on the property** and pay each of the claimants a day's pay (8 hours) at the rate of their respective supervisory positions for each day from February 28, 1958 . . ." (Emphasis ours.)

Carrier argues that under the Award claimants are entitled **only** to be "kept whole", which means that they are entitled to be "paid for all time lost **less any amount earned in other employment.**"

The basis upon which the claim was sustained was predicated solely on the fact that the Carrier did not comply with the Time Limit provisions in Article V of the August 21, 1954 Agreement. The pertinent sections of that Agreement read 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. (Emphasis ours.)

* * * * *

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

Failure of Carrier's authorized appeal officer to decline the claim within sixty (60) days from the date it was filed with him constitutes an automatic allowance of the claim "as presented." It is a confession of judgment. The claim "as presented" is the one set out in Employes' letter of April 18, 1958, previously quoted. In addition to the allegation of contract violation, the claim asked that the six named claimants be paid "a day's pay at their respective rates of their supervisory positions, which were abolished on January 10 and February 28, for each day subsequent to February 28, 1958 that T. H. Reidy performs supervisory work covered by the Clerks' Rules Agreement." By not declining the claim within the time limits of Article V of the August 21, 1954 Agreement, the claim set out in the April 18, 1958 letter was "allowed as presented", i.e., Carrier admitted to the violation of the Agreement and agreed that the claimants were entitled to compensation as therein set forth. To hold otherwise would be to emasculate the meaning, intent and purpose of the Time Limit Rule.

This Board has no right to entertain at this point and under this Award any principles of equity or the "kept whole" doctrine as urged by the Carrier. The claim was not submitted or processed on the merits. Award 11798 ruled only on the Time Limit Rule, and sustained the claim.

Award No. 11798 is, accordingly, interpreted to mean (1) that the Carrier did not comply with the Time Limit Rule of the August 21, 1954 Agreement, and (2) that for the reasons hereinbefore set forth, claimants are entitled to compensation from March 1, 1958 to July 31, 1958 at their respective rates of their abolished positions for each day that T. H. Reidy performed supervisory work during that period. No amounts earned by them in other positions shall be deducted.

Referee David Dolnick, who sat with the Division, as a member, when Award No. 11798 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of March 1968.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.

Serial No. 228

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Interpretation No. 2 to Award No. 11798

Docket No. CL-11546

Name of Organization:

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

Name of Carrier:

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Upon application of the representatives of the Carrier involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The Award said that the "Claim is sustained in accordance with the terms set out in the opinion." In the opinion this Board said, "Claimants are entitled relief only up to the date the claim was actually denied which was July 31, 1958."

Subsequently, the Employes requested this Division to interpret the Award. On March 25, 1968, this Division adopted Interpretation No. 1 which, in its essential part, says:

> "This Board has no right to entertain at this point and under this Award any principles of equity or the 'kept whole' doctrine as urged by the Carrier. The claim was not submitted or processed on the merits. Award 11798 ruled only on the Time Limit Rule and sustained the claim.
>
> Award No. 11798 is, accordingly, interpreted to mean (1) that the Carrier did not comply with the Time Limit Rule of the August 21, 1954 Agreement, and (2) that for the reasons hereinbefore set forth, claimants are entitled to compensation from March 1, 1958 to July 31, 1958 at their respective rates of their abolished positions for each day that T. H. Reidy performed supervisory work during that period. No amounts earned by them in other positions shall be deducted."

Litigation followed in the United States District Court for the Eastern District of Wisconsin. Claimant – Employes sought to enforce the Award and the Interpretation thereof. After many hearings and extensive arguments, Senior U. S. District Judge K. P. Grubb, on July 23, 1968, entered an order, the significant part of which reads:

> "The court is of the opinion that the 1966 amendments of the Railway Labor Act conferring finality on Board Awards do not contemplate federal district court evidentiary hearings and findings of fact to resolve disputes arising from ambiguities in the terms of the awards. Accordingly, the case again must be and it is hereby remanded to the Board for further interpretation to permit ascertainment of the money recovery from the face of the award for the purpose of enforcement by this court."

Carrier contends, as it did before the court, that this Board has no right to determine the days on which Mr. T. H. Reidy performed "supervisory work covered by the Clerks' Rules Agreement." Since the Award was made solely upon the Time Limit Rule of the August 25, 1954 Agreement, and since no substantive issue was therein involved, the Board has no right now to determine the days Mr. Reidy actually worked as a supervisor. There "is not now, never has been and never can be any proof that Mr. Reidy performed" such supervisory work.

As to the question of "money recovery" Carrier again says "that under the provisions of Award 11798 the claimants in the instant case were and are entitled only to be kept whole or, in other words, are entitled only to the difference between what they actually earned and what was claimed in their behalf, which difference totals $350.96 . . ."

Employes, on the other hand, say "that the Employe – claimants are to receive one day's pay for every day of the 107-day period from March 1 to July 31, 1958, that Reidy held the position of Assistant District Storekeeper without reference to the actual nature of the work he performed, including any days Reidy may have been absent from work on earned vacation time during the 107-day period."

In an Opinion and Order entered by Judge Grubb on March 1, 1967, he says: "According to the stipulation of the parties, the pay of the plaintiffs [Claimants], had they continued to occupy the supervisory positions abolished by defendant [Carrier], for the period in question would have been in the total amount of $12,240.47." That stipulation, dated December 15, 1966, provides "that each claimant, under those circumstances, would be entitled to the following amounts:

Claimant	Amount
Steven J. Laday	$2,038.07
Edwin A. Tarnow, Sr.	2,048.92
Erwin P. Murawski	2,038.07
John M. Thekan	2,038.07
Raymond A. Wittig	2,038.07
Elmer A. Jensen	2,039.27
TOTAL	$12,240.47"

It is a well established principle that this "Division has no authority under the guise of an interpretation to amend, modify or expand the scope of an Award and can only explain and interpret it in light of the circumstances that existed when the Award was rendered. (Serial No. 203, Interpretation No. 1 to Award No. 10878). Award No. 11798 was rendered upon a claim contained in Docket No. CL-11546. The formal claim under date of April 18, 1958, which is fully set out in Interpretation No. 1, consists of three paragraphs. The first charges that the "**Carrier violated . . . the Clerks' agreement when it arbitrarily established and designated a position of Assistant Storekeeper in the Store Department . . . without negotiation or agreement, excepting the position from the application of schedule rules,** and assigned the occupant to general supervisory work regularly assigned to and performed by positions fully covered by the Rules Agreement." (Emphasis ours.) When Carrier failed to comply with the Time Limit Rule as found by this Division in Award No. 11798, the Carrier lost its right to contest the facts alleged by the claim during the period March 1, 1958, thru July 31, 1958.

The language in the third paragraph of the April 18, 1958 formal claim mentions T. H. Reidy for the first time. It is clear from the reading of the entire formal claim that Reidy was that Assistant Storekeeper in the Store Department. And it is also clear that Reidy held that position all during the period from March 1, 1958 to July 31, 1958. It is not necessary to determine the days Reidy actually performed such work covered by the Agreement. It is sufficient that he was assigned and held that position during that period. This is the claim as presented; this is the claim on which the Carrier defaulted when it failed to abide by the Time Limit Rule.

The foregoing is neither an amendment, modification nor an expansion of the award.

Award No. 11798 is, accordingly, interpreted to mean (1) that the Carrier did not comply with the Time Limit Rule of August 21, 1954 Agreement, and (2) that for the reasons hereinbefore set forth and on the basis of the stipulation dated December 15, 1966 which is a part of the court record, Claimants are entitled to compensation from March 1, 1958 to July 31, 1958 in the following amounts:

Claimant	Amount
Steven J. Laday	$2,038.07
Edwin A. Tarnow, Sr.	2,048.92
Erwin P. Murawski	2,038.07
John M. Thekan	2,038.07
Raymond A. Wittig	2,038.07
Elmer A. Jensen	2,039.27
TOTAL	$12,240.47

No amounts earned by them in other positions shall be deducted.

Referee David Dolnick, who sat with the Division, as a member, when Award No. 11798 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION
ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1969.

Keenan Printing Co., Chicago, Ill. Printed in U.S.A.