Award No. 18480
Docket No. CL-18727

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6779) that:

(a) Carrier violates the Agreement between the parties, effective May 1, 1955, as revised, and fails and refuses to properly apply and conform to the "Quota Rule" at Pier 46, New York; and,

(b) Carrier shall, as result of its failure and refusal to properly apply the Agreement, pay the employes adversely affected, namely, H. Gilstrap, D. McMorrow, E. Bracey, J. Rubin, their successor or successors, in accord with their seniority standing and proper application of the Agreement, the extent of their loss of earnings opportunity each and every day from October 13, 1967, forward (as determined by a check of the payroll records for Pier 46) until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Claimants are employes of the Carrier, holding seniority and other rights under the Agreement, who "shape up" at Pier 46 in New York prepared to perform work consisting of handling freight tendered to the Carrier by the shipping public.

On October 13, 1967, three (3) regularly assigned positions of Stowers at Pier 46 were 'abolished' by Carrier whereupon a claim was filed because of the Organization's view that the methods employed by Carrier in making the reductions in the forces at Pier 46 were not consistent with the Agreement's intent and meaning — including the "Quota Rule" — and wrongfully denied Claimants of their rights and earnings opportunities when "shaping up" (reporting for work) at Pier 46 (Employes' Exhibit No. 1).

Basically the number of regularly assigned positions at Pier 46 in New York is determined by the amount of freight handling the Carrier has to perform for the shipping public. Under the Agreement, however, the minimum number of regularly assigned positions in any given month is determined by the formula in Rule 37, known and referred to as the "Quota Rule." That rule also establishes minimum guarantee for what is known as additional platform forces who are engaged to perform freight handling work at Pier 46 which cannot be handled by the regular forces.

Yet, Employes now present to the Board a claim altogether different, relating to alleged failure and refusal to properly apply the "Quota Rule" which Carrier denied violating and pointed out there had been no evidence presented to prove the allegation (Carrier's Exhibit F).

The claim before the Board is definitely not the same claim handled on the property and can have no standing for any consideration.

Whether or not the claim had been properly presented to the Board, i.e., at least as the same claim handled on the property, by reason of a Letter Agreement signed by both parties dated June 16, 1969, this case could not demand consideration. That Letter Agreement is Carrier's Exhibit G which made a disposition of all unadjusted disputes, claims, etc., between the Clerks' Organization and this Carrier.

Item 3 of that Agreement stipulated "that the only remaining, outstanding and unadjusted claims, other than those listed under Item 4 of the same agreement were C-68-12, C-68-26, C-68-29, C-68-39-40-41, and C-68-80-82.

Case C-68-27, apparently the instant case before your Board, although Carrier insists that it is not the same claim as handled on the property, was not stipulated in Item 3 or 4 of the June 16, 1969 Agreement (Carrier's Exhibit G), and, therefore, was not and is not an outstanding, unadjusted claim any longer, having lost all status by reason of the June 16, 1969 Agreement.

Further, as Exhibit F of the Carrier shows, the Carrier last wrote the Employes on November 8, 1968 on C-68-27 and failure of Employes to progress the matter to the Third Division or other proper means of adjudication from that date until March 9, 1970, when Employes served notice of intention to file ex parte submission, involves a period of more than the nine month period provided by Rule 33 of the current agreement and Railway Labor Act.

On this property for a number of years, Rule 33(b) which requires appeal and disallowance of appeal be made within respective sixty day (60) periods, was mutually waived in connection with the claim or grievance being appealed to the highest officer of the Carrier and in connection with its highest officer rendering a decision, but all other provisions of Rule 33 have remained in effect, including the requirement to institute action within nine (9) months of the date of the decision of the highest designated officer of the Carrier (See Rule 33, 1(c) and 5 of the current controlling agreement).

Without waiving other points made above, Carrier submits this matter is outdated and was abandoned by failure to progress within nine (9) months of Carrier's denial as required by Rule 33 and the Railway Labor Act.

Nothing contained herein, in any way, is intended to envelop the claim place before your Board with any acquiescence by Carrier that it is a proper claim, it is not.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization bases their claim on the allegation that Carrier violated Rule 37, known and referred to as the "Quota Rule". This rule sets out the method that Carrier may control forces at Pier 46. The number of regularly assigned positions at Pier 46 in New York is determined by the amount of freight handling Carrier is required to perform for the shipping public. The Organization contends that Carrier controlled

the number of positions at Pier 46 by progressively removing larger amounts of freight handling work from Pier 46 and sending the freight to Claremont Terminal to be handled by persons not covered by the Agreement. Carrier contends that the original claim has been changed in that the original claim pertained to the abolishment of three Stower's positions, Pier 46, New York, and that the claim before this Board now pertains to violation of the "Quota Rule"; that this claim was not progressed within 9 months of Carrier's denial as required by Rule 33 and the Railway Labor Act; and that the Organization has failed to sustain its burden of proof on merits of this dispute.

A careful examination of the record discloses that there is a fatal variance between the issue handled on the property and the dispute presented to this Board. The Claim on the property concerned itself with the abolishment of three (3) Stower-Positions, Pier 46, New York, in Case C-68-27. The Claim before this Board concerns itself with the failure of Carrier to properly apply the "Quota Rule". Therefore, this Board is without authority to consider this Claim. See Awards 1209 — Fourth Division (Coburn), 14878 by this Referee, 13235 (Dorsey), 17222 (Jones), 16786 (Zumas), 16665 (Franden).

The record further reflects that the final denial of this Claim was dated November 8, 1968; and that this Claim was not progressed to this Board until March 9, 1970. Therefore, absent an unqualified waiver of Rule 33 (Time Limit Rule), this Claim is barred for the reason the Organization did not progress the Claim to this Board within nine months from the date of final declination of Carrier on the property.

The Record in this dispute is confused as to whether or not this particular case was contemplated in the various correspondence exchanged between the parties on several other cases being progressed at the same time. However, this Board cannot imply that this case was being included in those exchanges, and absent probative evidence to the contrary, it must be concluded that without numerical identification, it was intended that this dispute was not being contemplated unless positively identified in the correspondence.

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 does not have jurisdiction over the dispute involved herein.

AWARD

Claim dismissed because of lack of jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1971.

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