Award No. 18998
Docket No. MW-13956

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Clement P. Cull, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, instead of calling and using Mr. F. D. Magnetta to service cabooses on September 16, 17, 23, 24, 30 and October 1, 7 and 8, 1961, it used employes outside the scope of the Agreement between the two parties to this dispute and who did not theretofore perform service of that character at Terre Haute, Indiana.

(2) Mr. F. D. Magnetta be allowed payment for a call on each of the dates mentioned in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimant was regularly assigned to Section 4607 at Terre Haute, Indiana, with a work week extending from Monday through Friday (rest days were Saturdays and Sundays).

Section forces have been exclusively used to service all cabooses at the Hulman Street Yards, Terre Haute, Indiana. On rest days and holidays, service of this character was likewise exclusively assigned to section forces, who were compensated therefor on a call basis.

Prior to, at the time of and subsequent to the effective date of the current agreement, all work of servicing cabooses at the subject location was mutually recognized as being the work of section forces exclusively.

Until the first date of the subject violation, there had never been any question as to the right of the section forces to exclusively perform the subject work at this location. However, the Carrier arbitrarily and unilaterally attempted to change this recognized and well-established practice by assigning such work to the section forces only during their regularly assigned work week. On Saturdays, Sundays and holidays, the Carrier assigned this work to Car Department employes.

In each instance, the claimant was available, willing and qualified to have performed this work on his rest days and on holidays.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments and intrepretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The instant claim has not, for reasons that will be fully explained in "Carrier's Position," been properly handled by the Organization in accordance with the provisions of Article V of the Agreement of August 21, 1954, therefore, the instant claim is barred.

The instant claim involves the question of servicing cabooses, which, by the claim which they have presented, the employes are contending is work exclusive to Maintenance of Way Employes, but which, in fact, is not work exclusive to employes within the scope and application of the Maintenance of Way Agreement as the Carrier will establish in its "Position."

There is attached as Carrier's Exhibit "A" copy of letter written by Mr. S. W. Amour, Assistant to Vice President, to Mr. J. G. James, General Chairman, under date of April 13, 1962 and as Carrier's Exhibit "B" copy of letter written by Mr. Amour to Mr. James under date of April 23, 1962.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier raises procedural questions contending that Petitioner did not progress this claim in accordance with the provisions of Article V of the Agreement of August 21, 1954. It contends, therefore, that the claim should be dismissed.

The procedural questions raised on the property during the handling of the claim appear in a letter dated April 13, 1962 from the Assistant to Vice President, the highest officer designated to receive appeals, to the General Chairman of the Petitioner. The procedural questions raised in the letter reads as follows:

> "First of all, please be advised that Roadmaster Fox was never advised in writing as to the rejection of his declination of the instant claim in view of which said claims have not been properly handled in accordance with the provisions of Article V of the Agreement of August 21, 1954 and is barred.
>
> Without in any way waiving my position that the instant claims are barred for the reason outlined in the preceding paragraph, Board Awards have held that the original claim presented the basis of complaint and the denial of them is controlling. A subsequent refiling does not give rise to a new proceeding, therefore, the entire claim is barred in accordance with the provisions of Article V of the Agreement of August 21, 1954."

This letter while raised on the property was not dealt with by Petitioner until it filed its rebuttal to Carrier's submission. At that time it also answered Carrier's new objection, which was not raised on the property, to the effect that the appeal from the Roadmaster's (the first step in the grievance procedure) declination of the claim was not filed with the General Superintendent (the second step) until 95 days after the Roadmaster's declination. Carrier argues that Petitioner should have responded to the objections raised in the letter of April 13, 1962 on the property and should not have waited until it filed its rebuttal. Petitioner asserts that by not pursuing the objections

in the letter of April 13, 1962 in its submission Carrier waived them and contends further that the assertion that the claim was appealed to the General Superintendent 95 days after it was denied by the Roadmaster is a new issue never raised on the property and should be disregarded. The contentions will be answered below.

The record reveals the chronology of the handling to be as follows:

October 26, 1961—Letter from General Chairman to Roadmaster filing claim.

November 24, 1961—Letter from Roadmaster to General Chairman denying claim.

January 22, 1962—Letter from General Chairman to General Superintendent appealing Roadmaster's denial with carbon copy to Roadmaster advising him of rejection of his denial.

January 26, 1962—Letter from General Superintendent to General Chairman denying claim.

On February 26, 1962 General Chairman progressed claim to Assistant to Vice President, who replied on April 13, 1962 denying the claim and raising the issues quoted above.

The record shows that the case started when Claimant submitted time slips for the days in question to the Roadmaster. The claim was rejected by the Roadmaster by letter dated October 19. Carrier dates the 95 days, mentioned above, from the date of that denial and contends that Roadmaster should have received a notice of the Petitioner's rejection of his denial.

The Board has held in Award 943 of the 4th Division cited with approbation in Award 14083, of the 3rd Division as follows:

"The general rule which is uniformly recognized is that unless a statute of limitations or an agreement of that character specifically provides otherwise, the period of limitation begins to run at the time when a complete cause or right of action accrues or arises. The authorities uniformly hold that the time when the aggrieved party could have conclusively determined his rights fixes the time when his cause of action accrued."

Accordingly, we find that the first claim was not the filing of the time slips and that the time did not start to run upon the rejection of them by Roadmaster. See Award 14083 and others. We find that the claim was filed on October 26, 1961 and that the time limits of the agreement were observed and that the Roadmaster was, by copy of the letter of January 22, 1962, advised of the rejection of his denial dated November 24.

Failure to refute the defense in the letter of April 13, 1962 on the property was not fatal to the claim where, as here, the defense was fallacious being based on a misconception of the Awards of this Board. Moreover, as all the letters enumerated above were in the Carrier's possession it was in a position to know that the time limits had been observed.

Thus we find that the Claim is properly before this Board and will proceed to consider the merits.

It is undisputed that, at this location, claimant performs the work in dispute Monday through Friday. Thus, we find him to be the regular employe. Rule 23 (k) of the agreement between the parties provides as follows:

> "Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

As there is no evidence in the record that an "extra" or "unassigned" employe was available for assignment the work should have been assigned to the regular employe. Therefore, in the circumstances of this case, reliance by Carrier on the exclusivity concept is misplaced. (Award 17619 and others).

Accordingly, claim will be sustained.

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of February 1972.

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