Award No. 17999
Docket No. TE-17851

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION

CLINCHFIELD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the Clinchfield Railroad Company, that:

FIRST

1. Carrier violated the Agreement on November 8, 1966, it transferred work formerly performed by the Agent at Dante, Virginia, to employes not covered by the Agreement at Dante Yard, Virginia. (Rule 1, Scope.)

2. Because of this violation Carrier shall compensate the senior, idle employe (extra in preference) for eight (8) hours at the rate of $2.7828 per hour each and every day beginning November 9, 1966, continuing until agreement is made for reinstatement of the Agent's position, or reclassification of a position at Dante Yard, Virginia, to Agent-Operator; this to conform with the work week of the former position as Agent, Dante, Virginia, Monday through Friday each week.

SECOND

Since the highest Carrier officer designated to handle disputes of this nature did not decline the above claim within sixty days of date it was appealed to him, the claim shall be allowed as presented in accordance with Section 1 (a) and (c) of Rule 26 of the Agreement.

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The dispute involved herein is predicated on various provisions of the collective bargaining agreement, entered into by the parties effective July 1, 1961. The claim was submitted to the proper officers of the Carrier and remains unresolved. It was discussed in conference between representatives of the parties on January 29, 1968.

The controversy arose on November 9, 1966, when the Carrier, acting unilaterally, and without consulting with the Union, abolished the position

govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the carrier to handle such disputes. * * *"

Nothing in the Agreement prevents the closing of an agency or the abolishment of positions.

The Carrier will show that the claim is in all respects without merit and must be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Employes first contend that the "threshhold issue is the Carrier's default under the time limit rule." The General Chairman said that he did not receive a notice of disallowance of the claim within 60 days from the date of the appeal sent on August 14, 1967. Carrier contends that such a notice of disallowance was sent on September 29, 1967 and the secretary to Carrier's General Manager has filed an affidavit stating that the letter of September 29, 1967 was dictated by Mr. L. R. Beals, the appeals officer, that she transcribed it, and that she mailed it in the usual and customary manner. The procedural issue is whether or not there is sufficient substantive evidence in the record to support Carrier's position that the claim was properly and timely disallowed.

It is difficult for the neutral member of this Board to decide with absolute certainty whether or not the General Chairman received Carrier's denial letter of September 29, 1967. He has had no opportunity to observe and hear the testimony of relevant witnesses, and he had no opportunity to interrogate them. He cannot fairly judge the credibility of either party upon that evidence which is in the record. Assuming, however, that the letter was dictated and was mailed by Mr. Beal's stenographer, there is no absolute proof that the letter was received. While there are some conflicting Board decisions on the subject, the prevailing view is that the burden of proof is upon the Carrier to show that the Employes were duly notified in writing of the reasons for the disallowance. It is also the prevailing view that the "Employes cannot be held responsible for the handling of Carrier's mail by the Post Office Department." (Award 14354). Also see Awards 15070, 16163, 17227, 16000 and 17291.

Employes were, however, advised on November 21, 1967 that the Claim had been denied by letter dated September 29, 1967. Since this is a continuing claim, Carrier's liability arising out of its failure to comply with the time limit rule stopped when Employes received the letter of November 21, 1967. Pending the adjudication of the claim on the substantive issue for prospective dates, the Board concludes that this claim should be allowed as presented for the respective time periods claimed up to and including November 21, 1967.

On October 27, 1966, Carrier issued the following Bulletin Notice No. 13846:

"ALL CONCERNED:

Effective with the close of business Tuesday, November 8, 1966, – the Dante, Virginia, Agency is permanently closed.

Waybills for shipments terminating at Dante, Virginia, will be handled by the agency at Fremont, Virginia, and waybills for shipments originating at Dante, Virginia, will be handled at the Dante Yard Office.

Please be governed accordingly.

/s/ J. L. London
Superintendent"

An examination of all the relevant and competent evidence in the record shows that the work performed at the Dante Yard after November 8, 1966 was the same as that performed prior thereto by clerical employes. No work previously performed exclusively by the Agent was thereafter performed at the Dante Yard by clerks. No clerical employe performed communication work. Dante Yard is not a one-man agency where all of the work, including clerical, belongs to the Agent. And there is no convincing evidence in the record that the Agent, by custom, practice and tradition, exclusively did the clerical work involved.

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 did not disallow the claim within sixty (60) days from the date of Appeal dated August 14, 1967, but did deny the claim on November 21, 1967.

That the Carrier did not violate the Agreement with respect to the merits thereof.

AWARD

1. Claim is sustained as presented for the respective time periods claimed up to and including November 21, 1967.

2. Claim is denied for all prospective dates after November 21, 1967.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1970.

DISSENT TO AWARD 17999, DOCKET TE-17851

While this award properly follows established precedent — with which precedent we do not entirely agree — concerning application of the time limit rule, its denial of the substantive claim is not responsive to the issue involved.

The sole issue was whether the position of agent at Dante, negotiated into coverage of the Agreement by the collective bargaining process, could be unilaterally eliminated without elimination of its duties. This issue was not discussed in the Opinion of Board and discussion of the method of performing clerical work is irrelevant.

Since the Award denied the substantive claim without any discussion of its merits, I must register dissent.

C. E. Kief
Labor Member

CARRIER MEMBERS' ANSWER TO DISSENT TO AWARD 17999, DOCKET TE-17851

Whether the dissenter entirely agrees with the cited precedent concerning application of the time limit rule is immaterial. However, as the Referee relies primarily on Award 14354 (Ives), attention is respectfully directed to subsequent Award 14695 by Referee Ives, in which he correctly states the rule as follows:

> "The National Disputes Committee Decision No. 16, dated March 17, 1965, incorporated into Award 13780, held that the claim should be considered 'filed' on the date received by the Carrier. Consequently, the date of receipt determines the 60 day time limit, which commences to run from that date. Subsequent Awards have held that the Carrier must stop the running of the time limit by mailing or posting the notice required within the 60 days of the date that the claim was received. (Award 11575 and Second Division Award 3656). Here, the Carrier responded to the appeal within the sixty day period and the dispute is properly before us on its merits."

See also Award 16370 (McGovern).

To say that the Award denied the substantive claim without any discussion of its merits is a misstatement of facts, and ignores the very wording of the claim that was handled on the property and submitted to the Division, i.e., that the Carrier violated the Agreement when it "transferred work formerly performed by the Agent at Dante, Virginia, to employes not covered by the Agreement at Dante Yard, Virginia. (Rule 1, Scope.)" The Award is clearly responsive to the claim that was properly before the Division, regardless of the views of the dissenter as to what he now regards as the sole issue.

P. C. Carter
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W. B. Jones
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