

Award No. 17987
Docket No. TE-18118

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
CHICAGO AND ILLINOIS MIDLAND RAILROAD COMPANY**

STATEMENT OF CLAIM: It is the claim of the General Committee of the Transportation-Communication Employees Union on the Chicago and Illinois Midland Railroad, that:

1. Carrier violated the Agreement between the parties when it arbitrarily assigned Extra Telegrapher R. M. Novick to the regular position of 3rd shift Telegrapher-Clerk at Ellis, Illinois.

2. Carrier shall compensate Telegrapher Novick for each day on which a junior employee is assigned to and performs service on a temporary vacancy from the extra list, in addition to the compensation received for work performed on the Telegrapher-Clerk position at Ellis.

3. Carrier further violated the Agreement when it refused to allow deadhead pay for deadheading from extra assignment at Shops, Illinois to the assignment at Ellis, Illinois on July 10, 1967.

4. Carrier shall compensate Telegrapher Novick deadhead allowance provided for in Article 24 of the Agreement, for deadheading from Shops, Illinois to Ellis, Illinois on July 10, 1967.

CARRIER DOCKET: MP TCEU 53-D — BU-13253-95

EMPLOYEES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties, effective November 1, 1946, as amended and supplemented, is on file with your Board, and by this reference is made part hereof.

Claim was timely presented, progressed, including conference with the highest officer designated by the Carrier to receive appeals, and has remained declined. The Employees, therefore, appeal to your Honorable Board for adjudication.

OPINION OF BOARD: The factual basis for claims asserted in this docket began on June 19, 1967, when Carrier's Chief Dispatcher served Claimant with notice that the third shift position at Ellis would be abolished effective June 26, 1967, at 12:01 A.M. The notice also advised that the position would be re-established on July 10, 1967, and contained the following: "Novick advise if desire to return to abolished position."

Article 21(b)(4) of the Agreement provides:

"An employe desiring to return to his former position, under the provisions of the Article must advise the Chief Dispatcher of his intention to do so within five (5) days from the date upon which he received notice that he may return to his former position; * * *."

It does not appear that Claimant Novick responded to the question; in fact, it is asserted by Employees that Mr. Novick did not desire to return to third shift Ellis. In any event, it is clear that Mr. Novick performed service as an extra telegrapher after the position was abolished. On July 5, 1967, Chief Dispatcher instructed Mr. Novick to perform one day's service at Pawnee on July 7th, "then return to 3rd trick Ellis 11:59 P.M., Monday, July 10." On the same date Mr. Novick replied that he would obey the instructions. The Chief Dispatcher issued additional instructions on July 8, 1967 to Mr. Novick directing that he work third shift at Shops Tower on July 8 and 9 — "then report to regular job 3rd trick Ellis Monday — July 10, 1967."

Mr. Novick performed the service as directed. He was allowed compensation for deadheading for the trips to Pawnee and Shops Tower; he claimed deadhead pay from Shops Tower to Ellis on July 10, 1967. Assistant Superintendent Adams declined to allow the claimed compensation on August 15, 1967, contending that Mr. Novick's return to Ellis on the 10th day of July was in the exercise of seniority; that "deadhead pay" was not due.

The parties are not in disagreement as to the interpretation of the provisions of Article 24, Deadheading. They are in disagreement on the fact question as to whether Mr. Novick requested right to return to the re-established position as provided in Article 21(B)(4). After conference, Superintendent Arnish disallowed the claim for the reason: "Claim (5) involves a temporary force reduction after which Mr. Novick advised the Chief Dispatcher that he would protect Pawnee 7:00 A.M., July 7th for one day and then return to the 3rd trick Ellis Monday, July 10th."

It is clear that Mr. Arnish was referring to the telegram sent by Mr. Novick to Chief Dispatcher on July 5, 1967. The telegram read: "Will protect Pawnee 7 A.M. July 7 for one day only and then return to 3rd trick Ellis Monday, July 10, 11:59 P.M." The telegram was sent at 11:05 P.M., in response to Chief Dispatcher's telegram, same date, sent at 11:13 A.M.

As heretofore stated, Mr. Novick received notice on June 19, 1967, that he could return to third shift at Ellis upon its re-establishment as of July 10. The rule [Article 21(B)(4)] requires that he "must advise the Chief Dispatcher of his intention to do so within five (5) days from the date upon which he received notice." The record does not affirmatively show that he did so.

Even though we should construe the July 5th wire response as indicating a desire of Mr. Novick to return Ellis, it would not be effective because not made within five days of the date he was advised that he could do so.

Therefore, the Carrier has not sustained its burden of showing that Mr. Novick did, in fact, exercise seniority rights in returning to Ellis on the 10th. He was still an extra employe, and entitled to the claimed dead-head pay. Claims 3 and 4 should be sustained.

The claims set forth in paragraphs 1 and 2 of the Statement of Claim were first asserted by General Chairman in letter dated September 20, 1967, directed to Superintendent Arnish. The claim was disallowed by Superintendent Arnish for the reason: "A claim for Mr. Novick starting July 17th has not been handled in accordance with the time limit provisions."

We think the position of the Carrier is well taken. The claim asserted in the September 20, 1967 letter to Superintendent Arnish was not submitted to the Assistant Superintendent, nor was it filed within 60 days from July 10, 1967. Paragraphs 1 and 2 should be dismissed as barred.

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 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

Claims 1 and 2 should be dismissed for failure to comply with time limit rule provisions. In Claims 3 and 4 the Agreement was violated.

AWARD

Claims 1 and 2 of the Statement of Claim are dismissed.

Claims 3 and 4 of the Statement of Claim are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1970.