

Award No. 10394

Docket No. CL-10182

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Arthur Stark, Referee

PARTIES TO DISPUTE:

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

INDIANA HARBOR BELT RAILROAD COMPANY

STATEMENT OF CLAIM: (1) Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the Clerks' Agreement when on or about March 1, 1956, they arbitrarily changed the clerical assignments at its Gibson Car Shop from a six day per week to a seven day per week schedule assigning Sunday as a regularly assigned work day at straight time rate and

(2) That the Carrier shall now be required to compensate Claimant Yatko's surviving widow or Claimant's estate an additional day's pay at pro rata rate for each Friday commencing March 9, 1956 and terminating Friday, March 15, 1957, plus the difference between straight time and time and one half rate for each Sunday that Claimant was required to work at straight time and

(4) That the Carrier shall also be required to compensate Claimant Yatko's successor (Harley H. Archibold) an additional day's pay at pro rata rate for each Friday plus the difference between straight time and time and one half for each Sunday that Harley M. Archibold was required to work at straight time, such payment to commence March 22, 1957, and continue until the occupant of Position #26 (Archibold or his successor) shall have been assigned to a work week of five days per week with Sunday as one of the two rest days.

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as representatives of the class or craft of employes in which the Claimants in this case held or now hold positions, and the Indiana Harbor Belt Railroad, hereafter referred to as the "Brotherhood" and the "Carrier" respectively.

Prior to September 1, 1949, the clerical forces at Gibson Car Shop had always been assigned on a six day per week, Monday through Saturday basis, No Sunday service was ever assigned in a regular seven day per week operation and any work performed on Sunday was performed at time and one half rate in accordance with the then existing Agreement.

All data and arguments herein contained have been presented to the Clerks in conference and/or correspondence.

(Exhibits Not Reproduced.)

OPINION OF BOARD: In March 1956 the Carrier established seven-day operations at its Gibson Car Repair Shop. Certain Clerical positions were reassigned in order that cars which were being spotted and repaired could also be checked. Prior to March 1956 Claimant A. Yatko (Position No. 26), the junior clerical Employee, worked a Monday-Friday schedule, with Saturday-Sunday rest days. Effective March 9 he was placed on Sunday-Thursday assignment, with Friday-Saturday rest days. Thereafter he received pro rata pay, rather than time and one-half, for Sunday work

The Brotherhood affirms that the Carrier's action violated Rule 15 since, prior to March 1956, the Carrier never contended that Gibson Car Shop clerical forces constituted a seven day per week force necessary to the continuous operation of the railroad. The principle of punitive time (time and one-half) payments for Sunday service, the Brotherhood asserts, is well established. It cites the following awards, among others: Case No. 212 (N.M.B.), Awards 6695, 5710, 6502, and 7370.

The Carrier requests the claim be denied since the Brotherhood's appeal from Management's June 7, 1956 denial was not made in 60 days as prescribed in Rule 13. (The BRC contends, contrariwise, that Management failed to comply with contractual time limits.) It also denies violating the Agreement since (1) clerical employees performed Sunday work before March 1956 in the Gibson Yards; (2) clerical employees are needed since car repairs must be performed whenever necessary, regardless of the day or hour; (3) no rule prohibits a seven-day operation; (4) more than half the regular clerks at the yard already work Sundays, at pro rata rates, in a seven-day operation. The Carrier does not think Case No. 212 or the other awards cited by BRC are in point; rather, it directs the Board's attention to Award 6856.

Timeliness. Rule 13 of the Schedule Agreement states, in relevant part:

"(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed . . . It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60 day period for either a decision or appeal, up to and including the highest officer of the carrier designated for that purpose."

The record shows that Yatko's claim was submitted to the General Car Foreman on either March 4 or March 9, 1956. It requested (1) payment at time and one-half for work performed on Sunday, (2) payment at straight time for Friday (previously a rest day but now a scheduled work day). Identical claims for Sundays and Fridays were submitted each week until May 20. They were all denied, individually, by General Foreman Whitehead, the last denial occurring on May 21.

These claims were appealed to Master Mechanic T. J. Lyon (the record does not reveal when, nor does it contain a copy of the appeals). On May 23 Lyon conferred with BRC Vice Chairman Zimmerman and the Local Committee. On June 7 Lyon wrote BRC Local Chairman R. E. Rathburn:

"Regarding meeting at Gibson, May 15th, due to time claims on the part of E. T. Carlson, and A. Yatko, Clerks at Gibson Car Shop covering change of assignment due to seven day operation at the car shop as of March 1, 1956.

"As per agreement the matter of the punitive time for the Sunday operation will be held in abeyance until the decision is rendered covering the pending Gibson Transfer.

"As the other claims that have accumulated in this respect all pertain to that same decision it will be necessary to decline payment of one employe making himself available covering his previous day of rest and the claim of clerks due to reassigning the work to cover the seven day operation.

"Just as soon as the decision is rendered will call another meeting to effect settlement in all instances and if necessary, rearrangement of forces to eliminate the present objection."

On June 13 BRC Vice General Chairman Zimmerman advised Lyon, in a two page letter, that (1) the Brotherhood's Committee had not understood that punitive pay claims would be held in abeyance; (2) the Brotherhood understood that only Yatko's Friday pay claims were to be held in abeyance; (3) the Committee refused to concur in a suggestion that the parties negotiate a change in some duties and assignments of Gibson Car Shop Clerks and establish a seven-day work week with the addition of one relief clerk. Zimmerman concluded:

"I make these elaborations because it may be necessary to appeal your decisions if a settlement is not reached in the near future, and a clear picture of the facts will be necessary at that time."

A month later, on July 3, Zimmerman wrote Lyon to clarify the Brotherhood's position that its claim was a "continuing" one, covering all Friday and Sunday assignments. Zimmerman stated, in part:

"While the claims submitted thus far specify certain dates, I would like to have it understood that these claims we now have under consideration cover punitive time for all Sundays worked by Mr. A. Yatko since March 4, 1956, and also cover a straight time day for the rest days arbitrarily assigned to Mr. Yatko.

* * *

"Since these are continuing violations, please consider this as a continuous claim filed on behalf of Mr. A. Yatko and Mr. E. Carlson or their successors to cover the period from March 4, 1956, until such time as the violations cease to exist.

"This arrangement will eliminate unnecessary paper work for all concerned."

There was no further correspondence until November 21, 1956 when Zimmerman wrote Lyon:

". . . to date these violations are continuing, and I have received no denial from you of the continuous claim.

"As this claim was not denied within the 60 days as required in our October 25, 1956 Agreement, please arrange to allow as requested . . ."

The Brotherhood's reference was to Rule 13, Paragraph 1(a) of the National Schedule Agreement which states, in part:

"Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe 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."

On February 20, 1957 (following a meeting on the same day with Zimmerman) Lyon replied, stating that he had denied BRC claims on June 7 and it was not necessary to re-deny the July 3 claim since, in his consideration, the original claim was a continuing one. Lyon also wrote:

"Original claims were denied in our letter of June 7, 1956 to Mr. R. E. Rathburn, Local Chairman, with copy to you, except the questions of overtime payment held in abeyance at our meeting of May 23, 1956."

Lyon concluded his letter by stating, "it is our understanding that you propose to appeal our decisions on these claims."

On March 20, 1957 BRC General Chairman Dalsky appealed "from decision rendered by Mr. T. J. Lyon. . . . contained in his letter of February 20, 1957. . . ." On April 11 Carrier representative D. R. Craft wrote Dalsky that the claims "are denied for the reason that appeal was not made by your Organization within sixty days from date of Master Mechanic Lyon's declination dated June 7, 1956. . . ."

Since at various stages of these proceedings each party has argued that the other failed to comply with a Rule 13 Time Limit requirement and, therefore, that some or all of the claims should either be denied or granted without consideration of the "merits", we must first consider these procedural arguments:

1. The Brotherhood states that, since Yatko's March 9 claims were not denied in writing until June 7, they should be granted under the 60 day limit clause. Similarly, all claims filed up to April 7 (60 days before June 7) should be granted.

This contention, however, was not made on the property or in the Submissions to this Board. Crucial facts are unavailable; it is impossible to ascertain just how the original claims were denied. Since, however, it is apparent that the Brotherhood appealed the matter to Master Mechanic Lyon, it follows that denials must have occurred prior to June 7, although the record is silent on the dates or form. (Significantly, the Brotherhood notes on Record Page 6, "These claims were individually denied on the local level by Mr. J. S. Whitehead, General Foreman, on various dates up to and including May 21, 1956." Moreover, the Brotherhood adds, "as the result of these denials, claims were appealed. . . .")

Under the circumstances this contention cannot be sustained.

2. The Brotherhood argues that if it be found that Yatko's original claim or claims (March - May) were not timely appealed (and the Brotherhood says they were), then the July 3 communication constituted a second claim which could not have been denied by Lyon's June 7 letter (it covered only March - May claims). This second claim, unlike the prior ones, covered (1) alleged continuous violations, 2) successors, if any, to Yatko. The right to file continuous claims, BRC notes, is found in Paragraph 3 of Rule 13; such claims may cover a period of 60 days prior to submission (May 3 in the instant case). This Rule provides:

"A claim may be filed at any time for an alleged continuing violation of the agreement and all rights, of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof."

Since the July 3 continuous claim was not denied by the Carrier it must be sustained, the Brotherhood argues, from May 3, 1956 and as long as the violation continues.

While it is true that Zimmerman's July 3 letter raises the question of "continuous" violations and "successors", which were not mentioned in earlier correspondence, detailed analysis of the wording in this letter convinces us that the Vice General Chairman was amending or changing previously filed claims, not submitting a new one:

(1) The opening paragraph states: "Please refer to claims filed by Mr. E. Carlson and Mr. A. Yatko. . . . account change of assignments. . . . effective March 1, 1956." This sets the basis for paragraphs which follow.

(2) The second paragraph notes in part: ". . . I would like to have it understood that these claims we now have under consideration cover punitive time for all Sundays worked by Mr. Yatko since March 4, 1956 . . ." (Emphasis ours). The claims then under consideration, clearly, were the claims filed by Carlson and Yatko mentioned in the first paragraph. The Vice General Chairman, in this second paragraph, was clarifying the Brotherhood's position ("I would like to have it understood") that existing claims extended to all days improperly assigned or improperly paid as well as specific days named in the previously submitted series of claims.

(3) The fourth paragraph states:

"Since these are continuing violations, please consider this as a continuous claim filed on behalf of Mr. Yatko and Mr. E. Carlson or their successors to cover the period from March 4, 1956, until such time as the violations cease to exist."

This is a somewhat ambiguous sentence. "Please consider this as a continuous claim. . . ." might be interpreted to mean that Zimmerman was submitting a new claim. On the other hand, "since these are continuing violations" refers to the previously filed claims mentioned in the first and second paragraphs. When read in the context of the entire letter paragraph four, in our judgment, reveals the writer's intent to amend and clarify the pre-existing

claims. Moreover, were this not the case, would not the Brotherhood have filed its new claim in the manner required by Rule 13, Paragraph 1(a)? Under this provision:

"All claims or grievances must be presented in writing by or on behalf the employe involved, to the officer of the carrier authorized to receive same . . ." (Emphasis ours.)

In this instance, the Vice General Chairman's letter was directed to Lyon, an appeals officer, rather than to General Foreman Whitehead, the claims-receiving officer.

Accordingly, we conclude that this July 3 letter served to amend and clarify the Brotherhood's position regarding previously submitted claims but did not in itself constitute a new claim. The Carrier, therefore, was not obligated to specifically disallow it (assuming, of course, that the prior claims had been timely denied).

3. The Carrier argues that the Brotherhood failed to appeal Master Mechanic Lyon's June 7 denial in a timely manner. It states, in essence, that

(1) In this letter the Carrier's appeal officer (a) specifically denied all claims relating to Carlson and Yatko except for punitive time for Sunday, and (b) confirmed an agreement, made at a prior meeting with BRC, that the Sunday punitive time matter would be held in abeyance until a decision was rendered in a pending Gibson Transfer arbitration.

(2) The Brotherhood, in its June 13 letter, rejected the suggestion that the Sunday punitive time issue be held in abeyance, thus, in effect, converting the Carrier's June 4 letter into a complete denial of all claims.

(3) No appeal from Lyon's June 7 denial was made until March 20, 1957, long after the 60 day deadline (August) had passed. Therefore, under Rule 13, all claims should be dismissed.

It is clear, from paragraph two of Lyon's June 7 letter, that he was denying the Brotherhood's claims for Friday pay for Yatko ("decline payment" was the phrase he used). It is also evident, from his first paragraph, that the Master Mechanic believed he had reached an understanding with the Brotherhood that the matter of Sunday punitive pay would be held in abeyance. Had there been no subsequent correspondence on this score, we would hold that this Agreement constituted a Rule 13-1(b) time-limit extension.

However, on June 13 the Vice General Chairman made it clear that, in the Brotherhood's mind, there was no such Agreement or understanding. True, some confusion exists regarding just what Lyon thought was being held in abeyance, the question of the validity of the Sunday punitive pay claim (in principle), or the question whether the Carrier should pay time and one-half to Yatko pending the outcome of Case 212. The Brotherhood's June 13 letter does little to clarify this matter. But, we believe that it was reasonable for the Carrier to conclude that the Brotherhood wanted to process all claims and hold none aside, in light of this declaration:

"Claims for punitive time for Sunday work by Mr. A. Yatko — It was not the understanding of our committee that these claims would be held in abeyance. . . ."

Under Rule 13 - 1(b) an appeal must be taken within 60 days from notice of disallowance. The key date here was June 7 when the Brotherhood clarified Lyon's understanding (or misunderstanding). Under Rule 13, therefore, the Brotherhood's appeal should have been submitted by August 8 or 13, 1956. But it was not. The appeal was filed in March 1957.

(True, this appeal, presumably, was from an alleged February 1957 denial. However, the Carrier's February 20 letter was not a denial at all; rather it constituted an explanation of Carrier's position that it was not obligated to re-deny the Brotherhoods' July 1956 "continuous claim". We have held above that the Carrier was correct in this position.)

Under the circumstances, we find that all claims must be dismissed since they were not appealed in a timely manner under the applicable provisions of Rule 13.

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 Employees involved in this dispute are respectively Carrier and Employees 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 for reasons stated in this Opinion the claim must be dismissed.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of March 1962.