Award No. 1640
Docket No. CL-1636

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

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

HOUSTON BELT & TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that the carrier is violating the Clerks' Agreement, that became effective November 16, 1940, by requiring or permitting persons not covered by that agreement to check and furnish record to the Houston Belt and Terminal on cars received by the Houston Belt and Terminal from connecting lines."

EMPLOYES' STATEMENT OF FACTS: "On February 21, 1940 the Brotherhood filed with the Third Division of the National Railroad Adjustment Board claim covered by Docket CL-1202, contending that the carrier was violating the Clerks' Agreement by requiring or permitting employes of connecting line carriers to check and furnish record to the Houston Belt and Terminal on cars received by the Houston Belt and Terminal from connecting lines.

"The Board rendered Award Number 1289 holding that 'the laches of the claimant precludes this Board from considering the merits of this claim.'

"When claim covered by Docket CL-1202 was first presented to the carrier they immediately raised the question of our delay in filing the claim. In its various submissions to the Board, and in its oral argument, the carrier stressed our failure to file the claim until several years after the violation occurred. This Board was impressed by the carrier's argument, and refused to consider the merits of the claim.

"In January 1940 the Brotherhood served formal notice of a desire to revise the rules agreement, which notice resulted in the current agreement that became effective November 16, 1940.

"Bearing in mind the carrier's contention in Docket CL-1202 the Brotherhood submitted to the carrier a proposal to include within the scope of the agreement all clerical and related work. An agreement was reached accomplishing that purpose, and it was written into the scope rule of the agreement.

"Following the effective date of the current agreement we requested the carrier to assign the work in question to employes holding rights and working under the Clerks' Agreement, but the carrier declines to do so."

POSITION OF EMPLOYES: "The employes contend that the agreement that became effective November 16, 1940 negotiated into the agreement all of the work here involved. We quote the following rules in support of the contention:

'This record amply supports the conclusion that, at the time the carrier agreed to this increase in pay, it believed that the only demand was for an increase in pay for the positions then in existence, and that the carrier would be called upon to pay only the positions then in existence, or such other positions as it might create. This belief found its justification in the failure of the employes over a period of six years to protest the action of the carrier in abolishing the positions about which they now complain. As was held in Award 116, the claimant "has slept on his rights."

'We recognize the prior awards of this Board relating to delays in presenting claims for acts which constitute continuing violations of agreements. We have no quarrel with these prior awards, however, we do not feel that these Awards are controlling of the fact situation now before us. We do not hold that mere delay will preclude this Board from considering the merits of a claim, but what we do hold is, where there has been no protest of the carrier's acts and the delay has been so extended that the carrier is justified in believing the employes have concurred in its acts, and in this belief the carrier at the demand of the employes increases rates of pay, it is too late thereafter for the employes to demand of this Board that positions, long out of existence at the time the increase in pay was granted, or the work of these positions, should be restored under the increased rates of pay.

'While all the elements of a technical estoppel are perhaps not present, nevertheless, we are of the opinion that the doctrine of laches should preclude the claimant from now obtaining from this Board the rights it asserts.'

"It is the contention of the Carrier that the present method of handling Transfer work on Houston Belt & Terminal Railway Company is not in violation of Agreement and that this contention is confirmed by Award 1289 which definitely decided the question. Further, that the question having once been decided should not be allowed to be reopened by the Organization because of the fact that the Award was not in their favor. No employe is being deprived of any work by arrangement in effect between the railroads making interchange in Houston, Texas, and no change should be made.

"Further, Carrier's submission covering claim under Docket CL-1202 is requested to be incorporated as a part of this submission."

OPINION OF BOARD: The claim here made is indistinguishable from an integral part of the claim made in Docket CL-1202—a dispute between the same parties over the same work and the same positions which were abolished in 1931. In the claim there made it was asserted: ". . . that the carrier is violating the Clerks' Agreement by (a) Requiring or permitting employes of connecting line carriers to check and furnish record to the Houston Belt & Terminal on cars received by the Houston Belt and Terminal from connecting lines; . . ."

In denying the claim made in that dispute (Award 1289) the Board said:

"Two transfer clerk's positions were abolished in 1931. The work of these positions was assigned as disclosed in (a) and (b) of the claim. Objection to this action of the carrier was made for the first time on April 12, 1939. In the meantime, at the demand of the employes, and through the mediation agreement of 1937, the carrier had agreed to a blanket increase in the rates of pay for the clerks. Certainly the carrier never agreed to this increase in pay believing that thereafter there would be a demand for the restoration of these positions out of existence for six years, and about which no complaint had ever been made.

"* * * * * *

". . . We do not hold that mere delay will preclude this Board from considering the merits of a claim, but what we do hold is, where there has been no protest of the carrier's acts and the delay has been so extended that the carrier is justified in believing the employes have concurred in its acts, and in this belief the carrier at the demand of the employes increases rates of pay, it is too late thereafter for the employes to demand of this Board that positions, long out of existence at the time the increase in pay was granted, or the work of these positions, should be restored under the increased rates of pay."

The claim in that case was made under the agreement effective March 1, 1930. The decision, however, is controlling in this dispute unless something can be found in the current agreement, effective November 16, 1940, which changes the situation existing when that claim was presented and denied by the Board.

It is the contention of the Organization that such a change was effected by broadening the scope of that agreement with the inclusion of Rule 1 (b) which provides:

"(b) Positions or work referred to in this agreement belongs to the employes covered thereby and no work or position shall be removed from this agreement except by mutual agreement."

The Organization says that, by the insertion of this provision, the parties intended to bring the work in question under the agreement. The Carrier denies that there was any such intention.

There is, of course, nothing in the quoted paragraph that remotely suggests that the parties had the dispute, then pending over this same work, in mind when they agreed to it. To accord the provision the significance imputed to it by the Organization would effect a settlement of the former dispute. That such was not its purpose we think is manifest from the fact that the former dispute was allowed to proceed to a decision without the imputation, now urged for it, being advanced.

When parties are in a controversy over a subject a settlement will not be imputed unless it is clear that their minds have met upon the subject and terms of settlement. Aside from the inherent impossibility of the parties mutually agreeing to the meaning of Rule 1 (b), now attributed to it by the Organization, the Carrier makes specific denial. The Organization says that the subject of dispute was discussed when the provision was agreed upon. The Carrier makes no specific denial of this statement. Failure to do so, however, is immaterial. Granting that the subject was discussed there is nothing in Rule 1 (b) to indicate a settlement of the dispute was effected. On the contrary, in allowing the former dispute to proceed to decision after the provision was agreed upon seems to us to refute completely the contention now made by the Organization with respect to its meaning.

The present dispute is indistinguishable from that presented in Docket CL-1202. The decision made upon that claim in Award 1289 is controlling of this.

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 carrier has not violated the agreement effective November 16, 1940.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of December, 1941.