NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22551
THIRD DIVISION Docket Number MW-22347

Louis Yagoda, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago, Milwaukee, St. Paul and Pacific
(Railroad Company

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

(1) The claim* as presented by the General Chairman on February 26, 1976 to Roadmaster J. E. Ely shall be allowed as presented because said claim was not disallowed by Roadmaster J. E. Ely in accordance with Rule 47 1 (a) (System File C#15-Wisconsin/D-1949).

*The letter of claim will be reproduced within our initial submission."

OPINION OF BOARD: The letter referred to in Statement of Claim charged Carrier with violating the effective Agreement by having failed to assign furloughed track laborer E. E. Erickson to the temporary position of laborer in accordance with his seniority, at Westby, Wisconsin on January 19, 1976 and thereafter, and demanded, as remedy, reimbursement to Erickson "for the earnings he would have received had he been assigned to this position as of January 19, 1976." The letter contended that Rules 2, 3, 8 "among others" were violated by Carrier's actions in this matter.

Inasmuch as the claim now before the Division is based on an alleged procedural default by Carrier, our examination of the record is addressed to the events involving the handling of the foregoing claim. In chronological sequence, these steps are:

1. The original claim letter was sent under date of February 26, 1976 from General Chairman R. O. Chambers to Roadmaster J. E. Ely, charging denial of assignment and demanding reimbursement therefor in an amount equivalent to that which he would have earned if he had been assigned.

2. In its statement to us, Carrier describes its reaction as one of having realized that employe Erickson should have been called in for the vacancy in question and so offered to pay his loss of 5 days' pay (January 19, 20, 21, 22 and 23, 1976) by permitting him to work an additional week with a section of the crew at Tomah, Wisconsin after the abolishment of the panel gang he had been working with in March 1976.

3. Carrier includes in the record a copy of a letter, under date of March 23, 1976, from Mr. Erickson to General Chairman R. O. Chambers of B.M.W.E., showing that copy was sent to J. E. Ely, Roadmaster. In this letter Mr. Erickson, referring to the subject claim, states, in part:

> "Please drop this claim as I have been duly compensated by Roadmaster J. E. Ely who allowed me to work an extra week longer with the Section crew at Tomah, Wisc. after the conclusion of the panel gang which I worked in during the month of March 1976."

4. However, under date of May 6, 1976, General Chairman Chambers wrote to Roadmaster Ely that Ely had not "responded to this claim in accordance to Rule 47 of the schedule of Rules governing the employes in the maintenance of way department. The claim is now in default." The letter quotes Rule 47 and goes on to ask when the remuneration requested in the original claim will be paid.

5. By letter dated May 21, 1976, Mr. Ely responded to Mr. Chambers that he had not regarded it as necessary to "respond" to the claim, "inasmuch as I accepted Mr. Erickson's letter, copy to me, of March 23, 1976 as settlement of the grievance and due to the fact that said letter was addressed to you, I had considered the letter as proper acknowledgement and handling of the claim."

6. Further exchanges of letters followed between Carrier and Organization in which are argued essentially their present postures before us on the procedural consequences of the alleged individual "settlements" by Claimant.

Rule 47-1(a) states:

> "All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any said claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as

"a precedent of waiver of the contentions of the Carrier as to other similar claims or grievances."

Organization calls particular attention to that part of the Rule which requires that (a) when claim is disallowed, Carrier shall, within 60 days from the date such claim is filed, give written notification to "whoever filed the claim," of the reasons for such disallowance, and (b) if "not so notified, the claim or grievance shall be allowed as presented..."

Organization notes that although the original claim was filed with Roadmaster Ely by letter dated February 26, 1976, Mr. Ely did not respond to communicator of claim until his letter of May 26, 1976, eighty-five days later, nor in their view, actually disallow the claim until a letter from him dated August 27, 1976, almost 3 months after that, wherein he stated to General Chairman (after exposition of Carrier's position in respect to Rule 47-1(a)) that claim is "declined."

Carrier emphasizes that the procedures relied on in Rule 47-1(a) by Organization refer to "...Should any such claim or grievance be disallowed..." In their view, the subject claim was not "disallowed"; it was, in fact, "allowed" by means of the settlement reached between both the "employee involved" and this Carrier. Accordingly, the claim is regarded as having been rendered moot by the elimination of an "employee involved" as well as the absence of a "disallowed" claim - inasmuch as the claim was timely satisfied by the arrangement made for and accepted by Claimant (in a letter of March 23, 1976 to Organization General Chairman - an elapsed time of less than 30 days from date of original claim).

Because the claim which has reached us relies only on a contention of procedural violation, we are confined to making a judgment solely on that basis; we cannot reach examination of the merits of the original work-denial claim.

It must also be stated that the "settlement" of the original claim which was reached between Carrier and the individual Claimant must be declared not to constitute an "allowance" of claim which Organization originally served on Carrier. That claim expressly demanded payment of a sum of money as reimbursement in compensation for the alleged work-deprivation. The "settlement" arranged, instead, for future extra work time equivalent to the time allegedly lost by Claimant. We must resist analysis of whether such arrangement might be regarded as a "just" disposition of the claim; the fact is that it did not grant said claim.

Accordingly, we must reject Carrier's position that it had "allowed" the claim and that the subject thereby became moot.

We must also find as a matter of plain fact that Carrier failed to meet its obligation to react explicitly and with direct responsiveness by the Carrier official addressed to the Organization official awaiting disposition of the claim sent by the latter, within the 60 days required in Rule 47. Here, there are also factors which might seem capable of reconstruction into an equivalence of such compliance. This comes from the fact - not refuted by Organization - that less than 30 days after the claim had been submitted by General Chairman Chambers to Roadmaster Ely, the employe on whose behalf the claim was made, sent a letter to Mr. Chambers, instructing him to drop the claim inasmuch as a settlement had been reached satisfactory to him. Again, there is some appeal to "logic" or "moral equivalency" in an argument that might run: "What's the difference? The individual on whose behalf the Organization had acted stated that he no longer had a claim and notified both Organization and Carrier representatives on the level which claim had then reached. Should not this be allowed to stand in place of the 'functionary-to-functionary' response requirement?" Or looked at another way: "Inasmuch as Claimant declared himself no longer a Claimant, was that not the end of the whole subject with any need to go further rendered academic?"

We believe that there is much to be said for these arguments, but we must take it for granted that Rule 47 means exactly what it says. Properly to comply with the provisions therein, Mr. Ely should have gone through what may have appeared to him a redundant act, but is in the Rule for good and sufficient reasons of orderly and protected procedures and mandated recognition by law of Organization as the exclusive bargaining agent for its constituents employed by Carrier.

Inasmuch as Rule 47 is quite specific in its requirement of consequence when there is failure to comply with the 60-day procedure therein mandated, we have no choice but to regard the situation as showing a forfeiture of "disallowance" and a consequent compelling of "allowance" of 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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A W Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1979.