Award No. 1411
Docket No. CL-1452

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Royal A. Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that Acin Miller, Roger Pierce, Arthur Baker and Dave Parker, Mail and Baggage Porters, Union Station, New Orleans, La., were each entitled to and shall now be paid a minimum of eight (8) hours at rate of time and one half on July 4, 1938, less amount already paid by Carrier for services performed on that date."

JOINT STATEMENT OF FACTS: "At New Orleans, Louisiana, the Carrier maintains and operates a Passenger Station continuously twenty-four hours each date. For the operation of the Mail and Baggage Department of that station, mail and baggage porters' positions are maintained and assigned to work seven days per week.

"Acin Miller, Roger Pierce, Arthur Baker and Dave Parker, above named, were on July 4, 1938, regularly assigned incumbents of positions of mail and baggage porters in said passenger station, each being assigned to work six days per week and assigned one regular day of rest each week with relief employes being assigned to work the rest days of said employes in accordance with the exception to Rule 42.

"On July 4, 1938, a legal holiday as stipulated in Rule 42, Acin Miller was required to lay off after performing 4 hours and 15 minutes work on his regular assignment for which service he was paid 4 hours and 15 minutes at rate of time and one-half.

"On July 4, 1938, Roger Pierce, Arthur Baker and Dave Parker were each required to lay off after performing 4 hours work on his regular assignment, for which service each was paid 4 hours at rate of time and one-half.

"Pay checks covering compensation for services above mentioned were delivered to said employes on July 29, 1938. Formal claim was filed on July 23, 1938, by the Local Chairman of the Brotherhood with Ticket Agent, T. D. Clark, that each of the said employes should have been permitted to work their regular eight hour assignments on July 4th and that each of them is entitled to be paid a minimum of 8 hours at time and one-half rate in accordance with Rule 42 of the Clerks' agreement.

"The officers of the Carrier, including the highest designated officer, C. R. Young, have declined to compensate these employes a minimum of 8 hours each at time and one-half rates for July 4, 1938, solely on the grounds or contention that the employes and/or their representatives did not comply with Rule 26 of the Agreement."

of the agreement, and Awards Nos. 417, 595, and 736 support our position and necessitate a straight denial of the claim."

OPINION OF BOARD: The theory upon which this case has been submitted makes it unnecessary to consider whether the claim is intrinsically meritorious or the opposite. All that is wanted is an interpretation of Rule 26 which reads thus:

"GRIEVANCES. Any grievance which may exist may be presented in writing to the employing officer within ten (10) days of its occurrence for settlement. If decision of the employing officer is unsatisfactory, it may be appealed to the Superintendent within thirty (30) days. In case the employe shall not be satisfied with the decision, he shall have the right to appeal to the General Superintendent and from him to the General Manager. In departments other than operating, appeal may be made in regular order to officers designated for such departments.

"If a transcript of the evidence taken at the investigation or on an appeal is made, a copy will be furnished upon request of the employe or his representative."

The first question posed by the argument is as to time of and occasion for "occurrence" of a grievance. The answer to that question in respect to a deficiency of pay, if that be the claim, must be that the grievance occurs when the carrier refuses to pay the larger amount wanted by the employe. Normally, that will be when the payee receives or is tendered his pay check for the period in question. That should end this case for here the grievance was presented even before the pay checks were tendered. A grievance does not occur when, and simply because the employe may know he will be disappointed in the future. It will occur only when there is the overt and determinative act, e. g., refusal of pay, which evidences and makes operative the carrier's decision of the matter.

If the Referee must go further in expressing himself concerning the interpretation of Rule 26 in its entirety, the following is submitted.

The word "may" taken in its context and application to its subject matter must be considered as synonymous with "shall" or "must." That is, presentation in writing of the grievance, whatever it may be, within a 10 day period is intended to be mandatory and condition precedent to consideration of the grievance on the merits. That condition is one that may be waived by conduct on the part of the carrier, indicating an intention not to insist upon it.

The concluding paragraph of the rule contemplating that in some cases testimony will be taken and transcribed during an "investigation" does not restrict the operation of the rule. The investigation of any grievance, whether it involves a money demand or not, may require the taking and transcribing of testimony. On the other hand, most grievances whether involving money demands or not, seem to be susceptible of settlement or decision without the taking of testimony, a fact which speaks well for the candor of the contending parties.

But that is not all. If the Referee must now pass judgment on the 10 day limitation, he is compelled to say that it is void as an attempt to impose an unreasonably short limitation of time upon the assertion of a claim for money. As to other grievances of employes arising in the course of railroad operation, it seems to be the more or less accepted practice to limit their presentation to 10 days after occurrence.

In some cases where the claim is for money, ten days may be long enough. But it is perfectly clear that many such cases may arise where the 10 day period, as just matter of plain sense, is too short to be considered reasonable. That is particularly so where the aggrieved employe, in order to procure

proper presentation of his claim, must seek out and consult the proper representative of his Brotherhood.

The foregoing may seem too legalistic. It is, of course, common practice to fix periods of limitation for commencing law suits. That is done by statute. Notwithstanding such statutes, contracting parties may in proper cases fix a different and shorter period. If, in doing so, they keep within the bounds of reason, courts will enforce and sustain their agreement.

But the Referee knows of no case where a contract, and that is what we are dealing with now, has been sustained in fixing so short a period as 10 days for the presentation of a claim for money, which if not allowed is proper subject matter for an action at law. In the nature of things 10 days is just too short a period to be a reasonable one to impose by a contract such as this one upon all cases which may arise under it.

The denunciation of the 10 day provision as void, so far as it is intended to have application to money demands, may result in necessity for negotiations leading to a recasting by agreement of Rule 26. It seems to be the accepted practice on some other roads (e. g., for the telegraphers on the P. R. R. System) to fix 30 days as the time limit in which claims for money must be presented in writing. That shows that there is some, if not general, recognition that 10 days is too short. There is no standard rule. What is here said is without prejudice to argument for or against any stated period, so long as it is reasonable in application.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 under the limited scope of the argument and theory of presentation, it must be held that there has been a violation of the Agreement in the manner indicated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 30th day of April, 1941.

Dissent to Award No. 1411, Docket No. CL-1452

For the following reasons dissent is rendered to the decision in this award declaring void the 10-day limitation for presentation of claims for money:

First: There is no finding by the Referee that the contract is void; on the contrary, he finds it a valid agreement between the parties.

Second: There is no claim by the Referee that Rule 26 is vague and ambiguous which would give the Referee the right to properly interpret the agreement on that account under the statute.