NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25145

THIRD DIVISION

Docket Number CL-24003

Wesley A. Wildman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes
(Pittsburgh and Lake Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9384) that:

(a) Carrier violated the Clerical Rules Agreement effective Sept. 1, 1946, as amended, particularly Rule 43.

(b) Claim presented by Clerk J. W. Moqan to General Foreman Diesel Shop, McKees Rocks, PA, on March 31, 1978 for one (1) days pay for each of the following dates for violation of the Scope Rule, (Rule 1), that were never answered in the prescribed time limits of Rule 43:

January 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31, 1978;

February 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 21, 22, 23, 24, 27, 28, 1978;

March 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 27, 28, 29, 30, 31, 1978.

(c) Claims presented by Clerk J. W. Moqan to General Foreman of the Diesel Shop, at McKees Rocks, PA on July 17, 1978 for one (1) days pay for each of the following dates for violation of Rule 1, (Scope), that were never answered in the prescribed time limits of Rule 43:

April 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 1978;

May 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 30, 31, 1978;

June 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 1978.

(d) Letter dated August 3, 1978, to General Foreman, Mr. R. E. Goosman by Local Chairman in regards to claim dated March 31, 1978 by Clerk, Mr. J. W. Mogan, was never acknowledged.

(e) Letter dated October 20, 1978 to General Foreman, Mr. R. E. Goosman by Local Chairman, Mr. P. A. Ranalli, in regards to claim dated July 17, 1978 by Clerk, Mr. J. W. Moqan, was never acknowledged.

(f) Letter dated November 29, 1978 by Local Chairman, Mr. P. A. Ranalli, to General Foreman, Mr. R. E. Goosman, in regards to his letters dated August 3 and October 20, 1978 were never answered by General Foreman, Mr. R. E. Goosman.

(g) General Foreman, Mr. R. E. Goosman, admits that he had seen claim dated March 31, 1978 as stated in Mr. Blair's letter of denial dated April 4, 1979, paragraph 3, and he also states that it was answered but he cannot produce a copy of such answer.

(h) General Foreman, Mr. R. E. Goosman, admits that he had seen Clerk, Mr. J. W. Mogan's claim dated July 27, 1978 and had never answered it, (paragraph 3 of Mr. Blair's denial dated April 4, 1979).

(i) That Claimant, Mr. J. W. Mogan, be compensated for one (1) days pay for each of the above mentioned dates. (BRAC 30-79) (107-9060)

OPINION OF BOARD: This case involves two virtually identical sets of claims alleging that Carrier, on numerous occasions over a six-month period, violated the Scope Rule in the clerical Agreement between the parties by allowing certain clerical functions to be performed by persons not covered by the Agreement; relief requested is one day's pay to Claimant fox each day on which a violation of the scope Rule by Carrier is alleged to have occurred.

The merits of the underlying claims are not before us. The only issue here is whether Carrier denied the claims in timely fashion. The Organization asserts that Carrier clearly failed to observe the familiar contractual requirement that claims must be formally denied in writing within 60 days from filing or be granted as presented (here, Rule 43).

Although Carrier is unable to provide any documentation, an ingenious, even valiant attempt is made by Carrier in its ex parte submission to prove proper handling and timely denial by essentially circumstantial evidence. We find, however, that the clear weight of the evidence on the record before us establishes that Carrier did, indeed, violate Rule 43 and did not timely deny the claims which are the subject of this case. Also, Carrier's assertion that the claims here were mooted by a subsequent negotiated settlement with the clerical employes here involved, covering certain pay and working conditions issues, does not enjoy sufficient support on the record before us.

Finally, with respect to its potential liability for violation of Rule 43, Carrier argues that the grievance filings here were untimely with respect to some of the days for which violation of the Scope Rule is alleged. The first set of claims was filed March 31 alleging violations dating back as far as January 9, with the second set filed July 17 for dates as far back as April 3. As the Agreement requires claim filing within 60 days of the occurrence of the event giving rise to the claim, Carrier asserts (impliedly) that at most, it is liable only for alleged violation days within the 60-day period prior to the filing of each set of claims.

This issue raises, of course, the familiar problem (which has produced a split of authority on the Third Division over the years) of whether an allegedly untimely filed grievance creates an obligation on Carrier to formally answer (deny) within 60 days (or ever). In this instance, we decline to generalize on this larger, sometimes paradoxical question which has frequently vexed this and other Boards. There may be cases where, given the nature of the grievance, a Carrier's assertion of untimely filing should be tested by the making of the claim by Carrier of untimeliness within the 60-day denial period. But such, we hold, is not the case here. The claims for all days here are based on precisely identical assertions of violation of the Scope Rule. These filings are on record before us in this case, and it is without doubt that, with regard to violations claimed to have occurred more than 60 days prior to the entering of each respective set of claims, the grievances were untimely filed. Accordingly, we sustain Carrier's position in this regard, and hold that the only days of alleged violation properly payable here are those which fall within the 60-day period prior to the filing of each respective set of claims.

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

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1984.