NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Arthur M. Millard, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY—EASTERN LINES

STATEMENT OF CLAIM.—

"Claim of the General Committee of The Order of Railroad Telegraphers on The Atchison, Topeka and Santa Fe Railway that the position of Agent, Pittsburg, Kansas, rated 98¢ per hour, be restored to the Telegraphers' Schedule and that all employes affected by seniority moves, since the agency was abolished, be compensated for any wage loss."

JOINT STATEMENT OF FACTS.—

"The Telegraphers' Schedule wage appendix lists a position of agent, Pittsburg, Kansas, rated 98¢ per hour. September 10, 1928, the Pittsburg Agency position was abolished and the station consolidated with that of Frontenac, Kansas, the agency at Frontenac being supervisory and not subject to the scope of the Telegraphers' Schedule."

An agrement bearing date of February 5, 1924, as to rules, and January 1, 1928, as to rates of pay is in effect between the parties.

POSITION OF EMPLOYES.—

"The employes contend that the Wage Agreement of the Telegraphers' Schedule, which is a part of a contract between the disputant parties, has been violated and held for naught by the Carrier as pertains to the position listed as agent, Pittsburg, Kansas, rate 98¢ per hour. It is the opinion of the employes, based on good ground as witness Awards 3, 94, 233, and 234 of the National Railroad Adjustment Board, that so long as agency work is being done at a station such position cannot be abolished, the jurisdiction of another agency (non scheduled) being extended thereto and that the contract between the Carrier and the Organization as pertains to that individual position remains in full force and effect.

"In addition, it is the position of the employes that Article 17, of the Telegraphers' Schedule enters into this dispute. Since the agency position at Pittsburg is a matter of contract as to jurisdiction, the rules of the Telegraphers' Schedule apply thereto, therefore, an employe of the telegraph class is entitled to be regularly assigned to such position and the guarantee rule (Article 17) applied. The carrier abolished the agency position at Pittsburg, Kansas, so far as the telegraph class is concerned, extending the jurisdiction of the agency at Frontenac, Kansas, a supervisory one, to Pittsburg. The agency work at both Frontenac and Pittsburg continues, all of which the employes claim is a direct violation of the contract."

POSITION OF CARRIER.—

"This grievance has no standing because it was not presented within thirty days from the date it occurred, as required by Section (1), Article V, of the Telegraphers' Schedule, reading:

"(i) Any grievances to be considered must be presented within thirty (30) days of date alleged to have occurred.'

"It will be noted there is no provision in this schedule rule for any exception to the handling plainly outlined therein."

OPINION OF BOARD.—The claimant in this case is the General Committee of the Order of Railroad Telegraphers and the claim is based upon the abolishing by the carrier, on September 10, 1928, of the agency at Pittsburg, Kansas, and the consolidation of that agency into the agency at Frontenac, Kansas, which is supervisory and not subject to the scope of the Telegraphers' Schedule or agreement.

The General Committee contends that the action of the carrier in discontinuing the Pittsburg agency and the position of agent at that station and consolidating the agency with that of Frontenac, constituted a violation of the Wage Agreement of the Telegraphers' Schedule, which is a contract between the disputant parties, inasmuch as agency work continued and has continued to be done at that station and ask that the position of agent at Pittsburg, Kansas, be restored to the Telegraphers' Schedule and that all employees affected by seniority moves since the agency was abolished be compensated for any wage loss.

The contention of the carrier is, first, that the Amended Railway Labor Act, approved, except as otherwise specified in the Act on June 21, 1934, limited the retroactive effect of this Act to cases that were pending and unadjusted on the date of its approval, and clearly intended that a case to come within the jurisdiction of the Board, which grew out of an occurrence prior to the enactment of the law, must have the essential characteristics of being both a pending and unadjusted case and that therefore the instant case involving an occurrence five years and nine months prior to the Amended Railway Labor Act becoming a law, and which was not presented to the carrier until two years after the Amended Railway Labor Act became law, cannot be considered a pending and unadjusted case. Second, the carrier contends that this claim has no standing because of non-compliance by the General Committee of Section (i) Article V of the Telegraphers' Agreement which requires that "Any grievances to be considered must be presented within thirty days of date alleged to have occurred." No submission is presented by the carrier with respect to the abolishing of the position, or agency, on which this claim is based.

Considering the contention of the carrier that cases must have the essential characteristics of being both pending and unadjusted on the date of the approval of the Amended Railway Labor Act, effective June 21, 1934, in order to come within the jurisdiction of this Board, the Board submits that the Act did not imply or apply any statute of limitation to cases pending and unadjusted, or for that matter to any other class of disputes and grievances growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. The Act meant and means exactly what is stated, or, cases in dispute between the employee and the carrier; and in its application to the proper and reasonable interpretation of the rules, or agreement between the employees and the carrier, may be made retroactive to the time when those rules came into existence insofar as any prohibition in the Act is concerned. In further connection with paragraph (i), Section 3 of the Amended Railway Labor Act, approved June 21, 1934, we cannot separate certain words or phrases in the paragraph to the exclusion of others without distorting the meaning and proper interpretation of the paragraph as a whole. When the paragraph is considered as a whole, both in its subject and its inclusions, it will be found that there will be no discrimination between cases pending and unadjusted or otherwise, but that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions including" (or taking in with and making a component part of such disputes) "cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including * * * the appropriate division of the Adjustment Board." Under this interpretation of paragraph (i), Section 3, of the Amended Railway Act, approved June 21, 1934, the Board rules that this instant case is properly before this Third Division of the National Railroad Adjustment Board.

With respect to the application of Article V (i) of the agreement between the carrier and the employees to this claim and which places a limitation of thirty days on the presentation of grievances, the Board calls attention to the fact that this claim does not represent a grievance in the sense in which the term is used in the agreement or the protest of an individual, or his representative or representatives, against what he may consider an unjust charge, a burden, an oppression, a hardship inflicted, or a trouble evidenced. This claim is made by the General Committee of the Order of Railroad Telegraphers, one of two parties to

the agreement, or schedule of rates and regulations between the employees and the carrier, and is not a grievance presented by an individual in the sense in which the term is used in Article V (i) of the schedule. The claim is a contention of one of the principals of the agreement with the other over the application or misapplication of rules, rates, or conditions whose proper application is a matter of mutual or joint responsibility.

Under these conditons the Board submits that there are no limitations that can be applied to discussions of the proper application of the rules, rates, or conditions contained in the schedule, or the rules, rates, or conditions which they involve; these are subjects to be determined in joint discussions and negotiations; or failing in this, to be interpreted in the manner provded, and the Board rules that in this instant case Artivle V (i) of the agreement does not apply.

In connection with the claim of the General Committee that the position of agent at Pittsburg, Kansas, be restored to the Telegraphers' Schedule and that all employees affected by seniority moves since the agency was abolished be compensated for any wage loss, the Board submits its opinion that where positions are negotiated into agreements between employees and carriers or between carriers and general committees, the carrier is equally obligated with the employees in following the orderly process that has been provided in the rules when changes are contemplated.

However, in this instant case no statements have been made by either of the parties as to the manner in which the agency was abolished, the cause therefor, or any of the conditions leading up to the action of the carrier, and whether or not the change was made by mutual agreement.

In their submission in this claim the General Committee cites Article 17 of the Schedule as having a bearing on the claim, in the absence, however, of more definite information regarding the conditions mentioned the Board has no means of determining the effect this rule has or has not upon the issue involved. The General Committee further cites awards 3, 94, 233, and 234 of the Third Division of the National Railroad Adjustment Board as having a bearing on this case. A review of these cases indicate that while there may be some similarity, they are dissimilar in many respects and emphasize the fact frequently emphasized before this Board that "each case must be decided upon its merits."

In considering this case, and with the ruling that the case is a proper one for presentation to this Board, the Board is confronted with the fact of silence on the part of the carrier as to the conditions involved, and the lack of definite information and serious lapse of time in the presentation of the claim on the part of the employees. In view of this the Board rules that the case be referred back to the parties for further negotiation and discussion, and, in the event that an equitable adjustment cannot be arrived at, with the privilege of resubmitting the issue to the Board with a definite and adequate record sufficient for a determination of the conditions involved.

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 employe involved in this dispute are respectively carrier and employe 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

Claim is properly before the Third Division of National Railroad Adjustment Board.

Referred back to parties for further negotiation and discussion with privilege of reinstating claim.

AWARD

1. Claim is properly before the Third Division of National Railroad Adjustment Board.

2. Referred back to parties for further negotiation and discussion with privilege of reinstating claim.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 18th day of May, 1937.

DISSENT ON DOCKET TE–455

The Referee's opinion in respect to "pending and unadjusted cases" as comprehended in the Railway Labor Act and the applicable rules of the contract between the parties involved, cannot be justified under any course of reason or logic, and is nothing short of a distortion of both the letter and spirit of the law, and the rules of the contract involved.

In using the phrase, "pending and unadjusted on the date of the approval of this Act," in Section 3 (i) of the Railway Labor Act as amended, Congress certainly did not intend to confer jurisdiction on the Board over all cases regardless of their antiquity. If such had been the intention, the law would have so provided in definite terms, and then there would have been no necessity of including in the Act the descriptive phrase "pending and unadjusted" with reference to the cases coming within the Board's jurisdiction. It is significant that the statute does not refer to cases which are "pending or unadjusted," but by using the conjunctive phrase "pending and unadjusted", instead of the disjunctive phrase "pending or unadjusted," Congress thereby evidenced a clear intent that a case must meet the requirement of being both "pending and unadjusted" as of the date of the approval of the Act in order to come within the Board's jurisdiction. It cannot be logically argued that the words "pending" and "unadjusted" are used synonymously in the Act. To do so is to indict Congress of having done a useless and confusing thing by using two different descriptive words having different meanings when only one meaning was intended. It is a cardinal rule of statutory construction that full force and effect must be given to all the language used, and it will not be presumed that any of the language was considered as mere surplusage.

The Referee employs unique reasoning when he construes the law as being retroactive to any period prior to its enactment because it does not contain a specific statute of limitation. Upon such a theory, all laws, all contracts, would be retroactive unless they specifically provided that they would not be retroactive. No law, no contract, or other instrument defining the rights of persons are considered as retroactive unless such instruments contain specific declarations of their retroactive features. The only retroactive provisions of the law are those found in Section 3 (i), reading:

> "* * * including cases pending and unadjusted on the date of the approval of this Act."

Congress acted advisedly in this matter and in the light of a construction placed upon the Transportation Act of 1920, involving the Labor Board's jurisdiction in cases arising out of occurrences prior to March 1, 1920, the effective date of said Act. The construction placed upon the Transportation Act in respect to its retroactive or retrospective effect is shown by Decision No. 83, Docket 123–C, of the United States Railroad Labor Board.

Without the specific provisions in Section 3 (i) covering pending and unadjusted cases, the National Railroad Adjustment Board could not legally take jurisdiction of any question arising out of an occurrence prior to the effective date of the Act (June 21, 1934). In thus giving the Act a retroactive effect, Congress specifically limited such retroactive effect to cases that were pending and unadjusted on the date of its approval, and clearly intended that a case to come within the jurisdiction of the Board, which grew out of an occurrence prior to the enactment of the law, must have the essential characteristics of being both pending and unadjusted.

The opinion by Referee Samuell, identical in Awards 53, 54, and 65 of this Division, was an inclusive interpretation of pending and unadjusted cases. In respect to disputes arising from occurrences six years prior to the date of the Railway Labor Act, amended, as did the occurrence in the instant case, Judge Samuell's opinion may not be read to dignify such as a dispute or case until it had thus been accredited under the provisions of the Railway Labor Act of 1926, at the time in effect. No grievance was then presented; no dispute was then considered; no case, pending and unadjusted or otherwise, then existed.

It is clear, from Judge Samuell's opinion, that a case involving an occurrence prior to June 21, 1934, could not be considered as a pending and unadjusted case unless it had ripened into a dispute and had progressed through the various channels provided by the Act of 1926.

The instant case, involving an occurrence five years and nine months prior to the Amended Railway Labor Act becoming law, and which was not presented to the carrier until two years after the Amended Railway Labor Act became law, cannot by any course of reason or logic be considered a "pending and unadjusted" case.

In the Opinion, in respect to the application of Article 5 (i) of the agreement between the carrier and the employees involved in this case, the Referee states:

> "* * * the Board calls attention to the fact that this claim does not represent a grievance in the sense in which the term is used in the agreement or the protest of an individual, or his representative or representatives, against what he may consider an unjust charge, a burden, an oppression, a hardship inflicted, or a trouble evidenced * * * and is not a grievance presented by an individual in the sense in which the term is used in Article 5 (i) of the schedule."

Another referee, in Award 417, involving the same carrier, same organization, same contract, and the same rule, on April 22, 1937, stated his opinion to be:

> "Article 5 (i) cannot be held to cut off the claim of the employee, for the grievance here involved was a continuing and recurring one * * *.
>
> "The employee's claim for back pay, however, cannot under this rule logically extend for more than thirty days prior to the date on which complaint was first made, February 21, 1934. Obviously, if the grievance is held to be recurring and a continuing one on the basis that there is a separate violation on each day, any and all violations committed before thirty days prior from the time the complaint is first made are outlawed under Article 5 (i)."

Thus it is seen that one referee holds that such a case as the instant one is not a grievance within the meaning of Rule 5 (i), while the other holds that it is a grievance within the meaning of Rule 5 (i) and that said rule has application.

We are in agreement with the opinion stated in Award 417 to the extent that the question involved a grievance coming under and subject to the terms of Paragraph 5 (i). We disagree with the application of the rule as made to that case, as evidenced by the dissent which accompanied Award 417. We find no fault with the principle of one referee disagreeing with another. This dissent goes to the unwarranted and wholly unjustified construction placed upon the terms "pending and unadjusted," as these terms appear in the Railway Labor Act, and upon the terms and provisions of the rule of the agreement between the parties involved in the instant case.

Even if this Board had jurisdiction under the Amended Railway Labor Act, this claim should have been denied because of non-compliance by the employees with the following provisions of the agreement:

Article 5 (h):

> "The same line of procedure as that followed in the handling of discipline cases will be followed in handling other grievances arising in connection with the application of this schedule."

Article 5 (i):

> "Any grievances to be considered must be presented within thirty (30) days of date alleged to have occurred."

It is undisputed in the record that the change complained of took place on September 10, 1928, and that no claim was presented until June 22, 1936. The rules above quoted clearly established estoppel against the presentation of claim after the expiration of 30 days from the time the change took place on September 10, 1928. The written rules are merely an expression of the agreement reached between the parties, and such agreements must be construed and interpreted to give effect to the intention of the parties to the agreements.

It is clear, from the language of the above rules, that it was the intent of the parties to create an estoppel against the presentation of any claim which was not presented within 30 days of its first occurrence, and, if not so presented, would not thereafter be subject to determination under the agreement.

The representatives of the employees and of the management drew the terms of this agreement with a common understanding of occurrences which created

grievances. The change in position at Pittsburg, Kansas, if objectionable to the employees, constituted such an occurrence, and gave cause for a grievance under the agreement on the date that the change took place. It was to such a grievance and such a date that Article 5 (i) of the agreement referred .

It is clear that no other interpretation can be properly placed upon these rules in view of their plain language, intent, and purpose.

Indicative of the importance attached by the Telegraphers' Organization to compliance with the requirements of the above quoted rules, the following is quoted from booklet which was prepared and issued by Santa Fe System Division No. 61 of The Order of Railroad Telegraphers, entitled "Interpretations of Schedule, March 16, 1922":

> "SEC. 'i'. *Grievance to be taken up within thirty days.*—This is a new rule and should not be overlooked in any way. Each employee should become conversant with his working contract, and any irregularity alleged to have occurred, a formal protest should immediately be made. Special attention should be given to this section."

The above is complete confirmation of the purpose and intent of the parties as we have previously related. The filing of a claim approximately eight years after the change took place cannot by sound reason or logic be construed as compliance with these rules.

A. H. JONES.
J. G. TORIAN.
R. H. ALLISON.
GEO. H. DUGAN.
C. C. COOK.