Award No. 16567
Docket No. TE-15654

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bill Heskett, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Kansas City Terminal Railway, that:

1. Carrier violated the Agreement between the parties when it unilaterally reinstated C. R. Wagner, restored his original seniority date and permitted him to exercise displacement rights.

2. Carrier shall compensate employes improperly displaced and adversely affected by this improper action as follows:

(a) J. J. Mullin, J. C. Hurley, W. K. Woods and D. Taylor, who were displaced from their respective regular assignments acquired by seniority and required to work other positions, at the time and one-half rate as provided for in Rule 13 of the Agreement.

(b) D. L. Jacobs, J. Laier, J. Leathers, D. Moroney and J. Auddley, extra employes who were placed in a less favorable position on the extra board, for any loss of pay.

3. Carrier shall correct the seniority roster in Seniority District No. 2 giving C. R. Wagner a seniority date of May 4, 1964, the date he re-entered the service.

4. Carrier also violated the provisions of the Time Limits Rule, Article V of the August 21, 1954 Agreement, when in answering the initial claim it failed to give the reasons in writing for disallowing the claim.

5. Because of its failure to comply with the Time Limits Rule, Carrier shall be required to allow the claim as presented.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, effective June 1, 1953, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

Subsequent correspondence between the parties is attached hereto as TCU Exhibits 1 through 6.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS:

As a result of investigation held on February 20, 1964 Towerman C. R. Wagner was dismissed for violation of Operating rules. Subsequently, Mr. Wagner requested leniency, and was permitted to return to service on a leniency basis with no pay for time lost, with full seniority rights restored and vacation rights unimpaired. On May 4, 1964, after Wagner was advised of his reinstatement, he reported for work and exercised his restored seniority to position of Train Director second trick, starting at 3:00 P. M. at Tower 5, displacing J. J. Mullin, a junior employe.

On June 1, 1964, General Chairman Lunsford submitted the instant claim to Trainmaster Maher which was denied on June 18, 1964, as follows:

"June 18, 1964

Mr. R. L. Lunsford, General Chairman
The Order of Railroad Telegraphers
Kansas City Terminal System Division 65
R.R. No. 2
Easton, Kansas

Dear Sir:

Reference your letter dated June 1, 1964 in behalf of J. J. Mullin, J. C. Hurley, W. K. Woods, D. Taylor and extra employes D. L. Jacobs, J. Leathers, D. Moroney, and J. Audley, alleging they were either illegally displaced or were forced to a lower position on the extra board due to the alleged unilateral reinstatement of C. R. Wagner on May 4, 1964.

In any displacement dispute, a legitimate claim cannot be made for other than the first man displaced, and there is no evidence of a rule violation.

Your claim is therefore respectfully declined.

Yours truly,

/s/ J. P. Maher
Trainmaster"

On July 23, 1964, the claim was appealed to Manager of Personnel Llewellyn, and denied on September 14, 1964.

On June 10, 1965, the Organization gave the Third Division, National Railroad Adjustment Board, 30 days' advance notice of intent to file an ex parte submission in the case.

OPINION OF BOARD: Carrier contends that because this claim was never discussed in conference subsequent to the same being filed on 1 June,

1964, this Board has no jurisdiction. This same argument was seemingly put to rest by Judge Boyle in The Order of Railroad Telegraphers vs. New Orleans and Northeastern Railroad Co., Civ. No. 13944 "D", U.S. Dist. Co., E. Dist., La.

The apparent mandatory requirements of the Railway Labor Act, Section 2, Second, were correctly held by Judge Boyle to be controlled by the final proviso of Section 2, Sixth, thereof and which was in the same chapter. Said latter section reads in part as follows:

> "And provided further, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

However, it was held in connection therewith that said Section Two, Sixth, reserved ". . . to the parties the right to determine by agreement the procedure to be followed in the processing of claims" and hence, where they had agreed upon an involved procedure for appeal to this Board, omitting mention of conferences, that it is apparent they did not intend for conferences to be mandatory. With this conclusion, we must respectfully disagree. Section 2, Second, is mandatory unless an agreement doing away with conferences was made. See Awards 11434 (Rose), 11484, 11896 (Hall), 13120 (Dorsey), 13571 (Engelstein), 13509 (Moore), 13721 (Wolf), 14873 (Ritter), 15330 (House), and 16370 (McGovern).

The proviso in Section 2, Sixth, simply allowed for the parties' agreement "on conferences" — when they should be held, with whom they should be held, whether they have to be held, etc. We fail to see how an agreement which outlines procedures, including time-limit, but makes no mention of conferences could possibly abrogate the explicit mandates of Section 2, Second.

Assuming that we were to draw the conclusion that the parties' silence on the subject meant that no conferences were necessary, is it not, arguendo, more probative to draw the conclusion that their silence is an acceptance of the mandate of Section 2, Second? We believe that the latter conclusion is more logical and does more to carry out the clear intent of Congress in establishing this Board and prescribing some of its procedures, i.e., that the parties exhaust every possible avenue of concluding a dispute between themselves before coming here on appeal. See Awards 12290, 12468 (Kane) and 12499 (Wolf); also see Brotherhood of Locomotive Engineers, et al. vs. Louisville and Nashville Railroad Co., 373 U.S. 33.

In Award 11737 (Stack) we said:

> "The Act, it is true, does not place responsibility solely on either party for conducting a conference; this is a mutual obligation. However, Board Rules, in restricting consideration of petitions to those whose subject matter has been handled in accordance with the Act, impose a duty on the petitioning party to insure that this requirement has been met."

While there is a line of awards which hold that a conference must have been requested by the party raising the issue, we cannot reconcile same with Section 2, Second, and our Board Rules. We hold that it is incumbent upon the petitioning party to make the request — if Carrier should refuse, then, this Board would have jurisdiction because all possible avenues of settlement would have been exhausted.

The Organization contends that to seek a conference would be a useless act for the reason that when the Organization discussed same with Carrier's representatives, prior to the claim being filed, it was arbitrarily "brushed aside" and that it is not required to do a useless or futile act. Even if the Carrier's attitude was arbitrary, we cannot accept the Organization's application of the facts notwithstanding we are in full accord with its statement of the applicable law. See Awards 2786 (Mitchell), 3269 (Carter) and 10030 (Webster); also see Patterson vs. Chicago and Eastern Illinois Railroad Co., et al, 50 F. Supp. 344. All the discussions were, according to the Record, involved with the dispute surrounding Carrier's reinstatement of one Wagner with full seniority. The claim, when filed, expanded on the discussions by including the displaced Claimants and same should have been discussed at a face to face conference on the property prior to submitting the dispute to this Board. Distinguish Award 10424 (Dolnick) where the conference held prior to the claim being filed was on the merits on the entire 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 is without jurisdiction of the dispute herein involved.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of September 1968.

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