Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28131
THIRD DIVISION Docket No. TD-26793
89-3-85-3-692

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE:((American Train Dispatchers Association
(Norfolk and Western Railway Company

STATEMENT OF CLAIM:

"(a) Claim sixteen (16) hours compensation at the rate applicable to Assistant Chief Train Dispatcher position at Muncie, Indiana, on each respective date beginning August 6, 1984, eight (8) hours each to the two (2) senior available extra train dispatchers, and if no extra train dispatchers available, eight (8) hours each to the two (2) senior available train dispatcher, account excepted Chief Train Dispatcher performing duties of Assistant Chief Train Dispatcher in the absence of an Assistant Chief Train Dispatcher provided for by Article 1(a) and Article 1(b) of the August 1, 1951 schedule agreement between the New York, Chicago & St. Louis Railroad Company, now the Norfolk and Western Railway Company.

These duties include but are not limited to:

(1) maintaining records, making decisions and issuing instructions to operating trains on that portion formerly known as the Muncie Division, now part of the Fort Wayne Division of the Western Region.

(2) maintaining records, making decisions and issuing instructions pertaining to balancing and maintaining crews for train operations between Bellevue Ohio and Lima Ohio, between Lima Ohio and Frankfort Indiana, between Fort Wayne Indiana and Cincinnati Indiana and between Indianapolis Indiana and Michigan City Indiana and branch line between New Castle Indiana and Connersville Indiana.

(3) supervision of train dispatchers and other similar employes.

(4) performing other related work.

(b) The claimants referred to in the above paragraph include but are not limited to, F. B. Cooper, D. E. Finney, R. G. Waters, H. D. Thompson, M. H. Kortman, J. E. Coleman, R. L. Rafferty, D. L. Wallace and R. M. Bowman. Their respective identities and dates of service on the date referred to in the beginning paragraph above and during the claim period, are readily ascertainable on a continuing basis, and shall be determined by a periodic joint check of the Carrier's records in order to avoid continuation of the filing of a multiplicity of daily claims, until such time as the Carrier:

(1) allows the compensation claimed in the beginning paragraph above on a current and continuing basis, or,

(2) establishes two (2) additional Assistant Chief Train Dispatcher positions daily in the Muncie Indiana office."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The most significant and critical aspect of the Claim before the Board is the fact that an identical claim was filed on February 4, 1982. Both the February 4, 1982, claim and the instant claim were premised on the allegation that the Chief Train Dispatcher performed work reserved to employees under Rule 1. The February 4, 1982, claim contended that the violation began December 7, 1981 (which was shortly after the abolishment of the 2nd trick Assistant Chief Train Dispatcher and rescheduling of hours). The instant claim uses August 6, 1984, as a claim date. Both are asserted to be continuing claims.

It is also noted that the February 4, 1982, case was appealed to the Board on July 29, 1983, but was subsequently withdrawn on January 3, 1984. The Carrier argues that we have no jurisdiction to hear the August 6, 1984, claim since it is merely a refiling of the previous claim, which was withdrawn and expired under the time limits. We must agree. The relevant rules read:

"(a) All claims or grievances must be prescribed in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 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 grievance.

(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 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.

(d) A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

(e) This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employees it represents."

A reasonable reading of (d) and (c) is that continuing claims need not observe the 60 day time limit for initial filing. However, nothing would allow the refiling of a defective claim once it was barred under the time limits. It is apparent that since the first claim was effectively never presented to the Board within the time limits its subject is barred. A claim, whether continuing or not, cannot have new life breathed into it once it has expired. The continuing nature excuses a late initial filing (i.e. are not filed within 60 days) but does not alter other procedure requirements or subsequent violations of time limit rules. If it did, paragraph (c) would have no meaning. The rule must be construed to give meaning to all its aspects.

This Board has faced similar situations before and clearly enunciated the applicable guidelines. For instance, it was stated in Third Division Award 9447:

"This claim was originally advanced on April 14, 1955 denied by the Auditor of Disbursements on May 2, 1955, and appealed on July 25, 1955 to the Chief Accounting Officer, who ruled on August 2, 1955 that the matter was closed under Article V of the National Agreement of August 21, 1954 because not appealed within the sixty day period therein specified.

No further action was taken on that proceeding, but on October 10, 1955 the District Chairman filed this claim which is identical except that retroactive payment is claimed for only the preceding sixty days.

* * * *

"As noted above, Section 1 (b) of the National Agreement provides that upon a failure to take an appeal within the prescribed sixty day period 'the matter shall be considered closed, ****.' Under the accepted rules we cannot reasonably adopt a constructions of Section 3 which would limit the effect of Section 1 to grievances which do not continue, so that continuing ones are open to refiling, either once or repeatedly. Any doubt in that regard seems further concluded by the additional provision of Section 1 (b) that 'this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances.' (Emphasis added). The express provision that other similar claims and grievances are not concluded by failure to appeal the current one certainly emphasizes the fact that the current claim or grievance is definitely and finally disposed of.

This claim is not properly before the Board, due to failure of the Organization to comply with the National Agreement of August 21, 1954, in that proper appeal on the property was not made within sixty days as required by Article V, Section 1 (b). The provisions of that Agreement are mandatory. (Awards 8383, 8564, 8886, 9189). The Board is without authority to make an award on the merits." (emphasis added)

and in Third Division Award 10453:

"It has been held by this Board that continuing claims are not open to refiling under Article V of the August 21, 1954 Agreement between the parties. See Awards 9447 and 10251.

This Board has carefully analyzed the record, in this case and it is our opinion that the claim here involved is nothing more than a refiling of claims previously submitted or the same Claimant which claims were processed through the prescribed procedures and withdrawn by the Petitioner.

It is our decision that the claim is barred as a result of Section 1(c) of Article V of the August 21, 1954 Agreement."

Accordingly, the claim was barred from resubmission in the first place and any subsequent procedural irregularities are irrelevant. The claim must be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of September 1989.

LABOR MEMBER'S DISSENT
to
Award 28131 - Docket TD-26793
Referee Vernon

We believe the majority erred in two respects, which therefore warrant this Dissent.

First, it determined the instant Claim was a refiling of a previous claim, which was withdrawn and expired under the time limits. This determination ignores the fact that the previous claim was withdrawn from the Board "without prejudice". The Carrier argued that claims treating the same subject are forever barred, the issue having been decided. To the contrary, a withdrawn dispute does not establish any kind of precedent; nothing has been decided. Withdrawal without prejudice is not an admission the claim lacked merit. That was not the same claim. Among others, see Third Division Award 9639:

> "We are cognizant of the fact that a contending party may choose not to prosecute a claim, without that lack of prosecution constituting an admission of lack of validity of a claim particularly where as in C 369 it was made 'without prejudice'."

The Carrier argued that the incident on which the claim is based goes back to 1981. The Employees readily affirmed that the violations were condoned for several years, "gratuitously". However, either party to an agreement may insist upon its rights thereunder at any time, notwithstanding a practice or custom of long duration. See Third Division Awards 2635, 3696, and 5407.

This was the quintessential "continuing claim." It was not the abolishment of the third shift Assistant Chief Dispatcher's position which precipitated the violation. It was, instead, the excepted Chief Dispatcher's assumption of the abolished position's duties, on a day-to-day basis, which resulted in the instant continuing claim.

Second, without receding from our position on the Claim's merits, the Claim should have been allowed as presented until the date it was finally denied, for the Carrier's time limit default, without regard to merit or procedure. This Board has so held:

Third Division Award 14759:

". . . In this case, it is immaterial whether the claim was valid or not. . . . Since it is admitted here that there was a default by the Assistant Superintendent, the Carrier became obligated to allow the claim as presented. . . ."

Third Division Award 14965:

". . . its letter of declination of August 24, 1962 was more than 60 days from receipt of the notice of appeal. Therefore the claim is allowed as presented up to the date of the late declination. . . . "

Third Division Award 16564:

". . . Carrier's obligation to deny any claim filed within 60 days of filing, giving its reasons for disallowance in writing, is, by application of Rule 21, absolute. Since Carrier failed in this contractual obligation we are compelled by Rule 21, to sustain the instant claim as presented."

Third Division Award 23511:

". . . He was entitled to a response, pursuant to the clear language of Rule 47(a) within the specified 60 day period. If the claim were frivolous or indefensible, Carrier could deny it on procedural or substantive grounds, but it was obligated to answer claiment's letter. . . ."

Third Division Award 25165:

". . . The record reveals that Carrier did not respond to the Organization's initial claim. Rule 52(a) requires that claims must be denied within sixty days. Otherwise claims will be allowed as presented. Thus, the claim must be sustained in accordance with Rule 52(a).

The failure of Carrier to timely respond to this claim invalidates its contention that the Organization is guilty of laches. Upon the expiration of Carrier's time to respond, the claim had to be sustained."

For the above reasons, we dissent to this errant Award.

Robert J. Irvin
Labor Member