Award No. 7713
Docket No. CL-7557

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

THE LONG ISLAND RAIL ROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Board of the Brotherhood that:

1. The Carrier violated the provisions of the Clerks' Agreement, the Agreement dated February 15, 1951, The Mediation Agreement dated January 27th, 1938 and established interpretations covering prior claims, when it abolished positions of Baggage and Mail Messengers and assigned the work to Trainmen, and

2. The Carrier shall restore said work to Baggage & Mail Messengers, and shall compensate all affected Baggage and Mail Messengers, Station Baggagemen, Baggage Foremen, Gatemen, Ushers and others holding seniority rights in Districts 4 and 8, for all monetary losses, retroactive to April 1, 1952, and

3. Insofar as the Carrier failed to comply with Rule 4-D-1 of the Clerks' Agreement, this claim is now payable in full.

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement effective July 1, 1945, covering clerical, other office, station and storehouse employes, including Baggage and Mail Messengers, between this Carrier and this Brotherhood. The Rules Agreement will be considered a part of this Statement of Facts. Various Rules and Memorandums thereof, may be referred to from time to time without quoting in full.

This dispute involves the question of whether or not the Carrier complied with the meaning and intent of the Clerks' Agreement, when it:

1. Abolished Baggage and Mail Messenger positions and turned the remaining work over to Trainmen.

2. Fails to deny the original Claim within ninety (90) days after it was presented to Carrier.

3. Failed to deny the Claim, as provided in the Memorandum of Understanding, dated September 12, 1945, either by the Superintendent or General Manager (Manager of Personnel). Note: This Memorandum of Understanding was revised as of April 1, 1954.

1938 under the auspices of the National Mediation Board when the aforementioned Mediation Agreement was consumated.

It will be noted that throughout this discussion both sides of the table gave convincing evidence that they understood that the underlying principle involved in this Agreement was the following:

> **"If and when head end work, i. e., the handling of baggage, newspapers, mail, etc., increased in volume beyond the ability of a trainman member of the crew to handle it incident to the primary duties of his position, an additional employe would be assigned for such purpose and that employe would be classified as a Baggage and Mail Messenger. Conversely, in the event the volume of head end work declined again to a point where trainmen could again resume it incident to the primary duties of their job they would do so and the Baggage and Mail Messenger would be removed and his removal would not be violative of the Mediation Agreement."** (Emphasis supplied)

As further evidence of the intent of the partics, attcntion is directed to the settlement of two cases on the property—Cases 34 and 56. Copy of the decision in each of these cases is attached hereto and made a part hereof marked Carrier's Exhibits 18 and 19.

The facts in Case 34-1 were that the Carrier, effective May 1, 1946 abolished 4 positions of Baggage and Mail Messenger at a time when there was no reduction in the amount of Baggage and Mail work on the trains involved in the assignments. In fact, after a review of the operation was made, the 4 positions plus 5 additional positions were established on November 11, 1946. Since the Carrier could not support the abolishment of the 4 positions by a reduction in the amount of Baggage and Mail work, the claim in that instance was allowed.

In Case 56 the number of hours comprehended in the assignment were reduced by having the Baggage and Mail Messenger involved leave Train 236 at Mineola instead of continuing through to Farmingdale as he had previously.

Neither Cases 34 or 56 are analogous to the instant case since in the instant case the Post Office Department unilaterally removed 50% of the bulk mail previously handled by this Railroad from the rails. This great reduction in the volume of bulk mail handled necessitated revising the Baggage and Mail Messenger forces accordingly and since the remaining head end work could again be resumed by trainmen incident to their primary duties, such work was returned to them.

In conclusion the Carrier reiterates each and all of the points previously made and holds that based on the facts present and the evidence aduced, there is no basis for the instant claim and it should, therefore, be denied.

(Exhibits not reproduced)

OPINION OF BOARD: Claim is here made that the Respondent violated provisions of the effective Agreement by improperly abolishing certain Baggage and Mail Messenger positions and assigning work belonging to this group to employes not covered by said Agreement. Reparations are sought for all employes affected for that period of time between April 1, 1952 and June 1, 1954 at which time the alleged violation ceased.

The Organization asserts that the work here involved was placed within the Scope of the effective Agreement by the jointly executed Mediation Agreement of January 27, 1938, and that prior settlement on the property recognize this fact to be true. It was further asserted that this particular claim was presently valid in its entirety because of the Respondent's failure to comply with the 90 day requirement provided in Rule 4-D-1-(c).

The Respondent contended that the Baggage and Mail Messengers were entitled to perform the work in question only when the amount thereof was in excess of the Trainmen's ability to perform same under the ebb and flow doctrine which was in truth and in fact recognized by the aforementioned Mediation Agreement. In connection with the proper application of Rule 4-D-1-(c). the Respondent asserted that this claim was in effect denied on June 16, 1952, but most certainly denied on August 15, 1952 for which reason the 90 day cut off provision of the Rule makes this claim valid only for that period of time extending from April 1, 1952 to May 15, 1952.

While the record contains an abundance of extraneous matter this dispute can be determined by resolving (1) the proper interpretation and application of Rule 4-D-1 (a) (b) (c) and (2) whether or not the work here was improperly withdrawn from the Claimants in question. Rule 4-D-1 (a) (b) and (c):

> "4-D-1 (a). Claims for compensation alleged to be due, may be made only by an employe or by the 'duly accredited representative' as that term is defined in this Agreement, on his behalf, and must be presented, in writing, to the head of the department involved within ninety (90) days from the date the employe received his pay check for the pay period involved, except:
>
> 1. Time off duty on account of sickness, leave of absence, suspension or reduction in force, will extend the time limit specified in paragraph (a) of this Rule 4-D-1 by the period of such time off duty.
>
> 2. When a claim for compensation alleged to be due is based on an occurrence during a period employe was out of active service due to sickness, leave of absence, suspension or reduction in force, it must be made, in writing, within ninety (90) days from the date the employe resumes duty.
>
> (b). If claims are not made within the time limit specified in the foregoing paragraph (a) of this Rule (4-D-1) including Exceptions 1 and 2, they will not be entertained nor allowed.
>
> (c). When claims for compensation alleged to be due have been presented in accordance with the foregoing paragraph (a) of this Rule (4-D-1) including Exceptions 1 and 2, and are not allowed, the employe will be notified to this effect, in writing within ninety (90) days from the date his claim was presented. When not so notified claims will be allowed."

This Rule is clear and without ambiguity. Paragraph (a) provides (with two exceptions that are not here applicable) by whom, in what manner, and within what time limitation claims are to be presented. Paragraph (b) provides that if claims are not presented within the time limitation of 90 days provided in paragraph (a) they will not be considered or allowed. Paragraph (c) provides that when claims are presented in accordance with paragraph (a) and are not allowed, the employe will be notified, in writing, of the disallowance within 90 days from the date the claim was presented, with the further provision that when no such notification is given claims will be allowed.

The alleged violation occurred on April 1, 1952. The General Chairman presented the claim, in writing on April 26, 1952. That this act was accomplished in accordance with paragraph (a) of the rule is not questioned.

Paragraphs (b) and (c) are cut off provisions that apply in the first instance to the employe and in the latter instance to the Carrier. The purpose of the Rule is to expedite procedure and prevent delay in handling on the property.

We cannot read a denial of the confronting claim into the Carrier's Letter of June 16, 1952. We are of the opinion that these claims were not denied, within the meaning of paragraph (c), until August 15, 1952, which is obviously beyond the 90 day period provided in this portion of the Rule.

Rules similar to the one here in question have been interpreted by this Board both with and without the assistance of a Referee. Awards 4529 and 3013. In Award 4529:

> "* * * We think the rule requires that a decision actually has to be made by the officer of the Carrier on whom that responsibility has been placed, which in this case was Manager Keene, within the time as therein specified, that Rule 22 requires that he give his reasons for so doing if the claim is disallowed, and that the employe and his representative be notified thereof in writing within the time as required by Rule 44 (c). Having failed to comply with Rule 44 (c) the claims, by the express provision thereof, must be allowed. Nor does the provision of the rule contemplate, when it is applicable, that the merits of the Claim shall be considered. Consequently, we shall not do so."

Here the Respondent could have limited the amount of its obligation but it having failed to do so this Board has no alternative but to find that this claim is meritorious from the date of its inception on April 1, 1952, until the date the parties reconciled their differences on June 1, 1954.

Having found that Rule 4-D-1-(c) is controlling and applicable here, no purpose can be served by a consideration of merits of the claim.

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 dspute 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 Carrier violated the Agreement.

AWARD

Claims disposed of in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February, 1957.

DISSENT TO AWARD No. 7713—DOCKET No. CL-7557

In sustaining this claim to June 1, 1954, the majority, committed serious error by failing to recognize that Rule 4-D-1 (c) places no limitation upon the Carrier's inherent right to limit its liability by declining a claim, even though such declination is made subsequent to the 90-day period provided in the rule. The remedy for violation of Rule 4-D-1 (c) is damages for any delay that occurred, not allowance of damages subsequent to a denial otherwise regularly made.

In relying upon **Awards 3013 and 4529**, the majority displayed the basic error in their interpretation, because the reparation sought in each of those disputes was for a liquidated sum, i. e., the claim was for specified days, named employes, and ended prior to the filing of the claim. Here, contrary to the situation in **Awards 3013 and 4259**, the reparations sought involved a continuing claim for unnamed employes, hence the denial of August 15, 1952 was timely as to all claims of record involving dates 90 days prior thereto and denied and cut off all claims subsequent to May 15, 1952. In failing to recognize the continuing nature of this claim and in refusing to consider the merits thereof subsequent to May 15, 1952, the majority allowed a claim of this character to be used as a "vehicle for extorting an unconscionable exaction." **Award 6789.** In **Award 6789**, Referee Shake recognized the danger of allowing a claim under a time limit rule where the reparation sought was not for a liquidated sum or ascertainable by computation from the facts of record.

In the instant dispute, after denying the claim on August 15, 1952, the Carrier obviously could not comply with the claim as made without writing the controlling rule completely out of the effective Agreement, for said Agreement specifically provided that it should "not be construed to give the employes (Baggage and Mail Messengers) covered by this schedule the exclusive right to perform this class of work."

In effect, the majority has held the Carrier's denial of August 15, 1952, to be a nullity because it was not made within 90 days from the date the claim was presented. In **Award 3857** this Division made a similar holding which was subsequently reversed by the Fourth Circuit United States Court of Appeals in **Atlantic Coast Line Railroad Co. v. Brotherhood of Railway and Steamship Clerks**, 25 L. C. § 68, 163, rendered February 9, 1954. In **Award 3857** the Division sustained a claim for restoration to service with pay for time lost where the Carrier had dismissed claimants without affording them an investigation within 10 days of the date charged with the offense or held from service. The fact that the Carrier subsequently held an investigation was held to be "of no force or effect so far as Claimants are concerned." The Division suggested that the Carrier should reinstate claimants and dismiss them again in accordance with the rules. Here, the majority seems to suggest that the Carrier could have "limited the amount of obligation" by restoring the **status quo** that existed April 1, 1952, paying the unnamed claimants to August 15, 1952, and then abolishing the positions all over again.

The Fourth Circuit's opinion is a complete rejection of the idea that action taken subsequent to the expiration of a time limit rule is null and void **per se**, for the Court stated:

> "* * * The purpose of the ten-day provision is to expedite the proceedings for which the rule provides, not to serve as a limitation upon their being held; and the remedy for violation of that provision is damages for any delay that may have occurred, not reinstatement with an unassailable record or damages for an indeterminate period on the theory that the proceedings otherwise regularly held were a nullity. Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity."

For the foregoing reasons, this is an improper Award and we dissent.

/s/ **R. M. Butler**
/s/ **W. H. Castle**
/s/ **C. P. Dugan**
/s/ **J. E. Kemp**
/s/ **J. F. Mullen**