Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27640
THIRD DIVISION Docket No. SG-27709
88-3-87-3-171

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

On behalf of Signalmen J. Lira, R. Mancuso, M. James, J. Sandilla, B. Briese and other employees who were headquartered at Porter, Indiana for two (2) hours pay, each day, beginning 60 days prior to August 15, 1985 and continuing until this claim is settled, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 5-E-2, when it failed to provide adequate headquarter facilities for all signal employees in accordance with the Agreement." Carrier file SD-2256

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute centers on two Rules provisions, as follows:

"Rule 5-E-2. Headquarters shall be provided for all employees and shall be kept in good and sanitary condition. They shall be properly heated and lighted and sufficient air space provided. Drinking water and water suitable for domestic use shall be furnished. They shall be adequately furnished with chairs, desks, and lockers and toilets shall be accessible.

Rule 4-K-1 (a) All grievances or claims other than those involving discipline must be presented, in writing, by the employee or on his behalf by a union representative, to the Supervisor-C&S (or other designated supervisor), within sixty (60) calendar days from the date of the occurrence of which the grievance or claim is based. Should any such grievance or claim be denied, the Supervisor shall, within sixty (60) calendar days from the date same is filed, notify whoever filed the grievance or claim (employee or his representative) in writing of such denial. If not so notified, the claim will be allowed as presented."

The Claim was initiated by the Organization on August 15, 1985, and read as follows:

"The following claim is presented on behalf of the signal employees headquarter at Porter. The headquarter at Porter has no water or toilet facilities, lockers, or chairs. The employees headquartered there have to carry their drinking water from home and use toilet facilities under the sun and in the weeds like a DOG. With no lockers they have to carry their tools, change clothes and wash themselves at home after hours. The Company has violated Rule 5-E-2 by not furnishing water and forcing their signal employees to relieve themselves like a DOG.

We are therefore claiming one hour in the morning and one hour in the evening. This claim goes back 60 days and will continue until the signal employees are treated like men and not dogs.

This claim is for the following employees: J. Lira, R. Mancuso, M. James, J. Sandilla, B. Briese and other employees that have been headquartered there or will be. Please advise when this will be paid."

The initial reply of the Carrier was dated September 12, 1985, and read as follows:

"This refers to your claim dated August 15, 1985, concerning the signal employees' headquarters at Porter.

At this point in time, your claim has been noted. We are now in the process of writing up an AFE to provide you and your people with new headquarters.

I would like to extend my time limit 60 more days from September 14, 1985 to complete paperwork and remodeling of new and existing offices."

This reply was signed by the C&S Supervisor. Assuming the requested delay to have been granted, this would have required a reply from the Supervisor by November 13, 1985. No reply was received by this date. On January 22, 1986, the Local Chairman wrote to the Supervisor, noting that "nothing has been done" in reference to the Porter facilities; that the Supervisor had not "complied with the claim process"; and that the "claim is payable now."

The Claim was further processed to the Senior Director-Labor Relations, who denied the Claim on May 29, 1986. The Organization replied to this by letter of July 3, 1986, asserting that the Claim should be paid as presented, under the provisions of Rule 4-K-1 (a).

There can be no question but that the Carrier failed to comply with Rule 4-K-1 (a) when it did not deny the Claim in timely fashion, even under the requested 60-day extension. The Rule is then self-enforcing in that it states, under such circumstances, "the claim shall be allowed as presented."

The Carrier further argues, however, that the Claim for compensation is improper since "this Board has no authority to award any 'penalty pay' to the Claimants." But for the requirement of Rule 4-K-1 (a), the Board might well have been in a position to consider whether the Claim seeks "penalty pay" for readily implied admission of violation of Rule 5-E-2 or whether the remedy sought is proper compensation for alleged imconvenience. However, the Board is clearly precluded from reviewing this aspect of the dispute.

Even if the Carrier's denial of May 29, 1986, were to be found to halt liability based on previous failure to answer, this would be of no consequence. As acknowledged by both parties, the Claim is limited to the period up to March, 1986, when new facilities were provided for the Claimants.

As stated in Third Division Award No. 22822:

> "Rule 26 - Time Limits - requires the denial of a claim to be in writing within sixty (60) days from the date the claim was filed. This language is clear and umambiguous. Nothing presented to this Board excused Carrier from its obligation to disallow the claim within sixty days. By failing to do so, any arguments Carrier wished to present to defeat the claim are untimely.
>
> This Board has held many times that time requirements are mandatory and that failure to timely disallow a claim requires that 'it be allowed as presented.' See for example, Third Division Award No. 20520. As such, pursuant to Rule 26, we will pay the claim as presented up to November 14, 1977 - the date of the late denial."

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD 27640, DOCKET SG-27709
(Referee Marx)

The Honorable Justice J. Frederick Motz, of the United States District Court of Maryland, in Docket JFM-84-3140, B&O vs. BRAC, stated, when he overturned Third Division Awards 24861, 24862, 24863, 24864, 24865 and 24866, that:

> "...The Fourth Circuit has held that penalty pay is proper only if the employer had been guilty of willful or wanton misconduct or if the collective bargaining agreement provides for penalty pay.
>
> * * *
>
> Likewise, it is clear that the collective bargaining agreement does not provide for penalty pay. Indeed, BRAC does not argue to the contrary....There is no authority in the agreement to apply this rule to the alleged violation of Rule 87, by awarding penalty pay, the Fishgold panel was merely dispensing its own brand of industrial justice."

In First Division Award 23816, the Majority found that:

> "We have considered with care Mr. Holland's position before this Board, relying solely on the evidence he presented to the Board, since the Carrier failed to timely file an Ex Parte Submission.
>
> * * *
>
> While Mr. Holland contends that the August 17, 1983 Agreement is in violation of the constitution and Bylaws of the BLE, this Board has no jurisdiction to determine the validity of contracts..."

In Second Division Award 9321, the Majority found:

> "Numerous awards of this Board indicate that we are without jurisdiction to enforce legislatively created rights. In addition, Claimant has not shown that any federal or state safety laws were violated. Nor has Claimant shown that the Carrier failed to

"pledge to comply" with such laws. Finally, Claimant has failed to indicate under what power we might award the requested remedies.

Since this Board does not have jurisdiction over this claim, the lateness of the Carrier's answer to the grievance is of no consequence. As Referee O'Brien noted (Award No. 19766):

> 'Before the time limits of Article V become applicable, the claim as presented must come within the term "claims or grievances" upon which Article V is premised.

Accordingly, the claim must be denied.

A W A R D

Claim denied."

Ignoring the aforequoted precedent, the Majority in this dispute holds that:

> "There can be no question but that the Carrier failed to comply with Rule 4-K-1 (a) when it did not deny the Claim in timely fashion, even under the requested 60-day extension. The Rule is then self-enforcing in that it states, under such circumstances, 'the claim shall be allowed as presented.'
>
> The Carrier further argues, however, that the Claim for compensation is improper since 'this Board has no authority to award any 'penalty pay' to the Claimants.' But for the requirement of Rule 4-K-1 (a), the Board might well have been in a position to consider whether the Claim seeks 'penalty pay' for readily implied admission of violation of Rule 5-E-2 or whether the remedy sought is proper compensation for alleged inconvenience. However, the Board is clearly precluded from reviewing this aspect of the dispute."

Unless Penalty Payments are provided for in the negotiated contract (or levied for continued wanton violations) they are beyond the jurisdiction of this Board who's authority flows only to "...the interpretation or application of Agreements" (Third Division Award 26074).

The Majority limited the review of the dispute only to determine **whether** there was a time limit violation and looked no further, **refusing** to consider if that which was sought was within the jurisdiction of this Board to grant. Apparently this Majority believes that once the time limits are blown, that is it.

We Dissent.

Robert L Hicks
R. L. Hicks

M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P. V. Varga

James E. Yost
J. E. Yost