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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 23904
Docket No. 43528
88-1-87-E-1256

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM:

"Claim of Engineer M. O. Bennett and Various Firemen for Station Work performed while Engineer on the East Joliet and/or Clay Pit and Return. This claim is representative of many claims this individual has made. See attached claim and list of dates claim was presented. (Exhibit A)."

FINDINGS:

The First 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.

The claim herein seeks extra compensation contending that Claimant was required to perform station switching service while operating a road assignment, known as the "East Joliet - Clay Pit Turn," on various dates beginning July 21, 1986. The Rules relied upon by the Organization, to support its contention that this assignment is not a local train, are Articles 6(d) and 55. Article 6 (d) reads:

"(d) Local Trains

Local trains shall be those designated in timetable as such, also other trains required to load L.C.L. freight and trains designated as locals in Article 55. For local or way freight service fifty-two cents (52¢) per 100 miles or less shall be added to the through freight rates, according to the class of locomotive"

Article 55 reads:

"ARTICLE 55 - LOCAL TRAINS

(a) Local trains shall be those designated in timetable as such, also other trains required to load and unload L.C.L. freight.

(b) In addition to above, road engineers on the following runs to receive local pay:

Dell-Abbey Local (Clay Pit and Aurora)
Trains Nos. 31 and 32 (West Chicago and Aurora)
Trains Nos. 7 and 8 (Spaulding Turn) when doing Gravel Pit work
Runs advertised as Porter and Elsewhere"

While this matter was being handled on the property, Carrier contended that the assignment is actually a local train, and while it has not been designated as such in its timetables this is because on June 1, 1986, it combined three books, Timetables, Special Instructions and Safety Rules, into one publication which does not now list any trains at all.

Carrier also suggests that Article 55, along with other provisions of the Agreement, is "archaic." It points out that it has proposed revisions to the Agreement which incorporate changes required by the Award of Arbitration Board 458, as well as deleting references to obsolete assignments, practices or abandoned and retired segments of right-of-way, and submitted these to the Organization. However, the Organization declined adoption, preferring instead to wait until all interpretations of the Award were documented before revising its Agreement.

Before the Board, a jurisdictional defense was advanced. Here it was argued that the presentation of the Organization satisfied none of the requirements of Circular No. 1 and that by not demonstrating that a conference took place it has not shown that it complied with the requirements of the Railway Labor Act.

We are perplexed by the belated jurisdictional defense advanced in this case. While we agree that jurisdictional shortcomings may be raised at any time, even for the first time before the Board, we feel that they must be substantively presented, clearly defined and at least arguably supported by the record. We find none of these conditions to exist here. It is not enough, as was done here, to merely state that the Organization "... has satisfied none of the requirements of Circular No. 1..." and expect to prevail.

The only item that the instant procedural argument is even remotely specific on is an alleged failure on the part of the Organization to demonstrate that a conference took place on the property. In this regard we must note that the Organization's Submission affirmed:

> "It is affirmatively stated that the claim and dispute involved herein have been considered in conference and handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." (Emphasis added.)

Additionally, Carrier, which had the Organization's brief before it when it was preparing its Submission, has indicated in its Submission that the matter was handled in conference. Here Carrier stated:

> "All matters contained in the Ex Parte Submission have been discussed with the Organization in conference or by correspondence." (Emphasis added.)

From this it can only be concluded that the parties did, indeed, hold a conference on the property and both appear to be satisfied that they were in actual compliance with the Act and our Circular No. 1. A more definitive demonstration that a conference occurred had ought not now be required by the Board on its own motion. Accordingly, all arguments suggesting that we lack jurisdiction to consider this matter on its merits are rejected on the basis that they are either unsupported by the record or are inaccurate.

On the merits of the matter, we find that the provisions of the Rules relied upon support the position of the Organization. It is not disputed that Carrier has not designated Claimant's assignment as a local in the timetable. It is perhaps true that certain provisions of the Agreement are archaic and that the Carrier has made numerous operating changes since Article 55 was first adopted in 1941. But Carrier, nevertheless, has exclusive control over its timetables, both as to form and content. It was Carrier that decided to discontinue listing of trains within the timetable effective June 1, 1986. When it opted to proceed it most surely was aware of what was contained in Articles 6 and 55 of the Agreement concerning train classifications.

It may well be advisable for the parties to modify their Agreement from time to time to keep pace with changing operating conditions; however, Carrier is not free to unilaterally change Agreement Rules it decides are no longer necessary, nor may Carrier ignore Rules it feels are archaic, as it has done here. Importantly, from our consideration of this matter, we lack any authority to create new rules or modify existing rules for the parties. Were we to permit Carrier to prevail in this Claim, we would effectively be endorsing Agreement changes it unsuccessfully sought to have the Organization accept.

Additionally, Carrier has argued that practices or acquiescences have obtained with regard to the lack of designation of local trains within its timetables and that several early claims were filed but not progressed. We have examined the material submitted in support of these points and find it unpersuasive. As stated in Award 36, PLB 1605, "Silence, without more, does

not establish condonation...." With regard to claims which were denied without further appeal, as a minimum, it must be shown that someone with authority within the Organization was aware of the denial, before it can be assumed that the Organization was acquiescent.

In any event, the language of the Agreement is clear and unambiguous in meaning and intent. As we stated in First Division Award 23184:

> "Such contract language may not be ignored or modified by an alleged past practice, if one did exist."

The Claim will be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1988.

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION INTERPRETATION

With Referee John C. Fletcher

Award 23904

Docket 43528

PARTIES TO DISPUTE (Brotherhood of Locomotive Engineers
(
(Elgin, Joliet and Eastern Railway Company

INTERPRETATION

Carrier has requested an Interpretation of First Division Award 23904. In this request it presents the question:

> "Does the award require the payment of compensation to any employee of the Carrier other than Engineer M. O. Bennett?"

The question is answered "Yes." On November 6, 1987, the Organization (Petitioner herein) docketed a dispute with this Division setting forth a Statement of Claim reading:

> "Claim of Engineer M. O. Bennett and Various Firemen for Station Work performed while engineer on the East Joliet and/or Clay Pit and Return. This claim is representative of many claims this individual has made."

At that time the Organization affirmatively stated that the Claim and dispute had been considered in conference and handled in the usual manner with Carrier's Chief Operating Officer.

Carrier responded to the Claim on January 7, 1988. In its response, after quoting verbatim the Organization's Statement of Claim, Carrier set forth its version of the facts involved, opening with "Claimants, working the assignment ...." in the very first sentence. Carrier's second sentence also used "Claimants" in a plural sense. Elsewhere, its Submission makes reference to "Enginemen and their fellow crew members" referring to them again as "Claimants." Carrier's submission also contained an affirmation that "All matters ... had been discussed in conference or by correspondence."

INTERPRETATION

Award 23904

Docket 43528

It was not until after the record was closed and an Award was issued that argument was advanced (principally in a Dissent of Carrier Members) concerning the propriety of Claimants other than Engineer Bennett. Under well established Rules governing the procedure of this Board such argument is untimely and cannot be considered, even if it would be valid.

Carrier's request for an Interpretation echoes the Dissent. As such it does not seek clarification of an alleged ambiguity within the Award, the only proper basis for an Interpretation, but, rather seeks to have the scope of the Award modified on the basis of new argument developed in the Dissent.

In Award 23904 this Division sustained the Claim set forth in the Organization's Statement of Claim. This Claim was for Engineer Bennett and Various Firemen.

Referee John C. Fletcher, who sat with the Division, as a Neutral Member, when Award 23904 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 18th day of October 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 23904, DOCKET 43528
(Referee Fletcher)

The Majority confesses to being "perplexed by the belated jurisdictional defense advanced in this case." We shall attempt to overcome its bewilderment.

The Statement of Claim presented to this Board recites that it is filed on behalf of the Claimant "and Various Firemen"; that it is "representative of many claims" Claimant has made; and concludes "attached claim and list of dates claim was presented. (Exhibit A)." Exhibit A consists of a "Return and Delay Report" which requests allowance of one hour and 40 minutes for station work allegedly performed on March 29-30, 1987, and a second page which consists of a string of dates "of declined claims for Station Work," spanning the period from July 21, 1986, through June 9, 1987.

In our presentation of the dispute to the Board, we pointed out that the Organization's Submission, all page and one-half of it, did not attach a single piece of correspondence indicating the claim handling procedure, if any, followed in this case. Was there a specific claim or claims filed under the Agreement? If so, on behalf of whom? Was it for a single date, or multiple dates? What evidence was introduced on the property? What arguments and positions were taken by the parties? The Statement of Claim refers to "Various Firemen." If "Various Firemen" are involved, how can this Organization represent them before the Board when it does not hold the contract on the property? What

does the "Various Firemen" Agreement provide? What is the position of the Organization that does represent "Various Firemen" with respect to its Agreement?

The above questions are more than simply of passing curiosity. Circular No. 1 of this Board, which contains the Board's Rules of Procedure, recites under the section "Form of Submission":

> "Statement of Claim: Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired.
>
> "Position of Employees: Under this caption the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."

A perusal of the Submission filed by the Organization in this dispute shows a complete disregard of the most fundamental requirements of the Board's Rules of Procedure. The Board, in Awards too numerous to cite, has held that the Rules of Procedure are not merely hortatory but constitute jurisdictional requirements. A failure to follow such Procedures must result in a dismissal of the dispute.

Indeed, if "Various Firemen" are involved, and covered by the Award, the Award is completely invalid as no Third Party notice was provided the Organization representing them.

It is clear that the Award of this Board is unenforceable for at least two reasons. First, the Board exceeded its jurisdiction in sustaining a claim that did not comply with the jurisdictional requirements of this Board. Second, since we have

no idea what precise claim, if any, is before the Board, the Carrier can have no clue as to what it is to do in complying with the Award.

M. W. Fingerhut

R. L. Hicks

CARRIER MEMBERS' REPLY
TO
LABOR MEMBERS' SUPPORTING OPINION
TO
AWARD 23904, DOCKET 43528
(Referee Fletcher)

In our Dissent to the Award, we pointed out that the Organization's failure to provide the Board with the correspondence, if any, exchanged between the parties in the handling of the dispute on the property should have resulted in a dismissal of the dispute. The Organization's Supporting Opinion provides further evidence that our position was well taken.

Our Dissent pointed out just a few of the problems raised by the Majority's approval of the cavalier approach taken by the Organization in its handling of the dispute before the Board. As a prime example, we examined the issue of "various firemen." The Dissent pointed out that there is no reference to "various firemen" except in the Statement of Claim, and inasmuch as the file contains none of the on-property handling of the dispute, the Board does not even know if a claim was filed on their behalf (whoever they may be) on the property. What the Board does know is that the Organization does not represent the craft of firemen on this Carrier and we further know that no Third Party Notice was ever given to the Organization that does represent the firemen.

The Organization Members' response is histrionic. First, it complains that the Minority never raised any issues dealing with "various firemen." An examination of the file before the Board, however, shows that except for the phrase "various firemen" in

the Statement of Claim, the term "firemen," various or otherwise, is not to be found anywhere in the dispute. Indeed, Exhibit A to the Statement of Claim, which lists dates the Agreement allegedly was violated, are all on behalf of "M. O. Bennett," the engineer named in the Statement of Claim. Furthermore, the only Agreement provisions set forth in the Organization's Submission are taken from the Engineers' Agreement. Nothing was presented or argued concerning "various firemen." If the Organization intended the Board to sustain a claim for "various firemen", it had the burden to establish its claim. Surely, the author of the Supporting Opinion knows, or should know, that the burden of proof is upon the moving party before the Board, not the Respondent or the Carrier Member of the Board.

The Supporting Opinion next states that there is a 30-year history that provides that one labor member of the Board may represent a claimant belonging to another craft by authority of an agreement so providing. We do not take issue with that point. What we do take issue with is the Organization coming before this Board in an effort to sustain a claim on behalf of "various firemen" on the basis of its Agreement with the Carrier, an Agreement that does not cover firemen, and a craft which it does not even represent. We know of no precedent for such action.

The Supporting Opinion contains a sentence that reads: "The parties did not join the 'Various Firemen' aspect of the claim before the Board." We agree with the statement completely. It then goes on to state that it was the obligation of the Carrier, or the Carrier Member of the Board to join the issue. The

Carrier is thus faulted for not joining an issue that is not even mentioned in the Submission of the Organization. Was it raised by the Organization in the on-property handling of the dispute? The Board has no was of knowing as no on-property correspondence was presented to the Board.

Finally, we have the ultimate in simplistic reasoning wherein the Supporting Opinion dismisses the Board's failure to require Third Party notice to the Organization that does represent "various firemen" on the ground that it was the responsibility of the Carrier Member to make a "motion" that such notice be provided. The writer of the Supporting Opinion apparently believes that the statutory jurisdiction of the Board can be waived by the Board. If the Organization intended to rely upon the UTU Agreement, it should have notified the Board to provide Third Party notice to the UTU. If it neglected to do so, and the Board likewise failed to take the appropriate action, the Board's Award is a nullity.

We have one final comment to make. Some 54 years ago, the Board issued Circular No. 1 to establish the Rules of Procedure of the Board. The requirements included the provision that the parties to the dispute present to the Board "all documentary evidence submitted in exhibit form," and that such evidence "must affirmatively show the same to have been presented to the Carrier and made a part of the particular question in dispute." The wisdom of the Board in adopting such requirements is fully demonstrated in this dispute. The Organization did not include a single scrap of documentary evidence to show the on-property handling of the dispute. Had it done so, it is possible that

much, if not all, the issues raised in the Dissent might have been resolved. In the argument before the Board, the Board's attention was called to the failure of the Organization to follow the dictates of Circular No. 1. Each specific deficiency was presented to the Board. It was pointed out to the Board that in the absence of any evidence of the position taken by the parties on the property, the Board could not even determine the issues involved, let alone the position taken by the parties on the property with respect to such issues. The Majority nonetheless determined to disregard its own Rules of Procedure and by so doing, has rendered an Award that is unclear with respect to its scope and, depending upon its scope, may be a complete nullity.

M. W. Fingerhut

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Robert L Hicks

R. L. HICKS