Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12266
SECOND DIVISION Docket No. 12090
92-2-90-2-192

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers
(
(Illinois Central Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, the Illinois Central Railroad assigned the Laborer duties performed by Mr. H. Giles and Mr. J. Johnson, Jackson, Mississippi, to other crafts after they were furloughed.

2. That, accordingly, the Illinois Central Railroad be ordered to compensate Mr. Giles and Mr. Johnson for forty hours per week, at the pro rata rate, beginning August 1, 1989 and continuing until such time as they are returned to work. They should also be reimbursed for all losses sustained on account of loss of coverage under Health and Welfare and Life Insurance Agreements during the time that they are furloughed.

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 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.

In this dispute, the Organization argues that the Claim must be "allowed as presented" based on its assertion that the Carrier failed to comply with the 45-day time limit provided in Rule 12. This Rule reads in pertinent part as follows:

> "Should any such claim or grievance be disallowed, the Carrier shall, within 45 days from the date 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, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

The Carrier argues that the Board has no authority to consider this aspect of the dispute, since the Organization "did not claim a time limit violation on its notification of intent to file an ex parte submission to the Board." The Carrier notes that Circular No. 1 requires such notice "to include the particular question on which an Award is desired." The Carrier cites as support Third Division Award 21543, which states:

> "We need consider only that the claimant failed to make this [the time limit rule] a part of his formal statement of claim."

In this instance, the Organization specifically referred in its appeal letters on the property to its contention of time limit violation, and the Carrier responded thereto. (The Carrier's response was not a denial of the violation but rather a contention that any resulting liability should properly cease upon the Carrier's allegedly late response.) This is not an instance where a procedural matter is raised in the first instance before the Board.

There has been extensive previous review of the issue of the Board's jurisdiction to hear a contention of time-limit violation in the absence of it being specifically mentioned in the formal Statement of Claim to the Board. The Board will not attempt to summarize here the various findings on this subject. First Division Award 23931 examines the question in full, making reference to Awards of the First, Third and Fourth Divisions, including Third Division Award 21543 quoted above. Based on this survey, First Division Award 23931 concludes:

> "In this Claim, . . . the time limit issue was raised by the Organization in the on-property handling in support of the Claim and we do not have evidence that inclusion of alleged time limit violations in the formal Statement of Claim has been a consistent requirement of the First Division. Accordingly, the request that we dismiss the matter because of a failure to include the time limit issue within the Statement of Claim is rejected."

The Board adopts this reasoning in this instance. Here, the Carrier was aware on the property of the Organization's position and responded to it. The omission of the issue from the formal Claim put the Carrier at no disadvantage.

The facts involved here are that a Claim was initiated on September 7, 1989, and sent to the Carrier by certified mail on that date. The record shows that the Carrier received the Claim on September 13, 1989. The Carrier responded on October 27, 1989. Assuming September 7 to be the date the Claim was "filed," the response on October 27 was in excess of 45 days.

At the Hearing before the Board, the argument was advanced that the Claim was in fact "filed" on September 13, when the Carrier received it, and that this is less than 45 days prior to the date of response on October 27, 1989. The Organization protested that the Carrier had not raised this position on the property. However, even if it is to be considered, it does not make the answer timely. Fourth Division Award 4309 expresses this concept as follows:

> "A claim is 'filed' with the Carrier when it is received by the Carrier and the Claimant is 'notified' by the Carrier when the disallowance is received by the Claimant."

From September 13 to October 27, 1989 is 44 days (not counting the first day and counting the last day, in the accepted manner). However, reasonably assuming receipt of the reply on October 30 (as indicated by a date stamp thereon), the 45 days was still exceeded.

The Carrier makes the further defense that, even if the Claim is "allowed as presented," liability should cease upon the date of the Carrier's tardy response (assuming that the Claim is not supported on the merits). To consider this requires a brief review of the substance of the dispute. The Claimants were employed as Laborers at Jackson, Mississippi, serving on the 7:00 A.M. to 3:00 P.M. and 3:00 P.M. to 11:00 P.M. shifts, respectively. In July 1989, the Claimants were furloughed. They were the last remaining employees represented by the Organization at this facility. The Organization claims that their work was "reassigned to other crafts" in violation of Rules 1 and 41.

Rule 1 is the Scope Rule. Rule 41 provides in pertinent part as follows:

> "1. At points where there is a laborer employed on a shift, all work exclusively performed by employees represented by the Firemen and Oilers on that shift on the effective date of this agreement [November 1, 1981] will not be reassigned to employees of other crafts on that shift.
>
> NOTE: This rule does not apply when there is not sufficient work to justify a full-time position or on scheduled days off at locations where there is only one laborer on a shift."

Rule 41 also provides for a joint check at the request of the General Chairman when there is a dispute as to whether or not there is "sufficient work" to justify employing a Laborer.

Review of the exchange of information on the property convinces the Board that the Organization failed to disprove the Carrier's contentions both that many of the listed Laborer duties are not performed "exclusively" by them and that there is not "sufficient work" to justify retention of a Laborer. In addition, no joint check was requested to verify the amount of work involved.

Consideration now returns to the appropriate remedy, in view of the requirement under Rule 12 that the Claim be "allowed as presented." On this basis, the Board will sustain the Claim for pay until October 30, 1989, the date on which it may be reasonably presumed the Organization (and the Claimants) were "notified" of the Carrier's tardy response. In the particular circumstances here, the Board concludes there is no basis for further payment. This is a continuous claim, and consideration must be given to the factual situation. The Organization cannot maintain indefinitely its position as to the amount and exclusive nature of the work. Since no Agreement violation as to the Claim's merits are found, the Board in this instance follows the reasoning in Third Division Award 24269, which states that the "Carrier's liability is not infinite." See also Third Division Awards 26213 and 25604. This finding is confined to the particular circumstances herein and is not a general interpretation of the "allowed as presented" provision.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1992.