Award No. 3298
Docket No. 2621
2-MP-MA-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Machinists)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement Machinists C. M. Allen, R. B. Moorman, G. T. Harris and Q. M. Downs were improperly furloughed from Gurdon and Carmen, who have no contractual rights to perform Machinists' work, were assigned to perform the duties contracted to the Machinists.

2. That on January 15, 1956, the employes' representative appealed to representatives of the Carrier, Mr. V. M. Driskill, General Foreman, and he did not answer the appeal until April 11, 1956, which is in direct violation of Article V of the August 21 Agreement.

3. That accordingly the Missouri Pacific Railroad Company be ordered to compensate the above named Machinist employes for all time lost since January 15, 1956.

EMPLOYES' STATEMENT OF FACTS: The Missouri Pacific Railroad Company, hereinafter called the carrier, made the election at the close of shifts effective Sunday, January 15, 1956, to lay off all of the machinists at Gurdon, Arkansas, namely, C. M. Allen, R. B. Moorman, G. T. Harris and Q. M. Downs, hereinafter referred to as the claimants, and this is affirmed by the submitted copy of Bulletin No. 4 dated January 9, 1956 at North Little Rock, Arkansas, identified as Exhibit A.

The carrier likewise rearranged the carmen force at Gurdon so as to cover the jobs of the machinists who were furloughed with carmen. The locomotive units handled by the carrier at Gurdon, Arkansas, according to information furnished us, are as follows:

ommended by Emergency Board No. 106 and adopted by the parties in the agreement of August 21, 1954.

All of the other crafts parties to the shop crafts agreement, effective September 1, 1949, on this property have recognized the right of the carrier to do what was done at Gurdon in the instant case, which has been the practice since the railroad was first operated, and continues to be the generally accepted practice throughout the property. Said practice was written into the shop crafts agreement in 1922 and carried forward in all subsequent agreements without any complaint having been made and without any change having been requested, although the shop crafts agreement has been revised numerous times.

In view of the facts set forth above, there is no basis for contending there has been a violation of the provisions of the agreements between the parties; accordingly the action taken at Gurdon is contemplated by the agreement and in accordance with practice on this property which has existed continuously since the railroad was built.

This claim should be denied because it is without merit.

The contention by the employes that Article V (a) of the agreement of August 21, 1954 was violated should be rejected for lack of merit and without basis in fact.

In the event your Board concludes there was a violation of the provisions of Article V (a) of the agreement of August 21, 1954, monetary claims should not extend beyond the period beginning January 16, 1956 and ending with April 11, 1956, less earnings during said period, and the amounts of money which could, in the exercise of due diligence, have been earned during said period.

FINDINGS: The Second 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 employe within the meaning of the Railway Act as approved June 21, 1934.

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

Parties to said dispute were given due notice of hearing thereon.

Effective January 15, 1956, claimants' jobs were abolished by bulletin. On the same date, claim was filed requesting that the named claimants "be compensated for all time lost from the date of January 15, 1956 until this violation is corrected and machinists listed above returned to their jobs".

The claim was declined April 11, 1956, by the same general foreman who acknowledged receipt of the original claim.

The facts and rules interpreted in Award No. 2607 (Docket No. 2396) between the same parties are in general, identical with the instant case. That claim was denied on the premise that there was not sufficient work to occupy a machinist and that the carmen were giving only brief inspections to the diesels. We agree with that conclusion. However, in that case the Division did

not have before it the automatic provisions of Article V of the August 21, 1954, Agreement.

We are of the opinion that time limits fixed as agreed to by the parties should be strictly applied. This claim falls within the type known as a continuing claim. "Continuing claims" are a device adopted by the parties to avoid a multiplicity of claims, to avoid the need for filing a new claim every day for that day's violation.

Article V.-1. (a) of the August 21, 1954 agreement provides explicitly, "All claims must be presented . . . within 60 days . . . Should . . . such claim be disallowed, the carrier shall, within 60 days . . . notify in writing of the reasons . . . If not so notified the claim or grievance shall be allowed as presented,".

At first glance the rule appears deceptively simple of application. The difficulty arises when it is attempted to put it into operation in a claim for an alleged violation in the future. If the claim is found to be valid on its merits, it should properly be allowed without any restriction on future application. On the other hand, if the claim was without merit in the first place, as we have already found in this docket, the allowance on the technical rule violation presents a dilemma, which the framers of the rule did not anticipate except as they provided in Article V. 3. of the August 21, 1954, agreement, wherein continuing violations are recognized, defined and limited. It provides, 'A claim . . . for an alleged continuing violation . . . shall be fully protected . . . as long as such alleged violation, **if found to be such** continues'. This is followed by a retroactive limit of 60 days prior to filing, but the rule is silent on how long in future such claims should be granted. Having found against the merits we should not reverse our decision and create an absurdity.

We conclude by summarizing:

1. That the substantive issue claimed in this docket is without merit.

2. That a technical violation of Article V. 1. a. has been proven and should be sustained.

3. That the alleged violation not having been **"found to be such"** on its merits, our allowance is limited to the period prior to the late declination and is not addressed to the substantive merits of the basic claim.

AWARD

Claim sustained to the extent and for the period indicated in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1959.

DISSENT OF THE LABOR MEMBERS TO AWARD NO. 3298.

We believe the facts as developed in the submission support a sustaining award as presented.

However, the manner in which the Time Limit on Claims Rule (Article V of the August 21, 1954 Agreement) is applied—or, more precisely, misapplied by disregard of its essential terms—represents such a far-reaching departure from the obligation of the Board to predicate its awards upon the terms of existing agreements that we feel obliged to point out this departure.

Obviously the controlling provision is paragraph 1 (a) of Article V. This paragraph requires the carrier in the case of a disallowed claim to notify the employe or his representative of the disallowance and the reasons therefor within 60 days from the date the claim is filed. It then provides "if not so notified, the claim or grievance shall be allowed as presented." (Emphasis supplied.)

In this case there is no dispute about the facts that (1) the claim was filed on January 15, 1956; (2) the claim "as presented" was that the claimants "be compensated for all time lost from the date of January 15, 1956 until this violation is corrected and machinists listed above returned to their jobs"; and (3) no notification of disallowance was given until April 11, 1956, more than 60 days after the claim was filed. The controlling rule therefore clearly and unqualifiedly requires that the claim be allowed as presented which necessarily means that the claimants be compensated for all time lost from January 15, 1956 until the claimants are returned to their jobs, which, so far as the record discloses, has not yet occurred. There is no ambiguity in the rule, no doubt as to the facts, the proper conclusion is just that simple. Any other conclusion can only represent a refusal to apply the agreement according to its terms.

The majority says "At first glance the rule appears deceptively simple of application." It is not deceptively simple; it is in fact simple and it remains so not only at first glance but after most intensive analysis. The majority says a difficulty arises when it is attempted to put it into operation in a claim for an alleged violation in the future. They then attempt to make a distinction between the operation of the rule with respect to a claim found to be valid on the merits and one found not to be valid on the merits. The rule makes no such distinction. The majority has simply invented a distinction where none exists. This invented distinction is said to present "a dilemma, which the framers of the rule did not anticipate except as they provided in Article V. 3, of the August 21, 1954, agreement, wherein continuing violations are recognized, defined and limited." Naturally the framers of the rule anticipated no dilemma since they unqualifiedly provided, without distinction between claims found to be valid on the merits and those not so found, that all claims not disallowed within the time limit should automatically be "allowed as presented." If the rule is applied as the framers wrote it, there is no dilemma.

Paragraph 3 of Article V with respect to continuing violations has nothing whatever to do with the case except to relieve claimants from filing repeated claims for claimed continuing violations. The majority seizes upon the language "if found to be such" in this paragraph as justification for limiting the allowance to which a claimant is entitled under paragraph 1 (a). There is no basis in reason for reading into paragraph 3 any limitation

on paragraph 1 (a). Paragraph 3 deals solely and exclusively with the matter of filing repeated claims for continuing violations and with the extent of retroactive monetary claims in the case of such violations that have continued for more than 60 days before claim is filed.

The majority's use of the language "if found to be such" as a limitation upon the automatic allowance of belatedly denied claims poses a real dilemma from which the majority cannot escape. In order to allow the claim from January 15 to April 11, 1956, the majority must recognize that the violation has been "found to be such" by reason of paragraph 1 (a). This having been recognized, there is no escape from the conclusion that the duration for which the claim must be allowed is determined by the claim "as presented."

It is quite apparent that the majority has been moved to disregard the plain requirements of the rule by a desire to protect the carrier from indefinite accumulation of liability by reason of a tardy denial of a continuing claim that is found not valid on its merits. There is no necessity whatever for disregarding the rule to achieve such protection. The carrier has such protection at its disposal at any time. When a carrier finds that it is required to allow a claim by failure to make timely disallowance, it can immediately correct the claimed violation. The rule specifically provides that the automatic allowance of the claim as presented is not a precedent or waiver of the carrier's contentions. If the carrier wants to test the merits of the claim it can then reestablish assignments that will give rise to new claims that can be handled on their merits within the time limit rule. If the carrier, as in this case, chooses not to follow that course the Board has no choice but to apply the rule as written and allow the claim "as presented."

Article V 1 (a)

> "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of this occurrence on which the claim or grievance is based. Should any such claim or grievance go disallowed, the carrier shall within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe 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 or waiver of the contentions of the Carrier as to other similar claims or grievances.** (Emphasis supplied.)

discloses that the award is in error.

R. W. Blake

C. E. Goodlin

T. E. Losey

E. W. Wiesner

James B. Zink

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 3298 DOCKET NO. 2621

NAME OF ORGANIZATION: System Federation No. 2, Railway Employes' Department, A. F. of L.-C. I. O. (Machinists).

NAME OF CARRIER: Missouri Pacific Railroad Company.

QUESTION FOR INTERPRETATION: A dispute having arisen involving an interpretation of our Award No. 3298, the organization has requested that we interpret the award in the light of the dispute in pursuance of Section 3, First (m).

The question posed by the petitioner is:

> "Do the words in Award No. 3298: 'Claim sustained to the extent and for the period indicated in the findings authorize the carrier to deduct from the monetary settlement, money earned during the period involved at another seniority point?' "

Originally the claim was "for all time lost". From petitioners' Exhibit B it appears that in applying our award the carrier seeks to deduct earnings made by the claimants for work done during the period involved on the carrier's property. The organization contends that this is an erroneous construction which is untenable and contrary to the award for the reason that the claim filed contained no provision for such deduction, and for the further reason that machinists lost **work at Gurdon, Arkansas** and accordingly they should be paid for such work loss.

In the claim itself, Paragraph I is a statement of facts relating to Gurdon. The demand is contained in Paragraph 3 "for all time lost since January 15, 1956". From the facts of record it appears that some claimants lost more time than others who elected to accept other assignments.

This Division sustained that claim for all time lost. To hold that claimants should be paid for days on which they worked, were paid, and which were not lost, would be granting more than they claimed.

This Division holds that the claimants are entitled to be paid only what they lost, not that they should receive pay for every day not worked at Gurdon, Araknsas. To hold otherwise would be contrary to reason and precedent and would exceed the amount claimed.

Referee D. Emmett Ferguson who sat with the Division as a member, when Award No. 3298 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of January 1960.