Award No. 7850
Docket No. SG-8175

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Kansas City Southern Railway Company that:

(a) The Carrier did not properly apply Article I, Section 1, of the August 21, 1954 National Agreement to its monthly-rated signal employes.

(b) The Carrier compensate each of its monthly-rated signal employes, who received less than six (6) days' pay for each week they were on vacation in 1954, one (1) additional day's pay.

EMPLOYES STATEMENT OF FACTS: In applying the provisions of the August 21, 1954, National Agreement to its monthly-rated employes, the Carrier did not properly apply Article I, Section 1 of the agreement, which grants to weekly and monthly rated employes, whose rates contemplate more than five (5) days of service each week, vacations of one, two, and three work weeks. Article I, Section 1, paragraphs (a), (b), (c), and (d), read:

"ARTICLE I—VACATIONS.

Section 1. Article 1 of the Vacation Agreement of December 17, 1941 is hereby amended to read as follows:

(a) Effective with the calendar year 1954, an annual vacation of five (5) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than one hundred thirty-three (133) days during the preceding calendar year.

(b) Effective with the calendar year 1954, an annual vacation of ten (10) consecutive work days with pay will be granted to each employe covered by this Agreement who renders compensated service on not less than 133 days during the preceding calendar year and who has five or more years of continuous service and who, during such period of continuous service, renders compensated service on not less than 133 days (151 days in 1949 and 160 days in each of such years prior to 1949) in each of five (5) of such years not necessarily consecutive.

OPINION OF BOARD: We are initially confronted here with argument presented on behalf of Carrier as follows:

> "Attention is directed to page 16 of this record whereat Carrier raises the following jurisdictional issue: Does the mere serving of notice of intent to file an ex parte submission—which notice is required by Circular 1, the published rules of this Board—constitute institution of proceedings before this Board?
>
> "The resolvement of this issue is necessary because of the provisions contained in Article V, Section (c) of the 1954 National Agreement, the same Agreement which we are requested to apply in a resolving of the merits of this dispute. This Article provides **that all claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine 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 this Board unless extended by agreement.**" (Emphasis theirs.)

It is agreed that the claim here involved was denied by the highest officer designated by the Carrier to handle such disputes on February 23, 1955; that Organization's notice of intent to file an ex parte submission was served upon the Board and the Carrier November 23, 1955.

In acknowledging receipt of such notice, Carrier, on November 29, 1955, wrote this Board advising:

> "It is our position that the time limit rule of the August 21, 1954 agreement requires that appeals must actually be received by your Division within the time limit specified, and that a 'notice of intention' does not stop the operation of the time limit rule."

Carrier thereafter, on December 19, 1955 asked for and received from this Board a 30 day extension of time for filing its submission in the case.

While the presentations of the parties to the Referee in argument are voluminous, Carrier's main contention is that the mere filing of a notice of intent to file an ex parte submission does not meet the requirements of Section 3, First (i) of the Railway Labor Act or of the applicable Agreement; that according to provisions of Section 3, First (i) of the Act, an unadjusted dispute is properly referred to this Board upon the filing of a petition which contains a full statement of facts and all supporting data bearing upon the dispute.

Carrier's argument continues:

> "For example, a petition which includes a statement of the claim but does not include a statement of facts, etc., is not the type of petition contemplated by Section 3, First (i) of the Act. Consequently, the filing of a notice does not, in and of itself, institute proceedings before this Board. Expressed otherwise, because no other method for referring a dispute to this Board is contemplated by the Act itself it is only proper to assume that nothing less than what is prescribed therein will afford full compliance with this provision."

The pertinent portion of Section 3, First (i) of the Railway Labor Act reads as follows:

> "The disputes * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The pertinent portion of Article V, Section 1(c) of the National Agreement of August 21, 1954 is as follows:

> "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 * * * 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."

Organization, on the other hand, argues its notice of intent to file an ex parte submission, filed as Carrier concedes within the 9 months' limit met the requirements of the Agreement.

Organization, like Carrier, cites numerous Awards of the several Divisions of the National Railroad Adjustment Board, and material from other sources which each believes supports its respective position.

We have, then, before us Article V, Section 1(c) of the applicable Agreement ("proceeding are instituted") and Section 3 First (i) of the Railway Labor Act ("disputes may be referred by petition * * * with a full statement of the facts and all supporting data bearing upon the disputes.").

Under the Act, it is the "dispute" which is referred, and is primary, "with a full statement of the facts". But the law does not say that the "dispute" and the "full statement of the facts and all supporting data" must be filed together, at the same time. In fact, the Law merely says the "disputes" and the "facts" **may** be referred.

Circular 1 of the National Railroad Adjustment Board entitled "Organization and Certain Rules of Procedure" merely quotes from the Act, as above, and then adds:

> "The petitioner will serve written notice upon the appropriate Division * * * of intention to file an ex parte submission on a certain date (thirty days hence) and at the same time provide the other party with copy of such notice."

But the Agreement of the parties provides that "all claims * * * shall be barred unless within 9 months * * * proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board * * *."

Actually the Act itself and Circular No. 1 say that the "dispute" may be referred by petition. The dispute in this case, which is Organization's claim, is fully stated in Organization's letter of November 23, 1955, being its notice of intent to file within 30 days an ex parte statement covering the dispute. Thus did Organization refer, by petition to this Board, its stated dispute. And Carrier concedes this was done within the required nine months.

Carrier Members, in argument before the Referee, offered in evidence a dissent filed by Carrier Members to Award 7813, this Division, wherein such Carrier Members quote from a response made by the National Railroad Adjustment Board, Chairman Charles J. McGowan and Vice Chairman E. W. Fowler to an inquiry from the Attorney General of the United States wherein the Board said:

> 'The written submissions alone invoke the official action of the Board."

But the question before us turns on the phrase "proceedings are instituted".

"Proceedings" is defined by Webster as acts, measures or steps in a course of business or conduct.

"Instituted" is defined as initiated, set up, set on foot— in plainer English, started or begun.

Carrier's argument and evidence to the contrary, we must and do conclude that by its letter dated November 23, 1955, citing the dispute at issue and serving notice of its intent to file an ex parte submission covering the dispute within 30 days, the Organization "instituted proceedings" within the meaning of Article V, Section 1(c) of the applicable agreement.

We have another objection raised by Carrier with relation to Article V, Section 1(a). It is Carrier's position this section was intended "to bar claims made on behalf of unnamed claimants, as in the instant case."

However, because Carrier did not raise the issue while the dispute was being handled on the property, it cannot do so now.

Insofar as the merits of the case are concerned, it is conceded on behalf of Carrier that the Agreement "specifically grants 'weekly and monthly rated employes, whose rates contemplate more than five days of service each week, vacations of one, two or three work weeks.' "

The case turns on the point of whether claimants here involved are monthly rated employes "whose rates contemplate more than five days of service each week".

Organization asserts Rule 76—"Monthly Rated Employes"—of the Agreement, revised effective September 1, 1949 to conform to the 40-hour week principles, "makes it clear and undisputed that a monthly rated employe has a six-day work week".

Rule 76 gives monthly rated employes "one regular rest day per week, Sunday if possible".

Rule 76 fixes a formula for computation of pay for such employes—"313 calendar days per year"—which establishes they are paid for six days per week.

Rule 76 also states that "ordinary maintenance or construction work not required on Sunday prior to September 1, 1949 will not be required on the **sixth day of the work week.**" (Emphasis added)

Article 1, Section 1(d) of the August 21, 1954 National Agreement provides:

> "Paragraphs (a), (b) and (c) hereof shall be construed to grant to weekly and monthly rated employes, whose rates contemplate more than five days of service each week, vacations of one, two or three work weeks."

The several presentments of and on behalf of Carrier, as well as the numerous Awards it cites, have been carefully reviewed. Our opinion is Organization's case has been proven conclusively by the Agreement itself, above quoted; claimants are paid for and operate on the basis of a six day work week.

We cannot, however, agree to wholly sustain part (b) of Organization's claim as made. Conceivably, these men received their full monthly pay while on vacation. We will therefore remand part (b) of the claim to the parties for such monetary adjustments, if any, as may be necessary to comply with our opinion and award sustaining part (a) of the claim.

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 has been violated.

AWARD

Claim (a) sustained.

Claim (b) remanded to parties as per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 9th day of May, 1957.

DISSENT TO AWARD NO. 7850, DOCKET NO. SG-8175

In respect of Section 3, First (i) of the Railway Labor Act, the majority herein correctly hold:

> "Under the Act, it is the 'dispute' which is referred, and is primary 'with a full statement of the facts' ",

The majority should have gone further and added thereto "and all supporting data bearing upon the dispute" as specifically set forth in the Act.

The majority herein errs in the construction it places upon the word "may", and in construing the Act as not requiring the "dispute" and the "full statement of facts and all supporting data" to be "filed together, at the same time". Use of the word "may" simply gives the parties an election whether or not to refer disputes to the Board. If and when disputes are referred to the Board, however, the Act is specific in providing how it shall be done, viz., "by petition * * * with a full statement of facts and all supporting data". In using the adverb "with", the Act is specific in requiring that a "full statement of facts and all supporting data" accompany the "petition". According to Webster, the adverb "with" means "Together in association or time".

Circular No. 1 of the National Railroad Adjustment Board is coextensive with the Railway Labor Act itself.

By action of the full Board, "the written submissions alone invoke official action of the Board" and not informal or formal complaint or application.

Accordingly, Article V, Section 1 (c) of the applicable Agreement, construed together with specific provisions of the Act and policy of this Board, required dismissal of the instant claim inasmuch as Petitioner's written submission was not received until after the nine-month period for the filing thereof had expired.

The majority also erred in refusing to consider Article V, Section 1 (a), in its effect on this claim. Section 1 (c) makes Sections 1 (a) and (b) parts thereof. Having considered Section 1 (c) there were just as valid reasons for considering Section 1 (a). The majority's action in this respect was in conflict with consistent holdings that this Board must determine rights of the parties from the four corners of the Agreement, and that no rule thereof need be specifically pled at any time to be applicable inasmuch as agreement rules are always before us.

In sustaining the claim on the merits under Article I Section 1 (d) of the August 21, 1954 National Agreement, the claim for pay should have been limited to sixty days prior to January 3, 1955, the date on which it was filed, in order to conform to Article V, Section 1 (a).

For the above reasons we dissent.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen