Award No. 14903
Docket No. CL-14414

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

GRAND TRUNK WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5437) that:

(1) Carrier violated the current agreement between the parties, effective January 15, 1955, and supplements thereto, when on Saturday, January 26th, and Sunday, January 27th, 1963, Carrier failed and refused to call Claimant to perform Clerk-Messenger work regularly assigned to his position during his Monday to Friday workweek.

(2) Mr. Robert Mann, Clerk-Messenger, Pontiac, Michigan, shall now be compensated for fifteen (15) hours' pay at the overtime rate of his position for Saturday, January 26th, and for three (3) hours' pay at the overtime rate of his position for Sunday, January 27th, 1963, and for each subsequent Saturday and Sunday on which this violation occurs until violation is corrected.

(3) All other employes who may be adversely affected by this agreement violation shall likewise be compensated subsequent to January 27th, 1963 to be determined by joint check of Carrier's payroll and other records.

EMPLOYES' STATEMENT OF FACTS: Employes' Exhibit No. 1 shows the Brief Description of Duties attached to the Rate Clerk. Also Bulletin No. 49 (Employes' Exhibit No. 1), was the last time the Rate Clerk's position was advertised for application or bids. Claim was filed by Local Chairman, Mr. M. Lektzian, (Employes' Exhibit No. 2) only after repeated efforts by the Local Chairman to persuade the Agent to call out a Clerk-Messenger on Saturdays and Sundays because of the increased production at Pontiac Motor Division which necessitated the Rate Clerk to make several trips in his own automobile to Pontiac Motor and the Johnson Avenue Yard Office at Pontiac to pick up and deliver Inbound and Outbound Waybills which time is spread out over a period of about 13 hours.

The Agent declined claim (Employes' Exhibit No. 3) stating that since the advent of the forty hour work week on August 31, 1949, the Rate Clerks have been doing Clerk-Messenger duties on Saturdays and Sundays and since that time this procedure has not changed.

The conference requested in the employes' above-quoted letter was held in Detroit, Michigan, on July 2, 1963, during which the Vice President and General Manager's April 23, 1963 declination was reaffirmed. The decision rendered at the July 2, 1963 conference was confirmed in writing to the employes as follows:

"GRAND TRUNK WESTERN RAILROAD COMPANY

July 2, 1963
File: 8325-1(285)
Your File: 61-1430

Mr. James E. Darling, General Chairman
Brotherhood of Railway and Steamship Clerks
1902 South 17th Avenue
Maywood, Illinois

Dear Sir:

Referring to conference which Mr. W. W. Byam held with you in Detroit today with regard to the claim of Mr. Robert Mann, Clerk-Messenger, Pontiac Freight House for 15 hours' pay at overtime rate for Saturday, January 26, and 3 hours' pay at overtime rate for Sunday, January 27, 1963, and similar claim for subsequent Saturdays and Sundays.

The entire file was reviewed at the conference and fully discussed and you were informed that there is no change in my declination of the above claim as given to you in my letter of April 23, 1963.

Yours very truly,

/s/ H. A. Sanders

cc: Mr. E. T. Rose
Superintendent
Milw. Jct. Mich.
Your File: 8325-421"

Copies of the Clerks' Working Agreement, effective January 15, 1955, are on file with the Third Division.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier has raised two jurisdictional or procedural issues. In the first instance, Carrier alleges that paragraph (3) of the Statement of Claim is for unnamed claimants, and does not, therefore, meet the requirement of Section 1(a) of Article V of the Agreement. The claim was first presented to the Agent on behalf of "Mr. R. Mann, and for all other employes that may be involved or affected by this agreement violation subsequent to the date of this claim until said agreement violation is corrected." The issue of unnamed claimants was not raised by the Carrier in the subsequent handling on the property. The decisions of this Division and of the National Disputes Committee firmly hold that where either party fails to raise a procedural issue on the property, it is waived and it may not be considered by the Board.

Second, Carrier contends "that the instant Claims are barred by reason of the Claim presented in March and April, 1959, for an alleged violation having become barred under Section 1(b) of Article V." The record shows that the Local Chairman presented a similar claim to Carrier's Agent on April 27, 1959, on behalf of the same employe, alleging that the Carrier failed to call the claimant to work on March 7, 14, 21, April 4, 11, 18 and 25, 1959 as required by the Agreement. The Agent declined the claim on April 30, 1959. For reasons not appearing in the record, this claim was never appealed on the property, and the matter was closed on the basis of Section 1(b) of Article V, which reads as follows:

> "(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 the time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. 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 the purposes."

There is no question that the basis for the instant claim is identical with the basis for the claim which was closed in 1959. Only the effective dates of the alleged contract violation are different. It is immaterial that the Claimant is the same person in both instances.

Carrier argues that the present claim is not properly before this Division because it is the same claim that was abandoned in 1959. It is, therefore, closed within the meaning and intent of Section 1(b) of Article V.

It may be well to examine several Awards cited by the Carrier. The ruling in Award 9447 is stressed with considerable emphasis. Two positions of Payroll Clerk were abolished on March 15, 1955 in the office of Auditor of Disbursements and transferred to machine operation in the office of Auditor of Freight Accounts, in another seniority district. Employes in that case asked that the position be restored to the seniority district from which it was transferred and that certain clerks be compensated for lost earnings. The claim was predicated upon the allegation that the position in the office of the Auditor of Disbursements was improperly and illegally abolished. When the Employes failed to appeal the denial of the original claim within the required sixty (60) days, the claim was closed and the issue was decided in favor of the Carrier. The Board held this failure to appeal sustained Carrier's contention that the positions were properly and legally abolished and for that reason the later claim was barred.

However questionable the reasoning of the Board may be in Award 9447, the fact is that the instant claim is predicated upon a completely different set of facts and upon the alleged violation of a different type of Rule. Here we have to consider the meaning and intent of Rule 51(f), which reads:

> "(f) 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 40 hours of work that week; in all other cases by the regular employe."

Each alleged failure of the Carrier to call the proper employe under the circumstances and within the terms of said Rule 51(f) is a separate and distinct violation. The mere fact that the Employes failed to appeal the denial of the claim in 1959 is not a bar to the present claim because it is not the same claim. The Carrier may or may not have violated the Agreement, and more specifically Rule 51(f) in 1959, but we need now to determine whether the Carrier failed to comply with the terms of said Rule in the instant claim.

In Award 9447 the abolishment of the positions was the sole issue. There was only a single abolishment to consider. At this time we have two separate and distinct violations. We must assume that the Carrier did not violate the Agreement when the Employes did not appeal the claim within the time limits. But that is not res judicata to the present claim which arose four years later. It is not a refiling or resubmission of the 1959 claim.

Awards 10251, 14450 and 14451 also involved abolishment of positions. In Award 10329 we dismissed the claim because it related "to the same occurrence that happened on October 1, 1952." The dismissal of the claim in Award 12851 is predicated upon the fact that the claim, like the previous one which was not appealed in time after denial, is based upon the closing of the station at Walcott, Wyoming. We said there that "The genesis of these claims and the original claim was the closing of the Walcott agency." In Award 13659 the claim was for "loss of wages account of changed classification from March 5, 1950 to March 31, 1950." And, it was dismissed because "The claim submitted to the Board was not handled on the property and, therefore, must be dismissed." The Employes did not comply with Section 3, First (i) of the Railway Labor Act and Circular No. 1 of the National Railroad Adjustment Board.

For the reasons heretofore indicated the facts in the present case are distinguishable from the facts in those Awards relied upon by the Carrier.

There is another factor to be considered. Sections 1(a) and (b) of Article V provide that should an employe or his Organization fail to present a claim in writing within 60 days of the occurrence, or should either of them fail to appeal a claim "within 60 days from the receipt of notice of disallowance", the matter shall be considered **"closed."** (Emphasis ours.) Section (c) is different. It reads:

"(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employes and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be **barred** unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board, or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second

of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to." (Emphasis ours.)

"Barred" does not have the same meaning as "closed." Each applies to distinct situations. "Closed" is confined to a claim arising out of single and identical violation. "Barred" has a stronger connotation. It applies to all similar claims that have not been appealed to the Board within nine (9) months.

The 1959 claim was not processed beyond the agent, the very first designated Carrier officer to whom such claims are presented. That specific claim was "closed", but no similar claims, not arising from the same violation and not stemming from the same genesis are "barred." The instant claim does not arise from the same violation, nor does it stem from the same genesis.

For the reasons heretofore stated, the claim needs to be considered and resolved on the merits.

Claimant, Mann, was regularly assigned to the position of Clerk-Messenger. He was assigned to work from 7:00 A. M. to 3:00 P. M., Monday through Friday, with rest days on Saturday and Sunday.

The record is clear that, in addition to other duties, Claimant was required to pick up waybills at Pontiac Motors and at the Johnson Yard. He made as many trips to these locations as required. No other employe at the station did this work during the Monday through Friday workweek.

Although Carrier alleges that the Rate Clerk was assigned to perform messenger work on Saturdays by bulletin issued August 31, 1949, no such bulletin appears in the record, and the Employes deny that any was ever received. In the absence of probative evidence of such a bulletin, Carrier's allegation is only an assertion, and not evidence which may here be given credence. The record does show that the Claimant did perform messenger and clerical work at overtime pay on his rest days, Saturdays and Sundays. There is no convincing evidence that the work of Clerk-Messenger was part of the regular assignment of the Rate Clerk or the Chief Clerk on Saturdays and Sundays.

Rule 51(f) is a specific rule, clear and meaningful, not encumbered by ambiguities. Claimant is entitled to be assigned to perform his regular assigned duties on his rest days when no extra or unassigned employe, who does not have forty (40) hours of work that week, is available. No past practice to the contrary, if it existed — and this may not be here considered because it was not raised on the property — is relevant because such a past practice may not contravene the clear and explicit contract language. It may be considered only where the contract language is ambiguous and it is necessary to ascertain the meaning and intent of the parties. Such is not the case here.

On the basis of all the relevant and probative evidence in the record, it is concluded that there is merit to the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1966.

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NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 14903

Docket No. CL-14414

Name of Organization:

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

Name of Carrier:

GRAND TRUNK WESTERN RAILROAD COMPANY

Upon application of the representatives of the Carrier and the Employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretations are made:

1. The Carrier has asked for the following interpretation of Award 14903:

> "Was it the intention of the Board that the Carrier be required to pay that portion of the Claim in question, identified in paragraph (3) of the Statement of Claim, which was in fact never appealed on the property?"

It is the position of the Carrier that while the Carrier raised three jurisdictional or procedural issues, Award 14903 states that the Carrier raised only two such jurisdictional or procedural issues. Thus, that Award resolved two of the issues, but neither dealt with nor resolved whether paragraph (3) of the Statement of Claim was in fact appealed on the property as required by the Time Limit Rule.

In its Ex Parte Submission Carrier said:

> "It is the opinion of the Carrier that:
>
> 1. The claim hereinbefore described in paragraph (3) of the 'Statement of Claim' is not properly before this Board because it was not appealed on the property in accordance with the provisions of the Time Limit Rule.
>
> 2. The claim hereinbefore described in paragraph (1) and (2) of the 'Statement of Claim' is not properly before this Board because it is the same claim previously expired under the Time Limit Rule.

3. Even if the instant dispute was properly before this Board it would be unmerited in view of the long standing practice in effect at the Pontiac Freight Office.

Each of the above points will be hereinafter discussed in detail."

From the above it is clear why Award 14903 says that the "Carrier has raised two jurisdictional or procedural issues." But that above is frivolous. The fact is that the issue was considered and the Award deals directly with the question to be answered in this interpretation. The essential jurisdictional and procedural factors are fully discussed in the opinion. They cover all of the issues raised by the Carrier.

The answer to Carrier's question is that the Carrier is required to pay that portion of the Claim in question identified in paragraph (3) of the Statement of Claim.

Employes have requested an interpretation of the Award as it applies to paragraph 2 of the Statement of Claim.

Carrier has taken the position that since the Claimant was regularly assigned to the first trick hours Monday through Friday that he was entitled to be called under Rule 51 (f) only for the first trick hours on Saturday and Sunday.

The identical issue was raised by the Carrier in its Ex Parte Submission. Nowhere does the record show that there was a Clerk-Messenger assigned to the second trick. And, at no time did the Carrier raise the issue on the property that the second trick Clerk-Messenger was entitled to the call from 3:00 P. M. to 11:00 P. M. Even so, no other clerk is making a claim for such calls. The Carrier is not called upon to pay twice for the same violation.

It is the intent of Award 14903 that Claimant, Robert Mann, is entitled to fifteen (15) hours of pay at the overtime rate for Saturday, January 26, 1963, for three (3) hours of pay at the overtime rate for Sunday, January 27, 1963, and for all hours at the overtime rate on each subsequent Saturday and Sunday on which the Carrier similarly violated the Agreement until the violation is corrected.

Referee David Dolnick, who sat with the Division as a neutral member when Award No. 14903 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1967.

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