Award No. 9686
Docket No. TE-9612

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

CHICAGO GREAT WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chicago Great Western Railway that:

1. The Carrier improperly removed the name of Agent-Telegrapher J. P. Zeien from the Telegraphers' seniority roster on the Minnesota Division, Main Line-W M & P Districts;

2. The Carrier shall now restore the name of J. P. Zeien to its proper place on the Telegraphers' seniority roster for said district.

EMPLOYES' STATEMENT OF FACTS: J. P. Zeien, hereinafter referred to as the claimant in this case, was working for the Carrier in the capacity of telegrapher-leverman-clerk at New Hampton, Iowa, on January 20, 1940. The petitioner's service with the Chicago Great Western commenced prior to World War I at Empire, Minnesota (May 1, 1916 where he worked in the capacity of a towerman. While at Empire he entered into the service of the United States as a member of the armed forces in September of 1917, and returned to this railroad position, after having served two years in the army, where he remained for some fifteen years. As a result of the abolishment of the Interlocker at Empire sometime during 1931 he displaced the agent at Nerstrand. While at Nerstrand he performed the work of an agent-telegrapher.

Subsequent to his displacement of the Agent at Nerstrand, Zeien applied for, and was assigned to the agent-telegrapher's position at Welch, where he remained for a period of six years. Following this assignment, Claimant filled, in their related sequence, the agent-telegrapher's position at Alta Vista; the Agent's position at New Hampton; the Telegrapher-Leverman-Clerk's position at New Hampton; and following the removal of the interlocking facilities at New Hampton in 1950, he occupied the position of Operator-Clerk at this same location, which position he was holding when he suffered serious physical injury in the course of his employment. The assigned hours of this position were 2:45 A. M. to 10:45 A. M. The only other employe assigned at New Hampton is an Agent with assigned hours 10:45 A. M. to 6:45 P. M.

iority roster is fully set forth in Carrier's Exhibit "A". In the circumstances we resepctfully request that claim be denied.

The Carrier affirms that all data in support of its position has been presented to the other party and made a part of this particular question in dispute.

Carrier's Exhibit "A" is attached hereto and made a part hereof as if fully set forth herein.

(Exhibits not reproduced.)

OPINION OF BOARD: In Award 9510 this Board recognized that "Under Article V, Section 1 (a), of the August 21, 1954, National Agreement, a claim protesting permanent disqualification from service must be filed, to be timely, within 60 days from the date of the permanent disqualification." In the present case (which is covered by the aforementioned Article V) the Carrier removed Claimant's name from the seniority roster as of January 1, 1955, and the Organization definitely knew, at least by February 17, 1955, that the Carrier had removed Claimant's name from the seniority roster and that the Carrier had done so with the intent that Claimant be deemed permanently disqualified from any further service with the Carrier (one of General Chairman Kingsbury's letters expressly recognized, for instance, that Carrier's February 17, 1955 letter gave notice that Claimant's "employment relationship had been terminated"). The present claim was not filed until March 2, 1956, and accordingly is not timely; the claim must be dismissed. Also see Award 8745 in which the Board, without Referee, recognized that claims protesting removal of name from seniority roster must be filed within 60 days of the removal to be timely under an Agreement clause providing that "All claims or grievances must be made in writing within sixty (60) days from date of the occurrence on which the claim or grievance is based, and if not so presented, are barred."

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 Employe involved in this dispute are respectively Carrier and Employe 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 present claim is barred.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Shulty
Executive Secretary

Dated at Chicago, Illinois this 7th day of December, 1960.

DISSENT TO AWARD 9686, DOCKET TE-9612

The majority — the Referee and Carrier Members — appears to have been so preoccupied with technicalities that it lost sight of the real issues involved.

The Claimant, as a result of a suit for damages arising from an injury while on duty, was awarded $6,000.00. The Carrier retaliated by refusing to pay the vacation allowance due and by refusing to recognize the claimant's seniority when he sought to exercise it by bidding on a bulletined vacancy. A timely claim was filed on both counts. One day later the Carrier issued a seniority roster which omitted claimant's name.

Some time later the dispute about the vacation allowance was settled, but no agreement was reached on the question of claimant's attempt to exercise his seniority. That question was submitted to this Board in a legal and timely manner.

The claimant's representatives, during handling of the dispute, apparently became convinced that since he was still unable to handle a job requiring considerable physical strength the claim for pay was not realistic. They sought and secured a conference with the Carrier's highest officer, following which the original claim — asking assignment to a specific job with pay for time lost — was withdrawn from the Board and the present one — asking only that claimant's seniority be recognized in the abstract, without seeking any payment at all — was substituted.

The Carrier's sole defense was that the claim was an entirely new one and not presented within the time limit provided by Article V of the August 21, 1954 Agreement.

The majority accepted that defense as being valid. In my opinion it seriously erred in doing so.

First of all there was no new claim. The dispute from the beginning involved the question of claimant's seniority: Had he forfeited it by prevailing against the Carrier in a law suit? Claimant's name had not been removed from the roster when the claim was filed. That action came a day later and was merely an incident of the dispute. This incidental action was not the primary cause of the dispute, and thus was not the occurrence upon which the claim was based. The claim was based upon Carrier's refusal to recognize Claimant's seniority, which began during the month of November, 1954. The claim, based on that occurrence, was timely filed on December 31, 1954.

This Board has often held that claims may properly be amended from time to time during the handling. Obviously, then, the amendment of this claim — even if it be termed a substitution of one claim for another — where the potential liability of the Carrier was reduced from thousands of dollars to nothing, was entirely without prejudice to the Carrier, and was entirely proper.

I believe the logic of Award 3256 and many others like it should have guided our handling of this matter. In Award 3256 we said:

> ". . . It is a fact established by the record that variances in the form of the claim occurred from time to time until the claim

reached this Board. In this respect, it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes. The subject matter of the claim — the claim violation of the agreement, — has been the same throughout its handling. The fact that the reparations asked for because of the alleged violation may have been amended from time to time, does not result in a change in the identity of the subject of the claim. 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 this Board of authority to hear and determine it. No prejudice to the Carrier appears to have resulted in the present case and the claim of variance is without merit."

Certainly no prejudice to the Carrier resulted here when the Employes withdrew the claim that Zeien be accorded the right to exercise his seniority *on a specific position and substituted therefore a claim that the Carrier* merely continue to recognize that he has seniority rights.

The majority's treatment of the amended claim as if it were a new one does not, in my opinion, give proper consideration to all the facts and the principles which have guided our actions in such cases. It is thus in error.

I am convinced that the majority further erred when it failed to recognize, or even to mention, the provisions of Section 3, Article V, August 21, 1954 Agreement. That section obviously was included in the agreement to assure equitable treatment of both carriers and employes in those instances where for one reason or another a claim is not promptly filed in a situation that continues to exist. Clearly, the employes should not be forever barred from asserting their rights, in an allegedly continuing violation of their agreement, merely because they may have failed to present a proper claim within the sixty days which is provided for a "one-incident" violation.

And it is equally certain that the spirit of the rule does not require a carrier to assume unlimited retroactive liability in such a situation.

The parties protected themselves in Section 3 by agreeing that the employes would not be restricted to sixty days in filing a claim involving an alleged continuing violation and that where such a claim were filed no monetary claim should be allowed retroactively for more than sixty days *prior to the filing of such a claim.*

In the present case, the claim — even if in its final form it is proper to consider it a new claim, as the majority did — clearly involved an allegedly continuing violation of the agreement. As we have previously noted, the mere removal of Zeien's name from the roster was not the primary cause of complaint. The dispute involved the Carrier's refusal to recognize his seniority, and that refusal did not occur just once, but continued throughout the duration of the controversy.

Seniority is a continuing accumulation of rights, or perhaps it might be said to be a continuing potential of valuable rights. This Board, in First Division Award 19112, has compared seniority rights with the dower right, favored in law, but which is inchoate until properly asserted. The Award went on to note that:

". . . if a person has it, and has not waived it, the right may not be terminated, though it is said to be 'inchoate' for an indeterminate time. So it is in this instance with seniority rights."

The Carrier's refusal to recognize the Claimant's continuing seniority rights can only be a continuing matter until resolved one way or the other. The Employes alleged this continuing matter to be a violation of the parties' agreement. Therefore, they had a right to file their claim "at any time" under Section 3.

Failure of the majority to recognize this valuable right accruing to the Employes by virtue of the very rule relied upon by the Carrier constitutes grevious error and renders this award a nullity for the purposes sought to be accomplished by Congress when it created this tribunal.

For the reasons stated I dissent.

J. W. Whitehouse
Labor Member