NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21011

THIRD DIVISION

Docket Number DC-20760

Dana E. Eischen, Referee,

PARTIES TO DISPUTE: (Joint Council of Dining Car Employees
(Local 370
(
(Robert W. Blanchette, Richard C. Bond, and
(John H. McArthur, Trustees of the Property
(of Penn Central Transportation Company,
(Debtor

STATEMENT OF CLAIM: (a) Claim of the Joint Council of Dining Car Employees Local #370 on the property of the Penn Central Transportation Company for and behalf of employees Madaline Wyleczuk, John M. McGrath, and Eugene Rivera et al, who were denied their working rights on Trains #160 and #161 when the Penn Central Transportation Company on April 29, 1973 unilaterally put on there trains in the Buffet Coach and the Parlor Lounge Car8 employees of another Union (Food Workers). There trains were operated within the limits of the New Haven Region and the other Union (Food Workers) did not have a collective bargaining agreement covering this territory. In so doing the Penn Central Transportation Company not only violated the collective bargaining agreement of Local 370, but did this to circumvent in particular Rule 6 paragraph 3 of the Agreement dated October 1st, 1953, which was and is still the recognized collective bargaining agreement, including all the supplemental amendments.

(b) That the Penn Central Transportation Company make these employees whole for all wages, vacation time and any fringe benefits that may have been impaired by this action on the part of the Carrier. That the Carrier be admonished to adhere to the Collective Bargaining Agreement as well as Section 6 of the Railway Labor Act.

OPINION OF BOARD: Analysis Of the instant record indicates that, although voluminous, it 18 substantively anemic and factually sparse. Although the claim references three named claimants and includes the comprehensive designation "et al," there is no support in the record for a finding that other than the three, who were formerly employed on Trains 160 and 163 (New York to Boston and return) are covered by the claim.

A8 nearly a8 we can determine from this record the following are the operative facts: Carrier until April 29, 1973 provided buffet coach and parlor lounge service on Trains 160 (New York to Boston) and 163 (Boston to New York). Claimants, based in New York, worked these runs and made one round trip each day. Effective April 29, 1973 Carrier discontinued food service on those trains and Initiated such service on Trains 179 and 176 (Washington to Boston and return). Claimants had an opportunity to bid On

these new positions but elected not to do 80. Claimant John M. McGrath, who is the Organization's General Chairman, protested these changes before they were initiated and filed the instant claim after the changes, alleging violation of various schedule agreements as well as the Merger Protective Agreement. The claim was handled through various stages on the property without resolution and was appealed to our Board.

While the matter was pending before our Board, and before the record was closed by receipt of ex parte and reply submission, the General Chairman and Carrier officials renewed discussions on the property on July 1, 3 and 9, 1974. *Carrier* maintains that an oral agreement to settle the claim was reached during these discussions and commemorated in a letter of July 19, 1974 from it8 Manager-Personnel & Labor Relation8 to General Chairman McGrath. That letter reads as follows:

> 'This has reference to the discussions we had on July 1, 3 and 9, 1974, in connection with the claim of the Joint Council of Dining Cu Employees, Local 370, on behalf of employees Madeline Wyleczuk, John M. McGrath and Eugene Rivera, which was submitted to the National Railroad Adjustment Board.
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> A8 a result Of Our discussion, and on the basis of discussions previously had during the handling of this case on the property, it is understood that the only claimants involved are Madeline Wyleczuk and John M. McGrath. In addition, it was agreed that you would arrange to have the case withdrawn from the Board. In consideration thereof, and without prejudice to our position, you agreed to accept 8 total of $250.00 for each claimant, i.e., Madeline Wyleczuk and John M. McGrath, as complete and final settlement of this case.
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> Arrangement8 have been made to compensate the employees accordingly."

Curler aver8 that following the alleged settlement, General Chairman McGrath advised that the International Secretary-Treasurer of the Union refused to honor the settlement and refused to withdraw the claim from the Board. Carrier therefore urges that the claim be dismissed as moot in that it was settled on the property and cite8 substantial authority in the Awards of the various Divisions for this position. Curler also contended strenuously in it8 ex parte submission that the claim was untimely appealed to our Board. Finally, Carrier's advocate raised a jurisdictional issue in oral argument in this case, to wit: that the claim is premised upon alleged violations of the Merger Protective Agreement which contains it8 mm exclusive dispute settlement machinery and, accordingly the claim is outside the scope Of this Board's jurisdiction.

The Petitioner Organization on *behalf of the* employees contends that the General Chairman had no authority to settle the claim or to arrange for the withdrawal of the claim from the Third Division. Additionally, the Petitioner denies that McGrath did in fact agree to the settlement referenced in the July 19, 1974 letter and contends that raw is a deliberate attempt fraudulently to mislead thb mud. Alternatively, Petitioner asserts that the question of settlement is "a new issue that was not part of the handling of the claim on the property and cannot be considered by the Board." Petitioner also denies that the claim was not timely processed to our Board, citing numerous Awards to support it8 method of computing the time requirements for filing rather than that used by Carrier.

We have reviewed carefully the petition for dismissal of the Carrier, the numerous ground8 cited therefor and the reply arguments *of* the Petitioner with respect to • ech. We shall treat these matters seriatim as they were raised on the record. With respect to the timeliness question, we understand that this defense was abandoned in oral argument and we need not address it further herein. The motion for dismissal based on settlement and mootness, as well as the jurisdictional objection flowing from allegation of Merger Protective Agreement violation stand on a different footing and may not be *ignored.*

Our review of the record convinces us that there was a settlement between General Chairman McGrath and Carrier's Manager-Personnel & Labor Relations on or about July 9, 1974. Petitioner correctly asserts that the letter of July 19, 1974 is not a jointly executed Letter of Agreement and may not itself be considered the settlement agreement of the parties. But there is no Agreement provision to which our attention has been drawn which requires • vrltten settlement agreement, albeit such a practice would seem advisable to avoid situations such as the one presented herein. Nonetheless, it is well understood that oral settlement agreements, premised upon the informed Rood faith and integrity of the respective representatives, are commonplace in the handling of grievances. Even more basic is the accepted principle of labor relations that settlements in grievance handling by duly authorized representatives are final and binding on both parties and, absent express contractual requirement, am not subject to ratification or rejection by Other6 away from the table. To hold otherwise would be to undermine the integrity and validity of the lower level grievance procedures on the property which are designed to facilitate and encourage prompt, equitable and binding resolution of claims short of arbitration.

While them is mta signed settlement agreement on the record, and the July 19, 1974 letter is not itself that agreement, the letter may be taken as some evidence that such • settlement was had. ✡ℳ are also impressed by the lack in the record of any disavowal whatsoever from General Chairman McGrath that the settlement was made. Rather, all such protestations come from the International Secretary-Treasurer who avers

that McGrath did not have authority to settle and, therefore, could not make an agreement to settle the instant claim. We do not concur. The General Chairman on the property customarily and ordinarily processes claims, as did McGrath in this case. There can be no doubt that he is cloaked with actual and apparent authority to settle such claims in a final and binding fashion. Moreover, the evidence of record taken as a whole, even though circumstantial and not direct, compels a conclusion that he did settle this claim on the property after it was submitted to this Board. The Agreement is silent on the point but it cannot be gainsaid that the policyofSectior.3, First of the Railway Labor Act is to encourage and promote such settlements which might be made bt any time short of an Award disposing of the claim.

In consideration of the entire record and for the reasons 66t forth hereinabove we conclude that the claim is moot. An agreement to settle has been made on the property and, accordingly, the claim shall be dismissed and the parties directed to implement the settlement agreement reached on the property.

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 an agreement to settle was reached on the property.

A W A R D

The claim is dismissed and the parties are directed to implement the settlement agreement reached on the property.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated bt Chicago, Illinois, this 31st day of March 1976.

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760

Award 2101.1 is not only erroneous but lacks a basis in reason or fact, violate6 well-established principles of this Board a6 to when a record becomes closed prohibiting the submission of new issues, new evidence or exhibits, twist.8 the fact8 to lend support to a decision not based on reason or fact, exceeds the jurisdiction granted to this Board by making an Agreement for the parties and endorses fraud.

pocket DC-20760 should not have presented the problems evident in most cases wherein facts and circumstances are presented by each party and are often contested and/or disputed. The Carrier in Docket DC-20760 did not present any facts so there was no conflict with the facts presented by the Employes. The record shows that Carrier asked for, and was granted, the maximum mount *of* time allowed to reply to the Employes' Ex Parte Submission, including the facts detailed therein. But after asking for all of this time to make reply, the Carrier wrote the Executive Secretary stating "The Carrier doe6 not desire to file a reply".

The Carrier did not deal with the merits of the claim in its Ex Parte Submission merely making a petition to the Board to dismiss the claim on two procedural grounds. The Employes' Ex Parte Submission addressed itself to the merit6 of the claim making material factual statements. The Carrier advised the Third Division that it did not desire to file a reply to the Employes' Ex Parte Submission leaving the material factual statements contained therein concerning the merits of the claim uncontroverted and undenied. The following Awards involving such situation6 were twice presented to Referee Eischen for consideration at two panel argument sessions regarding Docket DC-20760 before Award 21011 was adopted:

Award 19927 (Lieberman) -

> "In addition to the foregoing, Petitioner did not elect to file a rebuttal statement to Carrier'8 ex parte submission thus leaving material factual statements uncontroverted and undenied. See Award 19849 end First Division Awards 22230, 22231, and 19808."

Award 20041 (Sickles) -

> "*** Awards of this Division have concluded that when material statements are made by one party and not denied by the other party, so that the allegations stand unrebutted, the material statements are accepted as established fact (especially when there is both tine end opportunity to deny). See Awards 9261 (Hombeck), 12840 (Hamilton), 14385 (Wolf). See also Awards 14399 (Lynch), 15035 (Franden) and 18605 (Rimer)."

The Statement of Claim presented in Docket DC-20760 is shown in Award 21011. This Statement of Claim clearly set forth the cm% of the dispute, stating in part:

> "(a) Claim of the Joint Council of Dining Car Employees Local #370 on the property of the Penn Central Transportation Company for and behalf of employees Madaline Wyleczuk, John M. McGrath, and Eugene Rivers et al, who were denied their working rights on Trains #160 and #161 when the Penn Central Transportation Company on April 29, 1973 unilaterally put on these trains in the Buffet Coach and the Parlor Lounge Cars employees of another Union (Food Workers). These train8 were operated within the limits of the New Haven Region and the other Union (Food Workers) did not have a collective bargaining agreement covering this territory. ***"

Award 21011, considering the facts set forth in the Statement of Claim and fully detailed in Docket DC-20760, states in part:

> "Analysis of the instant record indicates that, although voluminous, it is substantively anemic and factually sparse. Although the claim references three named claimants and include8 the comprehensive designation et al, there is no support in the record for a finding that other than the three, who were formerly employed on Trains160 and 163 (New York to Boston and return) are covered by the claim.
>
> "As nearly as we can determine from this record the following are the operative facts: Carrier until April 29, 1973 provided buffet coach and parlor lounge service on Trains 160 (New York to Boston) and 163

> "(Boston to New York), Claimants, based in New York, worked these runs end made one round trip each day. Effective April 29, 1973 Carrier discontinued food, service on those trains and initiated such service on Trains 179 and 176 (Washington to Boston snd return). Claimants had en opportunity to bid on these new positions but elected not to do so. Claimant John M. McGrath, who is the Organization's General Chairman, protested these changes before they were initiated end filed the instant claim after the changes, alleging violation of various schedule agreements as well as the Merger Protective Agreement. The claim was handled through various stages on the property without resolution and was appealed to our Board."

The "operative facts" sat forth in Award 21011 are as far fetched and illogical as the deter&nation regarding the alleged agreement to settle the claim. Award 21011 states "Analysis of the instant record indicates that, although voluminous, it is substantively anemic end factually sparse". Actually, Award 21011 is "substantively anemic" or worse when correct facts are iguored end replaced by what are alleged to be facts which are not supported by the record and/or the Statement of Claim which, if they had been read end considered, reveals the actual facts. Award 21011 is "factually sparse" in terms of considering the facts detailed in the record or in terms of providing a sound basis for what it put into Award 21011 as being the basis for and/or the cause of the dispute in Docket DC-20760.

If the Statement of Claim alone had been read and considered, it Should have been apparent that the trains involved in the dispute were No. 160 and No. 161 not trains No. 160 end No. I.63 as stated in Award 21011. Contrary to what Award 21011 states, the Carrier did not discontinue food service on trains No. I.60 and No. 161. The food service was continued on these trains but by using employes not covered by the applicable Agreements to man or work these trains. That was what the dispute was all about as the Stat-t of Claim clearly revealed.

As there was no substitution of food service on trains Nos. 179 end 176 for the food service on trains Nos. 160 and 1.61 as Award 21011 states, there is hardly any need to refute the statement in Award 21011 reading "Claimants had an opportunity to bid on these new positions but elected not to do So".

The two paragraphs in Award 21011 supposedly detailing the "operative facts" *contain* a "voluminous" misconstruction of what the undisputed and uncontroverted facts were in this dispute. Regardless of the size or extent of the record, the facts contained in the record should be considered to adjudicate a dispute and the decision should be based on facts rather than fantasy as in Award 21011.

The basis for the decision in Award 2101.1. is that the claim was moot because it was settled by agreement between the parties on the property. Yet the AWARD is "The claim is dismissed and the parties are directed to implement the settlement agreement reached on the property". This is an admission within Award 21011 itself that a settlement of the claim had not yet been made, i.e., the case was not withdrawn from the Board and no money peyments were made, which w-are the two terms or conditions of the alleged Agreement.

Award 21011 states "Carrier maintains that an oral agreement to settle the claim was reached during these discussions end commemorated in a letter of July 19, 1974 from its Manager-Personnel& Labor Relations to General Chairmsn McGrath". The lest page of the Employes' Reply or Rebuttal Submission pointed out that the Carrier was being dishonest, stating "The Carrier's petition for the Board to dismiss the claim because a cash settlement has been made end/or an agreement made to settle the claim on the property, end, therefore, the claim is moot is untrue aud a deliberate attempt to fradulently mislead the Board and should not be allowed".

Award 21011 states "While there is not a signed settlement agreement on the record, and the July 19, 1974 letter is not itself that agreement, the letter may be taken as sane evidence that such a settlement was had". This is entirely wrong because this allowed reising issues before the Board that were not presented on the property, allowed *new* evidence to be presented and/or accepted exhibits that were dated after the dispute was submitted to the Board (in fact dated after all the normal extensions of time requested by the Carrier for filing its Ex Parte Submission had ran out). But even more important is the fact that Referee Eischen's attention was specific- drawn to the fact that the July 19, 1974 letter was fradulent evidence.

In each of the panel argument sessions regarding Docket DC-20760 the following statements, which appeared on page 2 of the Carrier's Ex Parte Submission, were pointed out:

> "On July 17, 1974, General Chairmen McGrath, without further explanation, advised Mr. Blake that Mr. Richard W. Smith, Secretary-Treasurer of the Dining Car Employees Union refused to honor the agreed-upon settlement and refusedtowithdrawthe claim from the Board.

and

> "*** The terms of this agreement, which are set forth in Mr. Blake's letter of July 19, 1974, Attachment 'A', provided that only Claimants Madeline Wyleczuk and John M. McGrath were involved in the dispute and that the General Chairman would arrange to hare the claim withdrawn from the Board in consideration of the payment of $250.00 to each Claimant, Madaline Wyleczuk end John M. McGrath, es complete and final settlement of the claim. The Carrier has arranged to pay the Claimants the agreed-upon sums."

Award 21011 states "Carrier maintains that an oral agreement to settle the claim was reached during these discussions and commemorated in a letter of July 19, 1974 from its Manager-Personnel & Labor Relations to General Chairman McGrath.That letter reads as follows: ***". Award 21011 after citing "that letter" in full states "Carrier avers that following the alleged settlement, General Chairman McGrath advised that the International Secretary-Treasurer of the Union refused to honor the settlement and refused to withdraw the claim from the Board". But do you commemorate a settlement that has not been reached and/or has been rejected? If you do commemorate it, what is the purpose of such commemoration?

The Carrier stated that on July 17, 1974 the settlement was refused. Then, pray tell, what was the purpose of the Carrier (two days after it admits being advised that there was no existing agreed-upon settlement) writing the July 19, 1974 letter which "commemorated" an oral settlement which the Carrier says had already been rejected. The dates the Carrier itself entered into the record show the obvious purpose was to fraudulently establish there was an oral agreement to settle the dispute. The Carrier stated "Arrangements have been made to compensate the employees accordingly" but no money payments were actually made. The Carrier did not intend to make money payments as two days

prior to the July 19, 1974 commemorating letter the Carrier states it had been advised the settlement, if in fact proposed, was rejected. The Employes pointed out that the record shows no evidence of monetary payments being made, though such evidence surely would have existed if payments had been tendered, and proof of money payments should have been presented. The reason no evidence of money payments was presented was because such evidence did not exist and this clearly showed that an Agreement had not been consummated and further showed that the Carrier knew there was no such Agreement.

The record in this regard shows the Carrier desperately wished to reach an Agreement to settle the dispute because the Carrier had nothing to offer on the merits, but being unable to obtain such an Agreement the Carrier proceeded to fraudulently create an Agreement to settle the dispute for whatever value it might have. The pathetic part of it is that Award 21011 going counter to the record took the bait - hook, line and sinker - and swallowed the story that there was an Agreement consummated to settle the claim and thereby endorsed the Carrier's fraud.

The Carrier did not make any comments on the merits of the dispute in its E-x Parte Submission and elected not to make a reply to the Employes' Ex Parte Submission. The only exhibit presented by the Carrier was Exhibit A to the Carrier's Ex Parte Submission, which is the letter dated July 19, 1974 quoted in Award 21011. The Employes' letter of intention to file an Ex Parte Submission, closing the record on the property, is dated February 8, 1974. The final date for Ex Parte Submissions, after four extensions of time requested by the Carrier, was July 10, 1974. The July 19, 1974 letter came much too late to be considered as an issue raised on the property and, hence, properly before the Board for consideration. If the Carrier had complied with the Third Division's requests and/or instructions for filing of the Carrier's Ex Parte Submission, a letter dated July 19, 1974 would not have been available to submit to the Third Division. The Carrier failed to comply with the Executive Secretary's instructions but was given sn additional extension of time to present its Ex Parte Submission.

Referee Eischen was presented ample Award authority on the following points:

(1) Awards showing that the record is closed upon giving a Letter of Intent to file an Ex Parte Submission with the Third Division:

14355 (Ives), 20123 (Blackwell), 20587 (Sickles), 20773 (Sickles), 19832 (Sickles), 18120 (Dorsey).

(2) Awards showing that new issues cannot be raised for the first time before this Board:

4-3245 (Eischen), 4-3280 (Eischen).

(3) Awards showing that new evidence cannot be presented to the Board:

2-6883 (O'Brien), 16053 (Kensn), 20214 (Sickles), 20558 (Liebermsn), 20598 (Eischen), 20607 (Sickles), 20620 (Sickles).

(4) Awards showing that exhibits dated after the date the dispute was submitted to the Board must be rejected and cannot be considered as evidence by the Board:

13029 (Hall), 18635 (Devine).

(5) Awards showing that it must be proved an alleged oral understanding or agreement was reached:

17060 (Dugan), 12251 (Seff), 20190 (Sickles).

(6) Award showing that a party should not be faulted for engaging in discussions or attempts to settle a dispute:

4-3289(Eischen).

(7) Awards showing that the Board has no power to make Agreements for the parties but is limited to applying and/or interpreting Agreements already made:

4480 (Carter), 18423 (O'Brien).

The facts in Docket DC-20760, Award authority, and firmly-established principles of the Third Division were all ignored when Award 21011, written by Referee Eischen, was adopted by a Majority comprised of Carrier Members end Referee Eischen. Referee Eischen's adamant refusal to consider the facts and Award authority (and all of the points detailed herein were presented - many of them for the second time when the case was reargued) or to correct the obvious errors in Award 21011 (a revision of the original proposed Award resulted only in correction of a typographical omission and a punctuation correction) leaves room for doubt as to his ability to perform the function as detailed in Section 3 First (l) of the Railway Labor Act, i.e., "a neutral person, to be known as 'referee', to sit with the division as a member thereof and make sn Award".

LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760 (Cont'd)

Award 21011 thwarts the purpose for which the National Railroad Adjustment Board was created, which is to adjudicate disputes by interpreting or applying agreements as written by considering the facts and data in evidence.

I hereby register the strongest possible dissent to Award 21011 which is at the vary best a travesty of justice and/or the adjudicating process.

J. P. Erickson
Labor Member

CARRIER MEMBERS' ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 21011, DOCKET DC-20760. (Referee Eischcn)

While the mission of a dissent has been described by us in previous documents, we hasten to point out again that nothing is gained from personal denunciations of referees. If the award, as contended, "endorses fraud" then it should be the purpose of the dissent to spell that out and in doing so, meet the areas of concern set forth by the Referee.

In the present case, the Wajoritp made the excellent point that the General Chairman was alleged to have made an agreement settling the dispute. There was no disclaimer of such an agreement by the General Chairman, although there was full opportunity to do so. It is well recognized that silence and inaction when there is a duty to sneak, amounts to assent in contractual matters and is treated as an estoppel, or at the'very least, a justifiable inference may be drawn from the silence. Restatement of Contracts §72 and Williston on Contract8 §91.

In any event, the actions of the parties as evidenced by the record presented to the Board, represented a novation or an accord and satisfaction of the original claim which fully extinguished the debt, even assuming the original claim was meritorious. The

Majority's decision is well founded and we concur.

W. F. Euker

P. C. Carter

J. E. Mason

G. L. Naylor

G. M. Youhn