Award No. 5077
Docket No. CL-5064

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violates the rules of the Clerks' Agreement at Susquehanna, Pa., when on February 24, 1948, and subsequent dates it directs and permits employes not covered by the Clerks' Agreement to have access to and remove from Section "A" Roundhouse Storeroom, Susquehanna, Pa., and to disburse such material and supplies, and,

That Carrier shall compensate Mr. J. J. Mooney, Leading Stockkeeper—Section "A" Roundhouse Storeroom, Susquehanna, Pa., for a call on February 24, 1948, and all subsequent dates for each violation of the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: At the Roundhouse Storeroom, Section "A" Susquehanna, Pa., the work of disbursing material, supplies and equipment during the hours 8 A.M. to 5 P.M. is performed by employes coming within the scope of the Clerks' Agreement and Mr. J. J. Mooney is the regularly assigned incumbent of position of Leading Stockkeeper, Section "A", Roundhouse Storeroom.

During the hours 5 P.M. to 8 A.M. the Foreman and employes in the Roundhouse and Cripple Track, not covered by the Clerks' Agreement, go to the Roundhouse Storeroom, Section "A" enter by use of a key in possession of Roundhouse Foreman, and secure needed materials, supplies and equipment leaving 1410 orders to cover on the counter, such orders to be signed and handled in usual manner by Leading Stockkeeper when he comes to work at 8 A.M.

Materials for locomotives, car parts, diesel engines and train supplies and equipment are maintained in Section "A" Roundhouse Storeroom. 1410 orders are not always left for materials secured after 5 P.M. but are issued over the Foreman's signature if they think of it and where overlooked are issued at a later date.

On February 24, 1948, between the hours of 5 P.M. and 8 A.M. material was taken from section "A" Roundhouse Storeroom by Roundhouse employes not covered by the Clerks' Agreement and the regular assigned Leading Stockkeeper was not called to perform this work.

On subsequent dates, material was taken from Section "A" Roundhouse Storeroom in a similar manner and the same procedure is being followed at this writing.

9. Carrier protests acceptance by the Third Division of this or any other claim that has not been handled in accord with regular procedure on the property.

10. Carrier asserts that the Organization violated Rule 42 of the Current Agreement and Section 3, First (i) of the Railway Labor Act when on June 10, 1949 it attempted to change the claim and continues to violate Rule 42 and Section 3, First (i) of the Railway Labor Act when it persists in progressing the claim to your Board for decision. Further the Organization's actions in this instance is contrary to the provisions contained in Circular No. 1, issued October 10, 1934, by the National Railroad Adjustment Board, above quoted.

11. Carrier reiterates that the claim the Organization has in this instance progressed to the Board has not been handled in the regular procedure on the property and accordingly carrier is unable to determine or anticipate the claim in the above entitled matter.

12. Without prejudice to Carrier's position, herein stated, if the claim in the above entitled matter is docketed by the Third Division, Carrier will make a complete detailed reply after receiving a copy of the Organization's statement filed with the Third Division in connection therewith.

(Exhibits not reproduced.)

OPINION OF BOARD: On or about March 23, 1948 the Organization filed claim with the Carrier charging violation of the Agreement on February 24, 1948, "when it failed and refused to bulletin, assign and award two (2) positions of Countermen, Susquehanna Roundhouse Storeroom Section A, Susquehanna, Pa., between the hours 5:00 P.M. and 8:00 A.M. each day, to employes covered by the Clerks' Agreement." The remedy proposed was that senior qualified applicants be assigned to the positions and further that such senior applicants and all employes affected be reimbursed for all and any wage losses sustained, retroactive 90 days prior to February 24, 1948. The complaint was grounded on alleged violation of the Seniority and Scope Rules of the Agreement.

The claim, on being denied by the Division Storekeeper, was appealed April 22, 1949 to the Manager of Stores where it was again denied. On June 10, 1949, the claim was again presented to the Manager of Stores in its original form, except that "starting with the second paragraph" it was changed to read as follows:

> "That the Carrier shall now pay Mr. J. J. Mooney, regularly assigned Leading Stockkeeper, Section A, call for work performed on his position on February 24, 1948, and all subsequent dates outside his regularly assigned hours of service."

It was not until August 25, 1949, when the claim was presented to the Carrier's Vice President that it was framed in the language now before the Board. As of September 14, 1949 the Vice President denied the claim on the grounds that the same had been changed from the basis of its original presentation, amounting to an acceptance of the denial of the original claim, and "that the claim as now presented constitutes a new claim and has not been handled in the manner provided for in Rule 42."

From that point on, and for that matter prior thereto, the real differences between the parties suffered for lack of attention while the Carrier and the Organization debated the validity of the claim. They now bring that quarrel to the Board along with other differences submitted for Board consideration.

While this Board has adopted a liberal approach to jurisdictional problems, and is always reluctant to dispose of cases in such a way as to preclude consideration of their merits, it is sometimes necessary to do so. Award 2222.

In the instant case, the Carrier's position that the claim is a new and different claim and has not been handled in accordance with Rule 42, is not to be lightly considered or summarily dismissed, for changes are admitted, and the record shows there may be a fatal variance between the claim filed on March 23, 1948 and that with which we are dealing.

It has once been decided, between these same parties, that the fact changes may have occurred from time to time in a claim before it reached this Board is not always fatal. Award 3256. It was there held that the subject matter of the claim—the claimed violation of the Agreement—had been the same throughout all stages of the claim, and the fact that the reparations asked for because of the alleged violation may have been amended from time to time, does not result in a change in the identity of the subject of the claim. We think that rule sound and the opinion well reasoned. Therefore, the Award is binding on the parties if here there has been no fatal variance between the original claim and the one referred to this Board.

Points of distinction in such matters, however, are not always easily recognized. What is apparent as the reparations part of one claim, and, therefore, subject to amendment, may have become so interwoven into the allegation of violation in another as to become a substantive part of the claim. Where the relief demanded is clearly only an incident to the claim, it is treated as no part of the substantive claim. Where, on the other hand, the claimed violation is the failure to perform some duty required by the Agreement, the proposed remedy is more one of substance than of form. Accordingly, it is necessary to review the claimed variances in the cited case and compare the admitted changes made in the claim with which we are here dealing in order to determine the binding effect of our previous Award 3256.

In the earlier case the claim originally presented read as follows:

> "Claim is hereby made for 6 men now working as freight handlers at Jersey City Docks after they complete their regular assigned 8 hours at the rate which is the greater, or time and one-half for all time worked on the minute basis.
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> "Daniel Mahoney and Joseph Stanley, clerks at Supt. Office, John Messineo, clerk Marine Yard Office, George Geerinck, clerk in Master Mechanic's Office, Joseph Domico, stock clerk at Marine Yard storeroom, and George Ameer, clerk in Supt. Office, all go to work as truckers or laborers on the docks after completing their day's work at their respective positions as clerks and should be paid in accordance with the rules, that all time worked in excess of 8 hours should be paid time and one-half on the minute basis."

In the first step of the appeals procedure it was changed to read as follows:

> "Claim of the General Committee of the Brotherhood of Railway Clerks that the carrier violates the rules of the Clerks' Agreement when it permits clerical employes to work four hours handling freight at the Jersey City Milk Platform outside of their regular assigned hours of service and for which work they were compensated at straight time rate, and
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> "That such employes shall now be paid the difference in amount they received at the straight time work of position occupied and their regular clerical rates at time and one-half rate, or at time and one-half of the position worked, whichever is the greater retroactive to June 6, 1943."

In the next step, the words "and others" were added after named employes in the notice of appeal and the body of the claim was changed by adding the words, "retroactive to September 1, 1943."

Again the claim was further amended to show that:

> "These employes should be paid at rate of time and one-half for services performed in excess of eight hours on any day in accordance with the provisions of Rule 20, Section (a) thereof."

Finally, and when the claim reached the Board, the name of employe "Whalen" was added to those previously named.

Thus, it appears that from its inception there could be no doubt that the claimed violation concerned working certain employes beyond their regularly assigned hours and outside their regularly assigned positions at rates of pay claimed to be in violation of the rules. Therefore, the Carrier was continuously on notice by the claim itself about what was involved in the alleged violation of the Agreement. The fact that the claim was extended in its scope to include employes not originally named and to change the basis of compensation, and further to shorten the retroactive period, could not have left the Carrier under any misapprehension about what the claim involved. Accordingly, it was proper to hold that there had not been a fatal variance in the claim.

But in the instant case the initial claim involved, (1) failure to establish two counterman positions, and (2) wage losses for unnamed employes, retroactive to November 1947. The claim before the Board involves, (1) failure to call Lead Stockkeeper to disburse material, and (2) compensation for Lead Stockkeeper for "calls" retroactive to February 24, 1948. The first part of each claim is a part of the substantive charge of the violation and constitutes the subject matter of the claim. Reparations are involved in the second part of each claim. Thus, the complexion of the claim changes midway of the appeals procedures, and the Organization's theory of the violation also changes. What started out as a claim for the establishment of two additional positions on the property under the seniority and scope rules changes complexion and becomes a complaint for failure to call an employe under a separate and distinct rule of the Agreement (Rule 25) to perform work claimed by the craft and class under the Agreement. Had there been no change in the subject matter of the first claim, it is difficult to understand how the aggrieved employe would have rights thereunder, because he occupied an assigned position. The establishment of two additional positions and retroactive payments to senior employes entitled thereto could not have meant additional compensation for him. Therefore, we fail to see how a claim on his behalf can be substituted for an earlier one in which he had no interest without doing violence to Rule 42 of the Agreement. The Rule provides that claims for compensation must be presented to the claimant's immediate supervisor within 90 days from the date the employe received his pay check for the pay period involved, and must be first handled on the property to be valid. The rule further provides that claims not made within the prescribed time limits cannot be entertained nor allowed. Had the subject employe been a proper party to the claim as originally framed, his name could have been added or substituted and it would have been done within time under the authority of Award 3256. Otherwise, the latest filing date under Rule 42 for work in February would have been May 1948. It was not until June 1949 that he became a party to the complaint. The claim was never presented to claimant's immediate supervisor and there was no conference at that level involving claimed violation of Rule 25.

We do not believe Rule 42 can be circumvented in such a manner. The procedural rules of an Agreement are vital to orderly settlement of disputes, and time limits are not to be ignored or undermined. Claims must first be the subject of earnest and sincere efforts to settle on the property. The Board goes far afield if it ignores the plain mandate of rules, when it is charged with a duty to assist the parties to maintain agreements covering those same rules. Accordingly, we do not believe, under any theory of this case, the Board would be warranted in sustaining a claim for compensation which is as questionable as the one before us.

If possible, however, the Board should retain jurisdiction of the dispute separate and apart from the compensation aspects of the claim. This Board does not concern itself with technicalities nor is there any disposition to hold the parties to exacting form in the presentation of claims. However, something more must be demanded of the claim than a bald statement that an Agreement has been violated. The claim should put in issue the precise rules involved in the alleged violation and claimant's theory of the claimed violation. Those allegations should remain constant throughout all stages of the proceedings and any variance therein can be fatal to the Board's jurisdiction.

The Board's jurisdiction stems from an Act of Congress which places a duty on the parties to exert every reasonable effort to make and maintain Agreements and to settle all disputes whether arising out of such Agreements or otherwise. This they cannot do if outside influences go to work too soon and are injected into the controversy prematurely. The Board is not authorized to step in until the dispute has been properly referred to it, and only then after the parties have exhausted all recourse under their Agreement. The dispute, according to the Railway Labor Act, shall first be handled "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." This contemplates orderly procedures and does not permit the revision of a claim at some intermediate point of the discussion.

The Act further provides:

> "Second, all disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

It is not enough that the parties only perfunctorily deal with their problems before petitioning the Board for assistance. Award 137.

In commenting on the foregoing provisions of the Act, this Board said in Award 4346:

> "Naturally, this Board in its deliberations should be guided by the expressed policy of the Railway Labor Act and should expect the parties to discharge their respective duties in connection with grievances outlined therein. Were we to decide this dispute on the basis of the present record, we do not believe that such action would be in harmony with the general purpose of the Act, as set forth in Section 5, for it does not contribute to orderly settlement of disputes to consider a claim based on a grievance which in the course of progress to this Board changes in character from that which has been discussed on the property."

Factually, the last cited Award involved a situation where the Organization initiated a claim on June 18, 1947, for restoration of an abolished position. After the claim was denied by the Carrier's Superintendent, appeal was taken to the Director of Personnel, and then, on September 12, 1947, a specific time claim was lodged for the first time alleging wage loss to have been sustained through failure to call the aggrieved employe.

In Award 1314, the Board said that where a claim as first presented was changed during the course upward from the Superintendent to the Assistant Vice President to include additional items, such is not in accord with the Railway Labor Act. Had the case come to the Board on an ex parte submission, as here, instead of on a joint submission, the Board indicates that it would have disclaimed jurisdiction.

By reason of the foregoing, the Board has here concluded that it should not take jurisdiction of this case on the present record. It is not believed

that the dispute has been fully and sufficiently considered on the property, due to the failure of the Organization to back up and start anew when it felt under compulsion to change the claim. It appears more in harmony with the spirit and intent of the Railway Labor Act that the parties confer and make a sincere attempt to resolve the dispute on its merits before resorting to the Board. It is clear from the record that they have not done so, but have been bickering over procedural matters instead.

The delay attendant upon the Board's inability to dispose of this case on its merits is regrettable, but there are no shortcuts to get here. When the parties circumvent their own rules in a rush to bring the Board into their controversies, they impose on their own time and must suffer the delays ensuing. Accordingly, we hold that Rule 42 of the Agreement has not been complied with and the claim should be dismissed without prejudice to the Organization's right to institute and bring a new claim up through proper channels if the practice in question is continued over its objections.

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 subject matter of the claim is not properly before the Board.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1950.