NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21322
THIRD DIVISION Docket Number SG-20707

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM: Claims of the General Committee of the Brotherhood of Railroad Signalmen on the Terminal Railroad Association of St. Louis that:

Claim No. 1:

On behalf of F. Wiechert at the punitive rate of pay from June 21, 1972, and continuing until the signal maintainer position at "SH" Tower is rebulletined, because that position was abolished effective June 21, 1972, by Bulletin #13 of June 14, 1972, following the retirement of F. Gremmler and the work thereafter performed by the East Side Maintenance Gang, with the amount of hours to be determined from Carrier's records when this is satisfactorily concluded.

Claim No. 2:

On behalf of Signal Maintainer VonBehren, East Side Maintenance Gang, at the time and one-half rate of Lead Signalman account assuming the signal maintenance duties of the signal maintainer in charge at the "WR" Interlocking at Granite City, Illinois, since the signal maintainer position was abolished effective July 31, 1971, when the duties at "WR" became the duties of the East Side Maintenance Gang in which Mr. VonBehren is the Lead Signalman. Claim, is from sixty days prior to date of original claim (May 14, 1972, letter to Mr. P. A. Smith, Supt. of Sig. & Comm.) on a continuing basis until the position of signal maintainer in charge is rebulletined and restored to "WR" hours and money to be determined from the Carrier's records upon conclusion of this claim.

Claim No. 3:

On behalf of Messrs. F. J. Gremmler and A. L. Link for time and one-half the Lead Signalman's rate beginning April 21, 1972 and continuing because the position of signal maintainer "ID" Tower and signal maintainer "East Side Blocks" were abolished and the duties assigned to the West Side Maintenance Gang and the East Side Maintenance gang, respectively, these changes pursuant to Bulletin #9 dated April 21, 1972. Claim to continue until the positions are rebulletined, with hours and money to be determined from the Carrier's records.

Claim No. 4:

On behalf of the oldest signalman or signal maintainer in seniority who would have bid the position of signal maintainer in charge at "WR"

Interlocking, Granite City, Illinois, had the position not been abolished, at the time and one-half Lead Signalman rate, from sixty days prior to the original claim (May 14, 1972, letter to Mr. P. A. Smith, Supt. of Sig. & Comm.), and continuing, the amount of hours and money to be determined from the Carrier's records when the signal maintainer in charge at "WR" is rebulletined.

Claim No. 5: On behalf of all signalmen and/or signal maintainers on the Signal Department seniority roster who were adversely affected by Bulletin #10, dated April 28, 1972, and forced to bump and/or bid positions other than their already established positions prior to Bulletin #10, at one and one-half their respective rate of pay, until the positions are rebulletined as they were prior to Bulletin #10, with names to be submitted at conclusion of this claim, and hours and money to be determined from Carrier's records.

/Above five claims, based on Section 6(a) of Article I, and Section 3 of Article IX, were handled as separate claims at every level, and denied at the top level in five separate letters dated June 6, 1973, under Carrier's File: 013-311-1/

OPINION OF BOARD: The five (5) claims herein present similar questions of contract interpretation and application arising out of the abolishment by Carrier of several individual positions of Signal Maintainers in charge of a territory or interlocking plant and maintenance of their areas thereafter by a Signal Maintenance gang. These changes were effectuated by Carrier over a one-year period from July 30, 1971 to June 14, 1972 by four (4) bulletins. There are five (5) claims because two (2) claims were filed with respect to one (1) of the bulletins (Claims 2 and 4 were filed May 14, 1972 and both arise out of Bulletin #44 issued July 31, 1971). Each of the claims presents identical allegations that Carrier's actions violated Article I, Section 6(a) and Article IX, Section 3, respectively. But each such claim also involves important procedural distinctions which make uniform treatment by us impossible. It is, however, possible to set forth the basic substantive positions advanced by each of the parties common to all of the claims; following which we shall treat seriatim the individual procedural distinctions of the respective claims.

Before turning to the so-called merits positions of the parties, we note that Article I, Section 6(a) at issue herein is the result of negotiations initiated in 1958 by a Section 6 Notice of the Organization to amend Article I of the old Agreement effective July 13, 1950. Those negotiations produced the present language in a Memorandum of Agreement between the parties executed May 28, 1959 under the auspices of the National Mediation Board in Case No. A-5933. Before placing the instant claims before our Board, the Organization invoked the services of the National Mediation Board to interpret the Mediation Agreement in Case No. A-5933 pursuant to Section 5, Second of the Railway Labor Act. There-

after, by letter dated March 20, 1974 the NMB through its Executive Secretary responded as follows:

> "The specific issues in dispute involve whether or not certain changes in positions brought about as a result of certain Carrier bulletins constitute violation of the May 28, 1959, settlement of differences involved in National Mediation Board Case No. A-5933.
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> It appears from the exchange of correspondence that questions concerning the propriety of Bulletin Nos. 44, 9, 10 and 13 have been, on five separate occasions, progressed by the Brotherhood of Railroad Signalmen pursuant to the provisions of Section 3 of the Railway Labor Act. In these circumstances, the National Mediation Board finds it inappropriate to further process the request for an interpretation and advises the parties to seek resolution of the dispute pursuant to the provisions of Section 3 of the Railway Labor Act.
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> The file in this matter has been identified as Interpretation No. 132 and is hereby closed."

In the meantime, the Organization by Notice of Intent dated February 26, 1974 had invoked our jurisdiction and the claims are before us for adjudication. We also note that several issues were raised tangentially on the property and developed in detail de novo by both parties before our Board relative to interpretation and application of the National Agreement dated February 7, 1965, the so-called Job Stabilization Agreement. In our considered judgment such issues not only were not properly joined on the property but are of dubious relevance in this case. More importantly, however, disputes involving the interpretation or application of the February 7, 1965 Agreement properly are referable to Special Board of Adjustment No. 605. For these and other reasons set forth infra we do not reach any such issues in our handling of these claims.

The substantive positions of the respective parties relative to alleged violations of Article I, Section 6(a) and Article IX, Section 3 are consistent with respect to each of the claims. As we understand its position, the Organization argues alternative theories, to wit: 1) that the express language of the cited provisions has been violated and, 2) the intent of the parties is being subverted by Carrier's action. In this latter connection, the Organization points out that the Agreement provides a differential in pay (6¢ per hour in 1959, 8¢ per hour in 1974) for individual "section" Signal Maintainer positions on the first shift. This differential is not received by "gang" Signal Maintainers nor by "section" Signal Maintainers on the second or third shift. The gravamen of each of the Organization's claims is that Carrier made the disputed changes in order to avoid paying that differential and thereby violated the cited Agreement provisions.

Carrier, on the other hand, raises procedural objections against several of the claims and also maintains that there is no rule support whatever for any of the claims. Specifically Carrier maintains that Article I, Section 6(a) outlines the duties of a Signal Maintainer and in no way precludes the maintaining of a given area by a Signal Maintenance Gang rather than an individual Signal Maintainer. In each case of abolishment of individual position Carrier points out that the work continued to be performed by Signal Maintainers, albeit members of a Gang rather than individuals, and not by non-Signal employes. As for Article IX, Section 3, Carrier asserts that there was no violation because the abolished positions were not rebulletined subsequently at a lower rate of pay.

We treat infra with the substantive positions of the parties to the extent possible on this record, but first we must deal with several procedural/jurisdictional issues raised by Carrier. The problems presented are best indicated by a listing of the genesis and manner of handling of each of the five (5) claims:

Claim No. 1

a) June 14, 1972: Carrier issued Bulletin No. 13 announcing the retirement of incumbent from position of Signal Maintainer, "SH" Interlocking, Venice, Illinois and abolishment of the position due to attrition effective June 21, 1972. The Maintenance Gang was assigned thereafter for maintenance of the interlocking and a highway crossing.

b) June 20, 1972: General Chairman filed a claim on a "continuing basis" for "the oldest signal maintainer .....who would have bid on the job if it would not have (sic) abolished."

c) August 16, 1972: Carrier's Superintendent of Signals denied the claim because inter alia the claim was not filed by or on behalf of a named individual.

d) October 13, 1972: Claim was "appealed" to Chief Engineer, naming Mr. F. Wiechert as the Claimant. This was denied on December 11, 1972 by Chief Engineer and appealed by General Chairman to Manager, Labor Relations on February 10, 1973.

e) June 6, 1973: Claim No. 1 denied by Carrier on the basis of three (3) violations of the Time Limits on Claims Rule (Article V) of the National Agreement of August 21, 1954. Because: 1) No named Claimant in the "original" claim of June 14, 1972; 2) The claim on behalf of Mr. F. Wiechert was untimely filed on October 13, 1972; and 3) The claim for Wiechert was not presented to the Superintendent of Signals.

Claim No. 2

a) July 30, 1971: Carrier issued Bulletin No. 44 announcing the retirement of the Signal Maintainer at "WR" Interlocking, Granite City, Illinois and abolishment of the position due to attrition effective July 31, 1971. Duties at interlocking facilities and highway crossing protection referred to East Side Maintenance Gang.

b) May 14, 1972: General Chairman filed a claim on behalf of Mr. H. VonBehren alleging a "continuing violation" from 60 days prior to filing until the position is rebulletined and restored to "WR" Tower. Mr. VonBehren is the Lead Signal Maintainer on the East Side Maintenance Gang.

c) July 10, 1972: Carrier denied the claim for failure to comply with Time Limit Rule, and on the merits. Pointed out duplication in Claim No. 4 infra.

d) June 6, 1973: Appeals on the property exhausted.

Claim No. 3

a) April 21, 1972: Carrier issued Bulletin No. 9 abolishing positions of Signal Maintainer, "ID" Tower, Mr. F. J. Gremmler and Signal Maintainer, East Side Blocks, Mr. A. L. Link. The maintenance of signal facilities at "ID" were referred to the West Side Maintenance Gang and those on the East Side Blocks were referred to the East Side Maintenance Gang for all future maintenance.

b) May 14, 1972: General Chairman initiated the claim for Gremmler and Link for punitive rate from date of abolishment of the jobs until they shall be rebulletined.

c) July 10, 1972: Carrier raised no procedural defects but denied on the basis of no Agreement support.

d) June 6, 1973: Appeals on property exhausted, claim denied by highest Carrier officer handling labor relations.

Claim No. 4

a) July 30, 1971: Carrier issued Bulletin No. 44 (See Claim No. 2 supra).

b) May 14, 1972: General Chairman filed a claim premised on Bulletin No. 44 on behalf of "oldest signal maintainer....who would have bid on the job if it would not have (sic) been abolished."

c) July 10, 1972: Carrier denied on the basis of Time Limit on Claims Rule and on the merits. Pointed out duplication with Claim No. 2.

d) June 6, 1973: Appeals on property exhausted with denial by Manager, Labor Relations.

Claim No. 5

a) April 28, 1972: Carrier issued Bulletin No. 10 which announced in words or substance as follows: abolishment of five (5) positions involving eight (8) employes; expansion of the territory covered by "Q" Tower Maintenance Gang to the entire system; establishment and opening for bids of five (5) Maintenance positions; changing headquarters of the Signal Construction Gang; and, establishment and opening for bids of two (2) Construction positions.

b) May 14, 1972: General Chairman filed a claim that Bulletin No. 10 was a direct violation of Article IX, Section 3 and also citing Article I, Section 6(a). The claim read further as follows:

"It shall be considered that all signalmen and signal maintainers whom are adversly effected by this Bulletin #10 April 28, 1972, and are forced to bump and/or bid positions other than their established positions prior to Bulletin #10, shall have done so under protest in violation of above mentioned Articles of the Signalmen's Agreement.

Claim shall be made at the rate of time and one-half for every employee at his particular pay rate prior Bulletin #10, beginning May 9, 1972 and shall be on a continueing basis until these positions are rebulletined as they were prior Bulletin #10, April 28, 1972. Hours and money shall be determined from the Carrier's records to satisfy claims."

c) July 10, 1972: Carrier Superintendent of Signals denied the claim for alleged failure to comply with Time Limit on Claims Rule on account "the claim is vague and indefinite because it does not name the individuals who were allegedly adversely affected."

Also, Carrier denied on the merits.

d) June 6, 1973: Appeals exhausted on the property with denial by Manager, Labor Relations.

We have reviewed in detail the record, the positions of the parties and the many awards cited by each on the question whether Claims 1, 2, 4 and 5 are precluded from arbitral review due to fatal procedural defects. In our considered judgment, Carrier's contentions relative to violations of the 60-day filing requirement of Article V, Section 1(a) of the Time Limits Rule are well taken relative to Claims 2 and 4. These are not continuing violations as we have defined that term in previous awards and thus do not escape the time limit by dint of Section 3 of the Rule. The actions complained of in these claims are abolishment of the position and the remedy sought is, in addition to money damages, restoration of the position. The abolishment of the Granite City position and referal of the work to gang signal maintainers is "the occurrence on which the claim or grievance is based." This occurrence took place on July 30, 1971 but these claims were not filed until May 14, 1972, more than 9 months later. In rejecting the Organization's assertion that these are "continuing claims" we adhere to the principles stated in our Award 14450 from which we quote the following:

> "Recent awards of this Board consistently have 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. (Award Nos. 12045 and 10532.) Here, the action complained of was the abolishment of the section gang, including the position of Section Foreman, with headquarters at Franklin, Missouri and the assignment of the territory to headquarters in Boonville, Missouri. It is undisputed that the abolishment and transfer of territory by Carrier occurred on or about July 21, 1958. Therefore, we find the Time Limit Rule is applicable as the claim was not filed within sixty days after the date of the occurrence upon which it is based. (Award Nos. 14131 and 12984.)"

To the same effect, see Awards 16125, 18667, 19341, 20349 and 20631. We find that Claims 2 and 4 are time-barred and must be dismissed.

Carrier also presses procedural objections to the filing of Claims No. 1, 4 and 5 because no individuals are named therein as Claimants nor are same readily ascertainable from Carrier records. This issue is moot as to Claim 4 because that claim is, in any event, time-barred. With respect to Claim No. 5 we think the objection is well taken. But not so with Claim No. 1.

Study of apparently conflicting awards on this subject compels us to conclude that the better reasoned approach is one which exchews strict technical pleadings and favors processing of claims where the identity of the Claimant, if not specifically named, is readily ascertainable from Carrier records. When challenged on this point in Claim No. 1, the Organization provided the name of the specific Claimant in its appeal to the Chief Engineer. Leaving aside the propriety of this clarifying amendment, however, as we read the record, the identity of Claimant F. Wiechert was readily ascertainable from Carrier records when the claim initially was filed on June 20, 1972. In our considered judgment, Claim No. 1 is both timely and properly filed and Carrier's procedural objections thereto under the Time Limit Rule may not prevent its disposition on the merits. Applying the same general principle to Claim No. 5, however, we find that claim to be so ambiguously and conjecturally framed that the identity of the Claimants is undeterminable. In the circumstances we have no alternative but to dismiss Claim No. 5 because it does not identify "the employe involved" with the degree of particularity necessary for compliance with Article V, Section 1(a).

Based upon all of the foregoing, we find that of the five (5) claims presented only Claim No. 1 and Claim No. 3 properly are before us for determination on the merits. As with any allegation of contract violation not involving discipline or discharge, the Organization as moving party herein has the burden of persuasion on every material point in controversy to prove its allegations. Turning first to the language allegedly violated in Article I, Section 6(a) we find as follows:

> "Article I, Section 6(a):
>
> Signal Maintainer: An employee assigned to the maintenance duties of a territory or plant or to a Signal Maintenance Gang. Such employee shall perform such work as inspection and tests not covered by Section 2 of this Article I and light general maintenance and repairs on his assigned territory or plant. When Signal Maintainers are assigned to Signal Maintenance Gangs they shall perform heavy maintenance and repairs and other maintenance and repairs covered by the scope of this agreement which cannot be performed by the regularly assigned Signal Maintainer."

We can find in this record no evidence that the literal language of the cited provision was violated. That language describes the Signal Maintainers as an employe assigned to a territory or plant or to a gang. These assignments and the work performed by each are not mutually exclusive under the language nor is there any express prohibition against the action taken by Carrier herein. The only distinction drawn by the language cited between maintainers assigned to a gang and others relates to the performance of

certain "heavy" work but that question concededly is not at issue herein. The Organization asserts that the intent of the language if not its literal language has been violated. But in the face of such clear and unambiguous language and in the absence of any contractual prohibition on Carrier's action we cannot rightfully read such a meaning into Article I, Section 6(a). With respect to the other cited contractual basis for the claims, Article IX, Section 3 prohibits certain action, otherwise implicitly permitted, when done for a forbidden purpose. In our view, Carrier's assertion that this provision may be violated only if an abandoned position subsequently is re-bulletined at a lower rate of pay is too narrow. That is a most obvious way to violate the cited section but not the only way. But in each case of such alleged violation, the express language of that section requires the Claimant to prove by probative evidence both aspects of a violation to wit: commission of the act and that it was done with scienter, i.e., for the prohibited purpose of reducing rates of pay or evading the application of rules in the Agreement (Emphasis added). Even if the record is viewed in the manner most favorable to the Organization, only the first of these evidentiary burdens is met on this record. There is not sufficient evidence to show, and we may not speculate with the Organization in the absence of some evidentiary basis, that Carrier's purpose or intent was in the prohibited category. Given this failure of proof relative to intent we cannot conclude that Carrier violated Article IX, Section 3.

For the reasons set forth hereinabove we find with respect to each of the submitted claims as follows: Claims 2, 4 and 5 are procedurally defective and must be dismissed without reaching their merits. Claims 1 and 3 are not supported by the Agreement and must be denied on their merits.

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 Agreement was not violated.

A W A R D

Claim 1 is denied.
Claim 2 is dismissed.
Claim 3 is denied.
Claim 4 is dismissed.
Claim 5 is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1976.