

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21994
Docket Number MS-21873

James F. Searce, Referee

PARTIES TO DISPUTE: (Phillip B. Dalrymple
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: 1) Norfolk and Western Railway Company, hereinafter referred to as "the Carrier," violated the agreement in effect in October of 1975, between the Carrier and the ATDA which agreement is applicable to Mr. Dalrymple's case, in that:

(a) The Carrier refused to reinstate Phillip to his job as second trick "C" District dispatcher, despite the provisions of Article 4 (d), (f) and Article 8 (f) of said agreement, and

(b) The Carrier refused to reinstate Phillip to his former job of dispatcher despite the fact that the Chief Train Dispatcher, an officer of the Carrier, by his actions led Phillip to believe that he would be allowed to do so (detrimental reliance).

(2) Wherefore, claimant, Phillip B. Dalrymple, respectfully requests that he be reinstated to his job as dispatcher with back pay from October 8, 1975.

OPINION OF BOARD: By letter dated July 25, 1975, the Claimant informed Chief Train Dispatcher (CTD) B. L. Markijohn of his desire to change his employment status. (1)

"If accepted by the Signal and Communication Department I wish to transfer from the Transportation Department following my tour of duty August 2, 1975."

(1) At the time of preparing the letter, the Claimant was second trick "C" District Dispatcher at the Carrier's Conneaut, Ohio, facility.

Nothing in the record indicated a response from CTD Markijohn to the Claimant in regards to his expressed desire or intention.

Effective August 4, 1975, the Claimant commenced work in the position of Assistant Signal Maintainer, in the Signal and Communications Department (on a trial basis, according to the Claimant). This work apparently aggravated a lower back condition, which had developed out of an off-duty rear-end automobile collision involving the Claimant several months eariler. For this reason, the Claimant asserts, he found himself unable to meet the physical requirements of the Assistant Signal Maintainer's position. By letter dated October 6, 1975, J. M. Herr, Assistant Division Engineer for Signal and Communications informed the Claimant that:

"Your application for transfer to the Signal & Communication Department is hereby declined, effective 4:30 pm, October 3, 1975. If, in the future you need any recommendations, please feel free to call upon me."

Thereafter, the Claimant by letter dated October 8, 1975, advised CTD Markijohn the following:

"Please see the attached letter from Mr. J. M. Herr. As I was not accepted in the Signal Dept., and my being accepted was a stipulation in my request for transfer, I request to return to my regular assignment as second trick 'C' District dispatcher as soon as possible."

By letter of the same date -- October 8, 1975 -- but, according to the Claimant, actually written about October 12, 1975, the Claimant further informed CTD Markijohn as follows:

"Please reply in writing promptly the reason that I am being held out of service by the Norfolk and Western Railway Company.

It is essential that I have this information to secure compensation from my insurance holdings."

No response for either letter by him was forthcoming from CTD Markijohn; however, by letter dated October 27, 1975, Superintendent J. P. Watters did reply to the Claimant:

"Chief Train Dispatcher B. L. Markijohn has forwarded to me your letter dated October 9, 1975 in which you requested return to your former position as a train dispatcher.

I am not agreeable to restoring you as a dispatcher. After we accepted your request to transfer to the Signals and Communications Department, evidently you failed to qualify in that department.

It does not appear to me that we should be required to protect rights you may have had in the C.T. Department prior to your transfer in order for you to be in a position to fall back on them."

By use of counsel, the Claimant replied to Superintendent Watters by letter dated November 12, 1975:

"Please be advised that Philip B. Dalrymple has retained this office to represent him in regard to his employment status in addition to any union assistance which he might receive. Even though to the best of our information and belief you have not complied with the grievance procedure, we are going to acknowledge your letter of October 27, 1975 as refusing to restore Philip to his job as dispatcher.

Be advised further that we intend to assist Philip in properly perfecting his appeal to the highest officer designated by the management to handle such cases."

Also by letter of the same date, counsel for the Claimant informed J. R. Neikirk, Vice President - Administration of his claim:

"Please be advised that Philip B. Dalrymple has retained this office to represent him in regard to his employment status in addition to any union assistance which he might receive. Even though to the best of our information and belief you have not complied with the grievance procedure, we are going to acknowledge Superintendent Watters letter of October 27, 1975 as refusing to restore Philip to his job as dispatcher.

We respectfully request that you rescind Superintendent Watters order and reinstate Philip."

Thereafter, this matter was processed, without resolution, to this Board.

The Claimant contends that he considered the change from the Transportation Department to the Signal and Communications Department when he was led to believe, in the summer of 1975, that his job was to be abolished. He further contends that CTD Markijohn was party to and personally involved in drafting the "conditional change" (July 25, 1975 letter) He contends that a probationary trial period of sixty days existed in the Signal and Communications Department during which time he was given the opportunity to determine if he was suitable for the work. The Claimant contends further that, as a result of the lower back problem which prevented his performing the duties of the position, and after discussion with the appropriate Signal and Communications Department officials, it was determined that his "conditional transfer" would be denied. Accordingly, the Claimant notified CTD Markijohn of this circumstance, and requested reinstatement to the position he had left. The Carrier's actions, thereafter, denied the Claimant his rights to return to his position, the Claimant asserts, and specifically violated several provisions of the Agreement:

(1) Article 4 (f) - FORFEITURE OF SENIORITY

"Failure to perform service as train dispatcher during a period of 90 days shall cause forfeiture of seniority, except when such nonperformance is due to lack of work, physical disability or as otherwise provided in this agreement. A train dispatcher who voluntarily relinquishes his position and enters other service (except as provided in Article 4 (g)* hereof or in case of physical disability) shall forfeit his seniority as train dispatcher." (Emphasis added)

*4 (g) - OFFICIAL POSITIONS is not applicable to this case.

On this point, the Claimant asserts that he never relinquished his position, that the tenuous qualification -- "if accepted" -- in his letter to CTD Markijohn (which he claims Markijohn helped draft), and Assistant Division Engineer Herr's declination of his application for transfer are proof that no reassignment was ever consummated. He points out that 4 (f) contemplates two distant actions: voluntarily relinquishing his position and entering other service. He asserts that his going to the Signal Department on a conditional basis -- "if accepted..." and that Herr's letter affirms such a conditional nature -- "Your application ... is hereby declined...." are clear indications that neither action took place.

(2) Article 4 (d) - ROSTERS

"A seniority roster showing the names and seniority standing of all those entitled to hold seniority as train dispatchers under these rules shall be issued by the management for each seniority district and revised and reissued in January of each year. Rosters shall be kept on file in the respective dispatching offices open to the inspection of all concerned and shall be subject to correction upon proof of error or omission only if protest in writing is made within 30 days from date of first posting upon which such entry appears. Copies of all rosters and protests shall be furnished to the office chairman and to the general chairman."

On January 29, 1976 - several months after the Claimant was taken out of service and after a conference to discuss this matter was held (without a mutually satisfactory conclusion) a seniority roster bearing the Claimant's name was posted by CTD Markijohn, without protest. The Claimant points to the provision of 4 (d) which requires any such protests within thirty days from the date of first posting or such roster shall be deemed correct. No such objection by the Carrier, the Claimant asserts "....constitutes Carrier's recognition of his entitlement to hold train dispatcher seniority of such date. It is clearly apparent that no protests were registered to such listing." (Letter of April 6, 1976, by W. H. Bartle, attorney for the Claimant, to J. R. Neikirk, Vice President - Administration N&W Railway Company).

(3) Article 8 (f) - CLAIMS

"A train dispatcher who considers himself unjustly treated shall present his claim in writing direct or through representative of his choice to the chief train dispatcher within 30 days from date of occurrence on which it is based, otherwise claim is barred. The decision of the chief train dispatcher shall be rendered within 30 days from date claim is received or from date of conference, if one is had thereon. If the train dispatcher is not satisfied with the decision rendered, appeals may be made subject to the order of progression, time limits, etc., provided in Article 8 (c). If decision on appeals is not rendered within 30 days, claim will be considered **sustained**, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances."

The Claimant contends that, since the Chief Train Dispatcher did not render a decision to his claim as stated in his October 8, 1975 letter as required in 8 (f) the claim stands as sustained per this provision.

Finally, the Claimant claims he was led to believe that his job would be abolished through discussions with CTD Markijohn and that it was this potential and his concern for his family that led him to look elsewhere for a secure income with the Carrier. He claims to have asked for a physical examination so as to assess his ability to perform the work of the Signal and Communications Department, a request which he said was refused. He contends that his uncertainty on this and other points were factors in approaching the change on a tentative basis -- a condition understood and agreed to by CTD Markijohn and the Signal and Communications Department. When the Claimant prepared his letter to CTD Markijohn, concerning his conditional interest in the Signal and Communications Department, he was depending upon what he felt was guidance from CTD Markijohn, as well as understandings with Signal and Communications official Herr.

* * * *

The Carrier, on the other hand, contends that the Claimant communications to CTD Markijohn on October 8, 1975, never constituted a claim for handling in the "usual manner" on the property, and thus, should be dismissed on the basis of procedural deficiency alone. The Carrier also contends that the Claimant's assumption of the position of Assistant Signal Maintainer and his participation in that post for two months is clear evidence that he voluntarily forfeited his seniority as a train dispatcher as defined under Article 4 (f). The Carrier disputes the assertion that, because the Claimant's name appeared on the seniority roster after the Carrier refused to reinstate him as a dispatcher does not in and of itself establish seniority rights; rather, it was an oversight or error on the Carrier's part quickly corrected. The Carrier points to the lack of a role by the ATDA in this case as confirmation by that organization that the Carrier was correct in its decision to deny the Claimant a return to the dispatcher craft. The Carrier raises an objection to the introduction by the Claimant of correspondence between his attorney and the ATDA, as well as various other documents and affidavits as new evidence not introduced on the property, contending that they should be excised and not considered.

* * * *

On the matter of the Claimant's name having appeared on the January 29, 1976, roster of dispatchers, it is well established that the mere presence of an employee's name on a seniority roster does not dispense seniority to the employee. It was obviously an oversight and that particular claim is disposed of by this Board without further discussion.

Insofar as the Carrier's objection to the introduction of new evidence is concerned, it is clear that the record of this case has been developed and supplemented in other than the normal manner, not necessarily exclusively because of the Claimant's actions. A review of the record supports the Carrier's contention that new evidence and unsupported assertions were interjected throughout the handling of this dispute. Such actions were not limited to the Claimant, however; the Carrier was equally unrestricted in enhancing its record by new evidence, for example:

"Based on his personal physician's opinion relative to his ability to perform work in the S&C Department due to an off-duty injury and the fact his furlough from service in that department was imminent, he induced the assistant division engineer to decline his application for employment in the S&C Department effective October 3, 1975..." (Carrier's Ex Parte Submission) (Emphasis added).

Neither of the aforementioned assertions by the Carrier can be found in earlier correspondence and in the opinion of this Board are unsupported by the record of handling on the property. Such examples of "new evidence" by both parties are interspersed throughout the record. For this reason, this case will be considered on the basis of the record as a whole.

The Claimant contends that the Carrier is obliged to effect his request to return to the dispatcher craft because of the failure of CTD Markijohn to respond to him as required under Article 8(f), (hereinafter cited). This provision (8 (f)) assumes some action by the Carrier which a Claimant would consider as "unjust treatment". Certainly, the fact that the Claimant found himself physically unable to perform the duties of the Assistant Signal Maintainer cannot be construed as the grounds for a claim of "unjust treatment." His request to Markijohn of October 8, 1975, was precisely that -- a request. By means of another letter with the same date of October 8, 1975, the Claimant was obviously seeking information relative to his being held out of service. By his own statement in that letter it would appear that the purpose of that letter was to attend to the problem he had encountered doing his work at an Assistant Signal Maintainer -- his lower back. Thus, the Claimant cannot be said to have expressed a claim, as such, in his letter to Markijohn. There was, of course, little need to do so at that point, since he had no particular reason to assume unjust treatment. The Carrier, on the other hand, contends that the Claimant's failure to enunciate a set of particulars establishing unjust treatment by his October 8 letters to CTD Markijohn should negate any subsequent consideration in this regard. We find neither party is correct. The Claimant did not submit a claim in the strictest sense of the word to CTD Markijohn as defined under Article 8 (f), although his letters clearly expressed what he was requesting -- a return to the dispatcher craft as soon as possible. It was not until he received the response to the October 8, 1975, letters by the October 27, 1975, reply by Superintendent Watters that he had any substantive cause to believe he had been unjustly treated. The record does not indicate why Superintendent Watters responded in lieu of Markijohn, but having done so, no reason thereafter existed for the Claimant to return to a subordinate officer (CTD Markijohn) to assert a claim as defined under Article 8 (f) -- another procedural error according to the Carrier which it contends makes this claim moot. We do not concur with the Carrier's contention here; thus, the Claimant, through his attorney, moved his claim to the appeal process as defined by Article 9 (c) by his attorney's letters to Watters and Vice President J. R. Neikirk -- both dated November 18, 1975 (2). While the establishment of a claim by the Claimant cannot

(2) The Carrier has pointed out without prejudice to its position, that the letter to Neikirk arguably might be regarded as the statement of claim, but if so, no claim for back pay was made.

be said to have adhered in precision to the usual manner of doing so, this Board is satisfied that a "claim" was made. We find no merit, however, to the Claimant's assertion that the lack of a response specifically by Markijohn constitutes the basis for enforcement of a claim, since as was previously established, no "claim" was made.

Having determined a "claim" was made, we look to the document which constitutes the first communication in the sequence of events which could have been represented as a claim -- the November 18, 1975, letters to Superintendent Watters and Vice President Meikirk. Both letters are recitations of the Claimant's version of events leading up to this request to return to the dispatcher post he left and Watters rejection of this request on October 27, 1975. Both letters end with the requested action of the Carrier as follows:

"Therefore, please reinstate Phillip without delay."

We look now to the effect of the Claimant's actions and their relationship to Article 4 (f). A reading of the record as a whole would indicate that the Claimant's decision to seek an opportunity in the Signal and Communications Department was not so much predicated upon his concern for loss of his job as a dispatcher, as a desire to improve his advancement opportunities. The record is less clear as to whether he had any reason to doubt his physical or other capabilities to meet the requirements of his new position. It is reasonable to conclude, however, that the Claimant was satisfied that he was not foreclosing the protection of his rights by the change. Such assumption on the Claimant's part, standing alone, would be self serving and understandably so. But this claim is buttressed by the exchange of correspondence with two members of management -- Markijohn and Herr -- the result of which would lead to a reasonable conclusion that the occupational change was undertaken with the expectation of recourse back, if necessary.

While this Board finds limited merit in the Claimant's rationale relative to Article 4 (f), it cannot ignore the Carrier's acquiescence or, as a minimum, silence on the exchange of correspondence between the Claimant and CTD Markijohn on July 25, 1975, and Assistant Division

Engineer Herr on October 6, 1975. It is not enough to say that the Claimant's submission of a request in this case constituted a complete action. For whatever reason, it was predicated upon a condition -- "IF ACCEPTED." When this tentative request is considered in the context of the subsequent denial of such a request for transfer by Herr, without some intervening affirmation by the Carrier that the transfer was approved -- a factor not present -- it cannot be dismissed by asserting that such a transfer request is "self executing" or that the grievant induced Herr to decline his application for employment. Both Markijohn and Herr occupied positions of authority and as such are held accountable for representations on behalf of the Carrier. On the basis of this specific factor, this Board finds that the Claimant is entitled to be returned to his former position or a dispatcher position of similar status with his seniority intact. No back pay is awarded, it being noted that the initial claim was devoid of this condition. This order will be put into effect ten (10) days after it is signed.

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 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

The agreement was violated to the extent indicated in the Opinion.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulose
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1978.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21994
Docket Number MS-21873

James F. Searce, Referee

PARTIES TO DISPUTE: (Phillip B. Dalrymple
(
(Norfolk and Western Railway Company

ON REMAND FROM THE
UNITED STATES DISTRICT COURT -
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

INTERPRETATION TO AWARD 21994, DOCKET MS-21873

We are called upon to render an interpretation to Award 21994, particularly and principally as it relates to the question of back pay.

At the outset, we reiterate that which was stated in the Opinion: let there be no doubt that the Majority concluded that the Claimant took the actions sua sponte that would eventuate in his departure from his employ. The record clearly indicates that the decision to abandon his rights as a train dispatcher was not forced upon him, nor was it a result of any disciplinary measure taken against him. As such, the circumstances of his eventual departure from the Carrier ranks were not subject to the provisions of Article 8, Paragraph (e), even if this contractual right had been timely raised, which it was not. In point of fact, the Majority embraced the Carrier's position that Article 4(f) - Forfeiture of Seniority was self-executing and dispositive of the matter, particularly as it states that: "A train dispatcher who voluntarily relinquishes his position and enters other service...shall forfeit his seniority as train dispatcher." It was not out of repudiation of the Carrier that this Board ordered the Claimant be offered an opportunity to return to the ranks of train dispatcher, but rather to afford the Claimant a special, extra-contractual opportunity to return to work even though he had taken the original action voluntarily. We were also mindful of the effort of one of the Claimant's former supervisors to assist him in this regard. It may be argued that this Board exceeded its authority by directing such a work opportunity, but enlightened labor-management relations sometimes calls for exceptions where doing so does not compromise one or the other parties' positions in the long run. It would ill-serve relationships to misconstrue such flexibility as anything otherwise. If this Board erred in raising the matter of compensation in its Opinion and Award, it must now stand on such record. Nonetheless any

such claim, raised under any provision of the Agreement, would not be with merit, primarily due to the fact that the claim of rights to reinstatement was considered without merit and was not the basis upon which the Claimant's return to service was ordered.

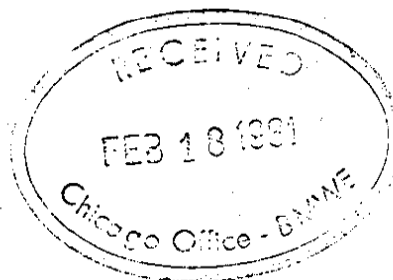
In sum, even if the Claimant had intended to raise the matter of compensation timely, Article 8(e) would not have been considered appropriate because this provision deals with disciplinary actions -- which does not exist here. Article 8(e) was not timely raised under any circumstance. This Board's decision to order reinstatement was arguably beyond its statutory authority, but such action was neither novel or unique. To construe such decision as an affirmation of the basic claim is an error and militates for retreat to an unbending, dogmatic approach to labor-management relations. This Board's reference to a denial of any claim for compensation, while possibly gratuitous in nature, was intended to dispel any uncertainty as to its position on this matter.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 15th day of January 1981.



LABOR MEMBER'S DISSENT
TO
SERIAL NO. 304
INTERPRETATION TO
AWARD 21994
DOCKET MS-21873

The Majority in Serial No. 304 (which was supposed to be an Interpretation to Award 21994 Docket MS-21873) failed to answer the question asked by the United States District Court, Northern District of Ohio, Eastern Division, when that Court concluded "that this case should be remanded to the Board for a clarification of the contractual basis for its conclusion that plaintiff was required to submit a separate claim for back pay", admitted that the Board's jurisdiction was probably exceeded and changed an award or decision of the Board in an interpretation of an award.

In adjudicating Docket MS-21873 the Majority, in Award 21994, denied back pay by stating "No back pay is awarded, it being noted that the initial claim was devoid of this condition" (Emphasis supplied). However, in Serial No. 304 the Majority attempts to establish another separate basis for denying the back pay which had been requested in the Statement of Claim to the Board.

The record of this dispute on the property (i.e. before being submitted to the Board) shows that the claim, ab initio, was a request that the Carrier return Claimant to service as a train dispatcher, or a request for the Claimant's reinstatement as a train dispatcher.

While Article 8(e) of the Agreement is captioned REINSTATEMENTS and this rule should be controlling as the Claimant was "taken out of service" according to the Board, as shown on page 6 of Award 21994,

the Carrier also acknowledged, on the property, that back pay was being requested or claimed. The Carrier in its letter of February 13, 1976 stated in part:

"For the reasons set forth in conference on January 16, 1976, and in our letters of December 17, 1975, and January 9, 1976, we are not agreeable to reinstating Mr. Dalrymple(sic) to his position as train dispatcher and your request for reinstatement with back pay is again denied".

And the Carrier in its letter of May 5, 1976 stated in part:

"Your request that Mr. Dalrymple be reinstated to his train dispatcher position with compensation for time lost is, therefore, denied".

The Carrier did not claim in either of its submissions to the Board that a claim for back pay was not present in this dispute. The Carrier claimed that there was no proper claim presented to the Chief Train Dispatcher in its attempt to avoid a finding that the initial handling of the claim by the Carrier was in default because the Chief Train Dispatcher failed to render a decision on the claim within thirty (30) days from the date the claim was received. The record shows the Chief Train Dispatcher never rendered a decision on the claim and, instead, turned it over the next higher officer to whom the decision of the Chief Train Dispatcher would normally have been appealed. The Majority in Award 21994 accepted the specious position of the Carrier in part though the initial claim or request stated in part "I request to return to my regular assignment as second track 'C' District dispatcher as soon as possible".

Despite the language in Award 21994 stating "No back pay is awarded, it being noted that the initial claim was devoid of this condition", the initial letter was a request that the Claimant be returned

to service as a train dispatcher and a claim for back pay was presented and progressed on the property.

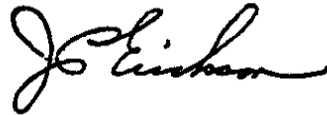
In Serial No. 304 the author stated "It may be argued that this Board exceeded its authority by directing such a work opportunity, but enlightened labor-management relations sometimes calls for exceptions where doing so does not compromise one or the other parties' positions in the long run" and "This Board's decision to order reinstatement was arguably beyond its statutory authority, but such action was neither novel or unique". The Railway Labor Act limits the jurisdiction of the National Railroad Adjustment Board to disputes "growing out of grievances or out of the interpretation or application of agreements governing rates of pay, rules, or working conditions". If a decision is not based on the interpretation or application of the Agreement, the Board has, indeed, exceeded its jurisdiction.

There have been numerous interpretations or serials issued which say that a new award should not and cannot be made by the Board in an interpretation of an award. For example; in Serial No. 301, which is Interpretation No. 1 to Award 9193, the Board stated in part:

"Initially, we are constrained to remind the parties that the purpose of an Interpretation is to clarify an Award. It is not a means to provide an avenue to reargue the original claim. Also, this Board has no authority to alter, change or modify the extent of an Award under the cloak of an interpretation. Rather, the Board is limited to interpreting an Award in the light of the circumstances which existed when the Award was rendered".

In Serial No. 304 the "neutral referee" failed to answer the question raised by the Court on remand, admitted that the Board's jurisdiction was probably exceeded and changed the basis for denial of back pay as set forth in Award 21994.

The Majority subscribed to the errors made by the author of Serial No. 304. However, I cannot endorse such errors and, therefore, I must dissent.



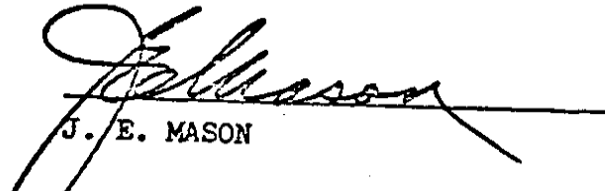
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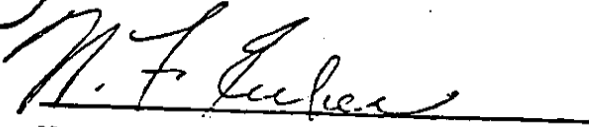
Labor Member

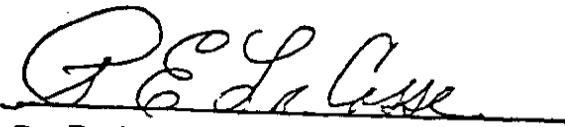


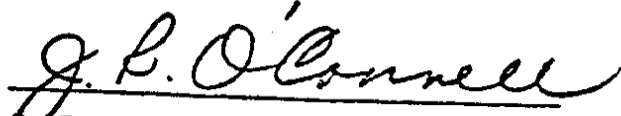
CARRIER MEMBERS' RESPONSE TO
LABOR MEMBER'S DISSENT TO SERIAL
NO. 304 - INTERPRETATION TO
AWARD 21994, DOCKET NO. MS-21873

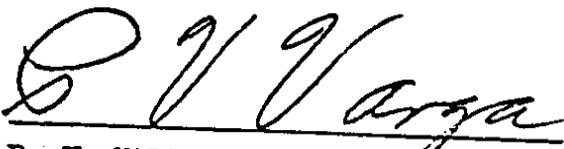
"He draweth out the thread of his verbosity finer than
the staple of his argument." (Shakespeare, Love's
Labour's Lost: Act V Scene 1, Line 18).


J. E. MASON


W. F. EUKER


P. E. LACOSSE


R. O'CONNELL


P. V. VARGA