Award No. 6115
Docket No. CL-6038

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS

STATEMENT OF CLAIM: Claim of the Protective Committee of the Brotherhood that:

(1) Management violated rules of the Clerks' Agreement commencing Saturday, January 7, 1950, and continuing on each Saturday thereafter by assigning work normally attached to and performed by the Rate and Bill Clerk at the Harvey, La., Freight Office on five (5) days of the week, namely, Mondays to Fridays, inclusive, to be performed on Saturdays by employes (Agents) without the scope of the Agreement; and

(2) The regular assigned Rate and Bill Clerk, Mr. Malcolm G. McCann, (and his successors, if there be any) be allowed wage losses sustained aggregating two (2) hours' pay at the rate of time and one-half (one call) for Saturday, January 7, 1950, and all subsequent Saturdays until the violative action named in Item (1) hereof is corrected.

EMPLOYES' STATEMENT OF FACTS: There are employed at the Harvey, La., Freight Station six (6) clerks, with various payroll classifications, coming within the Scope Rule of our Agreement that governs the working conditions of the clerical employes, effective January 1, 1950. There is, also, employed at this station an Agent which position, however, is without the scope of our General Rules Agreement with the Carrier. All Station employes are regularly assigned 6:00 A. M. to 5:00 P. M., less one hour for meals, with Saturdays and Sundays of each week as their designated rest days. This assignment was placed into effect by Management with the application of the 40-Hour Work Week Rules.

On Saturday, January 7, 1950, the first Saturday following consummation of our current Rules Agreement with the Carrier, that became effective January 1, 1950, the Carrier assigned the work of rating and billing freight to be performed by the local Agent instead of calling the Rate and Bill Clerk, Mr. McCann, to perform this service. The Rate and Bill Clerk's regular assignment, Mondays to Fridays, inclusive, requires him to rate and bill all freight at the Harvey Station. None of this work is rated or billed by the local Agent on Mondays and Fridays of each week.

CONCLUSION

The Carrier has attempted to point out to your Board the following important aspects of this case:

1. That there is not a proper joinder of parties in this dispute before your Board inasmuch as neither the agent nor his representative Organization, the Order of Railroad Telegraphers, has been afforded a notice of this hearing in conformity with Section 3, First, (j) of the Railway Labor Act. Therefore, we request a dismissal of the claim for lack of jurisdiction.

2. The working conditions of agents under the Order of Railroad Telegraphers' schedule agreement could be affected by any ruling your Board may make concerning this controversy and, inasmuch as they have not been given a proper hearing on the subject matter of this dispute before your Board, you are requested to dismiss this claim for lack of jurisdiction.

3. The statement of claim shows that the first date claimed is January 7, 1950, however, a formal claim for the named claimant shown, has never been properly handled with this carrier. In other words, the Organization is attempting to convert a protest (first handled informally in conference June 6, 1951) into a specific claim and dating it retroactively beyond the first date the protest was discussed. Even if the letter of September 11, 1951 should be considered a specific claim, the principle of latches should not allow the Organization to present a retroactive claim to January 7, 1950.

4. The agent at Harvey is a working agent who is paid punitive rates of pay for service performed on Saturdays and this claim is an attempt by the Clerks' Organization to deprive this employe of the right to perform routine agent's work on Saturdays.

5. The incidental billing of certain cars of freight on Saturdays by the agent is an incident of service properly required of a working agent.

The Carrier urges the Board to dismiss this claim in its entirety. However, in event it retains jurisdiction of the case we contend that the Carrier's position on the merits should prevail and request that the claim be denied.

(Exhibits not reproduced).

OPINION OF BOARD: The Carrier contends that this Division of the Adjustment Board is without jurisdiction to determine the claim filed with the Board by the Protective Committee of the Brotherhood in behalf of Bill and Rate Clerk McCann; the reason given is that the dispute involves the Bill and Rate Clerk covered by the Clerks' Agreement and the Agent covered by the Agreement of the Order of Railroad Telegraphers and, in accordance with the procedure provided by the Railway Labor Act, the Agent and the Order of Railroad Telegraphers having an interest in the outcome of this claim are necessary parties and should have been made parties to this dispute, and should have received notice as provided for by the Act. Failure in this respect would result in a void award in the event of an affirmance of the claim.

Section 3, First (j) of the Railway Labor Act is cited, which provides: "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any disputes submitted to them."

The meaning of the language "involved in any disputes" seems of prime importance. The Railway Labor Act delegates to each of the four divisions certain jurisdiction over agreements between the carriers and certain named crafts. The Clerks' Agreement and the Telegraphers' Agreement are within the jurisdiction of the Third Division.

As stated in the recent Award No. 1628 of the Second Division which covers the subject in detail referring to the questioned language above set out: "We think it means that when the rights of one person under a collective bargaining agreement are before a Division of the Board for determination, any employe or employes having rights under the named agreement which may be damaged or destroyed, is involved in the dispute within the meaning of Section 3 First (j), and is entitled to notice." The cited award reviews awards of the First, Second, and Third Divisions and states that they cannot be completely harmonized.

The legal situations have been developed pro and con by Awards 5432 and 5702 of the Third Division. Award 5702 of this Division is adhered to as announcing the correct rule. We are in accord with the rule as stated in Award 5702 of this Division and followed by Award 1628 by the Second Division. The result is, this Board has jurisdiction to determine the question before it under the Clerks' Agreement with reference to whom the work belongs. See also Award 5785.

The Carrier raises another issue with reference to the jurisdiction of this Board, contending no money claim was either presented to the Carrier or handled to final conclusion on the property as required under the law vesting jurisdiction in this Board. The following is cited: Section 3, First (i): "The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Under "General Duties" contained in the Railway Labor Act, Section 2, page 2 of the Act, is the following language: "All disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

This Board adopted the following rule of procedure: "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934."

The subject matter of the claim—the claimed violation of the Agreement—has been the same throughout its handling. The relief demanded is ordinarily treated as no part of the claim, and consequently may be amended from time to time without bringing about a variance that would deprive the Board of the authority to hear and determine it. No prejudice to the Carrier appears to have resulted in the present case. See Award 3256.

In Award 5195, this Board said: "The essence of the claim made by the Organization is for violation of the rules of the parties' agreement. The claims for penalty on behalf of the individuals named are merely incidental thereto. That the claims might have been made on behalf of individuals who had a better right to make them, is of no concern to the carrier. That

fact does not relieve it from violation and a penalty arising therefrom. In this case no other individuals are making claims." See Awards 2282, 4359.

In the light of the foregoing authorities we conclude that on the second phase of this case with reference to jurisdiction, the carrier's contention is without merit.

It is true, on the property, that this matter arose in conference on June 6, 1951. Subsequent thereto, by exchange of correspondence between the General Chairman and Mr. B. C. James, Assistant to the President, different awards were cited touching pro and con on the question at issue. This continued until August 7, 1951, when the General Chairman requested that the violation of the Agreement be stopped. We will speak about the alleged violation later. On September 11, 1951, the General Chairman wrote to the Assistant to the President to the effect: We believe that the best solution to the problem is to submit our claims on a call basis of three hours for every Saturday Agent Fitzpatrick has been billing freight, for failure to call the regular incumbent to perform the service who from Monday through Friday does the work. We will, within the next few days, file a claim against the Carrier in behalf of Malcom J. McCann, who is assigned to that position and if declined will progress to the Third Division of the National Railroad Adjustment Board for award.

On January 18, 1952, written notice was served of the intention of the Protective Committee of the Brotherhood to lodge the claim before this Division. From the record it is apparent that the Carrier was acquainted with the context of the claim and the penalty provided in the event the practice was not stopped, but simply ignored the claim. The effect of the Carrier's action constitutes a denial of the claim.

This brings us to the factual situation. There is evidence of an Agreement between the parties bearing effective date of January 1, 1950. The facts are in direct and sharp conflict. It appears from the record that the town of Harvey is located in the yards of New Orleans, Louisiana. In 1912, a station was located at this point. It was a one-man Agency. As business increased additional forces were added. The Carrier asserts the agent always participated in performing necessary clerical work, and the added personnel merely assisted him in doing the work. Business increased, and in 1941, the station complement consisted of an agent, chief clerk, a cashier, a bill rate clerk, 2 general clerks, a yard clerk, and a porter. In 1946, A. J. Fitzpatrick was appointed agent. At that time he performed service seven days a week and was paid on an hourly basis. The clerical forces were assigned six days a week and paid on a daily basis. Through the years Harvey became a large industrial center. Many large industrial plants were built in that area. Much of the work is of a seasonal nature, and therefore some of the plants operated seven days a week. On September 1, 1949, the so-called 40-hour week, which became effective, was applied to all the employes working at Harvey. The agency at Harvey has never been considered a station that requires an agent to perform solely supervisory work. No telegraphic work is carried on at this station. After September 1, 1949, the agent performed certain routine agent's work on Saturdays that he had previously performed on Sundays, on the basis of time and one-half for the work he performed on Saturdays.

It is the Carrier's contention that since the agency's inception at Harvey the agent has been a working agent; that there has always been a commingling of work at this station; that Monday is usually a heavy day for in-bound rating and extension, therefore it was customary for the rate clerk, the chief clerk, and the agent to work together clearing the load. On the remaining days of the week Rate and Bill Clerk McCann ordinarily does not handle in-bound rating, but handled correspondence to various customers regarding rates, and to the other matters incidental to the subject matter. As a usual rule, Clerk McCann does not handle the billing four days a week. This work is usually handled by another clerk, the chief clerk, or the agent.

The Rate and Bill Clerk does not perform all billing of cars at Harvey exclusively. He might be required to do this work, in fact at times he does bill cars. However, the agent, chief clerk, and general clerks also bill cars every day of the week. It is unnecessary to bill cars on Saturdays. Such billing is done as an incident of the working-agent's position. In fact, the Carrier has no way of knowing before hand whether an industry will require a car on Saturday. Quite often the bill will be brought to the office as late as 11:30 A. M., and noon, on Saturday. As a service to the customer, the agent bills these cars out.

Contra, the Employes point to the following evidence: On Saturday, January 1, 1950, the first day after the consummation of the current Agreement, the Carrier assigned the work of rating and billing freight to be performed by the Agent instead of calling Rate and Bill Clerk McCann to perform this service. The Rate and Bill Clerk's regular assignments Monday through Friday, inclusive, require him to rate and bill all freight at the Harvey station. None of this work is done by the agent on those days, and prior to the 40-hour week Agreement the rate and bill clerk performed these same services six days a week instead of five as he does now. As to the volume of work handled at this station, the Employes point to the earnings which approximate $450,143.00 a month in 1950, and $481,942.00 a month in 1951, which indicates this is a fair-sized station as distinguished from a lesser station, meaning a one or two-man station.

There is in evidence a statement of the rate and billing clerk to the effect that on week days he rates and bills out-going carloads and on Saturday the agent merely extends the out-bound carloads, accepting the rates provided by the shippers. He denied there was a comingling of work at the station as contended for by the agent. He stated that Monday was a busy day for the rating and billing clerk, but pointed out that the Agent was the Express Agent, and that work was also heavy on Monday and on other days; that the Agent does not bill freight nor run extensions on bills on any day except Saturday; and that he handles in-bound rating every single day, and hardly has time to devote proper attention to correspondence. The position of general clerk was established on October 18, 1952. Thereafter the rate and bill clerk received assistance from the general clerk on Tuesdays through Saturdays, and on Tuesdays through Fridays he received no assistance with the rating, but some of the bils were typed by the general clerk. He summarized his duties as follows: "On Monday in the morning I handle in-bound rating and corrections, correspondence, and telephoning and incidental work in connection with my position. In the afternoon I rate and bill all freight out-bound. On Tuesday through Friday my duties are the same as on Mondays, with the exception I receive assistance with the billing in the afternoons from a general clerk." Six employes certified to these facts.

The Agent made a statement to the effect that due to the volume of the business when the 40-hour week became effective it was necessary to enlarge the office force, and one general clerk was employed which reduced the detail including the actual billing of carload freight out-bound Tuesday through Friday, which was previously assigned to Rate and Bill Clerk McCann, and assisting another general clerk typing and expensing in-bound freight on Mondays. The original assignments of the position of Rate and Bill Clerk no longer requires that he do the actual billing of carload freight. Moreover, the actual billing performed by this clerk (we presume the rate and bill clerk) is of minute degree.

According to the Employes, the following question is presented: Does the Carrier's action violate the rules of the Clerks' Agreement when on Saturdays of each week clerical work, that has been assigned exclusively to the clerical position during the week Monday through Friday, is assigned to be performed by the Agent, which is outside of the scope of the Clerks' Agreement?

The following rules are involved: Rule 1, the Scope Rule, is cited. This rule does not enumerate the kind of work to which the Agreement applies,

but only enumerates the type of employes covered by the Agreement. However, this case also involves the following rules: Rule 3½ (b) relating to five-day positions; Rule 3½ (e) with reference to regular relief assignments; Rule 10 (e) relating to service on rest days, which is as follows: "Service rendered by employes on assigned rest days shall be paid for under the call rule, Rule 11, unless relieving an employe assigned to such day in which case they will be paid at the rate of time and one-half with a minimum of eight hours. * * *"

The pertinent rule here involved is Rule 10 (f), Work on Unassigned Days: "Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employe."

> Rule 11. "When called or directed to report before or after their assigned hours employes shall be allowed three (3) hours' pay for two (2) hours' work or less and actual time worked in excess of two (2) hours at rate of time and one-half."

> Rule 18. "Service on Rest Days and Holidays. Employes notified or called to perform work on assigned rest days and specified holidays shall be allowed a minimum of three (3) hours for two (2) hours' work or less; and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

We believe the foregoing rules are self-explanatory as they apply to the instant case.

The rule firmly established by repeated decisions of this Board is that work on rest days should be assigned in the first instance to a regularly assigned relief man if there be such; secondly, to an extra or unassigned employe; and finally, if such employes are not available, to the regular occupant of the position on overtime basis. See Awards 4288, 4815, 5833, 5925, 5623, 5271, 5333, 5465, 5475, 5558, 5708, 5804, and other decisions of this Division of the Board cited therein. The 40-hour week agreement did not change the application of that principle.

We hold that the evidence is substantial in character to conclude that the Employes' contention should be sustained and that the work on Saturday complained of, belongs to the Rate and Bill Clerk under the Clerks' Agreement, and not to the Agent.

There is some contention of a long delay with reference to progressing this claim, and the defense of laches is interposed by the Carrier. In this connection, a recognized authority defines laches as follows: It is unexcusable delay in asserting a right, an implied waiver arising from knowledge of existing conditions, and an acquiescence in them; such neglect to assert a right as taken into conjunction with the lapse of time more or less great and other circumstances causing prejudice to the adverse party, operates as a bar in a court of equity; such delay in enforcing one's right as to work disadvantage on another. See 21 C. J. 210; Award 2925. The delay in the present case is not shown here to have prejudiced the rights of the Carrier. If the passage of time alone was sufficient to bar a claim, the rule then rises to the dignity of the statute of limitations, something that was considered and rejected when the provisions of the Railway Labor Act was pending before the Congress. The facts in the present case do not warrant the application of the doctrine of laches. See Award 2925.

The second item of the claim is for wage loss aggregating two hours' pay at the rate of time and one-half from Saturday, January 7, 1950. It is apparent from the record that the first intimation of violation of the claim by the Carrier was in May, 1951, and folowed in conference June 6, 1951. We

do not propose to allow the penalty prior to the time that the Carrier had notice of the violation.

For the reasons given in this opinion the claim should be sustained.

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 the claim is sustained as provided for in the opinion.

AWARD

Items 1 and 2 of the claim sustained as provided for in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of February, 1953.

DISSENT TO AWARD NO. 6115. DOCKET CL-6038

For failure to comply with the due notice provisions of the Statute (USCA Title 45, Section 153, (j)), this Award is without legal force: See dissenting opinions on this point, Awards **5702** and **5790.**

This Award is likewise unenforceable for want of jurisdiction in that Petitioner failed to comply with the provisions contained in the Statute, **supra,** at Section 153, (i), which deficiency was pleaded.

For these reasons we dissent.

/s/ C. P. Dugan

/s/ R. M. Butler

/s/ W. H. Castle

/s/ E. T. Horsley

/s/ J. E. Kemp