

Award No. 9492

Docket No. CL-8925

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that the Carrier violated the August 21, 1954 Agreement at Muskegee, Oklahoma, when:

a. After having received claim on behalf of Mr. A. H. Schilt for eight hours at the difference between pro rata rate and punitive rate, and the claim of Mr. Harold Mill for eight hours at punitive rate, and having failed to notify the General Chairman in writing within 60 days that the claim was disallowed and the reason for disallowance, it failed and refused to compensate the employees involved for the time as claimed, and,

b. That Carrier shall now be required to compensate the employees involved for the amounts claimed account of this violation.

EMPLOYEES' STATEMENT OF FACTS: On July 13, 1955 claim was filed on behalf of Mr. A. H. Schilt, unassigned Clerk, account of being required to work more than 40 hours in his work week beginning Monday, May 23, 1955, for the difference between pro rata rate and punitive rate for 8 hours on May 28, 1955. Also claim was filed for 8 hours at punitive rate for Yard Clerk Harold Mill for May 28, 1955 account of being the senior available Yard Clerk entitled to work the overtime.

This claim was discussed in conference with the Carrier on August 5, 1955 and conference confirmed by the Carrier on August 11, 1955, in which letter the Carrier stated, "There was considerable discussion of the matter, however we were not able to reach an agreement."

POSITION OF EMPLOYEES: There is in evidence an agreement between the parties bearing effective date August 21, 1954 in which the following Article appears and which the Employees cite as being in violation:

Article V, Section (a), of the Agreement provides:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the

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."

Let us look at the record on August 5, 1955, when in conference the carrier, in order to dispose of the matter and without establishing a precedent for the future, made a proposal which was rejected. In our letter date August 11, 1955, which confirmed this conference, we stated "* * * There was considerable discussion of the matter, however we were not able to reach an agreement."

There was no misunderstanding on the part of the General Chairman as to our position in the matter when discussing the case on August 5, 1955, and when confirming the conference on August 11, 1955, we did not go into detail regarding the discussion, merely stating there was considerable discussion of the matter, however, we were not able to reach an agreement. Obviously our reply had the effect of declining the claim.

It is the position of the carrier that the rules relied upon by the petitioner in the beginning are not controlling even though the case had been submitted to the Board on the basis of the merits of the case. We believe that the petitioner recognized this fact and as an after-thought the petitioner submitted the case to the Board, alleging a violation of the Time Limit Rule. We do not believe the facts of record will support such a claim. Instead, we believe the procedural requirements provided for in the effective agreement were strictly complied with by the carrier.

Since this is an ex parte case, this submission has been prepared without seeing the employes' statement of facts or their contention as filed with the Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission.

All data submitted herewith in support of the carrier's position has been presented to the employes or their duly authorized representative and is hereby made a part of the matter in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: This claim is based on the contention that the Carrier failed to give written Notice, within sixty days, of the reasons for

the disallowance of claims filed July 13, 1955, on behalf of Claimants Schilt and Mill. Petitioner relies on Section 1 (a), Article V of the National Agreement dated August 21, 1954, which reads as follows:

"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 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."

The Carrier defends on the grounds that the claims of Schilt and Mill, were discussed at a conference held on August 5, 1955, the Carrier's Vice-President and General Manager indicated thereat his view that such claims were not supported by the rules but made an offer of compromise which was rejected, and by letter dated August 11, 1955, wrote the General Chairman as follows:

"This will confirm discussion in conference August 5, 1955, in regard to claim of Mr. A. H. Schilt, furloughed yard clerk, for the difference between straight time and punitive time for 8 hours on May 28, 1955, account filling vacancy as yard clerk on that date after having performed 40 hours service on another assignment during the work week —also claim of Mr. Harold Mill, yard clerk, for 8 hours at punitive rate May 28, 1955, account not used to fill the vacancy as yard clerk.

"There was considerable discussion of the matter, however, we were not able to reach an agreement."

While we are reluctant to reach a decision on the basis of procedural defects rather than on the merits of a claim, we are bound to such a result, when as here, the parties, by the language of their agreement, have made compliance with procedural requirements mandatory. We must also recognize that the time limitation and the provision for written notice of reasons for disallowance of claims have salutary purposes. The former serves to expedite the disposition of claims and the latter furnishes the claimant with a definite basis for considering the merits of his claim in order to determine whether to accept the disallowance or to proceed further.

The Carrier's letter dated August 11, 1955 does not state any reasons for disallowance of the claim referred to, or even that the claims are disallowed. Neither that letter nor the oral discussion on August 5, 1955, or both, can be considered as compliance with the mandatory written notice of reasons for disallowance required by the second sentence of Section 1 (a), Article V; and the final sentence of that provision requires that "If not so notified, the claim or grievance shall be allowed as presented." As a result, the claim must be sustained. See Awards 4529, 3013, 7713.

In the panel discussion of the case, it was argued that the claim was fatally defective for the reason that the Schilt and Mill claims were not presented "to the officer of the Carrier authorized to receive same", as provided in the first sentence of Section 1 (a), Article V, because Rule 26 (g) of the basic agreement provides that:

"Disputes growing out of the interpretation or application of agreements concerning wages . . . may be handled by one or more duly accredited representatives, first, with the immediate supervisory officer. . . ."

None of the claims were handled "first, with the immediate supervisory officer". The record shows, however, that the Carrier did not at any time object to the presentation of the claims on such grounds. The Carrier's complete silence in this regard must be taken to mean that it acquiesced in the presentation of the claims to the Vice-President and General Manager as "the officer of the Carrier authorized to receive same" and thereby waived what appears as the first step in the grievance procedure under Rule 26 (g).

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 Employees involved in this dispute are respectively Carrier and Employees 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1960.