

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 BELT RAILWAY COMPANY OF CHICAGO

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that the Carrier violated the Clerks' Agreement:

1. When it utilized the services of outsiders having no previous employment relationship, on an extra basis, to relieve regularly assigned employees on their rest days and to fill other short temporary vacancies that may occur.

2. That all employees with established seniority rights, who were available, willing, able and qualified to perform the work, be allowed eight (8) hours pay at the applicable rate for each and every day involved, on account of being deprived of their right to fill short temporary vacancies and to work their regularly assigned rest days, in the absence of a furloughed, or bonafide relief employee, effective with the date of April 1, 1954 and continuing until the violation is corrected.

3. Claimants herein not named are readily identified and to be determined by a joint check of the record and will include all of the bonafide furloughed employees up to and including forty-hours per week and those regularly assigned employees available and qualified for extra work, who in accordance with the plain provisions of the current working agreement should have been assigned such work.

EMPLOYEES' STATEMENT OF FACTS: There is an agreement in effect between the parties bearing an effective date of September 1, 1949, governing the hours of service and working conditions of employees of the Carrier represented by the Brotherhood, of which the language of the first part of Rule 1—Scope of Article 1 of the schedule of rules governing hours of service and working conditions was modified and adopted by an Arbitration Award on September 11, 1954. The Employees request that

OPINION OF BOARD: The Petitioner contends that the Carrier violated their Agreement when it augmented its clerical force by hiring outsiders, individuals who had no seniority rights, and used them on an extra basis to relieve regularly assigned employees on their rest days and to fill any short temporary vacancies. It further maintains that by the above described action, the Carrier denied the regularly assigned employees and the furloughed employees their rights under the Agreement. In support of its position, the Petitioner points to Rules 1, 7, 8, 11, 19, 27 and—most particularly—45 (f) of the Agreement. It also cites Awards 6259, 6284, 6760 and others that are rather persuasive with respect to the merits of this case.

However, it is the Carrier's position that we are precluded from considering the merits since the Petitioner has failed to comply with essential procedural requirements of Article V of the August 21, 1954, National Agreement. An examination of Article V establishes that an appeal from a disallowed grievance "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." It is apparent from the record that Petitioner did not comply with either of these two requirements. The claims were denied by the General Superintendent by letter dated June 8, 1954, and it was not until April 4, 1955, that the Petitioner appealed from the General Superintendent's decision.

Article V became effective January 1, 1955. It specifically covers the situation where pending claims were filed and ruled upon prior to January 1, 1955 and were awaiting further processing within the appellate framework on the property, for it prescribes that such claims must be appealed within sixty days after the effective date of the rule. There is no question, therefore, but that Article V is controlling in the situation now before us and that its time limit requirements have not been complied with by Petitioner.

These requirements are mandatory and afford us little latitude in their application. The only exception provided for is agreement by the parties to extend the prescribed time limits. The Carrier at no time expressly agreed to any such extension and no valid basis is perceived for implying a waiver of the requirement in this case. Nor are we satisfied that Carrier's failure to raise the question over a very considerable period of time on the property or in the record constitutes an estoppel or otherwise covers the failure to comply with Article V. We are of that view, even though we would very much prefer not to base this decision on this time-limit point. We recognize that a dismissal which is not based upon the merits is not entirely satisfactory; it possesses the vice of leaving Claimants with the feeling that they have not had "their day in court." Nevertheless, each of the contracting parties is responsible for the inclusion of this language in the Agreement and what we may think of its wisdom, relative importance or soundness is not at all material. As we pointed out in Award 8564:

"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 our 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 plain requirement expressly made essential by a written agreement to which Petitioner is a party.

It is true, as we mentioned before, that the time limit objection was not raised by the Carrier on the property or in the record and indeed not until a considerable period of time had elapsed. However, it is not an ingenious defense that was capable of misleading the Petitioner. On the contrary, it is patently disclosed by the record in this case. The entire record, including the August 21, 1954 National Agreement, is certainly before us and the Carrier may raise this jurisdictional point at any stage in the proceedings. See, among others, Awards 8886, 8797, 8383.

We have no alternative but to hold that the claim is barred and to dismiss 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 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 claim is barred by the August 21, 1954, National Agreement.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January, 1960.

DISSENT TO AWARD 9189, DOCKET CL-8708

This Award is in error in concluding that Petitioner failed to comply with Section 1 (b), Article V, August 21, 1954. This erroneous conclusion is based on the false premise that it was apparent from the record that Petitioner did not make an appeal within 60 days from the General Superintendent's notice of disallowance, nor, notify such official that his decision was being rejected.

The facts are that Carrier at no time claimed that the dispute was not properly handled, in accordance with Article V, on the property or in its ex parte submission or briefs presented to the Board. Therefore, this issue was not a part of the dispute that had been submitted to the Board. It was not until panel discussion before the Division, over four years later, that a Carrier Member of the Board raised the question and contended that

the "Entire Agreement is before the Board" for consideration and cited some twenty-five Third Division Awards and eleven awards of the First Division. A review of the Awards cited by Carrier shows that only two (Awards 8797, 8886) have sanctioned the introduction of new evidence and issues for the first time before the Board.

It is well settled that the Board will consider all rules and agreements between the parties in reaching a decision, but such rules or agreements must be relevant and pertinent to the issues raised and discussed on the property. Neither the contesting parties, nor, the Members of this Board have the right or authority to present new evidence and thereby create new issues for the first time before the Board. This truism is fully supported by the Railway Labor Act, as amended, rules of procedures (Circular No. 1) of the Board and numerous awards defining the Board's jurisdiction.

A review of the record shows that while the Petitioners supplied "supporting data bearing upon the dispute(s)" in their petition to the Board in accordance with Section 3, First (i), Title 1, of the Railway Labor Act, as amended, Respondent Carrier supplied no supporting data whatever in support of its statement. Therefore, the assumption that Petitioners failed to comply with Article V is drawn from an exchange of correspondence attached as exhibits to the Employees' Ex Parte Submission. Because such correspondence showed that an appeal was made from the General Superintendent's decision on April 4, 1955, and no exhibit was included showing that he was notified of the rejection of his decision, it was erroneously concluded that Article V had not been complied with.

In order to jump to this erroneous conclusion, it was necessary that it be assumed that there was no agreement between the General Chairman and General Superintendent to extend the time limits, as Section 1(b) provides:

"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 will be noted that there is nothing in this provision that requires the agreement to be in writing. Therefore, it would only be logical to assume, if we are authorized to speculate as to the facts, that an agreement was made to extend the time limits, in the absence of any evidence to the contrary. Surely, Carrier would have raised the issue on the property in the absence of an agreement. This conclusion is also supported by copies of other correspondence supplied by Petitioners where it is shown that conferences were held with the General Superintendent on December 2, 1954, he denied the claim again on February 25, 1955, referred back to him on March 19, and appealed on April 4, 1955.

It is crystal clear that the Award is based on the assumption that there was no agreement to extend time limits and that the General Superintendent was not notified in writing that his decision was rejected, as there is nothing in the docket to indicate one way or the other. If we were allowed to engage in speculations here, the weight of logical deductions would compel us to assume the contrary in the absence of the issue being raised on the property, where the Employees would have had an opportunity to defend themselves on that issue.

We do not have to go beyond Third Division Awards in support of the well established doctrine that no new evidence or issues can be introduced for the first time before the Board. See Awards 1219 (Tipton), 1485 (Richards), 3950, 5469, 5095, 5140 (Coffey), 5147 (Boyd), 5227 (Robertson), 5445, 5457, 6024, 6744 (Parker), 6140, 6500, 7036 (Whiting), 6215 (Wenke), 6657 (Wyckoff), 6769 (Shake), 7601 (Cluster), 7848, 7850, 8426, 8685 (Lynch), 8225 (Johnson), 8324 (McCoy), 8411, 8721 (Compare these Awards with Award 8797 by Daugherty), 8484, 8674, 8675 (Vokoun), 8567, 8572, 8573, 8758 (Sempliner), 8693, 8807 (Bailer), 8784 (Bakka), 9102 (Stone), 9029 (Hornbeck).

Award 8807, covered the same issue as presented here. Referee Bailer ruled.

"* * *, the only basis for contending that the involved notice was not given is that there is no specific indication in the record that any such notice was transmitted to the appropriate carrier officer. We do not know it was not given, however. The Carrier does not contend that the proper procedure was not followed by the Organization. We are not entitled to assume it was not given. We therefore reject this contention * * *." (Emphasis added.)

This Award is patently erroneous and clearly a departure from well established principles.

A more detailed memorandum, in support of this dissent, is being placed in the Divisions master file for further reference.

For the above reasons, I dissent.

J. B. Haines

Labor Member

REPLY TO LABOR MEMBER DISSENT TO AWARD 9189, DOCKET CL-8708

In the Labor Member's dissent to this Award 9189, it is agreed as "well settled that the Board will consider all rules and agreements between the parties in reaching a decision", but it is attempted to restrict such consideration to the extent that "such rules or agreements must be relevant and pertinent to the issues raised and discussed on the property." It is asserted that the time limit provisions of Article V, of the August 21, 1954 National Agreement are not "relevant and pertinent to the issues raised and discussed on the property", and that their application to the facts of this dispute as contained in the parties' submissions, with respect to time limits for appeal and notice of rejection to Carrier officer whose decision is appealed, constitutes new evidence creating new issues for the first time before the Board; also, that such application is by mere assumption or speculation.

Many Board and Court decisions hold to the principle that this Board is vested with the right to determine whether or not it has jurisdiction to resolve a dispute on its merits, e. g., see this Division's Award 8886 (McMahon):

"It is an elementary principle of law * * * that the question of jurisdiction can always be raised at any time in the proceedings."

and **First Division Award 15220 (Coffey)**:

"The Division is charged with the duty of inquiring into its jurisdiction when put on notice that such may be in question, even though that jurisdiction is not challenged by either party at any stage of the proceedings."

In **Spencer v. Patey**, 243 F. 555 it is held that jurisdiction which is lacking cannot be conferred by failure of the parties to raise the question.

In accord with such authorities, this Division ruled in **Award 9189** that it lacked jurisdiction to resolve the dispute on its merits because it was invalid when progressed to the Division (See **Award 40**, of **Special Board of Adjustment No. 170—CL v. I. C.—Sharpe**)—the dispute had not been properly progressed as required by the provisions of the agreed-upon Time Limit Article V, and based its ruling upon evidence contained in the Employees' submissions that (1) the General Superintendent's June 8, 1954 declination was not appealed within 60 days after January 1, 1955, per Section 2 of Article V; and (2) the General Superintendent was not notified of the rejection of his decision within 60 days after its rendition when appealed from, per Section 1 (b) of Article V. There can be no question but that the Employees' submissions are evidence before the Board, and that they did not show that the General Superintendent had been advised of the rejection of his decision or that the parties had agreed to extend the time limits for further appeal.

It is clear, then, that the Division's ruling is not based on new evidence but, to the contrariwise, on evidence of record before the Division also, that for it to have ruled otherwise its ruling then would have been based on assumption or speculation which was the case in **Award 8807 (Bailer)** stressed in the Dissent. In **Award 6299 (Shake)**, it is held:

"This Board is obliged to find the facts of a case in the record that it brought to it."

Referee Bailer's outstanding **Award 8807** is contrary to his denial **Award 8804** rendered on the same date, both in connection with cases wherein in Argument with respect to procedural violations of Article V by Employees was first presented by Carrier Members, and opposed to well-reasoned **Awards 8383 (Vokoun)**, **8564 (Wenton)**, **8797 (Daugherty)**, and **8886 (McMahon)**.

By reason of the foregoing, the undersigned Carrier Members are in accord that this **Award 9189** is properly based upon the facts of record considered in light of negotiated rules to which both parties are signatory, and that the dissenting Labor Member is without tenable grounds to now say that it is in error.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. F. Mullen

**ANSWER TO CARRIER MEMBERS' REPLY TO DISSENT TO
AWARD 9189, DOCKET CL-8708**

In their usual manner, Carrier Members attempt to confuse the issue by dissimulation and citation of irrelevant authorities in support of their argument.

The first paragraph contains a misstatement of fact as I did not assert "that the time limit provisions of Article V, of the August 21, 1954 National Agreement are **not relevant and pertinent to the issues raised and discussed on the property**", as a review of my Dissent will clearly show. What I did say, however, was that no rule or agreement, including Article V, could be considered by the Board, unless they were pertinent to the issues raised and discussed by the parties prior to submission of the dispute to the Board.

It will be noted that Carrier Members have injected a new issue into the controversy here by making the misleading statement that many Board and Court decisions hold to the principle that this Board is vested with the right to determine whether or not it has jurisdiction to resolve a dispute on its merits. They only cite two awards of this Board, one court case and one award of Special Board of Adjustment No. 170, in support of their contention.

It is hard to believe that Carrier Members are sincere in their contentions that the jurisdiction of the Board is contingent upon a collective bargaining agreement between the parties. This is the substance of their argument, which is inconsistent with the "Findings" adopted by them in Award 9189, reading:

"That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; * * *."

The National Railroad Adjustment Board was created by Congress upon the adoption of the Railway Labor Act, as amended June 21, 1934. The Act clearly defines the jurisdiction of this Division in Section 3, First (h), as follows:

"Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employes, train dispatchers, maintenance-of-way men, clerical employes, freight handlers, express, station, and store employes, signalmen, sleeping-car conductors, sleeping-car porters, and maids and dining-car employes. * * *."

Section 3, First (i), of the Act further clarifies the jurisdiction of the Board as follows:

"The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, 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 dispute 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 dispute."

The Act clearly states that the Board shall have jurisdiction over disputes **between** certain specified craft or class of employes and carrier, as the term "Carrier" is defined in Section 1, First of the Act. Award 9189 was decided upon a question that was not raised during the handling of the controversy on Carrier's property before submission to the Board. The question was **not in dispute between the parties** "growing out of grievances or out of the interpretation or application of agreements" as provided in Section 3, First (i) of the Act, supra, consequently, the majority exceeded their authority when they adopted this award, as the Act clearly does not vest jurisdiction within the Board to consider something that is not in dispute between the parties. This is a fundamental question of the Board's jurisdiction that can be raised at any time. Contrary to that contended for by Carrier Members, the fact remains that the Board had no jurisdiction over an issue that was first raised before the Board, thereby creating a dispute instead of resolving an existing dispute between employes and a Carrier, as provided in the Act.

First Division Award 15220, cited by Carrier Members, lends no support to their erroneous conclusions. The question before the Board in this dispute was a fundamental question of jurisdiction of the Board under the Act and did not involve the interpretation or application of the contesting parties agreement, as the Carrier Members would have us believe.

Referee Daugherty stated the question as follows and ruled:

"Such evidence, irrespective of the purpose for which submitted, puts the Division on inquiry as to whether or not there are other parties to the dispute entitled to notice **provided for by** Section 3, paragraph First, (j) of the Railway Labor Act (45 U. S. C. A. 153, First (j)) which reads in part:

' . . . and the several divisions of the Adjustment Board shall give due notice of all hearings to the employe or employes and the carrier or carriers involved in any dispute submitted to them.'

It has been held by the courts that the notice prescribed by the Act, if properly required, is jurisdictional and if not given when required the awards of this Board are a nullity. *Templeton vs. A. T. & S. F. Ry. Co.*, (8th F. Supp. 162, affirmed 181 F (2d) 527, cert. den. 330 U. S. 823).

Therefore, the Division is charged with the duty of inquiring into its jurisdiction when put on notice that such may be in question, even though that jurisdiction is not challenged by either party at any stage of the proceedings.

Our first inquiry, then, is whether or not there is another carrier or carriers, or other employes or employe representatives, involved in the dispute here submitted other than the petitioner and respondent."

It will be noted that the question of jurisdiction raised in Award 15220 had reference to a provision of the Railway Labor Act and not to the introduction of new evidence or issues, not in dispute between the parties, for the first time before the Board, as was the situation in Award 9189.

It should also be noted here that Carrier Members in their Dissent to Award 15220 recognized that the National Railroad Adjustment Board's jurisdiction is confined strictly to that conferred upon it by the Railway Labor Act. They said:

"We first discuss the jurisdictional question. Our jurisdiction is that (and only that) conferred by the Railway Labor Act. **Neither the Division nor the parties can add to, or take from, our jurisdiction as so conferred.**" (Emphasis added.)

It appears that the Carrier Members of the Board are not consistent in their contentions as they take different positions whenever it suits their purpose. Here they are attempting to impress us with the theory that a Member of the Division can create a dispute for the first time, which is over and beyond the jurisdiction conferred by the Act in Section 3, First (h) and (i), supra.

Carrier Members also show a lack of knowledge of the controlling principles involved by citing Award No. 40, Special Board of Adjustment No. 170.

Under the authority conferred by Section 3, Second, of the Act, the Representatives of the Clerks' Organization and the Carrier on the Illinois Central Railroad set up Special Board of Adjustment No. 170, by a collective Agreement, dated November 20, 1956. They agreed, among other things, that certain specified disputes would be withdrawn from the Third Division and referred to this Special Board and that:

"(a) * * * This Board shall have jurisdiction of, and shall hear and decide, claims and grievances (including discipline cases) arising out of the interpretation or application of agreements governing wages, rules or working conditions which are submitted to the Board.

* * * * *

(f) Evidence not contained in submission of the parties to the Third Division of the National Adjustment Board will not be considered by this Special Board."

The record involved in Award 40 shows that the contention "the dispute had not been properly progressed on the property" was first raised by the Carrier in its rebuttal brief and was a part of the submission of the parties to the Third Division. The situation there involved is clearly distinguishable from the factors presented in Award 9189. First, jurisdiction was conferred upon S. B. A. No. 170 by an Agreement between the parties and not the Railway Labor Act and, second, the Special Board was given jurisdiction to consider any matter that was contained within the submission that was withdrawn from the Third Division.

Carrier Members exposition of irrelevant and immaterial authorities in support of their conclusions is a discredit to their perception and ability to differentiate between a controlling precedent and one that has no application. It is twice prudent not to quote out of context or ascribe a strained meaning to the language of an authority in support of a person's conclusion. There is no more dismal and fruitless waste of time than to cite authority after authority that have no bearing on the issue under consideration, as was done here in Carrier Members' "Reply".

In view of what has been said herein, it is quite obvious that there is nothing in the "Reply" that in any way changes the force and effect of my Dissent to Award 9189.

J. B. Haines

Labor Member.