Award No. 16163
Docket No. TE-14734

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

MISSOURI PACIFIC RAILROAD
(Gulf District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad (Gulf District), that:

1. The Carrier violated the terms of the Telegraphers' Agreement of March 1, 1952, when it arbitrarily and unilaterally closed Agent-Telegrapher position at Jefferson Island, La., on July 25, 1962, without conference or agreement with this Organization and without abolishing the work thereof and instead transferred said work to the telegrapher-clerk at New Iberia, insofar as having him go to Jefferson Island, La., twice and three times daily to check yard, make switch lists and sign bills of lading, transferring all other necessary work to employes at New Iberia, La., not covered by the Telegraphers' Agreement.

2. The Carrier is unjustified in requiring the telegrapher-clerk at New Iberia, La., to perform such duties at Jefferson Island, La., especially in signing bills of lading, and all other work necessary at Jefferson Island, La., to clerical forces and others at New Iberia.

3. The Carrier shall, beginning July 25, 1962, and continuing thereafter, compensate Mr. J. K. Briley, who was agent at Jefferson Island, La., the difference of pay between the Jefferson Island, La., monthly rate of pay and what he receives on other positions, expenses involved on account of the closing of Jefferson Island agency, including moving from and to Jefferson Island, La., and all other expenses that he would not and did not have at Jefferson Island, La., until the position is restored.

4. The Carrier shall also compensate all other employes in a like manner adversely affected thereby.

EMPLOYES' STATEMENT OF FACTS: Jefferson Island, La., is located on a branch line extending from New Iberia, La., to Jefferson Island. It is known as the Jefferson Island Subdivision of the Missouri Pacific Railroad

ment. You have cited Rule 4(d); however, this rule is not applicable to job abolishments.

There is only one industry located at Jefferson Island and this is the Jefferson Island Salt Company. There was not enough work to justify maintaining a full time position at Jefferson Island, and the Louisiana Public Service Commission gave the Carrier authority to the close the station and handle the business of the Jefferson Island Salt Company at New Iberia. There is no rule of the Telegraphers' Agreement prohibiting the abolishment of a position when such position is not needed, and the position was abolished in accordance with the Telegraphers' Agreement. As you know, for many years when stations have been closed the business remaining to be handled is handled by the adjacent station as in the instant case. See Third Division Awards 6944, 6945, 8428 and more recently 10950.

Claim 'for all others' are invalid for the reasons expressed in the second paragraph; in any event, claims are without merit or rule support and are respectfully declined.

Yours truly,

/s/ B. W. Smith"

10. During a conference which was held April 3, 1963, at which time this dispute was discussed, the General Chairman exhibited an envelope which did have a postmark date of November 10, 1962, in which he contended the Superintendent's letter dated September 12, was received. However, an envelope with a November 10, 1962, postmark is not conclusive evidence that a letter dated September 12, 1962, was mailed in the same envelope. There is a great deal of correspondence between the District Chairman and the Superintendent on the DeQuincy Division, and the fact that the Employes had an envelope with a postmark of November 10, 1962, is not unusual. However, it is amazing that it would take four days for U.S. Mail to travel approximately eighty miles from DeQuincy to Opelousas, Louisiana; the Employes contend they did not receive the envelope postmarked November 10, 1962, until November 13, 1962.

Nevertheless the Carrier attempted to dispose of this question, but the General Chairman was not agreeable to anything short of restoring the abolished agent position at Jefferson Island it being his contention that the position would have to be restored to satisfy the claim after he alleged the claims were not timely declined by the Superintendent.

(Exhibits not reproduced.)

OPINION OF BOARD: Although this claim originally presented a multitude of issues, the matter now to be decided is a procedural question, namely, whether Carrier failed to comply with the provisions of Article V of the National Agreement.

It is undisputed that the original claim and grievance letter was written and mailed on September 6, 1962. This letter was deposited in the U.S. Post Office at Palestine, Texas, and was received by the addressee, Mr. A. K. McKeithan, Superintendent of Carrier's DeQuincy Division, one or two days later — in any event, by September 12, 1962. Under Article V (a) of the

National Agreement it was the mandatory obligation of this Carrier official to transmit a written declination of the claim (if Carrier chose to decline it) within a 60 days period of time. The Organization contends that Carrier failed to do this; that the letter of declination was deposited in the U.S. Mail at the Post Office at DeQuincy, Louisiana, November 10, 1962 and received by the District Chairman, Mr. Musgrove, November 13, 1962. The Organization presents as an exhibit the postmarked envelope in which the letter of declination was received. The Carrier disputes these allegations in regard to an untimely transmission of the denial decision by raising the following points: (1) that the letter in dispute was dated September 12, 1962 — and there is no debate in this regard, for both the original and carbon copies of the letter show that date, (2) that the carbon copy of the letter in Carrier's files shows a handwritten notation in the lower left corner, "Original mailed R. C. Musgrove on September 16, 1962." and it appears the handwriting is that of Mr. McKeithan and that the initials following the notation are his, (3) that in a letter dated November 30, 1962 — which was not signed by Mr. McKeithan but by another person for him — Carrier explains that the letter was dictated by Mr. McKeithan in the Houston, Texas office and sent to him for signature and signed by him September 16, 1962 and "placed in the regular channel for mailing," a procedure routine in nature, but involving a third party (not shown of record) delivering the letter to the counter in the agent's office where all of outgoing U.S. Mail was routinely picked up by a postal deliveryman working for the Post Office, and (4) Carrier states that the envelope presented by the Organization has no significant evidentiary value because Mr. McKeithan often wrote to Mr. Musgrove about business matters and this envelope might have contained a letter in reference to some item of business not associated with the claim before us.

This dispute involves more than a simple conflict of assertions. The question is whether a clerical mishap, or an accident in the process of handling, caused an untimely delay on the part of Carrier, or (harshly stated) whether the Organization seeks to win a point on a fraudulent basis.

We are inclined to resolve this matter on the clerical mishap theory. Although ably presented for and in behalf of Carrier, we are not persuaded by the Carrier contentions mentioned above. A hand written notation on the file carbon copy of the Carrier is not conclusive proof of depositing a letter of declination in the U.S. Mails. Such a notation may be a personal memorandum, or possibly an expression of intention, and it can be made while all of the papers are still on the desk of the executive, who might believe the actual mailing would be accomplished as a matter of routine. This is not a case where the Carrier officer executed an affidavit stating that he personally knew the letter was placed in the U.S. Mails on a date certain, nor do we have in the Record an affidavit from the official's secretary, etc. alleging that such was so done. The Record does show third party handling in the delivery of the letter to "the counter in the agent's office." This routine may work well most of the time, however, it is obviously not error-proof. Then there is the matter of the postmarked envelope stamped November 10, 1962, which was made a part of the Record by the Organization. We can fairly presume this envelope was subject to inspection by the Carrier in the handling on the property. If the envelope contained a letter on another subject, Carrier could have searched its files and produced the carbon copy of another letter compatible with that date and made its point in this regard stronger.

We believe that our best reasoned and most recent Awards place the responsibility on the Carrier to be certain that a letter of disallowance is

properly and timely transmitted and delivered. The Carrier has the burden of proof in this regard, and in the instant claim we cannot conclude this burden of proof has been met. Reference is made to Award 14354 and same is cited with approval.

We conclude that the Organization's claim must be upheld to the date the Organization received the Carrier's declination letter, November 13, 1962 — except we take judicial notice that that part of the claim, namely numbered paragraph 4., which refers to "all other employes in a like manner adversely affected thereby" should be stricken from the Claim. The weight of our most recent precedential authority constrains us to so find. Please refer to Award 15631.

We do not reach the substantive merits of the Claim.

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 a procedural violation occurred as indicated above and to that extent Carrier is in violation of the Agreement of the Parties.

AWARD

Claim sustained only in reference to J. K. Briley up to and including November 13, 1962.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of March 1968.

DISSENT TO AWARD 16163, DOCKET TE-14734

The majority in this case, the Referee and Carrier Members, have rendered a capricious award which is contrary to the Railway Labor Act as amended by Public Law 456, 89th Congress, approved June 20, 1966.

The error committed by the majority lies chiefly in its failure and refusal to consider the entire dispute as it was handled on the property and submitted to the Board.

The claim arose, and was timely filed with the proper officer of the Carrier, because the Carrier unilaterally discontinued the position of Agent-

Telegrapher at Jefferson Island, Louisiana, and reassigned all of its work to employes at another station, New Iberia, Louisiana, requiring such employes to make daily trips to Jefferson Island for performance of work there. The claim alleged that these actions constituted a violation of the agreement, and asked appropriate reparations.

The Carrier officer declined the claim. His letter of declination, however, was not received by the Employe representative within the time limit provided by the Agreement. Such failure requires, under the terms of the Agreement, that the "claim be allowed as presented." The Carrier officer involved at the primary level, however, refused to comply with this provision.

Appeal was taken in the usual order of progression, the Employes contending at each step that the claim should be allowed both because of the Carrier's default under the time limit rule and on the merits. For example, in his appeal to the General Manager, the General Chairman, after making his argument with respect to the time limit rule, said:

> "Without waiving the foregoing paragraphs in any manner we will consider the merit to this claim:"

then followed one and a half pages of closely typed argument on the merits of the claim, as shown at pages 35, 36 and 37 of the official record which was in the hands of the Referee and all other members of the Division.

Again, at page 39 of that same record, in a further letter to the General Manager, the General Chairman said:

> "Without waiving our position in any manner as set forth in the foregoing paragraph we wish to reiterate that the merits of this claim are unquestionable as pointed out in our letter of December 22, 1962 and the preceding file."

In his appeal to the highest officer of the Carrier, as shown at pages 41 and 42 of the official record, the General Chairman again argued both the time limit default and the merits of the claim. Then in a two and one-half page letter to that same highest officer of the Carrier the General Chairman contended at length that the claim was valid on the merits as well as being payable under the time limit rule. This letter appears at pages 45, 46 and 47 of the official record. Then, in a final effort to persuade the Carrier to correct the alleged violation, in a letter which appears at pages 49 and 50 of the record, the General Chairman, referring to a conference previously held between these two officers, said:

> "We disputed your contention that Carrier was liable only for the period from July 25, 1962 to November 10, 1962: It was, still is, our position that the claim here is a continuing claim and will remain as such until the terms of the initial claim has been fulfilled."

It was carefully pointed out to the Referee, during panel discussion of the dispute, that regardless of his decision on the procedural question, the merits of the claim were before us for decision. I specifically said that it seemed to me that the procedural question need not be decided at all if the claim were to be sustained on its merits, as I contended it should be.

Notwithstanding all this, the Referee chose to ignore the merits of the claim, confining his consideration to the procedural issue, as set out in the first paragraph of the Opinion of Board.

I agree that the procedural point was decided in accordance with prevailing precedent, although I do not agree that the precedent is correct and proper.

But a sound decision on the procedural question does not excuse failure to consider and decide the dispute on its merits. It is disheartening to see the careful work of a General Chairman in preserving the merits of a claim, as was done here, go for naught and be completely ignored by the very person chosen to decide the case in a neutral, impartial manner.

It is also discouraging to see the Carrier Members, who certainly know better, join in adopting such an improper, erroneous, and perhaps illegal award.

For these reasons, I dissent.

J. W. Whitehouse
Labor Member

ANSWER TO LABOR MEMBER'S DISSENT AND CONCURRING STATEMENT OF CARRIER MEMBERS TO AWARD 16163 DOCKET TE-14734 (Referee Miller)

The Board's refusal to consider the merits of this claim was proper for the simple reason that the Employes submitted no evidence to support the essential elements of their claim.

The ultimate issue on the merits was whether Carrier violated its agreement with the Employes when it closed a station. Carrier's right, under this same agreement, to close a station, has been fully considered in a final and binding decision of Special Board of Adjustment No. 506, wherein the Special Board held:

AWARD 23, SBA 506

> " 'Whether or not a station shall be closed is a prerogative of management, subject to the interests of the public which it is the duty of the public service commission to protect.' Award 508 (Carter). Here the Railroad Commission, after a proper hearing, authorized the closing of the Lolita Agency. Its order cannot, of course, affect the obligation of the Carrier under the Agreement between the parties. But **the burden is upon Employes to show that Carrier's action violated the Agreement.** We can find no rule of the Agreement which prohibited the closing of the station or the abolition of the Agent-Telegrapher position. Rule 21 deals with the displacement rights for employes whose positions have been abolished. There is nothing in the record indicating any violation of its provisions."
> (Emphasis ours.)

In addition to the foregoing, see our recent **Awards 15601** and **15602** involving the same parties and agreement.

In submitting this claim to the Board the Employes ignored completely the settled requirement that they must come forward with evidence to prove the essential elements of their claim. The Employes did not properly raise an issue on the merits with their wholly unsupported allegations. In reality, they were attempting to upset settled precedent and obtain a new rule by way of decision rather than collective bargaining. The well established procedure of this Board is to dismiss claims without considering the merits where the Petitioner relies on argument alone, with no proof of the essential elements of the claim.

The time limit issues presented to the Board included a question of fact and a question of law. The question of fact was whether the letter disallowing the claim was mailed on September 12, 1962, as alleged by Carrier, or on November 10, 1962, as alleged by the Employes. The question of law was whether, assuming the disallowance was not mailed until November 10, 1962, the claim should be allowed for all dates subsequent to the date of claim, as alleged by the Employes, or only for the dates from date of claim to the date the Employes received the late disallowance, as alleged by Carrier.

The Referee ruled in favor of the Employes on the question of fact and in favor of Carrier on the question of law.

The ruling on the question of law, recognizing the cut-off date, is sustained by both common sense and unimpeachable authority. See **Decision 16** of the National Disputes Committee and **Awards 14603** and **14502**, among many.

The ruling in favor of the Employes on the question of fact is questionable and in our opinion the Referee should have ruled the other way; however, in view of the evidence of record which is discussed in the Opinion, we feel there is some basis for the decision and in the interests of expediting the Board's work concur in the Referee's conclusion that the letter was not mailed until November 10, 1962.

In view of the finding that Carrier failed to prove the letter of disallowance was mailed before expiration of the time limits, the remarks of the Referee concerning a letter mailed within the time limits but delivered after 60 days were not necessary to the decision; however, to avoid possible misunderstanding from the Referee's reference to Award 14354 by Referee Ives, attention is respectfully directed to subsequent Award 14695 by Referee Ives in which he correctly states the rule as follows:

AWARD 14695 (Ives)

> "The National Disputes Committee Decision No. 16, dated March 17, 1965, incorporated into Award 13780, held that the claim should be considered 'filed' on the date received by the Carrier. Consequently, the date of receipt determines the 60 day time limit, which commences to run from that date. Subsequent Awards have held that the Carrier must stop the running of the time limit by mailing or posting the notice required within the 60 days of the date that the claim was received. (Award 11575 and Second Division Award 3656). Here, the Carrier responded to the appeal within the sixty day period and the dispute is properly before us on its merits."

"It is readily apparent, therefore, that the length of time consumed while the appeal or the denial decision was not in transit could not be chargeable to either of the parties. See Award 10490.

. . . Carrier must stop the running of the time limit of 60 days by notifying within the 60 day limit whoever filed the claim of the disallowance of the same. That can be accomplished by mailing or posting the notice required within 60 days of the date that the claim was received . . ."

R. E. Black
W. B. Jones
G. L. Naylor
P. C. Carter
G. C. White

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