Award No. 11211

Docket No. CL-10109

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

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

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier reimburse General Clerk H. E. Russell, Breakout B. Carrington and Trucker W. DeLapp, Waco, Texas, each for three hours at punitive rate of pay of their respective assignments for January 26, 1956, and subsequent dates until violation is corrected; and Report Clerk G. Bruner, Breakout H. Mayes and Stowman J. L. Price, Waco, Texas, each for three hours at punitive rate of pay of their respective assignments on February 3, 1956, and for subsequent dates until violation is corrected; and any and all other employees covered by the Clerks' Agreement, at punitive rate of pay for any of the work in connection with "Piggy-Back Service" which is denied them and is performed by those not under the scope of the Clerk's Agreement, account Carrier's failure to handle their claims within the time limits provided for in Article V-1 of the August 21, 1954 National Agreement. Our claim also contemplates that a check of Carrier's records be made to determine the extent of the violation of Waco, Texas.

EMPLOYES' STATEMENT OF FACTS:—Employes of the Southwestern Transportation Company are being used in performing the work outlined in part one (1) of Statement of Claim. The loading, bracing, blocking or securing cargo on flat cars is work properly belonging to employes under the scope of the Clerk's Agreement.

Claim was originated by Local Chairman H. E. Russell on March 21, 1956, with Mr. H. P. Irvin, Agent, Waco, and was declined by Mr. Irvin on March 29, 1956. (Employes' Exhibits A-1 and A-2)

Claim was appealed to Mr. W. G. Hazlewood, Division Superintendent, Tyler, Texas, by Division Chairman W. D. Metcalf on May 26, 1956. (Employes' Exhibit B)

On August 4, 1956, Division Chairman Metcalf wrote Mr. Hazlewood, attaching copy of his letter of May 26, 1956, and stated that the sixty day time limit had passed and no reply had been received and requested claim be paid. On August 6, 1956, Mr. Hazlewood replied to Mr. Metcalf's letter of August 4th, attaching copy of his letter of May 29, 1956, and stated it was

Carrier could properly consider the claim on the merits. A decision rendered on any date up to July 26 obviously would have been on the merits of the case—the claimed right to service. When the Employes invoked the time limit rule they could not deny the right of the Carrier to consider the rights to service in the future.

A continuing claim in the future would have been on the basis that the Carrier should make a perpetual payment to clerks for work not performed or should take work from trucking concern employes and from Firemen and Oilers who have performed it since the inception of Piggy-Back service. The Firemen and Oilers have already protested a request by Carmen for rights to the work. There can be no doubt that the employes of the trucking concerns would resist any effort of the Carrier to have clerks perform work they have handled. To notify a truck driver to get out of the cab of the truck he drives and permit a clerk to back the truck and trailer up a ramp, across running boards onto a flat car and possibly across several flat cars to the location where the trailer is to be tied down, would undoubtedly cause disputes as to rights to the service.

Consequently, in passing on any claim continuing beyond the last date it was alleged the Superintendent's decision was due, the Board would be passing on a question of right to the work involved, in the guise of passing on a claim for "reimbursement" because notice of decision in a claim was allegedly given 10 days late. To render any valid award as to right to the work, notice to parties involved and a hearing on merits of the claim of right to service would be required under the Railway Labor Act.

The Carrier respectfully submits that in no event could there be any valid basis for claim continuing beyond the last date it was alleged the Superintendent's decision was due.

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In conclusion the Carrier submits that the facts show plainly that there is no basis for the claim, and requests that the claim be denied.

All data herein has been presented to representatives of the Employes in correspondence or in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: The portion of the above Claim which reads as follows: ". . . and any and all other employes covered by the Clerks' Agreement" must be rejected and should be stricken from the Claim for the reason that it is far too vague and indefinite for our proper consideration.

We adopt the findings made in Award 10742 in regard to the failure of the Carrier to comply with the requirements of Article V of the August 21, 1954 National Agreement—as the factual situations in regard to transmittal of declination, within the prescribed time limits, are the same.

We now address ourselves to the important matter of the extent to which a continuing claim may be allowed when the Carrier is in default under the time limit rules prescribed by Article V.

This has posed a complicated problem, but it now appears that by virtue of the weight of current precedential Awards a continuing claim may be al-

lowed prospectively only in the event that the Claim is sustained on its substantive merits. See Third Division Awards 10644, 10401, and Interpretation No. 1 of Award No. 9578, which interpretation was adopted by this Division on the 12th day of June, 1962. See also Fourth Division Award No. 1657.

In our opinion, the decisions referred to above are not palpably wrong and should therefore be followed in the deciding of the instant Claim.

Inasmuch as the Employes chose to contend for allowance of this Claim on one ground alone, a procedural violation of the Article V time limit rules, there is nothing in the record which would sustain an affirmative award on the substantive merits.

The present Claim is distinguishable from a number of those cited to the neutral referee in that it involves the presenting and progressing of a continuing claim on purely a procedural point.

The current Awards are at variance to some extent as to the method of relief to be granted to the Employes in the continuing claim type of cases when Carrier is in default under Article V. Awards 10644 and 10401 limit the allowance to the period prior to the late declination. Interpretation No. 1 to Award 9578 would limit the allowance of the Claim to the date the timely declination could have been made.

Since Awards 10644 and 10401 are at least of as much precedential force as said Interpretation No. 1, we are more persuaded by and therefore choose to follow the former which, in effect, make it necessary for the Carrier to take the affirmative action of actually declining a continuing claim.

The referee has some misgivings in regard to the automatic judgment by default theory, i.e., that theory which holds that a claim of this type is automatically allowed at the time action could have been taken by the Carrier, the default judgment speaking as of the time thereof. The difficulty with this is that a claim often involves more than payment of money. It may embrace the claim of a craft to perform a certain type of work; and if such an issue is involved in the basic claim, a default money judgment for a very limited time period may conceivably be an unsatisfactory solution of the problem.

Our Awards point up the fact that neither the Employes nor the Carrier should rely upon a procedural point alone in progressing or defending a claim for a continuing violation.

We agree with the eminent referees who, while sitting with the Board, stated that Article V of the National Agreement placed concomitant obligations upon the signatory Carriers and Organizations; and we quote with particular approval the following portion of recent Award 10644:

> " . . . A party's failure to make a timely denial of a continuing claim, or to make a timely appeal from a denial of such a claim, does not mean that the substantive nature of the continuing claim therefore must be granted or denied for the unlimited future. . . . The purpose of the Time Limit Rule is to provide for the expeditious handling of claims, not to fasten upon the parties a system wherein a single lapse can produce continuing or repeated injustices thereafter . . ."

Therefore, except as stated in the first paragraph of this opinion, we conclude that the Claim before us should be allowed as presented for the respective time periods claimed up to, but not including, the 6th day of August, 1956, the date the authorized Carrier official actually declined 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 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

I. That there is no basis for sustaining the claim before us on its substantive merits.

II. That a technical violation by Carrier of Article V has been proved and must be sustained.

III. That the violation not having been found to be a violation on its merits, our allowance is limited to the period prior to the substantive merits of the basic claim.

AWARD

Claim sustained as set out in the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of March, 1963.

LABOR MEMBER'S DISSENT TO AWARD NO. 11211,
DOCKET NO. CL-10109

My position as to the proper interpretation and application of the requirements that:

"* * * * . If not so notified, the claim or grievance shall be allowed as presented. * * **" (Emphasis ours)

appearing in Section 1 (a), Article V, August 21, 1954 Agreement, has been clearly documented in my Answer to Carrier Members' Dissents to Awards 9578 and 10173, also, my Dissent to "Interpretation Nos. 1 to Award Nos. 9578 and 9579", thereby eliminating the necessity to repeat. The Board has repeatedly held that it has no authority to add to, take from, or write rules for the parties, as was done here. See Awards 2765, 5079, 5472, 5483, 6365, 6595, 6611, 6757, 6759, 10035 and 10888.

It is interesting to note, however, that Carrier Members, having voted in favor of this Award, have repudiated the holding of Referee Johnson in Award 9447, reaffirmed by Award 10971 (McMillen) and others.

In panel argument, the Carrier Member introduced the plea, which prevailed upon the Referee to change his original decision of sustaining the "claim as presented", reading as follows:

> "It is submitted that Award 10644 represents a sounder analysis. In this later Award he said—
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> '* * * A party's failure to make a timely denial of a continuing claim **or to make a timely appeal from a denial of such a claim,** does not mean that the substantive nature of the continuing claim therefore must be granted **or denied for the unlimited future, however, regardless of the merits of the claim. To hold otherwise would lead to absurd results—such as work properly belonging to a given craft being indefinitely lost to it because of failure to take timely action on an appeal,** or a Carrier being required for the indefinite future to pay employes for work to which they are not contractually entitled and which is properly being performed by others. **The purpose of the Time Limit Rule is to provide for the expeditious handling of claims, not to fasten upon the parties a system wherein a single lapse can produce continuing or repeated injustices thereafter.** We hold, therefore, that the confronting claim may be upheld for the period after January 5, 1956 only if the merits of the claim so indicate. We find no merit in the claim.'
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> You will note that this decision protects equally the employes and the carriers and thus cannot be said to favor either." (Emphasis ours)

Therefore, Carrier Members are bound by the stipulation emphasis above, and are estopped from hereafter taking an opposite position, when expedient to do so.

/s/ J. B. Haines
J. B. Haines
Labor Member