Award No. 14950
Docket No. CL-14321

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5370) that:

(a) Carrier violated Article V of the Agreement dated Chicago, August 21, 1954 when its Division Superintendent Mr. H. R. Koonce, Carbondale, Illinois, failed to render decision within the sixty (60) day time limit period in claim filed in behalf of Clerk R. L. Jones, Bluford, Illinois.

(b) R. L. Jones be compensated a day's pay at pro rata rate attaching Position No. 246 ($19.16 per day) for each work day Wednesday through Sunday beginning March 2, 1962, until he is restored to Position No. 246.

EMPLOYES' STATEMENT OF FACTS: Clerk C. T. Baker, Bluford, Illinois, who for several months had been on leave of absence, returned to active service and displaced R. L. Jones effective March 2, 1962.

March 4, 1962, R. L. Jones filed claim with Train Master R. L. Warren for a day's pay at the rate attaching Position No. 246 for each day Wednesday through Sunday account being illegally displaced by C. T. Baker in accordance with Rules Nos. 16 and 27. (See Employes' Exhibit No. 1-A.)

March 14, 1962, Train Master Warren denied claim upon the premise Jones' displacement by Baker was proper and in accordance with Baker's seniority rights. (See Employes' Exhibit No. 1-B.)

April 9, 1963, District Chairman H. S. Brewer advised Train Master Warren that his decision on the dispute was unsatisfactory and his decision would be appealed. (See Employes' Exhibit No. 1-C.)

April 9, 1962, District Chairman Brewer appealed the claim to Superintendent H. R. Koonce alleging that Baker's authorized leave of absence had expired January 10, 1962 and his belated displacement of Claimant Jones on March 2, 1962, was violative of Rule No. 27 as Baker had overstayed his leave of absence. (See Employes' Exhibit No. 2-A.)

but the division chairman — who had full knowledge of our understanding — nevertheless appealed the instant claim based on the the contention that Baker lost his seniority. The division chairman did not have the right to appeal the claim under the circumstances, and the superintendent was not, in our opinion, obligated to respond to the appeal within 60 days since the claim was based on a misstatement of the facts.

The agreement, moreover, providing for the filing of one claim to cover an alleged continuing violation reads:

> 'A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, **if found to be such,** continues. . . .' (Emphasis ours.)

The facts upon which this claim was premised — that Mr. Baker forfeited his seniority — were, as you admit, erroneous. The claimant, therefore, had no rights to protect and the claim certainly was not found to be based on a continuing violation. The claim was instead based on erroneous facts, and the fact that the claim was not declined within 60 days did not operate to change the facts.

We feel, in short, that an employe must make out a prima facie claim before the 60-day time limit rule begins to operate. He cannot file a claim based on erroneous facts, as here, and expect those facts to materialize if the claim is not declined within 60 days. If the contrary were true, all the results of the collective bargaining procedure could be set aside by the company's failure to decline claims such as this one within 60 days.

It is our position that Baker's right to return to his position was conclusively determined by our joint action, and that the division chairman had no right or authority to attempt to defeat it by handling a time claim in direct opposition thereto. There is no basis for allowing the claim, and we have no alternative but to reaffirm our previous declination."[19]

The agreement between the parties, effective June 23, 1922, as revised, is by reference made a part of this submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue is rather simple. It is agreed that the Carrier failed to respond to the District Chairman's letter within sixty (60) days as required in Article V of the August 21, 1954 Agreement. Carrier denies that said Article V was violated because (1) the precise issue was adjusted by agreement of the parties and (2) the "District Chairman was estopped from handling a duplicate claim . . ."

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[19]See Exhibit R.

The claim was filed with the Trainmaster on March 4, 1962, who declined it on March 14, 1962. An appeal was taken to the Superintendent on April 9, 1962, who failed to respond within the required sixty (60) days. On June 12, 1962, the District Chairman wrote the Superintendent calling his attention to the fact that the Carrier had failed to comply with Article V of the August 21, 1954 Agreement. The Superintendent wrote the District Chairman on July 5, 1962, in part, as follows:

> "The matter of Clerk C. T. Baker's leave of absence has been handled continuously by your General Chairman and the Manager of Personnel, starting with the General Chairman's letter dated April 19, 1961, and ending with the Manager of Personnel's letter dated June 12, 1962, as well as during two conference discussions . . ."

> "Since, through the negotiations between the General Chairman and Manager of Personnel, Clerk Baker did not frofeit his seniority as you contend, there was never a violation of the schedule agreement when he returned to service on March 2, 1962, and the alleged claim filed on the premise that he (Baker) had forfeited his seniority has never had a valid standing and did not constitute a claim within the meaning of Article V of the August 21, 1954 Agreement, and the failure to disallow such alleged claim did not violate that agreement."

It should be noted that if the identical claim had been resolved by the parties such an agreement was not consummated until the Manager of Personnel's letter dated June 12, 1962, which was sixty four (64) days after the claim was appealed to the Superintendent.

But the identical claim was not resolved by the parties. Carrier relies on a letter dated February 12, 1962, from the General Chairman to Carrier's Manager of Personnel which, in part, reads:

> "Mr. Baker is regularly assigned to a position at Bluford and I suggest you instruct the division officers to advise him that he should protect his assignment under the same conditions applicable to other employes at Bluford or be subject to disciplinary action.
>
> Please keep me advised of the action you take in resolution of this complaint."

Carrier notified Mr. Baker and on March 2, 1962, he displaced the Claimant. Again, it should be noted that all of this took place before the claim was filed. And the General Chairman's letter of February 12, 1962 is not an agreement that Baker had the right to displace the Claimant. Whether he did or not was a question of fact that could have been determined if Carrier had replied to the April 9, 1962 appeal within the time limits.

This claim was never resolved on the merits before June 12, 1962, or at any other time. The correspondence on the property after March 2, 1962, shows that the General Chairman continually questioned Baker's right to displace a junior employe. As a result of such correspondence, Baker resigned as an employe of the Carrier on October 8, 1962.

The doctrine of estoppel is not applicable in this case. Here, we have a specific contractual obligation with which Carrier did not comply. Employes proceeded in the manner set forth in that Agreement. They did not fail to do anything they were obliged to do.

There is no dispute, however, that the Carrier did deny the claim in the July 5, 1962 letter. Since this is a continuing claim, the liability of the Carrier is limited to the date when the Employes received Carrier's denial, which in this case is July 6, 1962. See National Dispute Committee Decision No. 16 and Awards 14904, 14603, 14502, 14426 and 14369.

Employes have presented no evidence on the merits of the claim. In their Rebuttal Brief they say that "they do not desire to become involved in a discussion on the merits of the instant claim . . ."

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 Carrier did not comply with the provisions of Article V of the August 21, 1954 Agreement as stated in the Opinion.

AWARD

Claim is sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14950
DOCKET CL-14321 (Referee Dolnick)

This Award is correct in assuming that Carrier was under no obligation to respond to the District Chairman's letter if the precise issue involved in that letter had theretofore been adjusted by agreement of the parties; but it it palpably wrong in holding that there had been no such adjustment by agreement.

The "precise issue" presented in the District Chairman's letter was admittedly whether "Baker had forfeited his seniority" and, therefore, had no right to return to the position to which he had theretofore been assigned.

The Award erroneously holds that this issue was not adjusted by agreement of the General Chairman because:

". . . the General Chairman's letter of February 12, 1962 is not an agreement that Baker had the right to displace the Claimant. . . ."

This holding is diametrically opposed to the admitted facts, for the General Chairman admits he agreed in his letter of February 12, 1962, that:

"Mr. Baker is regularly assigned to a position at Bluford and I suggest you instruct the division officers to advise him that he should protect his assignment under the same conditions applicable to other employes at Bluford or be subject to disciplinary action.

Please keep me advised of the action you take in resolution of this complaint."

To say that this unequivocal agreement that Baker "is regularly assigned" coupled with the request that Carrier advise Baker to "protect his assignment" did not constitute an agreement that Baker had a right to return to his assignment is preposterous. This agreement necessarily carried with it the agreement that Claimant had no right whatever to remain on Baker's assignment, should Baker be returned thereto. The District Chairman based his entire alleged claim squarely upon his unsupported allegation that Baker had forfeited all seniority rights and had no right to return to service. That claim was thus a direct attempt to overthrow the General Chairman's agreement that Baker was "regularly assigned" and should be returned to his position.

The Employes promptly abandoned the District Chairman's alleged claim that the agreement was violated in returning Baker to his position, and they have prosecuted this time limit claim on the erroneous theory that it should have been allowed even though the precise issue raised (Baker's seniority status and right to return to work as of 3-2-62) had previously been adjusted by agreement of the General Chairman and Carrier's highest officer.

In his letter appealing the claim to Carrier's highest officer the General Chairman admitted that:

"July 5, 1962, Mr. Koonce (Carrier's Superintendent) replied, stating the matter had previously been handled with me and that I on February 12, 1962, suggested that you instruct the division officers to advise Baker that he should protect his assignment or be subject to disciplinary action . . ."

The General Chairman denied none of this. His only response in his appeal letter was:

"Any reasoning Mr. Koonce wanted to advance in defense of the claim should have been submitted within the applicable time limits . . ."

The record is thus conclusive on the point that as of March 2, 1962, when Baker was permitted to return to his assigned position, the General Chairman had agreed in writing that Baker had retained his seniority and should be required to return to his assignment. The General Chairman was in complete agreement with Carrier on the return of Baker to his assignment at the time such action was taken and he has never denied such agreement.

The Referee's finding that the General Chairman did not agree on Baker's return to his assignment is so completely contrary to the record that it is arbitrary and in excess of the Board's jurisdiction.

Also contradicted by the record is the further finding that:

". . . The correspondence on the property after March 2, 1962, shows that the General Chairman continually questioned Baker's right to displace a junior employe . . ."

What the record actually shows is that the General Chairman never specifically questioned Baker's right to return to his assignment. The record indicates that after receiving notice from Carrier that Baker had indicated on March 1 that he would immediately return to service, the General Chairman responded as follows:

"By virtue of the statement made on January 3, 1962, by Mr. E. G. Marks, Chief, Benefits and Facilities Section, Veterans Administration, that Mr. Baker was not receiving training under any of the laws administered by the administration, I am not in accord with your assertion that his return to the service on March 1, 1962 resolves the complaint.

Therefore, the complaint will be docketed for discussion in conference in the near future."

There is certainly no denial of the prior agreement that Baker should be returned to his assignment, which agreement had been fully executed by Carrier's action in permitting Baker to return on March 2, 1962. In the above cited letter the General Chairman simply indicated that he had information (which proved to be erroneous) that Baker had not been receiving training under laws administered by the Veterans Administration, and for that reason the General Chairman considered there was still reason to keep the file open and further discuss Baker's situation.

Under elementary rules of estoppel, any such discussion regarding the possibility that Baker had violated his leave and should, therefore, be terminated could not have the effect of restroactively nullifying the fully executed agreement that Baker be returned to his assignment, and the Employes did not contend otherwise in this record. As we have already noted, they brought this time limit claim to the Board on the sole theory that even though the Local Chairman's alleged claim directly and necessarily turned on the precise issue that had been settled by agreement of the General Chairman, Carrier was nevertheless obligated under Article V to recognize the allegd claim and handle it as any other claim. That theory has been properly and emphatically rejected by this Board — see Award 7061 (Carter). Having recognized the error in that theory, and having proceeded on the premise that this claim could not be sustained if the precise issue involved in the District Chairman's letter had been settled by agreement of the General Chairman, the Referee should have taken the record as it actually is, thereby recognizing the clear agreement made by the General Chairman on the precise issue.

The claim should have been denied and the Board has exceeded its jurisdiction in attempting to sustain it. For these reasons, we dissent.

G. L. Naylor
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