NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20723
Docket Number TE-16516

Thomas L. Hayes, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
((formerly Transportation-Communication Employees Union)
(
(New York, Susquehanna and Western Railroad Company

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union on the New York, Susquehanna and Western Railroad, that:

CLAIM I

1. Carrier violated the Agreement between the parties when on October 21, 1963, without conference or agreement, it declared the agent-operator position at Midland Park, New Jersey abolished and assigned the work thereof to the agency position at North Hawthorne, New Jersey.

2. Carrier shall, because of said violation, commencing with October 21, 1963 and continuing thereafter until violation is corrected, be required to compensate the following employees the amounts specified for each day the violation exists:

(a) Mr. S. K. Dennis, former incumbent of agent-operator position at Midland Park, New Jersey, nine (9) hours' pay at the Midland Park rate in addition to any other wages he may be paid plus any expenses incurred.

(b) Mr. R. A. Fant, former agent at Vreeland Avenue, New Jersey, or his successor, a day's pay (eight hours) at the Vreeland Avenue rate in addition to any other wages he may be paid plus any expenses incurred.

(c) Mr. Stanley Kowalski, agent-operator at North Hawthorne, New Jersey, or any employee who may otherwise work the agent-operator position at North Hawthorne, a day's wages (eight hours) at the Midland Park rate in addition to any wages he may otherwise be paid.

3. Carrier shall permit a joint check of records to ascertain the amounts due employees identified in Item (2) above.

CLAIM II

1. Carrier violated the Agreement between the parties when on July 3, 1964, without conference or agreement, it declared the agent-operator position at Lodi, New Jersey abolished without abolishing the work thereof which work has been unilaterally combined with the agency position at Maywood, New Jersey.

2. Carrier shall because of said violation, commencing with July 3, 1964 and continuing thereafter until violation is corrected, be required to compensate the following employees the amounts specified for each day the violation exists:

(a) Mr. S. Dennis, former incumbent of agent-operator position at Lodi, New Jersey, or his successor, a day's pay and expenses incurred in addition to any wages he may otherwise be paid.

(b) Mr. E. Wiley, former agent at Maywood, New Jersey, his successor or the senior idle employee (extra in preference) for a day's pay at the Maywood rate, plus any expenses incurred in addition to any wages he may otherwise be paid.

3. Carrier shall restore the abolished position to its former status.

4. Carrier shall permit a joint check of records to ascertain the amounts due claimants.

CLAIM III

1. Carrier violated the Agreement between the parties when on February 17, 1964, without conference or agreement, it declared the agent-operator position at Rochelle Park, New Jersey abolished without abolishing the work thereof which work has been assigned to other employees.

2. Carrier shall, because of said violation, commencing on February 17, 1964, and continuing thereafter until violation is corrected, be required to compensate the following employees the amounts specified for each day the violation exists:

(a) Mr. C. L. Meade, former incumbent of agent-operator position at Rochelle Park, New Jersey, or his successor, a day's pay and expenses incurred in addition to any wages he may otherwise be paid.

(b) Mr. S. Kowalski, former agent at North Hawthorne, New Jersey, or his successor, a day's pay at the North Hawthorne rate plus any expenses incurred in addition to any wages he may otherwise be paid.

(c) Mr. S. Spence, former agent at Vreeland Avenue, New Jersey, or his successor, for a day's pay and expenses incurred in addition to any wages he may otherwise be paid.

(d) Mr. G. Hearns, occupant of agent-operator position at Babbitt, New Jersey, or any employee who may otherwise work the agent-operator position at Babbitt, a day's pay at the Rochelle Park rate in addition to any wages he may otherwise be paid.

(e) Mr. E. Wiley, occupant of the agent-operator position at Maywood, New Jersey, or any employee who may otherwise work the agent-operator position at Maywood, a day's pay at the Rochelle Park rate in addition to any wages he may otherwise be paid.

3. Carrier shall restore the abolished position to its former status.

4. Carrier shall permit a joint check of records to ascertain the amounts due claimants.

CLAIM IV

1. Carrier violates the Agreement between the parties when a clerk and other employees not covered by the Agreement are allowed to perform work at Passaic Junction, New Jersey on Saturdays and Sundays, which work is assigned to and performed by the agent-operator Monday through Friday of each week.

2. Carrier shall compensate Mr. T. F. Braithwaite, agent-operator, Passaic Junction, for a three hour call at time and one-half rate for each day such violation occurs.

3. Carrier shall permit joint check of records to determine dates of violations and amount due claimant.

CLAIM V

1. Carrier violates the Agreement between the parties by declaring the position of car distributor, Paterson, New Jersey, abolished, without, in fact, abolishing the work thereof but instead transferring the work to employees not covered by the Agreement.

2. Carrier shall compensate, commencing sixty days prior to the filing of this claim, the senior idle telegrapher, extra in preference, one day's pay for each day the violation continues to exist.

3. Carrier shall permit a joint check of records to determine names of claimants and amounts due each claimant.

CLAIM VI

1. Carrier violates the Agreement between the parties by requiring and permitting employees not covered by the Agreement to handle remote control devices at Paterson, New Jersey.

2. Carrier shall be required, because of said violations and commencing sixty (60) days prior to the filing of this claim and continuing until such violations are corrected, to compensate the following employees the amounts specified for each eight hour tour of duty during which the violations continue:

(a) The senior idle employee (extra in preference) a day's wages at the lowest rate shown in wage scale.

(b) In the event that no idle employee is available, Carrier shall divide compensation, based upon a day's wages for each eight hour tour of duty at the lowest rate in the wage scale, among telegrapher employees based upon seniority standing in addition to any wages that may be otherwise paid to such employees.

3. Carrier shall allow a joint check of records to ascertain names of claimants and amounts due each claimant.

4. Carrier shall be required to assign telegrapher employees to man the remote control devices at Paterson dispatchers' office.

CLAIM VII

1. Carrier violates the Agreement between the parties by not paying Mr. J. C. Cooke, present incumbent of Sparta-Sparta Junction, New Jersey, for the number of hours of work each day as provided for in the Agreement.

2. Carrier shall compensate Mr. J. C. Cooke or any other employee who may work the position at Sparta-Sparta Junction for one hour at the time and one-half rate of the position at Sparta-Sparta Junction for each working day commencing sixty (60) days prior to the filing of this claim and continuing so long as the violation exists.

3. Carrier shall reinstate the position at Sparta-Sparta Junction on a nine hour daily basis as provided for in the Memorandum of Agreement.

4. Carrier shall permit a joint check of records to determine the names of all claimants and amounts due each claimant.

CLAIM VIII

Carrier shall allow each of the above listed claims as presented because of its failure to observe the provisions of Rule 38 - Time Limits - of the Agreement between the parties.

OPINION OF BOARD: There are eight claims in this case and they will be dealt with separately and in numerical order.

CLAIM I

A special agreement signed by the parties on April 12, 1957 provided that each incumbent of certain positions would be allowed nine consecutive hours each working day (including one hour overtime) and that the agreement would remain in effect until modified in accordance with the Railway Labor Act, as amended.

The Agreement covered the combination of Wortendyke-Midland Park Agencies, known as Midland Park Position.

On October 21, 1963, without conference or agreement, Carrier abolished the Midland Park Agency Position. S. K. Dennis, whose position was abolished, displaced Mr. R. A. Fant from the Agency Position at Vreeland Avenue, and, as a consequence, Mr. Fant is unable to hold a regular position, thus greatly reducing his earnings. Claimant S. Kowalski is required to perform work on other than his regular assigned position at North Hawthorne as a result of the change.

It appears that the effect of the modification was to transfer the handling of paper work to North Hawthorne. This was not a case where a position was abolished because no work remained to be done in the position. So long as new work remains in connection with a position, the seniority rights of the employee, who held the job abolished, attach to the work.

After reviewing the entire file on this claim, the Board finds that Carrier did not comply with the sixty day provision of Rule 38 which requires it to give timely notice in writing to the employe involved or his representative of disallowance of the claim and/or appeal. In view of this procedural violation, all claimants must be allowed their claims as presented up to and including June 5, 1965, the date of receipt by the Organization of Carrier's denial.

On the substantive aspects of the case, the Board finds that Carrier violated the Agreement between the parties when it declared the Agent-operator position at Midland Park, New Jersey abolished and assigned the work thereof to the agency position at North Hawthorne, New Jersey. However, the Board holds that Claimants Dennis and Kowalski suffered no actual damages and may have no compensation awarded to them, other than for the procedural violation set forth above. With respect to the period subsequent to June 5, 1965, Claimant Fant is allowed a sum equal to the total amount of reduction in his earnings as a result of the change made by Carrier.

CLAIM II

The agent-operator positions at Lodi and Maywood, New Jersey were negotiated into a June 18, 1957 agreement between the parties.

On July 3, 1964 the Lodi position was abolished, without conference or agreement, and the work of the position was assigned to the Agent at Maywood.

Doubtless, the motives of the Carrier were good in making the change involved here, but, since the change infringed upon the terms of its agreement with its employees, negotiation not ex parte action should have been the procedure followed.

After reviewing this claim, the Board finds that Carrier violated the applicable Time Limits rule and, because of this procedural violation, the claim should be allowed as presented up to and including June 5, 1965, the date of receipt by the Organization of Carrier's denial.

As to the substantive aspects of the claim, the Board finds that there was a violation of the agreement. However, since there was no proof of actual damages, no compensation can be allowed in addition to that allowed for the procedural violation.

CLAIM III

The agent-operator position at Rochelle Park, New Jersey was negotiated into the agreement of June 18, 1957 between the parties.

On February 17, 1964 this position was abolished, without conference or agreement, and the work was reassigned to Agent Wiley at Maywood, New Jersey and Agent Hearns at Babbitt, New Jersey.

This ex parte action of the Carrier was in violation of the Agreement. However, no compensation is awardable on the substantive side of the dispute because Claimants did not meet their burden of proving actual damages.

The Board does find that Carrier violated the Time Limits Rule and therefore allows the claims as presented up to and including June 5, 1965, the date of receipt by the Organization of Carrier's denial.

CLAIM IV

Prior to May 1960, Carrier maintained at Passaic Junction, New Jersey an agent-operator and two operator-clerk, 7 days per week, that performed work related to the interchange of cars, checking train lists, waybills, cars and clerical work in addition to the communication work.

The Organization contends that the Carrier violated the Telegraphers' Agreement between the parties when a clerk and other employees not covered by the Agreement were allowed to perform work at Passaic Junction on Saturdays and Sundays.

The Organization also contends that although it agreed to waive the time limits until a conference was held on February 17, 1965 that no further extension of time limits was agreed to following this conference. The Organization states that since the Carrier failed to give reasons for denial of the claim until June 2, 1965, it exceeded the 60 day time limit provisions of Rule 38 and that the claim must be allowed as presented.

The Board finds that there was a violation of the Time Limits Rule and therefore sustains the claim for the period beginning with the date of the claim and ending June 5, 1965, the date of receipt by the Organization of Carrier's denial.

As to the substantive aspects of the dispute, the Board is persuaded that the Organization failed to prove that there was work performed on Saturdays and Sundays that should have been performed by telegraphers. The record indicates, among other things, that Carrier had a long practice of having a man at Passaic Junction to check ice and ventilation but this did not constitute a violation of the Telegraphers' Agreement.

CLAIM V

A review of this case indicates that the claim was appealed to R. E. Sease, President and General Manager of the Carrier on September 27, 1962, and that he failed to disallow the claim within the 60 day time limits required by the rules.

General Chairman R. E. Matthews made it clear that the Organization was willing to confer about the case but would not waive its rights under the Time Limits Rule.

The denial made by the highest Carrier Officer on June 2, 1965 was the first denial made by him since the September 27, 1962 appeal. Thus, it is clear that the 60 day time limits have been violated and that the claim must be allowed for the period beginning with the date the claim was filed until June 5, 1965, the date of the receipt by the Organization of Carrier's untimely denial.

Turning to the substantive aspects of the dispute, the Board notes the Organization contends that Carrier abolished the car distributor position at Paterson, New Jersey, without abolishing the work thereof. It further argues that a part of the duties of the same were assigned to employes not covered by the Telegraphers' Agreement. We find that the position of Car Distributor was negotiated into the Telegraphers' Agreement, effective June

18, 1957. While the evidence indicates that the work of the car distributor position diminished, it did not disappear altogether. The Board finds that dispatchers took car orders formerly handled by the Car Distributor and that cars were distributed by employes not covered by the Telegraphers' Agreement.

After reviewing all the evidence, we find a violation of the Telegraphers' Agreement and sustain the claim on the merits for the period subsequent to June 5, 1965.

CLAIM VI

Beginning about September 7, 1962, Carrier commenced a single track operation extending from Croxton, New Jersey to M.P. 11 just west of Little Ferry, operating signals and switches governing this portion of the track by remote control devices located in the train dispatchers offices at Paterson, New Jersey. The devices were manned by dispatchers, men not covered by the Telegraphers' Agreement.

The Organization contends that remote control devices should be operated by telegrapher class employees and that permitting employees of another class to handle such devices constitutes a violation of their Agreement.

The claim involved here was appealed to the highest designated Carrier officer on April 20, 1964, was discussed in conferences on February 17, 1965 and May 4, 1965 and was disallowed by letter dated June 2, 1965 which letter was received by the General Chairman on June 5, 1965.

The Organization contends that the claim should be sustained as presented because the Carrier failed at the highest level of handling to disallow the claim within 60 days of its appeal.

It appears to the Board that there was a violation of the time limits rule and the claim should be sustained for the period beginning with the date of the claim until June 5, 1965, the date of receipt by the Organization of Carrier's untimely denial.

Turning to the substantive aspects of the dispute, the Board finds that the new system involved the handling of signals and switches handled previously by operators and work belonging to the Telegraphers. It concerned the protection of train movements formerly taken care of by telegraphers such as block operators, levermen and towermen.

In view of the foregoing, the Board has concluded that Carrier violated the Telegraphers' Agreement by allowing employees not covered by it to perform the disputed work. Therefore, the claim is sustained for the period subsequent to June 5, 1965.

CLAIM VII

General Chairman R. E. Matthews and Superintendent T. R. Murphy extended the time limit on the subject claim of W. C. Cooke until June 30, 1963.

The General Chairman asked for a conference on June 19, 1963 to discuss this claim. This time and date was agreeable to Superintendent Murphy.

In a letter dated June 25, 1963 Superintendent Murphy stated:

> "Inasmuch as you indicated that you would write us further on both of these cases, we are agreeable to extending the time limits on each of these claims until July 31, 1963. Will you please advise if you concur in extending the time limits on these claims; if not, this will serve as a technical denial of the above mentioned claims."

The Organization contends that since Mr. Murphy, in his letter of June 25, 1963, failed to give any reasons for his denial of claim as provided in the Time Limit Rule there was a violation of Rule 38.

Moreover, the Organization points out that the case was discussed in conference with Director of Personnel C. W. Schroeder on February 17, 1965, both on its merits and the time limit aspect, and Mr. Schroeder stated he would give his decision in writing within a month.

The case was again discussed in conference on May 4, 1965 and was denied by Carrier's letter of June 2, 1965.

The Board finds that the Time Limits Rule was violated and that the claim should be sustained for the period beginning with the date of the claim and ending June 5, 1965, the date of receipt by the Organization of Carrier's untimely denial.

Now we turn to the substantive aspects of the dispute.

In this case there was a memorandum of agreement covering the performance of certain services by the Agent at Sparto Junction, New Jersey. Carrier indicates that it covered travel between Sparto Junction and Blairstown, New Jersey and provided for 7 hours work and 2 hours travel or a tour of duty of 9 hours.

Subsequent to the conclusion of the aforesaid Agreement, Carrier was authorized to abandon a part of the railroad. The original reason for the allocation of time in excess of 7 hours was to provide compensation for the use of a personal automobile to cover the territory. Since the railroad west of MP 63.21 was abandoned, Carrier allowed no travel time.

In view of the unusual circumstances in this case, involving the abolishing of some of the work, the Board does not believe that Carrier should be regarded as having violated the Agreement.

CLAIM VIII

Claim VIII is simply a contention that each of the claims 1 thru 7 should be sustained because of the alleged failure of Carrier to observe the provisions of Rule 38, the Time Limits Rule, of the Agreement between the parties.

In view of the fact that the Board has sustained claims 1 through 7 up to and including June 5, 1965 on procedural grounds, we can only reassert such result for the purpose of disposing of this 8th 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 violated the Agreement between the parties in each of the claims submitted, 1 through 7, in the ways previously described herein, that Claim VIII simply involves the contention that Carrier violated the Time Limits Rule in Claims 1 through 7, and that Carrier did violate such Rule in each of the first seven claims.

A W A R D

The first and third paragraphs of Claim I are sustained and the second paragraph is sustained to the extent set forth in the opinion dealing with such claim.

The first, third and fourth paragraphs of Claim II are sustained. The second paragraph of such claim is sustained on procedural grounds to the extent set forth in the opinion.

The first, third and fourth numbered paragraphs of Claim III are sustained. The second paragraph is sustained on procedural grounds up to and including June 5, 1965.

The first paragraph of Claim IV is denied on the substantive issues. The second paragraph is sustained on procedural grounds to the extent set forth in the opinion. The third paragraph of Claim IV is sustained.

The first and third paragraphs of Claim V are sustained. The second paragraph is sustained on procedural grounds up to and including June 5, 1965 and is sustained on the merits for the period subsequent thereto.

Claim VI is sustained with respect to paragraphs numbered one, three and four. Paragraph two of such claim is sustained up to and including June 5, 1965 on procedural grounds and thereafter on the merits.

Paragraphs one and three of Claim VII are denied on substantive grounds. Paragraph two is sustained with respect to the period up to and including June 5, 1965 because of a procedural violation. Paragraph four of Claim VII is sustained.

Claim VIII -- All claims 1 through 7 are sustained on procedural grounds to the extent set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1975.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20723 -
DOCKET NO. MS-16516 - (REFEREE HAYES)

This Award is a complete nullity. It is without doubt a travesty of justice.

To arrive at the conclusions set forth by the Referee is to completely ignore the responsibility of the Board to apply the clear provisions of the agreement.

The notice of intent by the organization to file a submission before this Board was June 2, 1966. A Third Party was involved and, as verbally requested by the organization, the dispute was held in abeyance.

A Third Party hearing was not held until December 1971, at which hearing the Third Party appeared, presented evidence and filed a submission.

The case was closed on February 29, 1972 and discussed in panel with the Neutral on November 9, 1972. On July 9, 1973 a proposed Award was received, exactly eight months after the first discussion.

The case was re-discussed on August 30, 1973 with the Neutral and the re-discussed proposed Award was received January 16, 1974, four and one-half months after the re-discussion. On March 13, 1974, a second re-discussion of the proposed Award was held with the Neutral and it was not until March 11, 1975 that we received the re-revised Award from the Neutral. Approximately one year elapsed before we received the present so-called Award.

As to Claims I, II and III: The Award erroneously sustains a violation of the Agreement and also sustains a joint check of records to ascertain the amounts due claimants. It also sustains the preposterous damage claims of the organization as set forth therein and sustains restoration of the positions in Claims II and III. Claim IV also sustains permission of joint check.

This machiavellian approach completely ignores the basic principles and tenets of this Board and is not supported by the record, by the rules involved, or precedent Awards of this Division.

As to Claims V and VI: These are the claims which involve the American Train Dispatchers Association. As mentioned above, this organization appeared at the hearing and presented convincing evidence and filed a submission on behalf of the employes it represents

With respect to Claim V: It was clearly shown that car distribution has always been handled by the Chief Dispatcher who was responsible for same. This was brought out forcibly in oral presentation and by written evidence.

As to Claim VI: The centralized traffic control system is a central control traffic system and is properly assigned to train dispatchers and has always been under their supervision. Also, the Award states that those claims are sustained on the merits for the period subsequent to June 5, 1965; this is also true of Claim I covering one claimant.

In this connection, we cite the following Awards in support of the well-established principles that this Board has no authority to order re-establishment of a position: Award Nos. 5785, 6967, 8526, 9416, 10743, 10867, 13125, 14136, 16729, 19783, among others. Also, that the Board cannot require Carrier to submit to a joint check, see Award Nos. 9343, 10435, 11156, 11776, 12739, 15759, 16078, among others.

See the following Awards dealing with C.T.C. operation: 4452, 4708, 4768, 8544, 8660, 10303, 11821, 12257, 15402, 19068, among others.

As to Awards holding mere listing of positions in the wage schedule do not prohibit their abolishment, your attention is called to the following Award Nos. 13933, 16501, 16686, 18666, among others.

To show more clearly the absurdity of this Award, the Neutral states, as mentioned above, insofar as Claims I, V and VI are concerned that they are sustained on the merits for the period subsequent to June 5, 1965. This, despite the crystal clear showing above of the long delays involved in this case caused by the organization and acquiesced in by the Neutral as is evident from his definite lack of alacrity in returning his proposed Awards to the Division, i.e., eight months, four and one-half months and one year. This, in and of itself, is proof of the ludicrous Award.

Therefore, as to the question of damages:

(a) No damages should be awarded for period claims were held in abeyance at the instance of the organization awaiting third party notice.

(b) No damages for excessive time consumed by the Referee in rendering his decision.

Despite denying the substantive aspects of Claim VII, in the Award it is stated that paragraph four of Claim VII is sustained, i.e., permission of a joint check.

We believe that a reading of this "patchwork quilt" will convey more forcibly than mere words of dissent can express the idiosyncrasy involved in the perpetration of this monstrosity.

We must, therefore, register our most vigorous dissent thereto.

H. F. M. Braidwood

P. C. Carter

W. F. Euker

G. L. Naylor

G. M. Youhn

RESPONSE OF REFEREE THOMAS HAYES TO CARRIER MEMBERS' DISSENT TO AWARD NO. 20723, DOCKET NO. TE-16516

A MATTER OF DELAY

More than eleven years elapsed from the time of the filing of Claim No. IV until it was turned over to this Neutral for panel discussion on November 9, 1972.

More than ten years elapsed from the time of the filing of Claim No. V until it was turned over to this Neutral for panel discussion on November 9, 1972.

More than nine years elapsed from the time of the filing of Claims No. I, VI AND VII until they were turned over to this Neutral for panel discussion on November 9, 1972.

More than eight years elapsed from the time of the filing of Claims No. II and III until they were turned over to this Neutral for panel discussion on November 9, 1972.

In fact, Claim No. IV, which was first appealed to the highest designated Carrier Officer on December 30, 1961, was not even finally denied on the property until June of 1965 when the other Claims mentioned above were denied.

As the following chronology will indicate, a number of delays in the handling of this Docket took place before it was turned over to this Referee. The chronology which follows sheds some light on the matter.

On November 4, 1966 Carrier mailed to the Third Division of the National Railroad Adjustment Board its submission in the eight Claims dealt within this case.

On November 18, 1966 the Executive Secretary of the Third Division, S. H. Schulty, indicated that all parties had until January 17, 1967 to make full answer to all matters covered in each others' initial submission.

On January 16, 1967 Carrier requested a thirty day extension of time in which to file rebuttal to T.C.U.'s initial submission.

On January 16, 1967 Mr. Schulty granted a thirty day extension of time at the request of Carrier.

On February 13, 1967 H. J. Draney, President of Carrier, requested an extension of sixty days from February 16, 1967 to make written reply to employees' submission in this case, and, pursuant to such request, an extension of time was granted to April 17, 1967.

On October 7, 1971, over four years after the letter of Mr. Schulty indicated that the file was closed and that the dispute would be placed in line for handling by the Division, a letter was sent giving notice of the pendency of a dispute before the Third Division, known as Docket No. TE-16516. This notice was sent to officers of the Brotherhood of Railway, Airline & Steamship Clerks, American Train Dispatchers Association and the United Transportation Union.

On October 26, 1971 the Executive Secretary of the Third Division was advised that the B.R.A.C. would not file a submission in the case. On November 1, 1971 the American Train Dispatchers Association requested an additional thirty days after November 4, 1971 to file the submission.

The hearing originally scheduled for November 4, 1971 was postponed and the Docket was reset for hearing on December 8, 1971.

On November 7, 1971 the United Transportation Union indicated that it would not attend the hearing. On November 16, 1971 the B.R.A.C. indicated that it would not file a submission.

On December 8, 1971 the American Train Dispatchers Association made a submission with respect to Claims V and VI.

On December 22, 1971 all parties affected were given until January 21, 1972 to supplement their original submissions. Mr. C. L. Dennis of the B.R.A.C. requested an extension of time to February 22, 1972 to supplement original submissions, which extension of time was granted by the Executive Secretary, E. A. Killeen.

Neither Management nor Labor, neither Carrier Members nor Organization Members of the Third Division may entirely escape responsibility for delays in the handling of this Docket before it was turned over to this Neutral for panel discussion on November 9, 1972.

THE ISSUE NEVER RAISED IN PANEL DISCUSSION

Although this Docket was the subject of panel discussion on November 9, 1972, was rediscussed on August 30, 1973 and on March 13, 1974, the Carrier Member present never uttered a single syllable or pointed to a single document that would indicate the Organization was responsible for delays subsequent to June 5, 1965. For the first time there appears in the dissent the allegation:

> "No damages should be awarded for period claims were held in abeyance at the instance of the organization awaiting third party notice."

Whether Monday morning quarterbacking has convinced the dissenters that an ordinarily prudent Carrier Member should have made such an allegation under the circumstances in the discharge of the duty then resting upon him, I leave for others to decide.

Perhaps the kindest thing that may be said about Carrier Members' dissent is that deep down it is shallow.

As proof partial of this Referee's contention that the above-mentioned argument concerning damages was never raised during the panel discussion, I attach herewith, as Appendix A, a copy of the Memorandum submitted by H.F.M. Braidwood, the first signatory on the dissent. Surely so concerned a dissenter would have included such an argument in his Memorandum if it had the importance in his mind that he places on it in dissent.

THE CYMBAL THAT IS OUT OF TUNE

After having arbitrated scores, yes, hundreds of cases, I have never once, before this, filed a response to a dissent. However hot the issues, most members of arbitration boards respect and follow the traditions of civility, believing as they do that a namecalling Member is no well-tuned cymbal, but a clanging reminder of our need always to rise above the level of the brute.

MEA CULPA

In their dissent the Carrier Members correctly state the following:

> "The case was...discussed in panel with the Neutral on November 9, 1972. On July 9, 1973 a proposed Award was received, exactly eight months after the first discussion.
>
> The case was re-discussed on August 30, 1973 with the Neutral and the re-discussed proposed Award was received January 16, 1974, four and one-half months after the re-discussion. On March 13, 1974, a second re-discussion of the proposed Award was held with the Neutral and it was not until March 11, 1975 that we received the re-revised Award from the Neutral. Approximately one year elapsed before we received the present so-called Award."

It is true that the case was first discussed in panel with this Referee on November 9, 1972, that it was re-argued twice and that a re-revised Award was submitted in March of 1975.

It would not excuse the delay to point out that the eight Claims were initially argued by one Organization Member and subsequently by another with a significantly different approach to the Claims.

It would not excuse the delay to point out that the case involves eight Claims, involving seven different factual situations.

It would not excuse the delay to point out that this Referee decided one hundred eighty nine other arbitration cases and wrote opinions with respect to the same during the time period involved in handling this Docket.

It would not excuse the delay in this case to point out that in January of 1973 I was appointed to represent all of the electrical consumers in the State of Vermont in a case that has already resulted in three decisions by the Vermont Supreme Court, is still in progress and is to be argued further in that Court in the weeks ahead.

It would not excuse the delay between November 9, 1972 and March 11, 1975 to point out that during this time period this Referee suffered a compressed fracture of the back, requiring him to be absolutely prone for several days and in a full back brace for six months, that several months later he collapsed with an internal hemorrhage, coming close to the point of shock and regaining his strength only after many days of rest, that two of the Referee's children underwent hospitalization and surgery during the period of the delay and that the youngest child of the Referee, who was brain injured in 1963, attempted suicide over the loss of a girlfriend and nearly succeeded.

No...none of these situations totally excuses the delays of the Referee but, to a person of modest understanding, they might constitute some small measure of justification or explanation.

CONCLUSION

For each of the dissenting Carrier Members I have but these parting words: May your body and mind be free of illness; may your home never be struck by tragedy of any sort. And may no man ever asperse your motives or impugn your integrity, as you have mine, by the use of the word "machiavellian" which means among other things, "characterized by unscrupulous cunning, deception, or dishonesty".

To paraphrase a former President, better the occasional faults of a Board living in a spirit of charity than the consistent unkindnesses of one frozen in the ice of its own indifference!

Dated at Burlington, Vermont this 23rd day of June, 1975.

/s/ THOMAS L. HAYES
Referee

APPENDIX A

DOCKET NO. TE-16516
NYS&W

MEMORANDUM FOR REFEREE HAYES

As to Claim #1: As pointed out by the carrier, the closing of Midland Park Station was handled in an orderly manner through application to the Board of Public Utility Commissioners of the State of New Jersey and upon their authorization under the law the Carrier proceeded with the necessary procedures under the agreement to close or combine a station. The employes were notified of impending hearings before the Board of Public Utility Commission and entered no protest.

Also as carrier states it has been repeatedly admitted in conferences that there is no provision of the agreement by which employes could limit the carrier's right to abolish positions. Rule 15 covers the abolishing positions and carrier was well within its rights in doing so. Hearings were held and the employes were cognizant of them and carrier complied with the agreement. As stated in Award No. 19222 (Referee Hayes):

> "The agreement between the parties, to the effect that the position occupied by Mr. Lovely would revert to its former status when he left it, did not have the consequence of creating a position in perpetuity and carrier was under no greater restriction to continue that position when the work declined than it would have been with respect to any other position for which there was insufficient work."

Also attached, in this connection, are copies of other awards of this Division with respect to Dualization.

As to Claims Nos. 2 and 3: The same factual situation is present in these claims as is present in Claim #1. Also, in Claims Nos. 2 and 3 the employes request the restoration of the abolished position. This Board is not empowered to restore positions and this is covered in the awards covering this subject attached to this memorandum.

As to the procedural contentions of the organization: The time limit provisions of the agreement were followed by the carrier and a proper denial was made at the lower levels. See awards attached to this memorandum with respect to reason given for denial of claims. If it is found that a violation occurred at the highest level then the date of the denial letter of the highest officer would stop the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement. See awards covering this matter attached to this memorandum and National Disputes Committee Decision No. 16.

As to Claim No. IV: Carrier sets forth its position on page 206 of its initial submission and also on pages 222 to to 224 of its rebuttal. In addition to the awards cited by the carrier, attached to this memorandum under Title III are additional awards covering this subject, i.e., that where the Telegraphers' Scope Rule is general, and in order to establish exclusive rights to particular work under that rule, the employes must prove the existence of a system-wide past practice of exclusive performance.

In connection with the procedural objections, your attention is called to page 32 of the employes' exparte submission wherein the employees themselves state:

> "The General Chairman on June 28, 1962, waived the time limit requirements of Rule 38 until the next conference was held."

so there was agreement to extend the time limits. As previously stated if it is found that a violation occurred at the highest level then the date of the denial letter of the highest officer stops the carrier's liability arising out of its failure to comply with the provisions of Article V of the August 21, 1954 Agreement. Based on the evidence before us in this record there is no merit to the claim and we would respectfully request that the claim on its merits be denied.

As to Claim V As you know this is a third party case and the American Train Dispatchers Association has filed a submission, which consists of 12 pages. On page 5 of its submission the President of the Train Dispatchers states:

> "On March 1st, 1940, the WYS&W Railroad established its own Chief Dispatchers Office and went on its own insofar as operation is concerned. For about 10 years thereafter the Chief Dispatcher handled all Car Distributor work on the property . . . ." (T.C.U. Exhibit #5, page 11).
>
> "Car Distribution has always been handled by the Chief Dispatcher, who has been responsible for same." (Carrier's Ex Parte Submission, page 8).
>
> "All parties are so familiar with the principle of ebb-and-flow that we feel there is no necessity of burdening the record with the numerous decisions resulting therefrom. The work came from the Chief Dispatcher - it flowed back to him." (Carrier's reply to employes' exparte submission, page 4.)."

The carrier also sets forth its position on page 207 of its exparte submission and on page 224 of its rebuttal.

Claim V continued -

Again, as in the previous cases, the date of the denial letter of the highest officer would stop the carrier's liability arising out of its failure to comply with Article V. And, as to the merits, we respectfully submit that based on the record before us there is no merit to the claim and it should be denied.

Claim VI

Again, as to Claim VI, this is a third party case and the American Train Dispatchers Association has filed a submission covering this claim. pages 6 through 12 of its submission. The employes on page 10 of their submission state:

> "It is the position of the ATDA that the appliances at Little Ferry Jct. and Mile Post 11 are parts of the Carrier's CTC installation.
>
> "If this Board finds this to be true it must also find that operation of the CTC machine is properly assigned to the train dispatchers, inasmuch as the machine is located in the train dispatcher's office at Paterson, New Jersey.

The employes(train dispatchers) list a large number of awards on page 11 of their submission and state that the holding of such awards can be summed up in two paragraphs:

1 The weight of authority holds that the actual operation of a CTC control panel is not the exclusive work of either train dispatchers or telegraphers - that if the control panel is located at a point where train dispatchers are employed it will be manned and operated by train dispatchers, and if installed at a point where train dispatchers are not employed then the control panel may be operated by a telegrapher, BUT,

2 If the control panel is located at a point other than one at which train dispatchers are employed and it is operated by telegraphers, that operation is to be under the supervision and direction of that train dispatcher.

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The carrier also sets forth its position on pages 208 and 209 of its exparte submission and on page 224 of its rebuttal.

Claim VI - continued -

The remarks made in connection with Claim V as to the procedural contentions of the organization, and as to merits of the claim, are applicable here.

Claim VII

Carrier lists its statement of facts covering this claim on page 210 of its ex parte submission and states as follows with respect to its position:

> "That the memorandum of agreement was no longer effective with the abandonment of the territory embraced thereby.
> "That employes cannot claim that this is any longer a valid agreement, any more than they could contend that with the disappearance of all positions within the scope of their agreement on a property that they still could effectively legislate on their own behalf.
> "This is another case of an attempt to place an undue burden upon the company and obtain remuneration for work not performed."

also on page 225 of its rebuttal statement it sums it up.

Again the same remarks in connection with Claim V obtain here as to the procedural contentions of the organization and as to the merits of the claim.

Claim VIII

The carrier sets forth its position on page 211 of its exparte submission and on page 225 of its rebuttal.

In summation: As to the merits, the claims before us here should be denied based on the record presented and which position has been upheld by numerous awards of this Board, copies of which are before the neutral.

As to the procedural contentions: It is evident from the record that carrier denied them at the lower level and if it is found that a violation occurred at the highest level then the carrier is only liable for payment from the appeal to the highest officer until denial is made. From the record before us the highest officer denied all claims on June 2, 1965. Therefore, any liability accruing to the carrier is stopped as of that date. As specifically stated in NDC Decision No. 16, which is a decision by the National Disputes Committee established by memorandum agreement dated May 31, 1963 to decide disputes involving interpretation or application of certain stated provisions of specified national nonoperating employee agreements, -

> "The National Disputes Committee rules that receipt of the carrier's denial letter dated December 29, 1959 stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement."

This is the situation obtaining in the case before us.

H. F. M. Braidwood
Carrier Member