Award No. 10401
Docket No. TE-8875

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the New York, Chicago and St. Louis Railroad that:

1. The Carrier violated the Agreement between the parties when it abolished the three operator-levermen positions at the Interlocking Tower, South Whitley, Indiana, on December 14, 1954, without in fact abolishing the work of said positions; and unilaterally transferred said work to employes under another agreement and in a separate seniority district.

2. The Carrier shall, because of such violative act, be required to compensate the senior idle employe, extra in preference, on the seniority district involved, eight (8) hours' pay for each shift of each day, commencing with the date of the filing of this claim, December 14, 1954, and

3. The Carrier shall also be required to compensate all other employes adversely affected for any loss of wages, or for expenses incurred due to Carrier's violative act, and in addition,

4. The Carrier stands in violation of Article V, paragraphs (a) and (b) (Carrier's Proposal No. 7) of the August 21, 1954 Agreement when it failed to notify the employes of its disallowance of said claim within the 60 day time limit from the date claim filed, as stipulated by said agreement, for which Carrier shall pay the claim as presented.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties to this dispute are by reference thereto made a part of this submission.

The facts are, that Carrier without conference or agreement, abolished three operator-levermen positions at the Interlocker at South Whitley, Indiana, on December 14, 1954, without in fact abolishing the work of the positions, and concurrent with the abolishment transferred the performance of the work to employes in a separate seniority district and under another agreement.

There are no train orders to handle. Present operations are conducted strictly in accordance with the working agreements covering the various crafts.

The Employes are now asking this Board to set back the clock and maintain positions which are not needed and which would serve no useful purpose. They are asking that the action of the Interstate Commerce Commission be nullified, despite the fact that they were given the opportunity by public notice of opposing such action. They are asking that a windfall be given to unidentified claimants for an alleged violation of the Scope Rule when no work remains to be performed under that rule.

There has been no violation of the current agreement and there is no basis for such an allegation. The claim is entirely without merit and should be denied.

All that is contained herein is either known or available to the Employes and their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute involves a contention by the Employes that when the Carrier abolished all three positions of operator-leverman at the Interlocking Tower South Whitley, Indiana, and transferred the work of these positions to employes of another craft, located in a different seniority district, it violated their Agreement. There is also involved a contention that the Carrier failed to comply with Article V of the August 21 Agreement.

The employes have not asked for the re-establishment of the South Whitley installation, but rather, because of such wrongful act, the Carrier be required to compensate the Senior idle employe, extra in preference, on the seniority district involved, eight (8) hours pay for each shift of each day commencing with December 14, 1954, and also all other employes adversely affected for any loss of wages and expenses.

The first question that confronts us, is did the Carrier have the right to abolish the positions at South Whitley tower?

It is the contention of the Carrier that the closing of South Whitley Tower was brought about by completion of C.T.C. on the Chicago Division, which practically eliminated the work previously performed by the Operators and Levermen at that point.

The record clearly shows that at South Whitley the C.T.C. has done, what it was designed to do, that is, it has made automatic the operation of switches and signals under the Supervisory Control of train dispatchers.

This Division has had many similar cases before it, we will quote from Award 4452, with Judge Carter, Referee:

> "It is evident from a reading of the foregoing Scope Rule that work incident to the operation of a CTC installation is not specifically mentioned. The Organization contends that the definition of the word 'leverman' and 'towerman' as used in the industry, includes those charged with the operation of CTC machines.
>
> "* * *

"* * * It must be borne in mind that when the Scope Rule of the Telegraphers' Agreement was negotiated, CTC installations were unknown and consequently not contemplated by the signatories to that Agreement. It is clear to this Board that the definition of a towerman or a leverman heretofore recited contemplated the handling of signals, switches and mechanical interlocking equipment from a tower under the general direction of a dispatcher by the train order method. By the accepted definition, a towerman or leverman operates interlocked switches and signals from a central point as does the operator of a CTC machine. The definition of a towerman or leverman, however, contains the additional limiting words 'by means of levers', a limitation wholly foreign to a CTC machine **which operates automatically without the use of levers.** The work of a towerman or leverman is necessarily restricted in the scope of its operation to the vicinity of the tower. A CTC operation is handled from a central point and controls large sections of a railroad line. Its scope of operation is much greater. **It is automatically controlled** and eliminates the train order method of handling trains. The Telegraphers' Agreement clearly includes the work of towerman and leverman. They naturally belong there because of the necessity for handling train orders in connection with their work. We cannot say that the operation of a CTC machine, which eliminates train order control and consequently one of the most descriptive elements of a telegrapher's work, is included in the scope of the Telegraphers' Agreement because it includes towermen and levermen. * * *

"We think the matter constitutes a jurisdictional dispute. It is a dispute of long standing on this and other railroads. It has resulted in mediation on some other Carriers where the situation has been similar to the one we have before us. Awards 641, 2804. The record indicates that this work has by agreement or arbitration been negotiated on other Carriers by the Telegraphers and Dispatchers without consistency of result. This is evidence only of the jurisdictional nature of the dispute. There must be an agreement with reference to the work before this Board has jurisdiction to act, this Board being solely an interpreting agency under the law creating it. * * *"

This Division has found that the A.T.D.A. is involved in this dispute and per Section 3 First (j) of the Act, A.T.D.A. was afforded opportunity to be heard which it waived.

Thus on the merits of the case there was no violation of the Agreement by the Carrier as it had a right to abolish the positions at South Whitley tower.

We come now to the claim of the Employes:

"that the Carrier stands in violation of Act V, paragraphs (a) and (b) of the August 21, 1954 Agrement when it failed to notify the employes of its disallowance of said claim within the 60 day time limit from the date claim was filed as stipulated by said Agreement, for which Carrier shall pay the claim as presented."

Thus it was the duty of the Carrier under the Agreement, within 60 days after the filing of the claim to notify whoever filed the claim or grievance in writing of the reasons for the disallowance, if the claim was disallowed.

We quote the pertinent part of Article V:

"All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

"(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) is writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

"(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with the provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employe as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any state of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose."

The Carrier states that the letter denying the claim was written on March 11, 1955, which was the very last day permissible, to wit the 59th day, and that it was mailed in the usual manner, in accordance with past practice, in the mailbox, March 11, 1955 which was Friday. The letter of March 11th was not mailed according to the post mark until March 14, 1955 which was the 62nd day after the filing of the claim.

The Carrier explains that by reason of grade elimination, work under construction at the time the mailbox at the depot was temporarily relocated, which it contends undoubtedly resulted in postal employe's failing to pick up the letter of March 11th over the weekend.

The employes submit a copy of a letter written to the Postmaster at Fort Wayne, Indiana, and his reply we quote from the letter of September 29, 1955, written by the Postmaster to Mr. Hayes:

"In reply to yours of September 29, 1955, please be advised that we have no record of failure to collect from the collection box located at the Nickel Plate Depot, on schedule, on Friday, March 11, 1955.

This box is scheduled to be opened five times during each week, by 3 different employes. It is almost inconceivable that all would have missed it on that particular day. Since yours is the only inquiry regarding the matter, it must be assumed that collections were made according to schedule."

This Division was confronted with a similar case in Award No. 8412, we quote:

"We cannot agree with this argument. Article V, Section 1 (a), specifies correlative rights and duties of employes (or their representatives) and of carriers. A carrier's specified duty is to give timely notice of a disallowed claim, with reasons for disallowance. Otherwise the claim must be allowed as presented. Inherent and necessary for the proper performance of this specified obligation are certain other, unspecified obligations. Among these are (1) The duty to keep the channels of communication within management open and free; (2) the duty to investigate claims promptly; (3) the duty to confer on claims promptly with representatives of claimants; and (4) the duty to make prompt decisions of allowance or disallowance. It is argued that some or all of these items are rights of a carrier under the Railway Labor Act. This may well be true. But they are also duties of a carrier under the second sentence of Article V, Section 1 (a) of the August 21, 1954 Agreement. They are duties which inhere in said sentence; and if said duties are not fulfilled, the carrier suffers a penalty. To so rule is not to rewrite or add to the Parties' Agreement.

"In respect to the loss of a written, timely filed claim in the mails or otherwise, it must be clear that a Carrier could defeat the purpose of Article V, Section 1 (a) if it failed wittingly or unwittingly to see that the claim was passed up to the decision-making official through proper channels. If the position of the Carrier in the instant case were to prevail, it would be possible to disallow a claim by losing it rather than by passing on its merits. If the claim were re-filed after being lost, it would be possible to allege that said re-filing was not timely."

We can come to no other conclusion, than that the Carrier failed to comply with Article V of the Agreement, in failing to give the required denial of the claim within the 60 day period.

Carrier claims that the officer of the Carrier authorized to receive the instant claim was the Chief Dispatcher, who issued the order abolishing claimants positions, and that the successive order of appeals, as required was to the Superintendent, General Superintendent and finally to the Director of Personnel.

The record shows that the instant claim was first filed by the General Chairman with the Superintendent (not with the Chief Dispatcher) under date of January 10, 1955, and it is the claim of the Carrier that from the very first, the Carrier called the attention of the Employes; that the claim had not been "properly progressed in the regular manner." The answer to this contention is that the letter calling this to the attention of Employes was the letter dated March 11, 1955, and postmarked March 14, 1955, in other words it was too late, more than 60 days had expired.

The Carrier relies on Award 8889 (McMahon), but in that case the procedure was outlined in the Agreement.

We quote from the Carrier's submission:

"The usual handling of claims or grievances on the Chicago Division in telegraphers' cases is the initial filing of claim with the Chief Dispatcher, with successive appeals, if required, to the Superintendent, General Superintendent, and finally to the Director of Personnel.

There are some few instances where the initial handling has been with the Superintendent. The initial handling or filing is usually by the Local Chairman with any subsequent handling by the General Chairman. In a few instances the initial handling has been by the General Chairman. The Carrier has not taken exception to the filing of claims by the individual employe or his authorized representative, be that representative the Local Chairman or General Chairman. However, it does object to duplicate handling of the same claim on a concurrent basis."

While there was some confusion in the handling of the claim on the property, the admission by the Carrier that "there are some few instances where the initial handling has been with the Superintendent," and also the fact that the letter calling the Employes attention to the improperly handling was the letter dated March 11, and postmarked March 14th, which was late, the 60 days having elapsed, we find no error in the manner in which the claim was handled.

In a case involving the same Article V of the August 21, 1954 Agreement and the same problem that confronts us in this case, the Second Division in Award No. 3298 (Referee Ferguson) said we quote with approval:

"We are of the opinion that time limits fixed are agreed to by the parties should be strictly applied. This claim falls within the type known as a continuing claim. 'Continuing claims' are a device adopted by the parties to avoid a multiplicity of claims, to avoid the need for filing a new claim every day for that day's violation.

Article V.-1 (a) of the August 21, 1954 agreement provides explicitly, 'All claims must be presented . . . within 60 days . . . Should . . . such claim be disallowed, the carrier shall, within 60 days . . . notify in writing of the reasons . . . If not so notified the claim or grievance shall be allowed as presented,'.

"At first glance the rule appears deceptively simple of application. The difficulty arises when it is attempted to put it into operation in a claim for an alleged violation in the future. If the claim is found to be valid on its merits, it should properly be allowed without any restriction on future application. On the other hand, if the claim was without merit in the first place, as we have already found in this docket, the allowance on the technical rule violation presents a delemma, which the framers of the rule did not anticipate except as they provided in Article V. 3. of the August 21, 1954, agreement, wherein continuing violations are recognized, defined and limited. It provides, 'A claim . . . for an alleged continuing violation . . . shall be fully protected . . . as long as such alleged violation, if found to be such continues'. This is followed by a retroactive limit of 60 days prior to filing, but the rule is silent on how long in future such claims should be granted. Having found against the merits we should not reverse our decision and create an absurdity."

The claim before us is a "continuing claim", there is no way under the Agreement that the claim can be terminated, the claim would go on forever; this we do not believe the parties had in mind when the Agreement was entered into.

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

I. That there is no merit in the claim before us,

II. That a technical violation of Article V-A has been proved and must be sustained.

III. That the violation not having been found to be a violation on its merits, our allowance is limited to the period prior to the late declination and is not addressed to the substantive merits of the basic claim.

AWARD

Claim sustained as set out in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of March, 1962.

DISSENT TO AWARD 10401, DOCKET TE-8875

Although Award 10401 sustains the Employes' position with respect to the Carrier's obligation to notify them of its disallowance of a claim within the 60-day limit the majority, composed of the Carrier Members and Referee, has committed a number of errors harmful to the Employes and their relations with their employers.

The first error — one that may be forgivable in view of prior awards, but error nevertheless — lies in the statement that:

> "The record clearly shows that at South Whitley the C.T.C. has done, what it was designed to do, that is, it has made automatic the operation of switches and signals under the Supervisory Control of train dispatchers."

The record shows no such thing, clearly or otherwise. The record shows that the Carrier accomplished its design by means of the C.T.C., that is, the transfer of the work involved in controlling operation of the switches and signals at South Whitley from telegraphers to train dispatchers.

The operation of switches and signals by means of C.T.C. equipment is no more automatic than operation of an electric fan. In either instance it is necessary to operate manually a device which completes an electric circuit so the current can cause the unit to operate.

The train dispatchers do not merely exercise supervisory control over operation of these switches and signals—they did that before the changes were made—but they manually operate the devices, the levers, which complete electric circuits that carry the current which causes the switches and signals to perform their required functions. This is precisely the work performed by the telegraphers before their jobs were abolished. It was not automatic then, and it is not automatic now.

Failure of referees to recognize or accept this basic fact — and I challenge anyone to prove that it is not a fact — has led to this glaring error. The present award merely compounds the error.

After correctly finding that the Carrier had not complied with the requirement that it notify the Employes of its disallowance of the claim within 60 days, the majority then committed a second, and even more grievous error. It accepted and considered an issue which was no part of the dispute.

The case was initially argued in panel session with the Referee on September 29, 1961. After extended consideration by the Referee further discussion—at his request— was held on January 19, 1962. Then, on January 22, 1962, the Carrier Member submitted a memorandum in which he raised two entirely new issues, that is, contentions and arguments which were not made by the Carrier itself either in handling on the property or in its submissions to the Board. I replied in writing on January 23.

The first of these extraneous arguments, a contention that the claim was defective because the claimants were not identified by name, was summarily rejected without comment, and properly so.

The second, however, was entertained and was dealt with in the last two paragraphs of the "Opinion of Board". This extraneous matter injected by the Carrier Member consisted of a contention that the Carrier's liability ceased when the Employes finally learned that the Carrier intended to disallow the claim, even though such notice came after expiration of the 60-day limit. No such question was ever mentioned by either party on the property or in the record before us.

This Board has long and consistently held that it has no power to decide questions which were never made a part of the particular dispute, and which have not been handled "in the usual manner" by the parties on the property in their efforts to reach a settlement. This is obviously a correct principle, and in conformity with the Railway Labor Act. Any other course would be to deny the parties due process.

I believe one citation is sufficient to illustrate the principle, although literally scores of our awards have commented and approved. In Award 8484 Referee Vokoun said, after reviewing a number of prior awards on the subject:

> "From the above opinions of the Board it is apparent that the Board has diligently protected the parties, both Carrier and Organization, in the presentation of their cases on appeal to the Board in limiting claims to those discussed on the property and limiting the defenses interposed so that there can be no enlargement—or in lay language, no second look after the case is concluded on the property."

This principle and many supporting awards were brought to the attention of the Referee. By its action of ignoring both the principle and our prior awards, and making a decision on the improperly injected question the majority denied the Employes due process in that they were denied the right to present their views. For that matter the Carrier also was likewise deprived of its opportunity to express itself. For all we know the Carrier might have desired to meet its problem in an entirely different manner. But in any event the majority erred seriously and the decision on the point should be treated as a nullity.

Then, further, after the majority had improperly accepted and considered an extraneous issue, it made a decision which is unsupportable. In its last paragraph the majority states that:

> "The claim before us is a 'continuing claim', there is no way under the Agreement that the claim can be terminated, the claim would go on forever . . .".

After making this interpretation, the majority went on to say:

> ". . . this we do not believe the parties had in mind when the Agreement was entered into."

And then immediately after noting that there is no way under the Agreement that the claim can be terminated the majority proceeds to terminate it in part III of the "Findings".

Now what kind of reasoning is this? Everyone knows that this Board has no power to change agreements. Also, everyone knows that contracts are to be construed so as to give effect to the parties' intention **as expressed by the language used**, not so as to give effect to what someone believes or thinks they meant.

If, as the majority found, there is no way under the Agreement to terminate the claim it obviously would be necessary to go outside the Agreement to find some way to do so. It necessarily follows that when the majority went outside both the agreement and the record to relieve the Carrier of an obligation it utterly exceeded the Board's power, which is clearly limited to interpretation of agreements and application of such interpretations to the question in dispute as submitted by the parties after their own efforts have failed to resolve their dispute.

The language of Article V which became applicable when the Carrier failed to notify, within 60 days, whoever filed the claim of its reasons for disallowance is not ambiguous. It clearly provides that "If not so notified, the claim or grievance shall be allowed as presented . . .". It does not say that the liability thus incurred will cease as of a certain time or anything of the sort.

The attempt of the majority to add a provision which is entirely foreign to the language of the rule should not, and in my opinion will not stand. Certainly further consideration of the question, if and when it properly occurs, will result in correction of this obvious error.

For the reasons, and to the extent set out above I consider Award 10401 to be erroneous, and I hereby register dissent.

J. W. WHITEHOUSE
Labor Member

ANSWER TO LABOR MEMBER'S DISSENT TO AWARD NO. 10401, DOCKET TE-8875

In the main, the Labor Member's Dissent simply expresses dissatisfaction over his arguments having been rejected by our finding on the merits in Award 10401 that there was no violation of the Agreement by the Carrier. In addition, the weight of authority, as well as of reason, support limitations on the requirement for payment by default under Article V of the August 21, 1954 Agreement, which Article Part 4 of the claim itself placed before the Division.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ T. F. Strunck