Award No. 9447
Docket No. CL-9000

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

FLORIDA EAST COAST RAILWAY COMPANY

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

(1) The Carrier violated provisions of the current agreement, as hereinafter stipulated, when on February 1, 1955 a position of Key Punch Operator was transferred from Auditor of Disbursements' Office to office of Auditor of Freight Accounts and required to perform higher rated work at lower rate of pay, and when on March 15, 1955, two positions of Payroll Clerk were abolished in office of Auditor of Disbursements and the work of these positions transferred to machine operation in the office of Auditor of Freight Accounts, in another seniority district, and

(2) That the work shall now be restored to the seniority district from which transferred and that Clerks Clyde C. Hoey Lucille B. Gilmore, and their successors, be compensated for all wage losses resulting from improper abolition of their positions as Payroll Clerks and transfer of their work to lower rated position in another seniority district, and that Clerk J. D. Hardee, and/or his successors, be paid the difference between the rate of $15.54 per day and $13.27 per day for performing higher rated payroll work, retroactive for a period of sixty days from October 10, 1955, and until correction is made, and that position of Key Punch Operator be returned to its original seniority district.

OPINION OF BOARD: This claim was originally advanced on April 14, 1955 denied by the Auditor of Disbursements on May 2, 1955, and appealed on July 25, 1955 to the Chief Accounting Officer, who ruled on August 2, 1955 that the matter was closed under Article V of the National Agreement of August 21, 1954 because not appealed within the sixty day period therein specified.

No further action was taken on that proceeding, but on October 10, 1955 the District Chairman filed this claim which is identical except that retroactive payment is claimed for only the preceding sixty days.

The Employes' Position is that the refiling, thus limited, is authorized by Section 3 of Article V of the National Agreement of August 21, 1954.

The material provisions of that National Agreement are as follows:

"1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

"(a) All claims or 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 the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contention of the Carrier as to other similar claims or grievances.

"(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 employes as to other similar claims or grievances. * * *

"(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employes and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. * * *

"3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof." * * *

The question presented is whether the filing of claims for continuous violations as authorized by Section 3 includes the refiling of claims which have been denied but not appealed within sixty days, and therefore under Section 1 (b) "shall be considered closed".

That the refiling of such claims was not within the contemplation of the parties is indicated by the absence of express reference, as well as by their obvious intention to provide for the prompt disposition of claims and grievances. The adoption of Section 3 indicates that for the purpose of the original filing of claims continuing violations were considered in a different category from violations not continuing, perhaps because they might affect successive claimants; — that claims for ordinary violations should therefore be filed within sixty days, but that claims for continuing ones could be filed at any time, though with financial retroactivity limited to sixty days to discourage intentional or undue delays.

There is no indication that their differences were considered such as to warrant the refiling of claims already closed by failure to observe time limits, or to warrant repeated filings; in fact, the contrary is suggested by the provision that the rights of all claimants should be fully protected by the filing of one claim as long as the violation continues, thus again evidencing the desire for prompt and final disposition of claims and grievances.

The above considerations are not conclusive, but our disposition of this claim is dictated by the well settled rules of construction of contracts that each provision is to be given effect, and that as to an ambiguous or doubtful provision a construction must if possible be adopted which is consistent with the rest of the agreement.

As noted above, Section 1 (b) of the National Agreement provides that upon a failure to take an appeal within the prescribed sixty day period "the matter shall be considered closed, * * *." Under the accepted rules we cannot reasonably adopt a construction of Section 3 which would limit the effect of Section 1 to grievances which do not continue, so that continuing ones are open to refiling, either once or repeatedly. Any doubt in that regard seems further concluded by the additional provision of Section 1 (b) that "this shall not be considered as a precedent or waiver of the contentions of the employes as to **other** similar claims or grievances". (Emphasis added.) The express provision that other similar claims and grievances are not concluded by failure to appeal the current one certainly emphasizes the fact that the current claim or grievance is definitely and finally disposed of.

This claim is not properly before the Board, due to failure of the Organization to comply with the National Agreement of August 21, 1954, in that proper appeal on the property was not made within sixty days as required by Article V, Section 1 (b). The provisions of that Agreement are mandatory. (Awards 8383, 8564, 8886, 9189.) The Board is without authority to make an award on the merits.

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 Board has no authority to consider this claim on the merits, and must therefore dismiss the claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 25th day of May, 1960.

DISSENT TO AWARD NO. 9447, DOCKET NO. CL-9000

This Award is erroneous. The majority have completely ignored the clear and unambiguous language of Section 3 of Article V of the National Agreement of August 21, 1954. This provision is a modification of the requirements of other provisions of the Article. There is nothing therein that prevents the refiling of claims for a "continuing violation" of an agreement, contrary to the contention of the majority.

Section 3 is a "saving clause", or special provision that prevails over the general terms of Section 1 (b), which is clear from that latter's language reading: "* * *, but this shall not be considered a precedent or waiver of the contentions of the employes as to other similar claims or grievances."

The majority have exceeded their authority by adding an exception to Section 3 that was never intended by the parties to the agreement.

The Award is patently wrong and erroneous, for that reason I dissent.

/s/ **J. B. Haines**
Labor Member

REPLY TO DISSENT TO AWARD NO. 9447, DOCKET NO. CL-9000

We concur in **Award 9447**. It properly construes Article V as against the facts in the case and the Labor Member's Dissent takes nothing away from the Award.

Article V does not permit of the refiling of claims already closed by failure to observe time limits. Once a claim for an alleged continuing violation, or otherwise, is timely filed, it must be handled in accordance with Section 1 of Article V which expressly applies to "**All** claims or grievances". When, as in this case, there was a failure to effect an appeal within sixty (60) days from receipt of notice of disallowance, Section 1 (b) states that "the matter shall be considered closed" but "shall not be considered as a precedent or waiver of the contentions of the employes as to **other** similar claims or grievances." There is no mystery in this languge and it is pure fiction to attempt to construe the attempted refiling of a claim as some "other similar claim or grievance" when, in fact, it was the identical matter which, by operation of Section 1 (b), had become closed. (Emphasis ours)

/s/ **C. P. Dugan**

/s/ **R. A. Carroll**

/s/ **W. H. Castle**

/s/ **J. E. Kemp**

/s/ **J. F. Mullen**