

Award No. 8225

Docket No. TE-7830

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE COLORADO AND SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Colorado and Southern Railway that:

(1) The Carrier has violated the effective agreement and the Vacation Agreement of December 17, 1941, when it failed and/or refused to cooperate with the Local Committee in the assignment of 1955 vacation dates to employees in violation of Article 4 (a), whereby claimant W. R. Phillips was required to suspend work on his own regular assignment for five (5) days, May 9 to 14, 1955, including five working days, and was not compensated for five days on vacation not granted May 30 to June 3, 1955, inclusive, and,

(2) The Carrier shall be required to compensate Telegrapher W. R. Phillips for five (5) days at pro rata rate when he was suspended from work on the dates shown in Part (1); and further,

(3) The Carrier shall be required to compensate Claimant Telegrapher W. R. Phillips for an additional five (5) days at time and one-half plus additional day at pro rata rate account May 30 being holiday and a regular work day, in lieu of vacation not granted.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between the parties, bearing effective date of October 1, 1948, including changes and agreed-to interpretations to date of reissue January 1, 1955; rates of pay effective December 3, 1954.

Telegrapher W. R. Phillips is regularly employed at Trinidad, Colorado, as Depot Ticket Clerk-Telegrapher, with a work week of Monday through Sunday and rest days of Saturday and Sunday of each week.

During the month of November 1954, pursuant to agreed practice, the Carrier issued a Bulletin to all employees under the Telegraphers' Agreement, requesting them to state their preferences for vacation periods for the year 1955. In accordance with the provisions of Article 4 (a) of the Vacation Agreement, Local Chairmen Phillips and McCleery met with Mr. Norman Heald, representing Superintendent Hoover, and Chief Dispatcher Couch, of the Colorado & Southern Railway on December 4, 1954, for the purpose of setting up a vacation schedule for 1955 for the employees under the Telegraphers' Agreement.

There is no rule in the Telegraphers' Agreement, nor in the currently effective Vacation Agreement, to warrant a claim of this nature under the circumstances upon which the instant claim is based.

The Carrier respectfully submits that the handling given the claimant in granting him his 3 weeks vacation was not improper and that the claim should be denied.

The Carrier affirmatively states that all data herein and herewith submitted has been previously submitted to the Employees.

OPINION OF BOARD: The Employees' ex parte submission states the essence of the claim as follows:

"The instant claim is a direct result of the Carrier's unilateral action in assigning vacation periods.

* * * * *

"The Employees insist that the issue here presented for the Board's consideration is whether the Carrier may unilaterally set up arbitrary vacation dates for its employees in total disregard of their desires and preferences in seniority order and without cooperating with the local committee in scheduling the vacation periods."

The vacation dates for 1955 were set up in December, 1954. The record shows that on December 4th and 11th, 1954, the representatives of the Carrier and the Organization, including Claimant, the Local Chairman, met for the purpose of scheduling vacation periods of all employee members for the calendar year 1955. On December 17, 1954, the Carrier's Superintendent issued a vacation schedule assigning vacations to the sixty-six employees for various periods throughout 1955, the twenty-ninth of which was for Claimant for the period May 9th through May 29th.

No question of seniority is presented. The objection is that Claimant requested the period from May 16th through June 3rd, but that without valid operating reason he was assigned a period beginning one week earlier. The vacation periods of six other telegraphers also varied from the periods requested, admittedly to exclude holidays from the vacations of the holders of six and seven day positions, but no claims are presented for them.

Article IV of Appendix 3 to the Rules provides the procedure for the filing, processing and appealing of claims and grievances.

Section 1 (a) of that Article provides that all claims or grievances arising on or after January 1, 1955, "must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based." Thus it must be presented (a) in writing; (b) to the Superintendent, the Carrier's officer authorized to receive it; (c) within 60 days from the date of the occurrence upon which it is based.

Section 1 (b) then provides that if the claim is disallowed an appeal shall be taken within 60 days, otherwise the matter will be considered closed. The final appeal is to the General Manager.

Section 2 provides that all claims or grievances arising out of occurrences prior to January 1, 1955, which have not been filed by that date, must be filed within 60 days after that date, and handled in accordance with Section 1.

This claim was filed by Claimant on June 2, 1955, on behalf of himself and C. A. Pope, another telegrapher. It was denied by the Superintendent on June 8th in a letter in which he mentioned that Mr. Pope had received

part of his vacation in January. In a letter to him on June 17th, Claimant accordingly reduced the claim as to Mr. Pope and requested reconsideration, which was refused on June 21st.

On July 1, 1955, the General Chairman appealed to the General Manager from the Superintendent's denial of the claim, but only on Claimant Phillips' behalf, stating "You will note that the claim for Telegrapher C. A. Pope is omitted from the original claim account it developed that Mr. Pope took part of his vacation in January."

The General Manager seized upon the appeal as an abandonment of the original claim for both Phillips and Pope, and an entirely new claim direct to him instead of the Superintendent for Claimant Phillips, which it clearly was not. In his letter of August 1, 1955, to the General Chairman denying the appeal he stated:

"Referring to your letter of July 1, 1955, file C-850, concerning claim presented on June 2, 1955 to Superintendent G. B. Hoover by ORT Local Chairman W. R. Phillips, Trinidad, in behalf of himself and Telegrapher C. A. Pope, which claim, in your letter of appeal to this office, you have abandoned and, apparently in lieu thereof, have presented to this office a claim in behalf of Depot Ticket Clerk-Telegrapher W. R. Phillips, Trinidad, Colorado, * * * predicated on the allegation that Carrier representative failed and/or refused to cooperate with the Local Committee, ORT, of which the claimant is a member, in the assignment, on December 4, 1954, of 1955 vacations for employes subject to the Telegraphers' Agreement, thus purportedly causing the claimant to take his 1955 vacation during a period other than desired:

"It is appropriate, at the outset, to point out to you that your presentation of a claim to this office in behalf of Telegrapher W. R. Phillips is contrary to the plain provisions of Paragraph (a) of the Time Limitation Agreement, which specifically requires that 'All claims and grievances must be presented in writing by or on behalf of the employe involved, to the officer of the carrier authorized to receive same, within 60 days from the date of occurrence on which the claim or grievance is based.' Therefore, since the original claim of Telegrapher Phillips and Telegrapher Pope has been abandoned and the instant claim of Telegrapher Phillips not having been presented to Superintendent G. B. Hoover, the officer of the Carrier authorized to receive same, within sixty days from the date of occurrence, thus estopping and barring further progression thereof, there appears to be nothing in the form of a claim remaining and no determination that may, with propriety, be made except to close file." (Emphasis added.)

In other words, although the December proceedings and the 60 day Time Limit Rule were mentioned, Mr. Wolfe apparently considered May as the time when the claim matured as to Claimant Phillip and C. A. Pope, for at the outset he mentioned that their claim was "presented on June 2, 1955, to Superintendent G. B. Hoover." The appeal to himself he considered as a "presentation of a claim to this office in behalf of Telegrapher W. R. Phillips," contrary to the rule because not presented to the Superintendent, "the officer of the carrier authorized to receive same." Although he also mentioned the 60 day limitation, it is clear that he regarded June 2nd as in time, and therefore could not well have considered July 1st as too late, since it was within 60 days from May 9th.

Therefore we need not consider whether the 60 days limit for the presentation of Mr. Phillips' claim started running on December 17, 1954, when the vacation schedule was adopted, or on May 9, 1955, when he was required to start his vacation at a time not of his choosing, and therefore became directly affected. For that question was not raised on the property. Awards 3950, 5095 and 7848.

In the Award of Referee Morse involving Interpretation and Application of the Vacation Agreement he said:

"It is the opinion of the referee that it was not intended by the parties that the desires and preferences of the employees in seniority order should be ignored in fixing vacation dates unless the service of the carrier would thereby be interfered with to an unreasonable degree. To put it another way, the carrier should oblige the employee in fixing vacation dates in accordance with his desires or preferences unless by so doing there would result a serious impairment in the efficiency of operations which could not be avoided by the employment of a relief worker at that particular time or by the making of some other reasonable adjustment. The mere fact that the granting of a vacation to a given employee at a particular time may cause some inconvenience or annoyance to the management, or increased costs, or necessitates some reorganization of operations, provides no justification for the carriers refusing to grant the vacation under the terms of Article 4 of the agreement.

"As both parties point out in the record, it is impossible for a referee to lay down a blanket interpretation of the clause 'consistent with the requirements of service' which can be applied on a rule-of-thumb basis. However, this referee is satisfied that when the parties adopted Article 4 they did not intend that vacation dates should be fixed in an arbitrary manner by the Carriers. * * *"

The committee established under Article 14 decided Case 16-W as follows:

"Article 4(a) of the Vacation Agreement of December 17, 1941 provides that vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employees in seniority order when fixing the dates for their vacations. It further provides that the carrier and the local committee representing the employees shall cooperate in assigning vacation dates.

"The carrier without a showing that their action is consistent with the requirements of the service cannot arbitrarily exclude any given period from the vacation schedule. On the other hand, the employees cannot insist that they are entitled to take vacations strictly in accordance with their own wishes. The mere fact that a holiday may occur within a given week is not sufficient justification for the exclusion or inclusion of that week in the vacation schedule. The determination of this point shall be consistent with requirements of the service."

We must conclude, therefore, that in arbitrarily excluding a holiday from Claimant's vacation the Carrier arbitrarily violated the Vacation Agreement.

The claim is that Claimant should be given five days' pay for the period from May 9 to May 14, on the ground that he was required to suspend work because he did not select them as part of his vacation. But he has already received vacation pay for those days. The claim also is that he should receive an additional five days' pay at time and one-half for the five days which he requested but did not receive as the last five days of his vacation. But he worked those days and has already been paid for them.

The apparent reason for the Carrier's refusal to grant certain employees vacation periods including a holiday is that extra expense would be involved. The parties are not in agreement as to the exact extra expense, if any; however, apparently it would not exceed one day's pay at the regular rate. Consequently, we consider that amount the proper compensation for Claimant herein.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing thereon;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Vacation Agreement has been violated.

AWARD

Claim sustained and Claimant awarded one day's pay at regular rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January, 1958.

DISSENT TO AWARD NO. 8225, DOCKET NO. TE-7830

Article V of the National Agreement dated August 21, 1954, here involved, provides certain requirements for presenting and progressing claims or grievances. Section 1 makes mandatory the primary requirements that all claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Thus, it must be presented (a) in writing; (b) to the Carrier's officer authorized to receive it; (c) within 60 days from the date of the occurrence upon which it is based.

Section 2 made mandatory for all claims or grievances which arose out of occurrences prior to January 1, 1955, and which had not been filed by that date, that they be filed within 60 days after that date and handled in accordance with Section 1. This primary requirement should have been controlling here. As shown in part 1 of Statement of Claim, the occurrence out of which this claim or grievance arose was the assignment of 1955 vacation dates, which was completed on December 17, 1954. Thus, March 1, 1955, was the final date for presentation of the claim or grievance under the rule and the claim of June 2, 1955 was too late.

Article V provides further that the parties may, by agreement, extend the 60-day period for either a **decision** or **appeal** up to and including the highest officer of the Carrier designated for that purpose. Significantly, however, there are no exceptions to the requirements for presenting claims or grievances initially. No provision for waiver or extension of these primary requirements for establishing a claim or grievance is contained in the rule and none may be implied. It is a universal rule of contract construction that where certain definite exceptions are expressed in a rule, no others are implied. The mandatory requirement that "All claims or grievances must be presented * * *" timely is basic and cannot be waived by failure to plead it in any certain way. In point is the statement expressed in the Findings in **First Division Award No. 15851**, to wit:

"While the investigation was held on September 1, 1948, before A. H. Stohle, Master Mechanic, neither the claimant or anyone in his

behalf appealed from the decision of discharge until January 1949, a period of time far in excess of the sixty day provision of Rule 131.

"It is asserted that inasmuch as Rule 131 was not relied upon by the carrier during the initial stages of this matter, its consideration here is untimely and that the Board is now precluded from considering same in connection with this claim.

"This contention is without merit. No rule of this schedule need be specifically pled at any specific time to be applicable. All of the schedule rules are before this Board at all times and may be given such consideration and weight as is deemed proper.

"Rule 131 is without ambiguity. In substance, it provides that all grievances must be presented within sixty days to warrant consideration."

The importance of the grievance provisions of agreement is made apparent by the Arbitrator in **Firestone Tire & Rubber Co., 9 LA 518, 522 (1948)** wherein he declared emphatically:

"To rule, without the strongest provocation, that (a) provision of a grievance section of a contract has been waived would be establishment of a precedent which might have far-reaching effects. To use an illustration, it would be like the neglecting of a leak in the dikes of Holland. * * * In other words if there is any place in the interpretation of collective bargaining agreements where strict or technical construction is necessary it is in that which provides for the grievance machinery and procedure."

It is well settled that the Agreement is conclusive upon this Board precisely as made by the parties, and that the Board has no power to vary or alter it for any purpose. This applies to the provisions of the time limit rule as well as to other parts of the Agreement. **Awards 2240 and 2268, Second Division; Award 16604, First Division.** Presentation of the instant claim after lapse of the time limit was but an empty gesture. No one could breathe life into it. Time for presenting such claim was gone forever.

Article V, here involved, was not involved in Awards 3950, 5095 and 7848. The distinguishing features of this Article set it apart from such awards and make the error of the majority here clearly evident.

We dissent.

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