Award No. 8564
Docket No. CL-8308

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

THE TEXAS AND PACIFIC RAILWAY COMPANY

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

(1) That Carrier violated and continues to violate Clerks' Agreement beginning September 6, 1954 when it assigned an employe with no Class 1 seniority and regularly assigned to a Class 2 position to work on a Class 1 position on dates hereinafter shown.

(2) That E. L. Sparks, regularly assigned to position T-181, Baggage Checker, be compensated at rate of time and one-half for September 6, 14, 15, 21, 22, 28, 29; November 11, 16, 17, 18, 21, 1954;

(3) That C. H. Proctor regularly assigned to Baggage Checker's Relief Position No. 1 be compensated at rate of time and one-half for October 1 and 8; November 6, 13, 1954;

(4) That W. W. Tatum regularly assigned to Baggage Checker's position T-179 be compensated at rate of time and one-half for October 31 and November 7, 14, 19, 20 and 21, 1954;

(5) That E. C. McDaniel regularly assigned to Baggage Checker's position T-1937 be compensated at rate of time and one-half for October 8, 15, 22, 29; November 5, 12, 1954 and each succeeding Friday of each week until April 6, 1955 on which date Baggage Checker's position T-1937 was abolished.

EMPLOYES' STATEMENT OF FACTS: Prior to September 11, 1954, the following positions were in existence in the Baggage Room, Fort Worth Passenger Station:

Position No.	Assigned Hours	Assigned Days	Rest Days	Occupant	Seniority Date
T-181	8:00 am to 4:00 pm	Thur. thru Fri.	Tue. & Wed.	Sparks	4-17-42
T-179	4:00 pm to 12:30 pm	Mon. thru Fri.	Sat. & Sun.	Taylor	3-19-43

case, as it is to see how the Brotherhood could want to win it. It certainly would not be to the interest of the majority of the employes for the Brotherhood to succeed in hampering the Carrier in the Carrier's effort to help its present employes advance themselves.

Therefore, the Carrier respectfully requests that the Board dismiss this case, or deny the claim.

All known relevant argumentative facts and documentary evidence are included herein. All data submitted in support of Carrier's position has been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Each of the four Claimants is regularly assigned to a Baggage Checker position at the Carrier's Fort Worth Station. This is a Group 1 position under the terms of the controlling Agreement which also provides for Group 2 and Group 3 positions. At various times between September 6, 1954, and April 6, 1955, employes occupying Group 2 positions were assigned to work on the unassigned rest days of the Class 1 positions of the Claimants or on the days when the regular incumbents of these positions were absent because of illness.

The Petitioner contends that this use of Group 2 employes in Group 1 positions is in violation of the Agreement. It further maintains that the Claimants were entitled to that work since they were regularly assigned Group 1 employes with roster seniority in that group. On the basis of this reasoning, the Petitioner insists that the Claimants should be compensated at the overtime rate for those days on which the Group 2 employes worked Group 1 assignments.

With respect to this question a number of rules of the Agreement are of interest. Rule 15 provides that separate seniority rosters will be maintained to cover employes in Groups 1, 2 and 3. Rule 3 (b) provides that seniority begins at the time an employe is assigned to a position in accordance with the rules of the Agreement in the seniority district and group where assigned. Rule 3 then goes on to state in its subparagraph (c) that

> "The fact that seniority of an employe is not established and listed upon the seniority roster until assigned by bulletin will not operate to deny to such employe the right to perform extra and/or relief work at the point where employed in the order of his employment date, when such work is not performed by employes that have established seniority."

Particularly pertinent to the question presented on the merits of the present case is Rule 30 (f) which reads as follows:

> "Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe assigned that class of work."

Some, if not all, of the aspects of the issue presented to us by these Rules and this record have been considered by this Board on a number of prior occasions (See e.g., Awards 7191, 8303, 8304, 7371, 6094, 6258, and 6691).

However, it is the Carrier's position that we are precluded from considering the merits of this case since the Petitioner has failed to comply with essential procedural requirements of the Agreement. In support of this contention, it points to Article V of the Agreement which deals with grievance procedure and specifically prescribes as follows in its subparagraph (b):

> "(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, 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."

It is uncontroverted that the Petitioner failed to notify the Carrier's Superintendent of the rejection of his decision, although it did otherwise comply with Article V in appealing the Superintendent's decision to the Carrier's Director of Personnel. That appeal was not the equivalent of the required notice of rejection to the Carrier's representative who made the decision. See Awards 1083 of the Fourth Division and 2135 of the Second Division. Article V is definite and clear in its language and conditions regarding the point in question and there is no doubt that the Petitioner failed to comply with its clear requirements.

The Carrier at no time expressly agreed to waive the requirement and the only question that remains with respect to this point is whether the fact the Carrier processed the claims one further step in the grievance procedure before raising the procedural objections constitutes a waiver of that defense.

This question must, in our opinion be answered in the negative. It would be manifestly unfair to require either party to act at its peril to the extent suggested, in continuing to process claims after a procedural defect had developed. The Carrier had no way of knowing at that time what this Board's decision would be either on the procedural or substantive issues presented and it is not to be held to have waived one by proceeding with the other in this case. We recognize full well that a dismissal that is not based on the merits of the case is not entirely satisfactory; it possesses the vice of leaving Claimants with the feeling that they have not had "their day in court." We would very much prefer not to base this decision on Article V of the Agreement. Nevertheless, each of the parties is responsible for the inclusion of this language in the Agreement and what we may think of its wisdom, relative importance of soundness is not at all material. It is our function to interpret the Agreement as it now stands and not to rewrite it in accordance with our own theories of labor-management relations. We are not disposed to strain interpretations in order to escape the technicalities of a plain meaning. Nor is it proper or desirable to resort to fictions and distortions to spell out a waiver, where none exists, in an effort to avoid a decision based on procedural defects rather than on the merits.

Here the Agreement is clear and unambiguous with respect to the immediate point in issue and it is entirely certain that the Petitioner has not complied with a requirement expressly made essential by the Agreement between the parties.

The point in question is not an ingenious defense that was deliberately concealed during the negotiations between the parties in order to mislead the Petitioner. This defect is patently disclosed by the record in the case and was strongly urged by the Carrier in its Statement submitted in reply to the Petitioner's Statement of Claim filed with this Board.

Under the circumstances, we have no alternative but to dismiss the claims.

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 claims are dismissed by reason of Petitioner's failure to comply with subparagraph (b) of Article V of the Agreement of August 21, 1954.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December, 1958.