Award No. 16164
Docket No. TE-14746

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION (Formerly The Order of Railroad Telegraphers)

COLUMBUS AND GREENVILLE RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Columbus and Greenville Railway that the following claim be allowed as presented because of the failure of the Carrier to comply with the provisions of Article IV of the Agreement between the parties:

Claim of the General Committee of The Order of Railroad Telegraphers on the Columbus and Greenville Railway Company that the Carrier violated and continues to violate Articles 1, 2, 3, 4, 13, 30 and other articles of the Agreement between the parties when on June 19, 1962, it

1. Declared abolished two positions of agent at Eupora, Mississippi and Winona, Mississippi, when the work of these two stations continued to exist; and

2. The Carrier violated the Agreement between the parties when it bulletined as vacancies the two positions named in paragraph (1) on a consolidated basis consolidating the positions at Eupora and Winona into one position requiring part time service at each of the points when in fact no vacancy existed within the meaning of the rules of the Agreement; and

3. Carrier shall restore the two named positions to the status existing prior to the violation of the Carrier in declaring them abolished; and

4. The Carrier shall restore the two occupants of the respective positions to their positions from which they were improperly removed; and

5. These two employes, Amzi Bennett, Eupora, Mississippi, and Jarvis Bennett, Winona, Mississippi, shall be compensated in full by the Carrier in accordance with all applicable rules of Agreement as pertains to this violation of the Agreement by the Carrier; and

6. All employes other than those herein named (to be ascertained by joint check of the Carrier records as to individual names, displacement exercised) who were adversely affected by losing an assigned position, or otherwise, shall likewise be restored to their former status and compensated in full by the Carrier in accordance with all applicable rules of the Agreement as pertains to the violations of the Agreement by the Carrier.

EMPLOYES' STATEMENT OF FACTS: The Agreements between the parties are available to your Board and by this reference are made a part hereof. Article IV of the Agreement made on September 7, 1955 is the rule governing the issue in the instant case.

Article IV of the September 7, 1955 Agreement reads:

"ARTICLE IV.
TIME LIMITS FOR PRESENTING AND PROGRESSING CLAIMS OR GRIEVANCES

1. All claims or grievances arising on or after January 1, 1956, shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. 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.

(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, 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 that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier shall govern 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 dis-

Winona or by the Mississippi Public Service Commission of either the action taken which brings this cause before your Honorable Board or of action which respondent later took to further simplify the duties at Winona and of which petitioner has not complained. This further action will be explained in the Statement of Carrier's position.

In its Awards 439, 4759, 4385, 5127, 5283 and 5318 the Third Division has generally recognized the right of the Carrier to discontinue a position where the work of that position declines to the point where a substantial part of the employe's time is not occupied with the duties of the position. In its Awards 6944, 11294 and 11589 the Third Division has reiterated quite emphatically, "As stated in Award 6022, there are two principles so well established there is no occasion for citing awards supporting them that must be given consideration in determining the rights of the parties under the confronting facts as we have construed them. The first is that except insofar as it has restricted itself by the agreement the assignment of work necessary for its operation lies within the Carrier's discretion. The second is that in the absence of any rules of the agreement precluding it from doing so it is the prerogative of management, so long as it actually intends to accomplish such a result, to abolish a position if a substantial part of the work thereof has disappeared. (See also Award 6839 and awards cited therein.)"

OPINION OF BOARD: This claim must be resolved on procedural issues, and therefore, the merits of the original claim are not decided either in favor of or against the petitioning Organization.

The date of the occurrence on which the claim is based was June 20, 1962. Pursuant to a bulletin which was issued by the Carrier June 8, 1962, the positions of Agent at Eupora and at Winona, Mississippi, respectively, were abolished effective with the close of business June 19, 1962; and effective June 20, 1962, the two positions were dualized to operate under one Agent. A study of the record indicates that this action on the part of the Carrier was unilateral; however, at the Local Chairman level of the Organization it appears that the first concern of those directly involved was bidding on the new position, seeking an increase in the hourly rate of pay and an increase in the auto mileage for travel between the two stations. The effort to receive higher pay was not successful. In any event, that is, without speculating whether or not there would have been a claim presented if the request for higher pay for the dualized position had been granted, the present claim was fild November 7, 1962 — a period of time substantially in excess of 60 days from the date of the occurrence on which the claim was based. The claim was progressed to this Board by the Organization and was filed here March 19, 1964.

The parties to the instant dispute were not signatories to the National Agreement of August 21, 1954. They did, however, on September 7, 1955, adopt some of the provisions of that National Agreement, including the Time Limit Rule. Article IV of the agreement between the parties differs from the familiar Article V of the National Agreement only in regard to the date the time limit rules became effective. The same rule as Article V became effective as to these parties January 1, 1956. Therefore, for all practical purposes, the Awards of this Board interpreting Article V of the National Agreement are applicable.

The claim at hand is quite unique in one particular: The Carrier did not make any written response to the claim filed November 7, 1962, until the claim was appealed to this Board. No written declination was made by the Carrier at any level as the Claim was presented and processed on the property. The Carrier's failure to comply with the time limit rules for declination is undisputed and can only be justified on the theory that if the claim was invalid when presented, no declination was necessary.

Patently, this claim was invalid in its incipiency, and obviously the Carrier did not respond to the claim in the proper manner.

The findings of the National Disputes Committee in 1965 have been very helpful in clarifying the interpretation and application of Article V. However, it is important to remember that when the Carrier took its complained of course of action (or inaction) in regard to this claim, this occurred in the years of 1962 and 1963.

The findings of the National Disputes Committee in 1965 could not have been predicted with certainty in 1962. If the officials of this Carrier had been students of our Awards during that time period, they would have been aware of strong precedential authority to justify their taking no action at all: Award 9684 (Elkouri), adopted December 7, 1960, and Award 10532 (Mitchell), adopted April 19, 1962. In Award 10532, we held in part as follows:

> "The claim in this case was first presented on March 5, 1955, which was in excess of 60 days after January 1, 1955. There is no dispute in regard to the late filing of the claim. The Claimant contends that the Carrier failed to raise the question that the claim was not filed within the 60 days on the property and by so doing waived this defense . . .
>
> This is a case under an Agreement that requires the filing of the claim within a specific time. There was no claim here because it was not filed within the time required, and there being no claim, it was not necessary to deny same within the 60 day period."

It is still important that a claim be properly and timely filed. In a recent Award we stated:

> ". . . We further state that since no valid claim existed ab initio, the fact that the Carrier failed to give a reason for declining the Claim is of no consequence. Since the Claim was invalid in the beginning, we have no right to consider Carrier's later procedural error nor do we have a right to consider the merits of the case. We will dismiss the claim." Award 15631, adopted June 16, 1967.

We find that the instant claim is not a "continuing claim" and consequently reject the appellate argumentation of both of the Parties in this regard. The claim at hand is based entirely upon a single event, the abolishment of two positions and consolidating these into one — an action that occurred on June 20, 1962. Award 12984 (Coburn).

For the reasons indicated above, basically because this claim was not filed within 60 days after the occurrence out of which the claim arose, and

no waiver of the time limit rules on the part of the Carrier appears in the Record, we find this claim is barred and we are constrained to dismiss it.

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 Claim is barred.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of March 1968.

DISSENT TO AWARD 16164, DOCKET TE 14746

This award is palpably erroneous.

The claim was filed more than 60 days after the occurrence on which it was based, although that occurrence had been the subject of a number of conversations and conferences between the parties.

The Carrier ignored the claim. It completely ignored all efforts of the Employe representative to secure a decision on the claim. If the Carrier had simply replied to the General Chairman with a statement that the claim was not timely filed, the Employes would have had a difficult time attempting to overcome such a defense.

By remaining silent, however, the Carrier plainly waived the procedural defense. This Board has held in a long line of awards that failure of a party to assert such a procedural defense at an appropriate time — which is now any time prior to institution of proceedings before the Board — it will be deemed to have waived that defense. A representative number of such awards were provided the Referee, as follows: Awards 15392, 14887, 14749, 14706, 14595, 14247, 14087, 13755, 13723, 13722, 13652.

In the awards relied on by the Referee and Carrier Members to support their decision the Carriers involved had made some sort of an argument on

the property. In most of them the procedural defense was specifically asserted by the Carriers as a reason for their denial of the claims, at some stage of handling prior to appeal to the Board. In our present case the Carrier asserted nothing. It completely ignored all efforts by the Employes to secure a decision on the claim. These awards, therefore, are entirely distinguishable and beside the point here.

Also, the Referee's attention was directed to our Awards 11939, 11987, 12388, in which the Board held that a Carrier, in presenting reasons for denial of a claim to the Board, is limited to those reasons which it gave to the Employes during handling on the property. Under this line of reasoning, which is entirely consistent with another long line of awards prohibiting injection of new issues at Board level, the Carrier could not properly present any reasons to the Board because it gave none to the Employes on the property.

The Railway Labor Act requires both railroads and their employes to ". . . exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether out of the application of such agreements or otherwise. . . ." The Carrier utterly failed to comply with the law.

Then, the majority which adopted Award 16164, contrary to established precedent, placed its stamp of approval on the Carrier's conduct. I do not believe the Congress intended this Board to be so misused, therefore, I dissent.

J. W. Whitehouse
Labor Member

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