Award No. 15928
Docket No. TE-14503

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

1. Carrier violated the Agreement between the parties when on June 25, 26, 27, 28, 29, 30; July 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31; August 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, 1962, it required or permitted an employe not covered by the Agreement to handle train orders, clearance cards and other communications of record at Bedford, Indiana. (51 dates)

2. Because of these violations, and for each day that such violations continue, Carrier shall compensate:

(a) The senior idle extra telegrapher in preference, one day's pay for each day listed above;

(b) If there were no extra telegraphers idle on the above dates, then compensate the following employes each a day's pay as per each date listed:

J. D. Maloney, June 25, 26, July 30 and 31, 1962.
V. F. Terry, June 27, 1962.
M. E. Hobert, June 28, July 12, August 16 and 23, 1962.
J. J. Wiersba, June 29, August 3, 17, 30 and 31, 1962.
M. G. Sellers, June 30, July 13, 27 and August 24, 1962.
D. G. Hobert, July 2, 3, August 6 and 7, 1962.
D. E. Barron, July 5, 6, 26, August 9 and 10, 1962.
D. R. McGill, July 9 and 24, 1962.
F. C. Hanna, July 10, 11, 17 and 18, 1962.
M. E. Murrell, July 14, 1962.
H. Byron, July 16, August 20 and 27, 1962.
R. R. Wright, July 19, 1962.

L. F. Sherrill, July 20, 1962.
J. F. White, July 23, 1962.
A. C. Dressler, July 25, August 8 and 15, 1962.
D. E. Pearison, August 1 and 2, 1962.
R. W. Temple, August 13, 1962.
W. I. Lidster, August 14, 21, 22, 28 and 29, 1962.

EMPLOYES' STATEMENT OF FACTS: The agreement between the parties, effective September 1, 1949, as amended and supplemented, is available to your Board and by this reference is made a part hereof.

The claims embodied in this dispute were handled on the property as five separate claims. They are combined here into one dispute. Employes attach hereto and make a part hereof ORT Exhibits 1 through 8, which is the correspondence exchanged between the parties in claim identified as Organization's file Case 23-10, Carrier's (highest officer) file, Case 1969-G, which is typical of the correspondence exchanged in all the other claims involved.

Historically, the position of the agent at Bedford, Indiana, has been that of supervisor of the station and forces at that station. Prior to April 1, 1947, the positions of agent at Bedford and at eleven other stations were filled strictly by appointment by the Carrier. The duties of these positions are exclusively supervisory in nature. Carrier held the right to appoint anyone to fill vacancies in such positions without regard to class, craft or seniority. On April 1, 1947, the parties entered into a Memorandum of Agreement which provides that the classification "agents" included in Rule 1 (a) will include in addition to the agents listed in the wage scale twelve named positions of agent. This Agreement further provides that none of the schedule rules contained in the Telegraphers' Agreement to which this Memorandum of Agreement will be considered supplementary, will apply to the listed agent positions. In filling subsequent permanent vacancies in the listed agent positions, this Agreement provides that the selection will be made from the existing assistant agents, irrespective of locations, or from employes holding seniority as telegraphers in any of the seniority districts specified in Rule 3 (entire system). A further provision is that the selection of the Carrier shall be final, from which there shall be no appeal. The final condition is that an employe holding seniority as a telegrapher appointed to one of the agency positions listed above will retain and continue to accumulate seniority as a telegrapher on the district from which promoted. It is noteworthy that appointment to one of these listed positions of agent continues to be considered a promotion.

Prior to May 31, 1962, in addition to the agent, there was a telegrapher (fully covered by the agreement) employed at Bedford. This dispute arose when Carrier declared the telegrapher's position to be abolished effective May 31, 1962, and transferred the work of the position to the supervisory agent.

Since Carrier does not deny, but, rather, affirms that the supervisory agent at Bedford commenced handling train orders, clearances, and other communications of record on the date the telegrapher position was abolished on May 31, 1962, the Employes, therefore, show below only the train orders handled by said supervisory agent on July 18, 1962, which are typi-

Various portions of the instant claim have not, for reasons which will be fully explained in "Carrier's Position", been properly handled by the Organization in accordance with the provisions of Article V of the Agreement of August 21, 1954, and are, therefore, barred, and should be dismissed for that reason.

Effective May 31, 1962, the position of Operator at Bedford, Indiana, was abolished, with the remaining work of that position, which is the work with which we are here concerned, and which amounts to less than 3 hours per day being transferred to the Agent at Bedford who, contrary to the employes' contentions, is an employe within the scope of the Telegraphers' Agreement by mutual agreement between the parties here in dispute, and this will be conclusively shown in "Carrier's Position."

There is attached hereto as Carrier's Exhibits A, B, C, D and E, copies of letters written by Mr. S. W. Amour, Assistant to Vice President, to Mr. R. M. Olson, General Chairman, under dates of November 19, 1962; November 21, 1962; November 21, 1962; December 18, 1962, and December 27, 1962, respectively.

(Exhibits not reproduced.)

OPINION OF BOARD: The instant claim resulted from the abolishment of the telegrapher's position at Bedford, Indiana, on May 31, 1962. The remaining train order and other work of said position, amounting to some three hours per day, was transferred to the Agent at Bedford. Petitioner filed five separate claims on the property, which are here consolidated for consideration. It is the contention of Petitioner that the Agent at Bedford is wholly excluded from coverage and applicability of all rules of the Telegraphers' current Agreement, and that Carrier violated the Scope Rule [Rule 1(c)] by assigning the remaining work of the abolished telegrapher position to the Agent.

Initially, Carrier contends that various parts of the claim are barred under the provisions of Article V of the Agreement of August 21, 1954, and must be dismissed. First, Carrier urges that portions of the claim covering all dates subsequent to July 30, 1962, are barred and must be dismissed, as they were not presented within sixty (60) days after the single occurrence upon which the entire consolidated claim is based. The record reflects that Petitioner concedes that the various claims involved herein arise out of "the same identical violation of the Agreement." This Board has frequently held that the essential distinction between a continuing claim and a non-continuing claim is whether the alleged violation in dispute is repeated on more than one occasion, or is a separate and definitive action which occurs on a particular date. (Awards 14450, 12045, 10532, and others.) The abolishment of the telegrapher's position at Bedford occurred on May 31, 1962. Therefore, we find the Time Limit Rule constitutes a bar to all claim dates subsequent to July 30, 1962, or sixty days after the date of the occurrence upon which such claims are based.

Second, Carrier urges that the portion of the claim for June 27 and July 3, 1962, must be dismissed because claims for these dates were not appealed to Carrier's highest officer. A review of the record reveals that claims for these specific dates were not appealed to the highest designated officer of Carrier and must be dismissed for lack of jurisdiction. (Awards 15384 and 13561.)

Third, Carrier avers that the portion of the claim for July 18, 1962, should be dismissed because it was not presented to the Chief Dispatcher, the officer of Carrier authorized to initially receive such claims. The record discloses conflicting evidence offered by the parties as to the validity of the claim filed for July 18, 1962. Therefore, we must dismiss it.

Fourth, Carrier contends that the portion of the claim for "each date violation continues" must be dismissed because such monetary claim was not contained in the initial submission on the property to the Chief Dispatcher, and was first presented to the Carrier's Superintendent in the course of appeal. Carrier's objection is bottomed upon the hypothesis that the claim was not handled in the "usual manner", as required by Section 3 First (i) of the Railway Labor Act, and failure to comply with the time limitation established by Article V of the 1954 Agreement. Petitioner has offered no evidence to refute Carrier's contention, and appears to have treated the consolidated claim as a continuing one. Accordingly, that portion of the claim for "each date violation continues" must also be dismissed. Award 12493.

Fifth, Carrier also contends that the portion of the claim on behalf of "senior idle extra telegraphers in preference" must be dismissed because such employes cannot be readily identified without specific names. The record reflects that Carrier raised this particular point on the property, but that Petitioner has offered no evidence to assist in determining whether the term refers to senior idle telegraphers in a particular office, on a particular district, or throughout Carrier's entire system. Although prior awards of this Board have held that Article V, 1(a) of the 1954 Agreement does not specifically require that an employe be named in a claim, his identity must be readily ascertainable. Such identity must be in a manner to prevent further controversy concerning identity. Here, Petitioner has failed to satisfy its burden of showing through competent evidence that the identity of the employes involved is known to the Carrier. Award 14468. Therefore, the portion of the Claim on behalf of "senior idle extra telegraphers in preference" must be dismissed.

Sixth, Carrier further maintains that all claims for named claimants in paragraph 2(b) of the Statement of Claim must be dismissed because none of the named claimants were available for service on the particular dates of claim. Petitioner contends that Claimants Murrell, Byron, Hanna, Wright, Sherrill, White, McGill, Dressler, Barron and Sellers were idle on claimed rest days and thus available for service as alleged in Petitioner's Submission. Therefore, we find that such named claimants were available as alleged by Petitioner in the absence of competent evidence supporting Carrier's general assertion that no named claimants were available on any specific dates of claim.

During consideration of this dispute on the property, both parties assumed that a "Memorandum of Agreement", dated April 1, 1947, was in effect as well as the schedule Agreement between the parties, dated September 1, 1949. Historically, the position of Agent at Bedford, Indiana, had been that of supervisor of the station, and prior to the Memorandum of Agreement dated April 1, 1947, the position of Agent at Bedford and eleven other specified stations were filled only by appointment, and were wholly outside the scope and application of the basic Agreement between the parties. Said Agreement was executed concurrent with the adoption of a revised schedule Agreement, and in part provided that the "Agents" positions would be included

in the classification of "agents" in Rule 1(a) of the schedule Agreement in addition to those positions of that classification listed in the wage scale. It further provided that none of the schedule rules contained in the schedule Agreement, to which it was supplementary, would apply to such agent positions. However, it did require the Carrier in filling subsequent permanent vacancies in the listed agent positions to select successors from presently existing assistant agents, or from employes holding seniority as telegraphers in any of the seniority districts specified in Rule 3 of the schedule Agreement.

Both parties relied upon this Memorandum of Agreement as supporting their respective positions during consideration of the merits of this dispute on the property. Petitioner averred that the Agent at Bedford is wholly excluded from coverage and applicability of all rules of the Telegraphers' Agreement because the Memorandum of Agreement provided that none of the schedule rules as contained in the Telegraphers' Agreement would apply to such agent positions. Whereas, Carrier argued that this Memorandum Agreement established the agent position at Bedford under the Scope Rule of the schedule Agreement, and that Carrier has a right to assign the disputed work to any agent covered by the Scope Rule of schedule Agreement between the parties.

For the first time in this proceeding, a new theory of the case was advanced during panel argument, which is bottomed upon the premise that the Memorandum of Agreement dated April 1, 1947, was revoked or superseded by Rule 28 of the present schedule Agreement between the parties. Said rule of the controlling Agreement provides as follows:

"RULE 28.

> This agreement supersedes all previous agreements, and shall be effective as of September 1, 1949, and shall continue in effect until changed in accordance with the provisions of the Railway Labor Act as amended."

Certain earlier agreements between the parties are incorporated by reference and attached to the present Agreement in an Appendix. No mention is found of the Memorandum of Agreement dated April 1, 1947, either in the current Agreement or the attached Appendix. Petitioner urges that as the only contract between the parties which related in any way to the Agent at Bedford has expired, this Board should find that the occupant is not covered by the Telegraphers' Agreement, and that the instant claim be sustained. Award 10494.

We concur in Petitioner's contention that all provisions of the present schedule Agreement between the parties are properly before the Board. Moreover, we find persuasive the argument that the Memorandum of Agreement dated April 1, 1947, has been superseded and the contents thereof omitted from the controlling Agreement between the parties, which became effective September 1, 1949. However, this position on the part of Petitioner in effect raises a new issue not the subject of consideration or conference by the parties on the property. It is the intent of the Railway Labor Act that issues in a dispute shall have been formed by the parties on the property and nowhere in the handling of the dispute on the property has either party

asserted that the Memorandum of Agreement has been superseded. Accordingly, the Claim must be dismissed without prejudice to the merits of the basic issues raised in this particular dispute.

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 upon the record made on the property we are unable to adjudicate the merits of the Claim.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of November 1967.

CARRIER MEMBERS' CONCURRING OPINION TO AWARD 15928, DOCKET TE-14503 (Referee Ives)

This Award has finally and properly disposed of the claim by dismissal. As the Opinion correctly indicates, major portions of the claim were forever barred by various provisions of the applicable time limit rules. The balance of the claim was subject to dismissal or denial because the record properly before the Board contains no evidence that logically tends to support the position taken by the Employes. Although the Award's ultimate effect is thus appropriate, we believe it is expedient to include in the record the following elaboration on two portions thereof, namely, the provision "without prejudice", and the discussion of the "new issue."

I.

"WITHOUT PREJUDICE"

The use of the words "without prejudice" in an Award of this Board has been repeatedly described as "unfortunate" (see **Awards 9254**, Weston, and 9435, Begley); however, in spite of some confusion in the earlier Awards, the specific meaning and effect to be given the term when used in an Award of this Board is now firmly established by a long line of consistent Awards.

AWARD 9397 (Rose)

". . . The Third Division has repeatedly regarded an award dismissing a claim without prejudice as a final disposition and refused to consider the same claim on resubmission in another docket. Awards 9377, 9255, 9254, 9026, 8760, 8752, 8419. Nothing in the record before us suggests any reason for disregarding these precedents."

AWARD 10516 (Miller)

". . . It is now well established on the Third Division that the Board does not have jurisdiction to reconsider and/or rehear what in effect is the identical claim previously disposed of by the Board by a decision dismissing the claim 'without prejudice.' "

Also see **Awards 8760** (Daugherty), **9025** (McMahon), **9254** (Weston), **9376** (Stone), **9435** (Begley), **9451** (Grady), **11096** (Dorsey), and **Interpretation No. 1** to **Second Division Award 1740** (Wenke), all of which held dismissal "without prejudice" prevented re-submission of the same claim.

During a discussion of the proposed Award in panel, the Referee stated that in using the term "without prejudice" in the subject Award he intended it to have the same meaning and effect that has been assigned thereto in the Awards just cited.

In the last three paragraphs of the Opinion, the Referee discusses the "new theory" of the case advanced by the Labor Member during the initial panel argument, and concludes that the new theory is a "new issue" which is not properly before the Board in this Docket. We agree with this conclusion, and we agree that the dismissal and final disposition of the instant claim is without prejudice to the "new issue", for such issue was not before us, and we had no jurisdiction over the same. This brings us to the question whether there is justification for asserting such a new issue at the panel discussion.

II.

THE "NEW ISSUE"

The "new theory" of the case which was first advanced by the Labor Member at the panel argument is nothing more nor less than an attempted repudiation of a basic fact which was affirmed by both parties in the record.

As stated in the Opinion, both parties to this dispute relied upon a Memorandum of Agreement dated April 1, 1947. Carrier's defense to the merits of the claim was based expressly on the provisions of the said Memorandum of Agreement. It was solely by force of said Agreement that Carrier claimed the right to take the action involved in the claim. The first paragraph of the Employes' statement of their position states that the "pivotal rule involved is the Memorandum of Agreement dated April 1, 1947 . . ." The Employes then quote said Agreement and proceed to base their entire case expressly on certain provisions thereof.

It was in the year 1963 that the parties thus agreed before this Board that the said Memorandum of Agreement was then in effect and was controlling insofar as this claim was concerned.

With this record before the Board, the Labor Member in panel handed the Referee a memorandum containing this argument:

"I contend that the Agent at Bedford is not covered by any rule of the Telegraphers' Agreement for two reasons: First, **the Memorandum of Agreement dated April 1, 1947, was completely cancelled by Rule 28 [adopted September 1, 1949] of the presently effective agreement** and its exclusion from the Appendix to that agreement by which the parties obviously preserved only those agreements there produced. **Since the only contract between the parties which related in any way to the Agent at Bedford has expired, the parties have no contract regarding the position of Agent at Bedford.** Its occupant, therefore, is not covered by the Telegraphers' Agreement in any manner.

(It may be contended that I have no right to make such an argument because neither party did; and because they both argue as if the Memorandum Agreement were in effect. My answer is twofold: (1) The parties quite apparently are mistaken about the present effectiveness of the Memorandum Agreement. (2) This Board has often held that all elements of agreements between disputant parties which have a bearing on the dispute are before us and may properly be considered in reaching a decision. The Carrier Members have no quarrel with this idea. They have a general brief in which they endorse it. And in a fairly recent case, Award 10494, Mr. Naylor, during panel argument and for the first time in the case, pointed out the inapplicability of an agreement provision relied on by the employes, thereby securing a denial award. Similarly, I believe I have a right to question applicability of the agreement here relied on by the Carrier)." (Emphasis ours.)

Here the Labor Member is telling us that Termination Rule 28, adopted on September 1, 1949, had the effect of terminating the Memorandum of Agreement at that time, and from this he says the Board must conclude that the Memorandum of Agreement was not in effect in 1963, even though the parties themselves agreed that it was.

It is elementary that even if Rule 28 had terminated the Memorandum of Agreement on September 1, 1949, the parties could have reinstated it at any time between that date and the date this claim arose; but the truth is that Rule 28 never did terminate the Memorandum of Agreement.

Immediately after the subject Award was released and the conduct of the Labor Member thereby brought to the attention of the parties, the Carrier responded with a photographic copy of a side agreement executed by the parties on September 1, 1949, which expressly preserved said Memorandum of Agreement and many other special agreements. The side agreement reads in material part:

"**It is agreed that Rule 28,** reading: 'This agreement supersedes all previous agreements, shall be effective as of September 1st, 1949, and shall continue in effect until changed in accordance with the provisions of the Railway Labor Act as amended', **shall not apply to the following; and each of the described documents shall continue in full force and effect** under its respective provisions subject to cancellation or modification as provided therein, or in accordance with the provisions of the Railway Labor Act:

* * * * *

Memorandum of Agreement dated Chicago, Illinois, April 1st, 1947, relative to the Agency positions at Beloit, Freeport, Racine,

Bedford, Clinton, Council Bluffs, Ottumwa, Winona, Mason City, Aberdeen, Miles City and Great Falls." (Emphasis ours.)

The adoption of such side agreements in conjunction with general revisions of the printed agreement is a common practice that is well known to men of experience in this work.

Whether the parties had actually continued this Memorandum of Agreement to the dates when this claim arose is a pure question of fact. With the parties in complete agreement on that fact, this Board had no jurisdiction to question it. The attempt to do so was manifestly improper.

The Labor Member attempts to justify his conduct on the basis of what was done by Carrier Member Naylor in Award 10494. The two cases are as different as daylight and dark.

The specific agreement involved in Award 10494, like the specific agreement involved here, was an old Memorandum Agreement that antedated the current printed agreement. There, as here, the claimants expressly based their claim on the Memorandum of Agreement, and it was evident from the clear and definite terms thereof that said Memorandum Agreement did not support their position. At Mr. Naylor's suggestion, in Award 10494, the Board simply applied the Memorandum Agreement in accordance with the plain and definite provisions thereof. The Board was obligated to accept and apply the plain, definite, and unequivocal language of the agreement, even though the respondent carrier had not attempted to construe the same for the Board. Perfectly clear language is "not subject to construction." **Award 4480** (Carter). Also see **Awards 14415** (Hall) and **9313** (Johnson), and 17 CORPUS JURIS SECUNDUM, Contracts, §325.

The difference between construing an agreement that is placed squarely in issue by the parties themselves, applying all of the clear and definite provisions in accordance with firmly established meanings thereof, as was properly done in Award 10494, and raising a new issue of fact, such as denying the very existence of the agreement the parties have themselves placed in evidence, as was attempted by the Labor Member here, is well stated by Judge Hall in the Opinion in recent Award 15151:

> "Carrier at the panel discussion raised the issue as to whether the word 'class' as it appears in the last paragraph in Rule 13 of the Agreement, upon which Claimant relies, refers to a 'class' as defined in Article I of the Agreement.
>
> Petitioner objects to a consideration of this question, as it was not raised by either party on the property. While this argument was first presented at the panel discussion, it involved the interpretation of a rule of the Agreement upon which Claimant relies, not a question of fact, and Carrier may properly raise it. See Award 10494 (Dugan)."

Here Judge Hall properly applied the principle that all provisions of the agreement are before the Board. He observed the meaning clearly attached to a term in a rule of the agreement even though the parties had not mentioned that rule; and his purpose in doing so was to observe the meaning attached to the particular term in the agreement as a whole and apply the principle that a term clearly used in a particular sense in one part of the agreement is presumed to be used in the same sense throughout the entire agreement.

We respectfully submit that one of the worst imaginable perversions of the principle that all provisions of the agreement are before the Board is that attempted by the Labor Member in this case, namely, the attempted contradiction in panel of statements by both parties in the record concerning the existence of a memorandum agreement, the contradiction being predicated solely on a rule that was placed in a printed agreement 14 years earlier and not cited by either party in the record.

Any person experienced in railway labor relations is keenly aware of the changes, interpretations and refinements of agreement rules that go on constantly on the property when collective bargaining is effective. What the parties did here, in modifying their printed agreement with a side agreement adopted the same day is in our experience common practice, and certainly it is a common-sense method of handling the countless details that are regulated by specific understandings but for one reason or another do not merit publication in the printed agreement.

This Board has no way of knowing of the existence of all such interpretations and agreements. The Executive Secretary does not even keep a record of memorandum agreements filed, and after the supply filed has been depleted by distribution to referees and Members, our records do not show when or whether they were ever filed. These facts alone should be sufficient to restrain this Board from contradicting both parties as to the existence of a memorandum agreement, even if we had jurisdiction to do so. Certainly, we have no jurisdiction to contradict both parties on such matters.

G. L. Naylor
R. E. Black
P. C. Carter
W. B. Jones
G. C. White

REPLY TO CARRIER MEMBERS' CONCURRING OPINION TO AWARD 15928, DOCKET TE-14503

I believe the so-called Concurring Opinion is nothing more than an improper effort to change the effect of the Award by creating an inference that the entire issue was finally and decisively dismissed.

The Referee plainly intended no such effect. The question at issue — whether the Agent at Bedford is covered by the Agreement and thus permitted to perform routine work — was left undecided.

The Award merely dismissed the current claim without prejudice to the Employes' right to seek solution of the basic question in further proper proceedings.

The Carrier Members' obvious chagrin at having the poor workmanship of the Carrier's writers exposed is mere childishness, and merits no further discussion.

J. W. Whitehouse
Labor Member

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