

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim that the Carrier violated the current Signalmen's Agreement and as a result thereof, Assistant Signal Maintainer Barney De Smet of the New York Division is entitled to be compensated as follows:

(a) All wages that would have accrued to Assistant Signal Maintainer De Smet on his regular assignment at "XW" tower when he was used by the Carrier as a Signal Maintainer at another point between October 15, 1944, and March 24, 1945.

(b) All the difference in wages between the straight time and time and one-half rate at the Signal Maintainer's rate of pay for all time worked while the Carrier used Assistant Signal Maintainer De Smet on Signal Maintainer positions outside of his regularly assigned hours between October 15, 1944, and March 24, 1945.

EMPLOYEES' STATEMENT OF FACTS: The claimant, Barney De Smet, held a regularly assigned position as Assistant Signal Maintainer at "XW" Tower, Paterson, N. J., with assigned hours 7:00 A. M. to 12:00 noon and from 1:00 P. M. to 4:00 P. M. daily except Sundays and holidays.

The claimant secured this position of Assistant Signal Maintainer by virtue of his seniority. He was awarded this position under bulletin advertising the position as a permanent vacancy under date of July 21, 1942.

On October 16, 1944, the claimant was taken off his Assistant Signal Maintainer's position by the Carrier and used to fill the position of Signal Maintainer at "HX" tower with assigned hours 3:00 P. M. to 11:00 P. M. He continued to work this Maintainer's position up to and including March 8, 1945. Likewise, the claimant was then used by the Carrier in a Maintainer's position at "HX" tower with assigned hours 11:00 P. M. to 7:00 A. M. from March 9, 1945, to March 24, 1945 (both dates included). The claimant was returned to his regular assignment as an Assistant Signal Maintainer on March 25, 1945.

The service rendered by the claimant in the Maintainer's position at "NX" tower was temporary. He was not assigned by or through the proper application of agreement rules. The Carrier of its own volition took the claimant off his own regular assignment and used him in temporary service in the Maintainer's position and, in the main, outside of his regularly assigned hours. The change also constituted a change in the claimant's headquarters.

and one-half at the Signal Maintainer's rate of pay for service that he performed outside of his assigned working hours on the following dates:

1944

Oct. 16	Nov. 6	Nov. 29	Dec. 21	Jan. 13	Feb. 2	Feb. 24	Mar. 17
18	8	Dec. 1	22	15	3	26	19
19	10	2	23	16	5	28	20
20	11	4	27	17	7	Mar. 1	21
21	13	6	28	18	8	2	23
23	15	7	29	19	9	3	
25	16	8	1945 30	20	10	6	
26	17	9	Jan. 3	22	12	7	
27	18	11	4	24	14	8	
28	20	13	5	25	15	9	
30	22	14	6	26	16	10	
Nov. 1	24	15	8	27	17	12	
2	25	16	10	29	19	13	
3	27	18	11	31	21	14	
4	28	20	12	Feb. 1	23	16	

I was the Foreman of Maintainers on this territory and it was my responsibility to assign men as required for the operation of the railroad and in accord with the Rules of the agreement with the Brotherhood. De Smet at the time was the senior assistant signalman and was qualified to perform signalman's work. We, De Smet and I, discussed the situation at many times and he was always agreeable to cover vacancies because he received the signalmen's rate of pay and because in many cases he worked Sundays or Relief days and received pay at time and one-half for the service. De Smet never complained to me about the arrangement because it was his opinion, and my opinion, that he was performing temporary vacancy service under Rule 38 of the agreement of June 1, 1944. Also, under the procedure set up in Rules 28 and 30, we were obliged to at least offer to the senior Assistant Signalman the opportunity to work on vacancies that were available for him in the higher class. If we had not done so then the union probably would have another claim because of failure to use the senior qualified Assistant Signalman in these circumstances. As a matter of record, it was substantially a voluntary arrangement by De Smet.

It is a matter of payroll record that on many dates prior to the dates that are mentioned in this claim, De Smet worked for me in exactly the same manner and was paid for his service in just the same manner that he has been paid on the dates that are involved in this claim.

(signed) P. R. Kelley"

It is the position of the Carrier that this claim should be dismissed because of Rule 61, Statute of Limitations, in as much as it is for the period October 15, 1944 to March 24, 1945 and a claim in writing was first filed by General Chairman Wilson August 25, 1945. There were no claims filed by De Smet on the original daily time slips all of which are available for examination by members of the Board if they desire to see them.

If this claim is not dismissed on the above then it should be denied on the basis that De Smet was the senior qualified Assistant Signalman and under the Seniority rules was entitled to and properly used to cover temporary vacancies (See Third Division Awards 495, 2381 and 3789).

(Exhibits not reproduced.)

OPINION OF BOARD: On the dates involved in the claim, Claimant held a regular assignment as Assistant Signal Maintainer at "XW" Tower, Paterson, New Jersey, with assigned hours 7:00 A. M. to 12:00 noon—1:00 P. M. to 4:00 P. M. daily except Sundays and holidays. Beginning October 16, 1944

and continuing through March 8, 1945 he was assigned to temporarily fill a position as Signal Maintainer at "HX" Tower, hours 3:00 P. M. to 11:00 P. M. Compensation is claimed as indicated in the notice of claim.

Carrier has asserted as one defense to this claim that it was not filed within the time limitation of Rule 61 which provides as follows:

"Any grievance must be filed in writing by the employee involved, or his duly accredited representative, with his supervising officer, and when not satisfactorily adjusted, will be progressed promptly through the usual channels up to the chief operating officer designated for that purpose. In handling of disputes which may involve money payments, such claims shall not extend behind a period of ninety (90) days prior to the date claim is filed. In making adjustments for over-payments, such adjustments shall not extend behind a period of ninety (90) days prior to the date on which the employees involved are notified that such adjustments are to be made."

It appears from the record that before the incidents giving rise to the instant claim, a previous claim similar in nature arose for the period September 21 to September 26, 1944 when Claimant furnished vacation relief for a Signaller at another point. That claim was duly filed in writing and discussed on the property and finally withdrawn on March 7, 1945, inasmuch as Carrier had promised to put on vacation relief jobs. The evidence in the record shows that on June 8, 1945 the General Chairman wrote to Carrier's Engineer Maintenance of Way starting in part as follows:

"You will probably recall that during our discussion of this matter in Mr. Wecheider's office, in your presence, on March 7, 1945, it was suggested and agreed by both parties that we would eliminate the claim by Mr. De Smet for the time claim at 'WJ' covering vacation relief work, thus leaving a time claim involving the work performed by Mr. De Smet at 'HX' Tower unsettled. Hence, it is this part of the dispute that I am appealing to you for a decision." (Emphasis supplied.)

To this letter the above-mentioned official replied in part as follows:

"Inasmuch as the written claim I have in my file covers 'WJ' Tower at Ridgewood and the case at 'HX' has been handled more or less verbally with Mr. Wecheider, will you please put the 'HX' claim in written form so it can be properly handled for a decision?"

On June 25, 1945 the General Chairman replied to this letter, saying in part as follows:

"The claim still in dispute is for the time De Smet was arbitrarily sent to work second and third tricks at 'HX' and runs from about October 15, 1945 to the middle of April 1945. It is my understanding you had all this information furnished you some time ago, and it now appears the only way I can receive this necessary information is for you to allow me to check the time sheets with some one recommended by your office. Please advise if you will grant me the permission to go over time sheets and furnish you the correct dates involved in this dispute."

On August 25, 1945 the claim was fully particularized in a letter to the Engineer by the General Chairman. It is this last letter which the Carrier claims constituted the first written filing of the claim. We view the matter differently, since we believe that the letter of June 25, 1945 was sufficient compliance with the requirements of Rule 61. In any event, however, that would still not be within the prescribed ninety-day period.

In Award 4191 this Board construed a Rule reading as follows:

"Any claim or grievance that may arise shall be presented by the employee aggrieved or by his representative to the employing officer within thirty (30) days of its occurrence."

The Board said:

"The foregoing operates as a cut-off rule and any claim made is limited to the thirty days immediately preceding the filing of the claim and to continuing violations subsequent thereto. Awards 4190, 4057, 3605, 2224, 2204, 1222."

We subscribe to the reasoning of the Board in that construction and since the first filing of this claim in writing was after the ninety-day period, we are constrained to hold that the claim is outlawed.

We take this view with reluctance for we look with disfavor upon forfeiture. However, we have searched the record with meticulous care and nowhere do we find any writing by the Employees which can reasonably be construed as being in compliance with Rule 61 nor any action of the Carrier indicating a waiver of its requirements. The Employees have referred to a letter from the Local Chairman dated November 27, 1944 to the Signal Supervisor in connection with the prior claim involving vacation relief as constituting compliance with Rule 61 in which he stated as follows:

"If for any reason however, you are unable to allow this claim, please render your decision without too much delay, as we are filing claim for all days B. DeSmet was taken from his regular assignment to perform work outside his regular hours."

This language indicates that sometime in the future such a claim would be filed as is borne out by the fact that the same language is again repeated in a letter of February 19, 1945 (again with respect to the earlier claim) from the Local Chairman to Carrier's Division Engineer. Nowhere, however, has it been shown that the instant claim was actually filed with Carrier in writing until the letter of June 25, 1945 aforementioned.

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

That both parties to this dispute waived oral hearing thereon;

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

That the claim was not presented as required by Rule 61 of the Agreement and is therefore outlawed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 5th day of August, 1949.