

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

INDIANA HARBOR BELT RAILROAD

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

(1) The decisions by Supervisor of Bridges and Buildings Smith, dated July 17, 1959, by Maintenance of Way Engineer Hess, dated October 14, 1959, and by Engineer Maintenance of Way Dunn, dated January 26, 1960 in the claim in behalf of Painter Foreman John Gerk (Carrier's File 103.1-14h) were not in conformance with the requirements of Sections 1 (a) and (c) of Article V of the August 21, 1954 Agreement, and in consequence thereof;

(2) The Carrier now be required and directed to allow the claim in behalf of Painter Foreman John Gerk as was presented by General Chairman Moffitt under date of May 23, 1959.

EMPLOYES' STATEMENT OF FACTS: The facts surrounding the presentation of this claim are substantially set forth in the letter of claim presentation which reads:

"May 23, 1959

Mr. C. A. Smith
Supervisor of B&B Department
Indiana Harbor Belt Railroad
2721-161st Street
Hammond (Gibson), Indiana

Dear Sir:

It has been brought to my attention that Mr. John Gerk and Mr. V. Enisele painted the inside of the Indiana Harbor Belt restaurant at Blue Island, Illinois in the month of April 1959. John Gerk being a Painter Foreman and V. Enisele being a painter and holding seniority as such. However, the work was placed under the supervision of B&B foremen Blake, with John Gerk and V. Enisele.

other facilities on the respondent Carrier's property, eliminated the necessity of maintaining a separate force of painters to perform work which was now no longer needed.

At the time of the abolishment of this paint gang Mr. Gerk was the foreman. Mr. Gerk had seniority rights both in the Carpenter and Paint class, and both the position of painter and carpenter carried the identical rate of pay. Mr. Gerk exercised his seniority rights as a carpenter in a Bridge and Building Gang under the supervision of a Bridge and Building Foreman. This Bridge and Building Gang was a Composite Gang comprised of carpenters and sheet metal workers.

The Organization's representatives protested the right of the Carrier to assign Mr. Gerk as a painter and another painter to paint the inside of the Indiana Harbor Belt Railroad restaurant at Blue Island during the days in question in April of 1959. Their position was that Mr. Gerk should have been assigned to this job as a paint foreman. The appeal was carried in successive stages to the undersigned as the highest appeals officer who denied the claim on January 26th, 1960, and after a protest by the General Chairman of the Brotherhood of Maintenance of Way Employees on the Indiana Harbor Belt Railroad that the denial was ambiguous, substantiated the denial on April 27, 1960. Copies of these denials are attached. On September 19, 1960 the Carrier was informed the dispute should be submitted to your Board.

OPINION OF BOARD: We are concerned here with the following portion of the August 21, 1954 Agreement:

"... 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."

Carrier's letter disallowing the claim was sent within the required 60 days. It stated:

"Your claim is without merit and is accordingly denied."

We must here determine whether the words "your claim is without merit" meet the requirements of the August 21, 1954 Agreement that the Carrier give the Claimant "the reasons for such disallowance."

We had this same issue before us in Docket No. 15, SBA No. 287 involving the Baltimore and Ohio Railroad and the Brotherhood of Maintenance of Way Employees, with this same referee.

There the Carrier's letter denying the claim stated:

"As a result of this investigation your claim is declined."

We sustained that claim by unanimous vote.

The language used by the Carrier in the docket before us here — "your claim is without merit" — is less responsive to the requirements of the August 21, 1954 Agreement than was the reply of Carrier in SBA No. 287.

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 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 Agreement was violated.

AWARD

In conformity with the August 21, 1954 Agreement the claim will be allowed as presented.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of March 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14259 DOCKET MW-12384

The conclusion of the majority that the denial considered in this proceeding "is less responsive to the requirements of the August 21, 1954 Agreement than was the reply of Carrier in SBA No. 287" demonstrates on the part of the majority a failure to analyze the wording used.

Removing from the subject denial the words of denial (i.e., "and is accordingly denied") leaves as the reason the words "Your claim is without merit" — certainly a most appropriate "reason" for denial.

By the same process (removing the words "your claim is denied" from the denial considered by SBA No. 287), we are left with the words "As a result of this investigation."

How the majority can arrive at a conclusion that "Your claim is without merit" is not a reason escapes us. More important, how experienced minds can conclude that "As a result of this investigation" is more responsive to the Agreement than in "Your claim is without merit" and then use this reasoning as a basis for sustaining the claim confounds us.

We dissent.

**C. H. Manoogian
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W. M. Roberts**

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