

Award 16346

Docket 25617

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois

With Referee Carroll R. Daugherty

PARTIES TO DISPUTE:

**BROTHERHOOD OF LOCOMOTIVE FIREMEN
AND ENGINEMEN**

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Engineer H. G. Nelson, et al, Lake Shore Division (Fond du Lac District), for 100 miles October 13, 1944 and subsequent dates when required to make side trips from Wisconsin Rapids to Nekoosa, Wisconsin, and return, prior to departure of regular assignment, train #34."

EMPLOYES' STATEMENT OF FACTS: Engineer H. G. Nelson and various firemen were assigned to way freight #39-34 operating between North Fond du Lac and Wisconsin Rapids with Sunday layover at North Fond du Lac. On October 13, 1944 this crew made a side trip between Wisconsin Rapids and Nekoosa. Sometime later claim was made by Engineer Nelson for 100 miles account making this side trip prior to taking up service on his regular assignment, dating his claim back to October 13, 1944. The claim was denied by the company on the basis that it had not been submitted properly.

POSITION OF EMPLOYES: Schedule rule 3(g) of the engineers' agreement, reads:

"Engineers on assigned passenger runs tie up after completion of regular assignment, and if used in other passenger or freight service subsequent to completion of regular assignment, a new day or trip begins. The same principle applies to engineers on assigned runs when used prior to beginning work on regular assignment at initial terminal."

A letter dated May 12, 1937 from Mr. Pangle, Asst. to President, C&NW Ry., reads:

"May 12, 1937.

APPLICATION OF RULE 11, ENGINEERS' AGREEMENT.

Referring to previous correspondence and conferences in respect to this subject, and with specific reference to application of that part of rule 11, reading:

'Engineers required to make short trips from a terminal to an outlying point and return, from an outlying point to

a terminal and return, or from an intermediate point to another intermediate point and return, on account of engine failure, running for fuel or water, running for wreck car or carmen, or on account of a derailment, when such conditions arise in connection with their own train, will be paid continuous time or mileage.'

as applied to engineers working in assigned service.

In applying the above quoted portion of rule 11, which has been in effect for approximately thirteen years, engineers have been compensated on a continuous time basis for lapbacks and side trips regardless of the causes therefor. However, taking into consideration all relevant factors, including various decisions of First Division, National Railroad Adjustment Board, we are agreeable, effective June 1, 1937, to compensating engineers in regularly assigned service on the basis of not less than a minimum day for lapback or side trips which are not a part of their assignment and for causes other than those specified in the above quoted portion of rule 11; this with the understanding that time consumed in making lapback or side trip movement will be deducted from trip allowance.

Please advise.

Yours truly,

(Signed) M. E. Pangle
Asst. to President

NOTE: The above was accepted for the Engineers by General Chairman McGuire, May 18, 1937."

Schedule rule 3(g) of the firemen's agreement reads the same as the engineers' rule aforequoted.

The last paragraph of rule 11 of the firemen's agreement reads:

"Firemen or helpers required to make short trips from a terminal to an outlying point and return, from an outlying point to a terminal and return, or from an intermediate point to another intermediate point and return, on account of engine failure, running for fuel or water, running for wreck car or carmen, or on account of a derailment, when such conditions arise in connection with their own train, will be paid continuous time or mileage."

The rules herein quoted are in simple and understandable language. There is nothing ambiguous in the language of these rules. The National Railroad Adjustment Board has many times decided favorably on claims similar to this one. The officials of the C&NW Ry. certainly knew they were violating the rule when they made the lapback trip in question a part of the assignment and did not bulletin it for an engine crew in accordance with schedule rules. This statement is borne out by the fact that on this same run, #34-39, the company agreed to pay the claim of Engineer G. H. Williams, et al., for a side trip Wisconsin Rapids to Nekoosa and return prior to departure of train #34.'

The railway company has knowledge of all matter submitted herein which has been presented to them through correspondence or discussed orally in accordance with the National Railroad Labor Act. An oral hearing is not desired unless requested by the railway company.

CARRIER'S STATEMENT OF FACTS: On June 4, 1947, General Chairman, BLF&E, appealed to Director of Personnel a claim in favor of Engineer G. H. Williams, et al., for 100 miles December 2, 1946 and subsequent dates when required to make side trip Wisconsin Rapids to Nekoosa and return,

prior to departure on regular assignment, train No. 34. The General Chairman's letter attached hereto marked "Railway Company's Exhibit 1." The claim was made on the basis that Engineer Williams made a side trip outside of his assignment and prior to taking up service on train No. 34. Time slips were submitted by Engineer Williams covering dates December 3, 12, 14 and 17, 1946. The claim of Engineer Williams and others was allowed for December 3, 1946 and subsequent dates or until the side trip was discontinued or properly included as a part of the assignment. Director of Personnel G. F. Stephens' letter of July 28, 1947 to General Chairman R. C. Willott, BLF&E, allowing the claim of Engineer Williams, is attached hereto marked "Railway Company's Exhibit 2." In disposition of this claim of Engineer Williams, et al., for various dates December 2, 1946 and subsequent thereto, the following allowances were made in the second period of August 1947:

Engineer G. H. Williams	\$ 91.73
" J. R. Williams	5.73
" G. G. Steward	18.08
" A. R. Nielson	8.31
" F. Saft	7.96
" L. J. Costello	101.79

General Chairman Willott was advised of these adjustments by the Director of Personnel in letter dated September 22, 1947, copy of which is attached hereto marked "Railway Company's Exhibit 3."

On October 7, 1947, General Chairman Willott addressed Mr. G. F. Stephens, Director of Personnel, questioning the allowance and asking that similar allowance be made to firemen working with the above mentioned six engineers. This matter was discussed in conference and finally it was agreed, as outlined in the Director of Personnel's letter of November 14, 1947 to General Chairman Willott, copy of which is attached hereto marked "Railway Company's Exhibit 4," giving the General Chairman the benefit of the doubt as to whether the original claim covered firemen and allowing similar compensation for the firemen working with the engineers who had previously been allowed additional compensation. As a result of this additional concession, additional allowances were made to firemen, as outlined in Director of Personnel's letter to General Chairman Willott dated December 31, 1947, copy of which is attached hereto marked "Railway Company's Exhibit 5."

Subsequent to the disposition of the claim of Engineer Williams, et al., for this side trip, claim was submitted to the Director of Personnel under date of September 18, 1947 by General Chairman Willott, in favor of Engineer Nelson, et al., for 100 miles October 13, 1944 and subsequent dates when required to make this side trip from Wisconsin Rapids to Nekoosa and return, prior to departure on regular assignment, train No. 34. The time slips submitted by Engineer Nelson account making this side trip on October 13, 1944 and subsequent dates were not submitted to the railway company until April 23, 1947, and the claim was not progressed until subsequent to the disposition of the claim of Engineer Williams. Copy of General Chairman's letter dated September 18, 1947, is attached hereto marked "Railway Company's Exhibit 6." The records in the Accounting Department indicate Engineer Nelson's time slip for service performed on October 13, 1944, for additional compensation covering side trip Wisconsin Rapids to Nekoosa, Wisconsin, and return prior to departure on regular assignment, train 34, was first received by the railway company from Engineer Nelson on April 23, 1947.

POSITION OF CARRIER: It is the railway company's position that while there were no time limit rules on filing claims in effect on this railway at the time these claims were submitted, the fact remains that a claim was first submitted to the Personnel Department by the General Chairman, BLF&E, for an additional day account making this side trip on December 2, 1946 and subsequent dates, and which claim was allowed on the basis that

the date of December 2, 1946 was the date of first assertion to the railway company and which decision was accepted by the General Chairman, BLF&E, and no contention was made at that time that there were any previous claims to be submitted covering retroactive dates prior to December 2, 1946.

This method of handling time claims is not in accordance with the usual practice on this railway and is treacherous to say the least. If claim of Engineer Nelson, et al., is supported there is nothing to prevent the General Chairman, BLF&E, submitting similar claims in favor of engineers and firemen account making this side trip retroactive to 1940 or even 1930. In this connection, the principle involved in this claim has been settled many times by the First Division, National Railroad Adjustment Board. In Award No. 10946, issued without the assistance of a referee, the findings provided in part as follows: "It is held that claims are valid where it be shown work was performed forming basis of claim from date protest or claims were filed with the carrier. Claims for retroactive adjustment for dates prior to filing protest or claim with the carrier are denied."

In Award No. 11269 the First Division with the assistance of Referee Thaxter stated in the findings in part as follows:

"A road crew was here called on to do yard switching. Such work belonged to yardmen and there was a clear violation of the Agreement. Under ordinary conditions an affirmative award would be required. The Carrier relies on long continued practice. Practice, even though long continued, will not justify a violation of a rule. Where, however, there has been long continued acquiescence in such practice, a claim should not be sustained because of its continuance until the Carrier has been put on notice that the employes no longer assent to it. For a discussion of this subject see Award 4839. The practice here was of many years standing and had been assented to by the employes. Until the filing of their claim the Carrier had no reason to suppose that the employes objected to it. Claims should be sustained only for violations committed subsequent to the date when the Carrier had notice of protest."

In Award No. 12328, issued by the First Division with the assistance of Referee Mart J. O'Malley, it is stated in the findings in part as follows:

"The facts of record show that Engineer W. E. Dagy and Fireman B. Barr performed work on June 29, 1943, which was not a part of their regular assignment and which constitutes road work. However, the first notice of this claim was given to the carrier on June 7, 1945, a date long subsequent to the performance of the work.

"In Award No. 9543, this Division was confronted with a claim which was filed in a manner similar to that of the instant case. In the finding of the award cited above, it was said:

' . . . in such circumstances where a particular custom and practice has been followed, neither party participating therein should be permitted to assert a claim, arising out of such practice, until the other party has notice that the practice will not thereafter be recognized as a compliance with the agreement.'

"We accept the above award as being equitably sound.

"Because the claim is contrary to an accepted practice of settlement and demands redress for a period prior to the giving of notice of the refusal to accept settlement in conformity with the former practice, an affirmative award is not justified."

In consideration of the very definite position taken by the board in previous awards as indicated above and many other awards which could be

cited involving the very principle involved in this claim for retroactive allowance from October 13, 1944 should be denied.

All of the data contained in this submission have been presented to the duly authorized representative of the employes and have been made a part of the particular question in dispute. The carrier requests oral hearing.

(Exhibits not reproduced.)

EMPLOYES' REPLY TO POSITION OF CARRIER: The Board's attention is called to the position of the railway company, found on page 2 of their reply to our submission of the claim of Engineer H. G. Nelson, et al., and reading in part:

"It is the railway company's position that while there were no time limit rules on filing claims in effect on this railway at the time these claims were submitted . . ."

It will be noted from the above quotation that the railway company has admitted it was proper to submit prior claims. Up until the Washington Agreement of August 11, 1948 there was no time limit rule on this railway. It is also our understanding there are no time limitations in the Railway Labor Act.

The Board's attention is directed further to Award 5577 which was rendered without the assistance of a referee. In our submission of the claim in Award 5577 we stated in part:

"The firemen who were assigned to the Erie Street Coach Yard job are entitled to a day at the hostling rate for each and every day they were required to take their engine to the Chicago Avenue roundhouse and hostile same; even though claims were not submitted at the beginning of this work. We say this for the reason that there is no time limitation rule in the firemen's agreement, governing claims. Moreover, the carrier exercises the privilege of making deductions for over-payment without regard to time limitations."

The findings of this award read in part:

"The evidence of record shows that the claim of Fireman Charles Knudson has been satisfied per letter of February 4, 1939, over the signature of Assistant to President of the respondent carrier and the dispute herein turns upon a question of fact as to work done by other firemen forming a basis of like claim; viz: whether such other firemen on the Chicago Terminal Division were required to perform hostling service such as had been performed by Fireman Knudson whom the carrier allowed additional compensation on basis of one day at inside hostler's rate.

It is asserted that "There is no dispute regarding the time limitation in adjusting legitimate claims . . ."

It is accordingly held that where complainant firemen can show that they were in fact required to perform such hostling services as entitled Fireman Knudson to additional compensation on basis of one day at inside hostlers rate on a date or dates so alleged, claim asserted herein is held valid; otherwise it is denied."

The railway company has taken the position that the H. G. Nelson claim was not submitted to Mr. Stephens, Director of Personnel, until after the claim of Engineer Williams had been ordered paid. That may be true, however, the claim of Engineer Nelson, et al., was submitted to the local officials on April 23, 1947, and the claim of Engineer Williams, et al., was submitted to the personnel office June 4, 1947. While this information may be immaterial, it is called to the Board's attention only to show that Engineer Nelson's

claim was in progress of adjustment locally before any decision was rendered by the Director of Personnel on the Williams' claim.

In Award 13166 the referee stated in part:

"We are not impressed with the argument the claim should be rejected by reason of the time element with reference to the original date the claim herein was filed.

Award: Claim sustained."

When the violation of rule 3(g) was called to the attention of the general chairman he immediately notified the local chairman on the seniority district where the violation occurred, that the crew operating Wisconsin Rapids to Nekoosa and return to Wisconsin Rapids and then Wisconsin Rapids to North Fond du Lac, were not being paid in accordance with the schedule rules.

As aforesaid, it has always been the employes' position that the date of filing had no bearing on claims prior to August 11, 1948.

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

From the record, it appears that the sole issue in dispute between the parties and before this Board is whether the instant claims are too "stale" for affirmative adjudication. It is the carrier's contention that the claimants are estopped from achieving such adjudication because their claims (1) were not presented concurrently with those of engineer G. H. Williams and others, and (2) apply to a period beginning more than two years before the first date of the Williams claims.

The record discloses that the initial date of the Williams time slips was December 2, 1946 whereas the instant claimants, Engineer H. G. Nelson and others, are asking for 100 miles for side trips made beginning October 13, 1944. The latter claims were first asserted locally, by the submission of time slips, on April 23, 1947. The Williams claims were approved formally by the carrier on July 28, 1947; informal approval had been granted in conference, apparently during June. Appeal from local denial of the Nelson claims was taken by the General Chairman to the carrier's Director of Personnel on September 18, 1947.

It thus appears that, although the instant claims were filed locally more than four months after the Williams claims, the former were filed locally before the Williams claims were approved by the carrier. The instant claims, however, were not appealed until after such approval.

It appears, further, that whereas the Williams claims apply to an initial date (December 2, 1946) only one day before they were first filed locally, the first date of the Nelson claims (October 13, 1944) is roughly two and one-half years before local filing.

The Railway Labor Act contains no provision limiting the time within which claims may be filed by employes. Nor does the parties' agreement applicable to the instant case contain any such statute of limitation. In the absence of such formal prescriptions, should this Board be persuaded by the facts of this case to create one?

We think not. Under the circumstances as above set forth, such action by us here would amount to our writing a time-limit rule for the parties. And this we are not empowered to do. Accordingly we find that a sustaining award is in order.

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AWARD Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **FIRST DIVISION**

ATTEST: (Signed) J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June, 1953.