

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The claim* presented by Claimant E. I. Williams on October 25, 1967, to Assistant Division Engineer of Track A. W. Wilson, should be allowed, as presented, because said claim was not disallowed by Assistant Division Engineer of Track A. W. Wilson or by Superintendent O. R. Thurston in accordance with the provisions of Article V of the National Agreement dated August 21, 1954 (System File L-126-1080/1-E-371).

(*) The claim, as presented, reads:

In view of the mishandling of the displacements and violation of Maintenance of Way Agreement Rule 6, paragraph 'B', I am claiming, until I am returned to my rightful position, 430 miles per week at 8 cents per mile plus 1 hour each way to and from work per day to compensate me for being required to travel to the position I was forced to take to protect my seniority and support my family."

EMPLOYEES' STATEMENT OF FACTS: The claimant has established and holds seniority as a maintenance gang foreman dating from February 7, 1948. Prior to the violation involved here, he was regularly assigned as foreman on Maintenance Gang No. 434.

On August 28, 1967, the Carrier issued Bulletin No. 241 reading:

"M of W BULLETIN NO. 241

SECTION FORCES — OLD ARKANSAS TERRITORY

El Reno
Aug. 28, 1967
File - 26

All MTCE and Section Foremen
All Assistant Foremen

each way to and from work per day until "he was returned to his rightful position." This claim was directed to Assistant Division Engineer-Track, Mr. A. W. Wilson (see Carrier Exhibit J).

16. Under date of November 22, 1967, Roadmaster R. C. Mingus, acting in behalf of Mr. Wilson, denied same claim account there was no provision within the Maintenance of Way Schedule Agreement supporting the claim.

17. Under date of December 19, 1967, this claim was appealed to the Division Superintendent (see Carrier Exhibit K). It was declined by the Division Superintendent under date of January 31, 1968 (see Carrier Exhibit L).

For the convenience of your Board these Exhibits, while made part of Carrier's submission, are not attached to the Carrier's submission, but accompany the submission for ease of handling and making reference thereto. Also, the correspondence relevant to the April 6, 1967 Agreement and its subsequent implementation is voluminous and, for the most part, not pertinent to this dispute. Accordingly, Carrier has not included such as part of Exhibits, but will refer to pertinent portions in its submission and rebuttal where such is applicable. Of course, should your Board require copies of this correspondence, etc., Carrier will supply such as requested.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 25, 1967, Claimant, alleging that he had been improperly displaced, filed his claim with the Assistant Division Engineer of Track, A. W. Wilson, who had been designated by Carrier to receive claims and grievances. On November 22, 1967, Carrier's Roadmaster, R. C. Mingus, declined the claim.

The Organization's position is that Carrier violated Section 1 of Article V of the August 21, 1954 National Agreement when it permitted said Roadmaster Mingus, an officer of Carrier not authorized to receive claims or appeals, to decline the claim involved herein; that when Carrier's Superintendent, O. R. Thurston, finally declined the claim on January 31, 1968, he failed to give reasons for his declination of the claim in violation of Section 1(a) of said Article V of the August 21, 1954 National Agreement.

We agree with the Organization that Carrier violated Section 1(a) of Article V of the August 21, 1954 National Agreement, governing the parties to this dispute, when it permitted its Roadmaster, R. C. Mingus, to decline the claim, rather than having its Assistant Division Engineer of Track, A. W. Wilson, who was authorized by Carrier to receive claims on its behalf, deny the claim. The fact that the position of Assistant Division Engineer of Track was new to Mr. Wilson does not excuse the violation. Further, the Organization's local chairman, by letter dated December 19, 1967, pointed out to Carrier's Superintendent, O. R. Thurston, that he had not been notified of disallowance of the claim either by Mr. Thurston or by Mr. Wilson, and that if either of them did not disallow the claim within 60 days from the date the claim is received, the claim therefore is payable under the August 21, 1954 National Agreement. Thus, the Organization reminded Carrier that it still was within the 60 day time limit to have the claim properly denied as required by said Article V of the 1954 Agreement by either Carrier's Superintendent or its Assistant Division Engineer of Track.

Concerning damages, Carrier's member of this Board in the oral panel discussion before this Board, contended that Carrier's liability for damages on account of a violation of said Agreement ceased as of January 31, 1968, the date Carrier's Superintendent denied the claim, and cited numerous awards in support of said contention.

We have carefully examined the record in regard to the handling on the property and the submissions and rebuttals of both parties to this Board and we find that both Carrier and the Organization did not at any time raise or mention or consider such a contention as proposed by said Carrier's member of this Board. Therefore, in line with numerous and consistent holdings of awards of this Board that we are limited to considering only contentions or charges raised on the property, we are compelled to deny the contention of Carrier's member of this Board that Carrier's liability ceased as of January 31, 1968.

In view of Section 1(a) of Article V of the August 21, 1954 National Agreement, and finding a violation thereof, we will sustain the claim as presented.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1970.

CARRIER MEMBERS' DISSENT TO AWARD 18002, DOCKET MW-18170 (Referee Paul C. Dugan)

A "continuing" claim was presented to an assistant Division Engineer of Track who, under Article V of the August 21, 1954 Agreement, "was the proper officer authorized to receive same". However, the claim was declined by a Roadmaster, who was not an officer designated "in the line of appeal". The Assistant Division Engineer of Track never declined the claim within

the 60 day time limit as provided for in Article V of the August 21, 1954 Agreement. The organization appealed it to the next higher officer, the Superintendent, who denied the claim under date of January 31, 1968. The claim was finally filed with this Board solely on the ground that Carrier violated Article V of the August 21, 1954 Agreement, and the organization requested that this Board render a sustaining award to the effect that the claim should be "paid as presented".

As is evident from a reading of the award, Carrier Member during the panel argument on this case emphatically pointed out to the referee that under prior holdings of this Board and NDC Decision No. 16, which constituted a recognized, mutually agreed-upon interpretation of Article V of the August 21, 1954 Agreement, Carrier's monetary liability ceased as of date of late denial of the claim, which was January 31, 1968. The referee completely rejected Carrier member's argument and, instead of applying NDC Decision No. 16 consistent with our prior decisions, erected an issue which neither party, nor Labor member nor Carrier member during the panel discussion, even remotely touched upon and then to further compound his error, decided the case on that fragile and flimsy issue which was, in his words:

"We have carefully examined the record in regard to the handling on the property and the submissions and rebuttals of both parties to this Board and we find that both Carrier and the Organization did not at any time raise or mention or consider such a contention as proposed by said Carrier's member of this Board. Therefore, in line with numerous and consistent holdings of awards of this Board that we are limited to considering only contentions or charges raised on the property, we are compelled to deny the contention of Carrier's member of this Board that Carrier's liability ceased as of January 31, 1968." (Emphasis ours.)

Such a decision, which was clearly in excess of authority granted a referee in adjudicating cases before this Board, being so contrary to prior decisions of this Board, a rediscussion of this case was held. During the rediscussion of this case Carrier member advised the referee:

(a) The referee is not empowered to erect an issue and then decide a case upon it.

(b) NDC Decision No. 16 should have been applied to the instant case since it was an agreed-upon interpretation of Article V of the August 21, 1954 Agreement and through the proper application of this decision Carrier's monetary liability should have ceased as of the date of the late denial by Carrier's Superintendent.

(c) The preponderance of awards issued by this Board hold that Carrier's liability ceases as of date of late denial by Carrier. In this respect the Referee was again handed twenty-seven (27) Third Division awards, four of which ruled that Carrier's liability ceased as of date of late denial of claim which awards were rendered prior to NDC Decision No. 16, and 23 awards holding the same which were issued subsequent to NDC Decision No. 16.

At the conclusion of the re-discussion, the referee was requested by Carrier member to re-consider his decision and correctly apply NDC Decision No. 16.

The referee, for reasons best known to himself, obviously refused to consider Carrier member's argument, the numerous awards applicable to this case, NDC Decision No. 16, and, just as obviously, has clearly exceeded his authority as a neutral referee when he remained content to personally raise an issue foreign to the case, and then decide this case on that issue.

To further confuse this Board, as well as the railroad industry, the same referee, in Award 18004, adopted the same day as was Award 18002, correctly applied NDC Decision No. 16 when he ruled that the monetary liability to Carrier, in Award 18004, ceased as of the date of receipt by the organization of late denial of the claim by Carrier. This is completely inconsistent with the position he took in rendering his decision in Award 18002, and especially so when the parties in Award 18004 had not presented argument relative to the application of NDC Decision No. 16 either on the property or in their submissions to this Board.

Accordingly, Award 18002 is a "maverick" award; is absolutely contrary to the preponderance of awards in similar cases; completely ignores an agreed-upon interpretation of Article V of the August 21, 1954 Agreement; is authored by a referee who has clearly exceeded his authority in adjudicating disputes before this Board; and, standing alone, is neither to be regarded as a precedent award, nor of any value in the adjudication of a similar case[s].

For the foregoing reasons, we vigorously dissent.

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

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 18002

Docket No. MW-18170

Name of Organization:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Name of Carrier:

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY**

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

This Board in Award No. 18002 found that Carrier was in violation of Section 1(a) of Article V of the August 21, 1954 National Agreement and sustained the claim "as presented." The claim as presented asked for mileage, expenses and two hours' pay per workday until "Claimant is returned to his rightful position."

Carrier's position is that:

- (1) The Award did not determine whether Claimant was, or was not, deprived of his rightful position inasmuch as the substantive merits of the claim were not resolved; and
- (2) The Carrier's monetary liability for defaulting under Article V, Section 1(a) of the August 21, 1954 Agreement be limited to the date when it cured that default by actually declining the claim during handling on the property.

This Board has consistently adhered to the well established principle that it has no authority to alter, change or modify the extent of an Award under the cloak of an interpretation thereto, but this Board is limited to explaining and interpreting an Award in the light of the circumstances that existed when the Award was rendered. See Interpretation No. 2 to Award No. 11798, Serial No. 228.

If we were to concur in regard to Carrier's contentions aforesaid, we would be altering, changing and modifying said Award No. 18002, which this Board is not empowered to do.

Therefore, Claimant is entitled to damages as set forth in his claim as presented to this Board. The Organization states in its request for an interpretation, at page 5, that: "The claimant was finally returned to his rightful position as foreman of Maintenance Gang No. 434 at Malvern on March 23, 1971, and this is the date of termination of the monetary claim if the claim as presented is to be allowed." If this is factually true, then the claim would terminate as of said date.

Referee Paul C. Dugan, who sat with the Division, as a neutral member, when Award No. 18002 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of October 1971.