

The Third Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Norfolk & Western Railway Company

STATEMENT OF CLAIM:

"(a) Claim eight (8) hours compensation at the rate applicable to Operator/Clerk position at Muncie, Indiana, on each respective date beginning August 7, 1984, to the Assistant Chief Train Dispatcher(s) employed in the Muncie, Indiana, train dispatching office, account being required to perform work outside the scope of duties as provided in Article 1(a) & Article 1(b) of the August 1, 1951 schedule agreement between the American Train Dispatchers Association and the New York, Chicago & St. Louis Railroad Company.

The work referred to in the paragraph above consists of transmission of reports by means of electronic equipment from the Chief Train Dispatchers office at Muncie Indiana to various points on the railroad system, also similar transmission of various type of communications from the same office to various points throughout the railroad system including instructions to trains, instructions to personnel concerning duties and service requirements.

(b) The claimants referred to in the above paragraph include but are not limited to F. B. Cooper, D. E. Finney, R. G. Waters, H. D. Thompson, M. H. Kortman, J. E. Coleman, R. L. Rafferty, D. L. Wallace, and R. M. Bowman. Their respective identities and dates of service on the dates referred to in the beginning paragraph above and during the claim period, are readily ascertainable on a continuing basis, and shall be determined by a periodic joint check of the Carrier's records in order to avoid continuation of the filing of a multiplicity of daily claims, until such time as the Carrier:

"(1) allows the compensation claimed in the beginning paragraph above on a current and continuing basis, or,

(2) removes the responsibility for performance of the described work not included in the duties described in the aforementioned agreement articles."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On October 5, 1984, the Organization filed the Claim at issue herein. It mainly contends that, effective on August 7, 1984, Train Dispatchers were required to transmit reports and other communications by means of electronic equipment. It asserts that this work historically was performed by Operators and Operator-Clerks.

As a threshold matter, the Organization submits that the Carrier failed to respond to the initial Claim in a timely manner, in this case, sixty days.

The evidence supports the Organization that the Claim must be sustained on the procedural grounds that the Carrier defaulted by not denying the Claim until December 14, 1984, when the determination was hand delivered to the Organization. While we understand and are not unappreciative of the Carrier's procedural arguments, the facts are that the Carrier had the Organization's claim before it and it failed to respond in a timely fashion, as required by the parties' Agreement.

With respect to the request for damages, pursuant to the National Disputes Committee Decision 16 and the many awards affirming this decision, the Carrier's liability was cured when it issued its denial letter to the Organization on December 14, 1984. However, there has been no substantive showing on the property that any employee was deprived of work or harmed in any manner. Therefore, and in view of all of the circumstances, we conclude that damages are not appropriate.

This decision is based solely on the procedural violation of the Carrier and we will not address the merits of the Claim.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1990.

LABOR MEMBERS' CONCURRENCE AND DISSENT
to
Award No. 28273 - Docket TD-26835
_____(Referee Muessig)_____

In the case at hand, the Referee correctly recognized the Carrier's failure to respond in a timely manner to the Organization's claim when he stated:

"The evidence supports the Organization that the Claim must be sustained on the procedural grounds that the Carrier defaulted by not denying the Claim until December 14, 1984, when the determination was hand delivered to the Organization. While we understand and are not unappreciative of the Carrier's procedural arguments, the facts are that the Carrier had the Organization's claim before it and it failed to respond in a timely fashion, as required by the parties' Agreement." (Underscoring added)

At this point the Award is correct and reasonable minds would expect a sustaining Award which would logically include compensation.

In fact, the very beginning of the next paragraph suggests that compensation is not only correct, but will be forthcoming inasmuch as the Referee states the following:

"With respect to the request for damages, pursuant to the National Disputes Committee Decision 16 and the many awards affirming this decision, the Carrier's liability was cured when it issued its denial letter to the Organization on December 14, 1984."

A logical conclusion to the aforementioned is that if the Carrier's liability was cured after it issued a denial letter on December 14, 1984, then they owe compensation for the time prior to that date. Unfortunately, it is in the next sentence that logic is abandoned when the Referee states:

"However, there has been no substantive showing on the property that any employee was deprived of work or harmed in any manner. Therefore, and view of all the circumstances, we conclude that damages are not appropriate."

Labor Members' Concurrence and Dissent to Award 28273, continued

When there is a time limit fault, it is not appropriate to examine the measure of damages, since that goes to the merits. Further, it is an attempt to render equity, and the Board is precluded from doing that.

The Time Limit Rule is very specific:

" . . . Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date the 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, . . ." [Underscoring supplied]

The Referee was presented forty-nine (49) awards which support the language underscored in the above quoted Rule. Illustrative examples:

" . . . This Board has no discretion with respect to this time limit. Under Rule 34(a) a claim must be allowed as presented when the Carrier fails to give timely notice. . . ." (Second Div. Award 7626)

" . . . we find that the Article, clearly and unequivocally without limitation or qualification, makes mandatory that the 'claim . . . be allowed as presented.' . . ." (Third Div. Award 10948)

" . . . In this case, it is immaterial whether the claim was valid or not. We are not concerned here with the merits of the claim, but applicability of the Time Limit Rule. . . . the Carrier became obligated to allow the claim as presented. . . ." (Third Div. Award 14759)

[Citing decisions on the Time Limit Rule], "These decisions do not delve into mitigation of damages, but, on the contrary, grant relief by a prescribed formula. We do not reach the issue of mitigation of damages under the particular circumstances of this case. . . . Claim shall be allowed as presented, . . ." (Third Div. Award 15723)

"The Board has held many times that the time limit requirements of the August 21, 1954 Agreement are mandatory and that failure to timely disallow a claim

Labor Members' Concurrence and Dissent to Award 28273, continued

requires that it "be allowed as presented." (Third Div. Award 20520)

". . . 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. . . . However, the Board holds that Claimants Dennis and Kowalski suffered no actual damages and may have no compensation awarded to the, other than for the procedural violation set forth above. . . ." (Third Div. Award 20723)

". . . we have held repeatedly that even where the claim is deemed 'fanciful' or 'without merit', Carrier is required to reject within the time limit set forth in the Rule. . . . Since Carrier failed in this contractual obligation we are compelled . . . to sustain the instant claim as presented." (Third Div. Award 20900)

". . . 'As presented' has been interpreted strictly in similar cases, denying offset where the employe was unavailable for work during the time in question . . . and denying deduction for amounts earned in another position . . ." (Third Div. Award 21787)

". . . In Third Division Award 10500, which conceptually supports this case, we stated in pertinent part that: ". . . This procedural section is mandatory rather than directive in that a definite penalty is provided therein for failure to write disallowance of claim within sixty days - the claim to be allowed as presented." (Third Div. Award 23511)

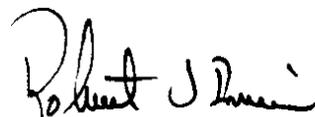
In light of the clear language of the Rule and the Board's precedent in such cases, it is clear that the Referee erred most critically when he addressed the question of the quantum of damages. The Claim should have been allowed, as presented, from its initial date until the Carrier finally made a response to the Claim.

Turning to the question of the merits, the Referee failed to address them. While it is true the merits were not under consideration during the period of time that elapsed until the

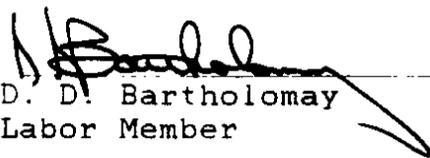
Labor Members' Concurrence and Dissent to Award 28273, continued

Carrier finally declined the continuing claim, the parties are left with no decision at all with the regard to the issue following the Carrier's denial of the Claim. Both the Time Limit issue and the merits were before the Board for adjudication.

This Award does not comply with the Railway Labor Act, in that it makes no finding on the merits. This Award does not conform or confine itself to matters within the scope of the Division's jurisdiction, in that it improperly determined the quantum of damages when the applicable Rule grants relief "by a prescribed formula". Hence, this Dissent.



Robert J. Irvin
Labor Member



D. D. Bartholomay
Labor Member



C. A. McGraw
Labor Member



William R. Miller
Labor Member



Ernest Monroe
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
TO
AWARD 28273, DOCKET TD-26835
(Referee Eckehard Muessig)

The Majority in sustaining the claim of the Train Dispatchers to December 14, 1984, completely ignored the record of handling, and in so doing, committed a gross error for the following reasons:

First. The Majority failed to recognize that the Organization was seeking to secure a right that it sought and failed to secure in a Section 6 Notice. The record before the Board established that a January 29, 1981 Section 6 Notice filed by the Organization sought to obtain for dispatchers, to the exclusion of all others, the right to operate electronic communications equipment installed in dispatching offices. The mere filing of the Section 6 Notice is admission that the disputed work is not exclusively clerical or Train Dispatcher's work, but is work that is incidental to a Train Dispatcher's duties.

The Majority simply failed to recognize, despite a showing of ample arbitral authority that the disputed work was not the exclusive work of the clerks, and therefore could be properly performed by the Train Dispatchers within the scope of their agreement.

Section 153 First (i) of the Railway Labor Act states:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The claim before the Board asserted that the work was outside the scope of duties set forth in the Train Dispatchers' Agreement with the Carrier, and the Board should have addressed that part of the claim in accordance with the above-cited provisions of the Act.

Second. The record before the Board in this dispute reveals that TCU/BRAC took a case to PLB 2474 claiming violation of its agreement when Train Dispatchers were used to operate CRT machines at Muncie, Indiana. The Train Dispatchers were given notice of the pendency of the dispute and responded to PLB 2474 "The rights of the employees represented by the ATDA are predicated upon agreements between the Carrier and the ATDA." PLB 2474 issued Award No. 1 denying TCU/BRAC's claim on the basis that the work (operation of CRT) is not specifically covered by the Clerks' Scope Rule and can be performed by Train Dispatcher positions.

Third. The claim for eight (8) hours' compensation was filed with Carrier October 5, 1984, while the record reveals that the occurrence giving rise thereto first took place on May 16, 1978, when the CRT machines were first installed at Muncie. The undisputed facts of record reveal that the practice of having Train Dispatchers transmit reports by means of CRT existed for at least 6 1/2 years prior to date of filing.

Obviously, the compensation claim was not filed within 60 days of the occurrence, and since it was not, the claim was barred from consideration by the Board.

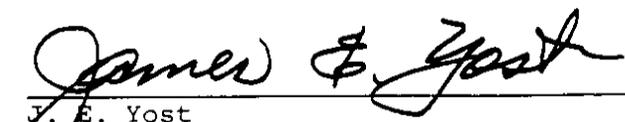
Fourth. The Train Dispatcher's time limit issue was not included in its formal claim to the Board, and since it was not, the question was not properly before the Board for a decision. Circular No. 1 of the NRAB states:

"STATEMENT OF CLAIM: Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired."

See Third Division Awards 21543, 17512 and 11006.

The Organization adduced no evidence to show that any Train Dispatcher was deprived of work or in any way harmed. Neither did it show that eight (8) hours per shift were consumed in performing the work of transmitting the reports by means of a CRT device. The time spent was de minimis, and we concur with the Majority's findings that "damages are not appropriate."

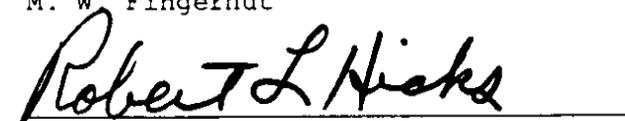
The Board had no Claim before it requesting compensation under the Train Dispatcher's agreement with the Carrier. Since it did not, the Board was without authority under the Railway Labor Act to award damages.



J. E. Yost



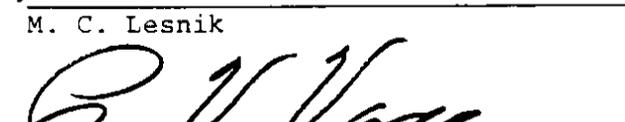
M. W. Fingerhut



R. L. Hicks



M. C. Lesnik



P. V. Varga

LABOR MEMBERS RESPONSE
TO
CARRIER MEMBERS RESPONSE
TO
LABOR MEMBERS CONCURRING AND DISSENTING OPINION
TO
AWARD 28273, DOCKET TD-26835

No comments are required with respect to the portion of the Carrier Members' Response which discusses the Claims merits and the date of the occurrence on which it was based. For all the reasons set forth in the Labor Members' Concurrence and Dissent, the Claim should have been allowed as presented until the date it was denied.

With respect to the contention that the statement of Claim did not incorporate the time limit issue, the Carrier Members' reliance on three isolated Awards is misplaced. Third Division Award 21543 is the only one cited which holds that the statement of Claim must include a formal claim on time limits. Third division Awards 17512 and 11006 were relied upon for precedent by the author of Award 21543.

In award 17512, the application of the time limit rule was not raised during on-property handling. That fact alone distinguishes the dispute in Award 17512 from the dispute treated in Award 28273, in which the time limit issue was raised on the property.

LABOR MEMBERS RESPONSE

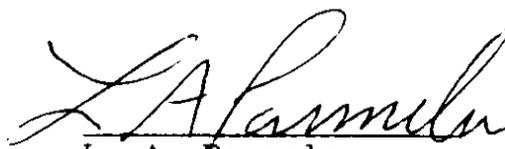
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In Award 11006, the time limit rule was not even at issue. However, other contentions were raised by the Organization there involved for the first time in its Submission. The Majority properly found that such new issues cannot be considered when appearing for the first time in an ex parte submission.

Therefore, Awards 17512 and 11006 have nothing at all to do with the question of whether the time limit issue must be included in a Statement of Claim, and the only Award cited which treats this matter is Award 21543.

By, Contrast, however, Third Division Award 23845 specifically addressed the question and held that the issue need not be included in the Statement of Claim, so long as it is raised during on-property handling. Further, there are large numbers of Third Division Awards which allow claims as presented on the basis of a carrier's failure to timely render its decision. See, as examples, Third Division Awards 23494, 23946, 26329, all post dating Award 21543.



L. A. Parmelee
Labor Member