Award No. 7412
Docket No. CLX-7250

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

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that

(a) The Agreement governing hours of service and working conditions between Railway Express Agency, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949 was violated at the Milwaukee, Wisconsin Agency September 20, 1949, in the treatment accorded A. J. Honthaner and Charles A. Muench; and

(b) They shall now be restored to their positions of Collector and compensated for salary loss sustained, retroactive to and including September 20, 1949.

EMPLOYES' STATEMENT OF FACTS: A. J. Honthaner, with a seniority date of April 24, 1926, was prior to September 20, 1949, the regularly assigned occupant of position titled Collector, hours of assignment 7:00 A. M. to 3:30 P. M., days of rest Saturday and Sunday, salary $251.93 basic per month.

Charles A. Muench, with a seniority date of September 1, 1908, was prior to September 20, 1949, the regularly assigned occupant of position titled Collector, hours of assignment 7:00 A. M. to 3:30 P. M., days of rest Saturday and Sunday, salary $251.93 basic per month.

Claimants Honthaner and Muench occupied their respective positions by virtue of a Special Agreement entered into during 1943 in keeping with the provisions of Rule 87, whereby, Carrier in compliance with the language of the rule, agreed that it would provide employment (work) for employes becoming physically unable to continue in service in their present positions. Prior to reaching this understanding (Special Agreement), strife and discord had existed over the issue of carrier meeting, in fact, the requirement imposed upon it by the language of Rule 87. Prior to the time the special agreement was entered into both claimants were employed in the Vehicle Seniority District—in the performance of their work within that seniority district. The work to which claimants were assigned by the special agreement came within the City Office Seniority District. By mutual agreement these positions were not bulletined.

the Board for a period of two years after employes had received their final decision on the property. Referee McMahon in denying the claim made this statement in approval of Award 4941:

> "The record clearly shows the Organization took no further action until December 12, 1951, when the General Chairman notified the Carrier of its rejection and the denial, and gave notice of appeal to this Board. This action by the General Chairman in filing and notifying the Carrier, approximately two years after denial, of their intention to appeal to this Board, is in our opinion an unreasonable time in which to take such further action, and certainly is not in compliance with the Railway Labor Act. See 2, 'General Purposes', as set in (4) and (5) of said section. There is nothing contained in the Act nor in the current Agreement which puts a time limit on the filing of an appeal to this Board from any denial of a claim by the Carrier, but such appeal must be prompt and orderly. Certainly the parties are entitled to a reasonable period of time in which to perfect an appeal to this Board, but a period of approximately two years in which the Organization elected to further assert its rights to this Board is unreasonable, and not within the purview of the provisions of the Railway Labor Act, and said claim should be denied. We are in accord with Award 4941, Carter Referee."

All evidence and data set forth have been considered by the parties in correspondence and in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: The purported mistreatment of claimants is predicated on Rule 87 which reads:

> "Efforts will be made to furnish employment (suited to their capacity) to employes who have become physically unable to continue in service in their present positions.
>
> Such employes shall be paid not less than the established rate of the position to which assigned."

Therefore, complaint is grounded on an asserted rules violation and not on unjust treatment outside the protection of rules. Accordingly, Rule 34 does not constitute a bar to claims at issue.

Laches, an equitable doctrine that is also asserted here as a bar, is applied in a proper forum to promote diligence and to discourage stale demands of all kinds. It has no proper place, however, in a proceedings before a tribual, such as this Board, which confines itself to the inflexibility and rigidity of interpreting and applying rules of agreements without regard to conscience or convenience.

It is not that this Board aids the slothful or is disposed to encourage claimants to sleep on their rights, that causes it to steer clear of equity and equitable considerations, but the Board does see some greater wisdom in recognizing the futility of any attempt to do equal justice between all parties to every dispute, as it must undertake to do if it turns from rules to focus attention on natural justice.

For reasons above stated, there is no validity to the contention that claims of record are not timely. A decision on the merits, therefore, is next in order.

A. J. Honthaner and Charles A. Muench, claimants above named, upon becoming physically incapable of continuing to perform the duties of their regularly assigned positions, enjoyed the benefits of Rule 87 for 6 years beginning in 1943 and continuing until late in the year 1949, when, due to

some decline in business, each was relieved of his duties, and the remaining work was assigned to others.

Honthaner was out of service from about September 20, 1949 to November 21, 1950, when, as of the latter date, he accepted the bulletined position of Air Express Driver. Muench, on October 5, 1949 took the position of Money Driver after being out of service only from September 20, 1949.

From the foregoing summary of the facts, it becomes at once apparent that efforts were made to furnish employment, and, in fact, employment was furnished to both Honthaner and Muench. Thus, we have altogether a different case here than the one that was decided by Express Board of Adjustment No. 1, Decision E-1511, on a record showing no effort was made to furnish employment to claimant appearing before that Board.

Petitioner in the present docket, on the strength of a special agreement made pursuant to Rule 87 for placement of the aggrieved employes, seeks to impose upon that rule other rules of general application to all employes as a class and only adaptable to established positions or work involving a position.

Rule 87 obviously is a special rule of only limited application "to employes who have become physically unable to continue in service in their present positions," and, in our opinion, bears no direct relationship to other rules of the schedule.

In negotiating a rule for the benefit of incapacitated employes, the parties manifestly did not have in mind the accomplishment of more than some effort to furnish employment suited to the capacity of those who could no longer continue in service on their established positions. Hence, they were unquestionably thinking of special employments not necessarily involving class of work or contractual rates of pay.

We are confident that if more were intended the parties would not have written a rule that refers to "employment" rather than positions, nor would it have been found necessary to make special provision for compensating the incapacitated employe at rates of pay different from those for wage rated positions under the schedule.

In the instant case we are fully satisfied that claimants have enjoyed every advantage of that rule which clearly was negotiated to afford some relief for those in carrier's service who, on being found physically incapable of continuing in service in their present positions, might otherwise be denied humane treatment and be cast adrift without effort to furnish employment suited to their capacity.

Neither do we think carrier's management officials acted inprovidently in seeking and obtaining agreement with the employe representative for rearranging work of established positions to make work for incapacitated employes, when failure to do so could have given rise to a possible contention that rules for established positions and for transferring work involving a position had been violated.

It is our studied opinion that carrier has made that effort contemplated by Rule 87 to furnish claimants employment suited to their capacity and that more cannot reasonably be expected or demanded of it without imposing obligations at variance with the spirit and intent of the only rule that admits of direct application to facts and circumstances of record.

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 Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September, 1956.