Award No. 6718
Docket No. TE-6676

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE LONG ISLAND RAIL ROAD COMPANY, Debtor
WM. WYER, Trustee

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Long Island Rail Road (David E. Smucker and Wm. Wyer, Trustees) that:

(1) The Carrier violated and continues to violate the provisions of the agreement between the parties when it refuses to pay claimants Stevenson, Bonn and Noller at the rate of time and one-half for service performed in excess of eight hours on any day (24-hours); and

(2) The Carrier shall be required to now properly pay each of the above named claimants at the rate of time and one-half on each and every day such employes are required to perform service for the Carrier in excess of eight hours on any day (24-hours) commencing July 5, 1950.

(3) All other employes covered by the agreement who are likewise required to perform service in excess of eight hours on any day (24-hours) shall be paid at the rate of time and one-half commencing July 5, 1950.

EMPLOYES' STATEMENT OF FACTS: At the time this claim was initiated on the property R. H. Stevenson was occupying the position of Passenger Agent at Garden City, L. I., New York, with regular assigned hours:

Week days 6:30 a.m. to 3:00 p.m.
Sundays 9:00 a.m. to 6:00 p.m.

J. H. Bonn was occupying the position of Agent at Lindenhurst, L. I., New York, with regular assigned hours:

Week days 6:35 a.m. to 3:35 p.m.
Sundays 12:00 noon to 7:55 p.m.

Louis J. Noller was occupying the position of Agent at Oyster Bay, L. I., New York, with regular assigned hours:

Week days 6:30 a.m. to 3:30 p.m.
Sundays 11:40 a.m. to 8:40 p.m.

and on which they performed more than eight hours of service in a "day" computed from the set back starting time of their assignment on Sunday and continuing for twenty-four clock hours from that time.

That there can be no basis whatsoever for such a claim has been already clearly established by the fact that the parties to the applicable Rules and Working Conditions Agreement entered into a Memorandum Agreement on the same date as they signed the master Agreement which had the effect of modifying the master Agreement to the extent that it is permissible, without penalty, to set back the starting time of an Agent's position at one-man stations on Sundays in order to meet the service requirements at the particular location involved.

If, as we have shown previously, it was the intent of the parties to exact the penalty now contended for by the organization, they would have so stipulated in the Memorandum Agreement and the fact that they did not is conclusive proof that no such penalty was intended.

Further, we have pointed out, that in the application of the well established and accepted principle that the conduct of the parties to an agreement is as expressive of their desires as the text of the Agreement and the conduct of the parties in this instance conclusively shows they had no intention of imposing the penalty now contended for by the organization. This is demonstrated by the fact that the Memorandum Agreement has been in effect for seven years without previous protest by the organization. This fact alone refutes the intention of this organization because prior to the existence of the Memorandum Agreement, this Carrier was without the authority to set back the fixed starting time of any Agent on a Sunday.

In conclusion, we desire to reiterate the organization has failed in its obligation as the moving party in this controversy to discharge its obligation of presenting to your Honorable Board proof that the applicable Rules and Working Conditions Agreement or the interpretations thereof supports the instant claim.

In view of the foregoing and for the reasons stated, this claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: While this Claim involves three named Claimants (Stevenson, Bonn and Noller), it will suffice for the purposes of this discussion to state the facts pertaining to one of them, since the others are similar.

Prior to June 11, 1950, Stevenson was the regularly assigned Passenger Agent at Garden City, N. Y., with hours from 6:30 A.M. to 3:00 P.M. each day except Tuesdays and Wednesdays. On the above date his Sunday hours were changed so as to begin at 9:00 A.M. and end at 6:00 P.M. On Monday, June 12, Claimant again reported for work at 6:30 A.M., by reason of which he claims he is entitled to pay at the time and one-half rate for the first three hours of his Monday work, since he was obliged to work more than eight hours in the twenty-four hour period, calculated from the starting time of his previous tour of duty.

There is in evidence an Agreement executed on May 4 and effective on June 1, 1945, Articles V, A-1 and IV, C-1 of which read, respectively:

> V, A-1: "Regular assignments shall have a fixed starting time, and the regular starting time shall not be changed without at least twenty-four (24) hours' notice to the employes affected."
>
> IV, C-1: "Except as otherwise provided in this Agreement, time worked in excess of eight (8) hours, exclusive of meal period on any day, will be considered overtime and paid on the actual minute basis at the time and one-half rate, except a relief employee . . ."

On the same day that the above Agreement was executed, the parties also entered into a Memorandum of Agreement providing:

> "The parties signatory hereto recognize that, in order to meet public transportation demands, passenger train service on Sundays must be and is scheduled differently than on week days; therefore, pursuant to the exception provisions of the starting time and meal period rules of the Schedule Agreement:—
>
> IT IS AGREED:
>
> In those one-shift offices, where the service requirements on Sundays vary from the service requirements on weekdays more than two (2) hours, the starting time and meal period on Sundays may be set back to the extent of the variation in service requirements, but not to exceed five (5) hours and the establishment of such different starting time and meal period on Sunday shall not constitute a violation of the starting time and meal period provisions of the Schedule Agreement, effective June 1, 1945. * * *"

On the merits, the sole question before us is whether the quoted provision of the Memorandum abrogated or rendered inapplicable to the facts of this case the requirements of Article IV, C-1, of the Agreement, proper. We think not. In the absence of the Memorandum, the Carrier would not have had the right to change the Claimant's Sunday hours without incurring liability for three hours' overtime when, on the Monday following, he went back on his regular weekday hours. The general Agreement and the Memorandum appear to have been executed simultaneously. The only exception in IV, C-1, pertains to relief employes, with whom we are not here concerned. There is a rule of construction that when an agreement contains a specific exception, this gives rise to an inference that no others were contemplated.

Stevenson claimed payment for overtime for work performed between 6:30 A. M. and 9:00 A. M. on Monday, June 12, 1950, on his time card for that day. This claim was timely denied on the local level, but was not appealed to the Supervising Agent until June 20, 1951. Attached to the appeal were claims on behalf of Bonn and Noller, as well as Stevenson, asserting demands on their behalf as far back as June, 1950.

On June 28, 1951, the Supervising Agent denied the appealed claims, assigning, among other reasons, that demands for dates prior to April 11, 1951, were barred by Article IV, P-1-(d), of the Agreement. This rule provides that a denied claim will be considered invalid unless it is listed for discussion by the duly accredited representatives within sixty days after the date on which it was initially denied.

The Carrier significantly points out that if it had not denied the claim within sixty days after it was first presented, it would have been required to treat it as allowed. It is urged that the Organization ought to be held to the same strict accountability. We think this conclusion is correct and the claims properly before us should be allowed retroactively to April 11, 1951.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Carrier violated the Agreement.

AWARD

Claims sustained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of July, 1954.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 6718
Docket No. TE-6676

NAME OF ORGANIZATION: The Order of Railroad Telegraphers.

NAME OF CARRIER: The Long Island Railroad Company, Debtor Wm. Wyer, Trustee.

Upon application of the Carrier involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning, as provided for in Sec. 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

As originally asserted on the property by the Organization's General Chairman the Claim was as follows:

> "Claim is made for those employes who perform service more than eight hours on any day (24 hrs.) at the rate of time and one half, Article IV, Paragraphs B-1 and C-1."

On April 13, 1951 the Carrier's Manager of Personnel advised the General Chairman as follows:

> "The foregoing subject is not sufficiently specific to permit a determination of the merits of this case.
>
> However, if you have any specific instances involving this question, which have been progressed with the Superintendent in accordance with the provisions of the Telegraphers' Agreement, I shall be glad to discuss them with you."

On June 20, 1951 the General Chairman reiterated the Claim as stated above and also presented specific Claims on behalf of the employes, Stevenson, Bonn and Noller.

The Personnel Manager again rejected the Claim on June 28, 1951, to which the General Chairman replied as follows:

> "It will be noted whereas I am submitting only three of the claims effected in the general claim and by such submission in no way is to be received as being my intention of waiving or abandoning the general claim. It is my desire by submitting the noted claims that it will expedite the securing a basis for settlement of the general claim, * * *"

Again on September 22, 1952 the General Chairman wrote to the Personnel Manager as follows:

> "There has been presented only three names, by such presentation it must not be construed in any way that I am waiving or abandoning the general Claim."

Finally, on November 24, 1952 the Personnel Manager again denied the Claim on the grounds that it had not been prosecuted within the time limits prescribed by Article IV, P-1(a) of the Agreement, and that, "since these Claimants were regularly assigned employes, work performed by them on Sundays is governed by the provisions of the Agreement of May 4, 1945"; and on April 16, 1953 the Organization filed with this Board its Ex Parte Submission stating the Claim in three parts as disclosed by the Award adopted on July 16, 1954.

Subsequently, on March 30, 1955, the Carrier requested an interpretation of Award 6718. The Carrier concedes that as to the Claimants, Stevenson, Bonn and Noller, the Award is valid and that they should be paid. It is also conceded, "that if there were other valid claims which had been handled in accordance with the provisions of Article IV, Paragraph P-1 of the applicable Rules and Working Conditions Agreement and which were held in abeyance pending the disposition of the instant case, those claims would likewise be payable under the provisions of the Award." But the Carrier says, "the Organization errs in holding that all employes who may have performed the work in question are likewise valid claimants under the terms of this Award since it was not the intention of your Honorable Board to circumvent the governing rules of the applicable Agreement."

All payments in discharge of the Award have been withheld by the Carrier, awaiting this interpretation.

It is unnecessary to quote extensively from the Award since it is already before the parties. The pertinent language is that, "the claims properly before us should be allowed retroactively to April 11, 1951," and, "Claims sustained as per Opinion and Findings." The question is, what claims, under the facts of record, have been sustained?

It is our opinion that the Carrier is placing too narrow a construction on the scope of the Award. The record clearly discloses that the General Chairman was consistently asserting a claim on behalf of all the employes who were required to work in excess of eight (8) hours, exclusive of the meal period, on any day. In his letter of June 20, 1951, the General Chairman pointed out the basis of his claim, identified the group of employes that were involved and specified the provision of the Agreement that he contended had been violated. While the complaint was under consideration on the property and after the Personnel Manager had asked for specific instances of alleged violation of the Agreement the General Chairman cited, by way of examples, the cases of Stevenson, Bonn and Noller. At the same time, and twice subsequently, the Chairman made it clear that he was pressing a general claim on behalf of all employes similarly situated. Had the Personnel Manager taken the position that he would consider only the claims of the three named claimants, unless the others were personally identified, we would have a different issue; but, on the contrary, in his final letter he rejected all of the claims on the further ground that the practice complained of was permissible under the special Agreement of May 4, 1945. We held that Agreement inapplicable in our original Opinion.

The question as to when a general claim, as distinguished from specific claims made on behalf of named employes, will suffice has been before this Board in a number of cases. The proper rule appears to be that a general claim is permissible when the question at issue operates uniformly on a class of employes, the members of which are readily determinable. See Awards 4821 and 5117. Measured by that formula, the general claim asserted by the Organization in the instant case would appear to be proper, and, as was noted in Award 4821, the Carrier can now be required to supply the names of the employes in whose favor the Award operates or permit a representative of the Organization to search them out. There is no showing that such names are unascertainable.

We find nothing in the current Agreement between the parties that justifies any other or different conclusion. Article IV, P-1(a) provides that,

with certain exceptions, "Claims for money alleged to be due may be made only by an employe or his duly accredited representative, in his behalf, and must be presented in writing to the proper officer of the Company within sixty (60) days from the date the employe received his pay check for the pay period involved." Sub-paragraph (c) of said Rule provides that if such a claim is not allowed and the employe so notified in writing within sixty days from the date it is presented, it shall be considered allowed; and sub-paragraph (d) says that if such a claim is denied by the Company, it shall be invalid, unless it is listed for discussion with the proper officer of the Company by the duly accredited representative of the employe within sixty (60) days after the date it was initially denied.

Under such contractual provisions it is not necessary that the claim be prosecuted by the employe personally. Award 4456. Delay on the part of the Organization in progressing the matter to the Carrier's Superintendent within sixty days following its rejection by the Supervising Agent did not bar the claim, but only operated as a cut-off with respect to the period for which a recovery may be made effective. This must be so in the light of the fact that the Carrier did not rely exclusively on limitations but, on the contrary, took the position that no violation of the Agreement had occurred. Award 6771.

We interpret the Award to mean that all employes covered by the Agreement who were required to perform service in excess of eight (8) hours on any 24-hour day are entitled to be compensated at the rate of time and one-half for services performed in excess of eight (8) hours on any such day or days, retroactively to April 11, 1951.

Referee Curtis G. Shake, who sat with the Division as a member when Award No. 6718 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of November, 1955.

DISSENT TO INTERPRETATION NO. 1—TO AWARD NO. 6718, DOCKET NO. TE-6676

This Award No. 6718 and Interpretation No. 1 thereto, involve an Agreement rule titled **"Time claim—Preservation limit"**—designed to compel the presentation of claims for money, in writing, and the processing of such claims within specified limits and with all parties subject to the penalty prescribed therein. The rule provisions are here quoted:

Time claim—Presentation limit

P-1 (a) Claims for money alleged to be due may be made only by an employe or his duly accredited representative, in his behalf, and must be presented in writing to the proper officer of the Company within sixty (60) days from the date the employe received his pay check for the pay period involved, except:

Time claim—Invalid

(b) A claim which is not made within the time limit specified in the foregoing paragraph (a), including exceptions 1 and 2, shall not be entertained or allowed.

Time claim—Notice of Denial

(c) When a claim has been presented in accordance with paragraph (a) hereof and is not allowed, the employe shall be notified to

that effect, in writing, within sixty (60) days from the date his claim was presented. When not so notified the claim will be allowed.

Time claim—Listing of

(d) A claim denied in accordance with paragraph (c) hereof shall be considered invalid unless it is listed for discussion by the duly accredited representative with the proper officer of the Company within sixty (60) days after the date on which the claim was initially denied.

Award No. 6718 issued July 16, 1954 stipulated that "Claims sustained as per Opinion and Findings."

The Opinion, fully aware of the compelling requirements of Rule P-1, after reciting details, expressed opinion holding that:

"* * * claims properly before us should be allowed retroactively to April 11, 1951."

In the guise of an interpretation, the majority now defeat Rule P-1, the express purpose of which was designed to control "money" claims, first by giving recognition to so called **General Money Claims** and claims for **unnamed claimants,** and secondly by holding as follows:

"* * * Delay on the part of the Organization in progressing the matter to the Carrier's Superintendent within sixty days following its rejection by the Supervising Agent did not bar the claim, but only operated as a cut-off with respect to the period for which a recovery may be made effective. * * *"

Clearly this interpretation expands the primary award beyond its original framework, and proposes payment of claims that were not properly processed and therefore "not properly before us."

For these reasons we dissent.

/s/ R. M. Butler
/s/ W. H. Castle
/s/ E. T. Horsley
/s/ C. P. Dugan
/s/ J. E. Kemp