Award No. 9867
Docket No. CL-9244

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

STATEMENT OF CLAIM: (1) Claim that position of Bill & Yard Clerk, Red Wing, Minnesota, be restablished, that Clerk J. J. Havey be restored thereto and compensated for loss of compensation from January 20, 1950, account position abolished and work assigned to other employes in alleged violation of the effective agreement — Carrier's file K-34, Organization's Case G-388.

CARRIER'S STATEMENT OF FACTS: The Carrier and the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes are parties to National Agreement signed at Chicago, Illinois, August 21, 1954, between participating Eastern, Western and Southeastern Carriers and Employes represented by the Fifteen Cooperating Railway Labor Organizations signatory thereto. Article 5 of that Agreement (Time Limit on Claims Rule, effective January 1, 1955) was incorporated in current schedule agreement (reprinted May 1, 1955) between the Carrier and the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes as Rule 40. Exhibit "A" hereto is reproduction of Rule 40 of current agreement between the parties. Paragraph (d) of Rule 40, which became effective January 1, 1955, reads in part:

> "* * * in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) hereof before the claim or grievance is barred."

The instant claim (Employes' Case G-388 — Carrier's file K-34 was appealed to Personnel officer D. K. Lawson (highest officer designated by the Carrier to handle claims and grievances) by General Chairman of the Clerks' Brotherhood in letter dated February 17, 1951 and was declined in writing in Personnel Officer's letter to General Chairman Kief dated November 11, 1954, i.e., claim was declined in writing prior to effective date (January 1, 1955) of Rule 40 (Time Limit on Claims Rule). Consequently,

OPINION OF BOARD: The claim here, like forty-five other claims, was referred by the Carrier to this Division in the same form in which it was submitted by the Employes to the Carrier and handled by them on the property. The Carrier asserts that:

> "There is a dispute between the parties as to whether or not the claim herein is barred by the terms of Rule 40 of the Clerks' Agreement — **sole purpose of this ex parte submission is to resolve that dispute.**"

Rule 40 of the Agreement between the parties was adopted from Article V of the August 21, 1954 National Agreement and became effective January 1, 1955. The Carrier contends that the Rule requires the issuance of a denial award on the claim.

The Employes assert that the claim falls within a group of unsettled disputes which were not handled to a conclusion on the property and that the Organization was attempting to settle them by further negotiations or by means other than this Board pursuant to Article V, Section 5 of the Agreement of August 21, 1954.

The Employes contend that the Board must determine the claim on the merits because by instituting the proceeding here, the Carrier waived, and is estopped from asserting the time limits and other procedural defects including its failure to create a prior referable dispute in that the Carrier never raised on the property the question whether Article V barred it from submitting the Employes' claim to this Board. The Employes also contend that if the evidence in the record is insufficient for a determination on the merits, the claim should be remanded without prejudice to a resubmission by either party with a full statement of facts.

Paragraphs (c) and (d) of Rule 40 provide, in part, that:

> "(c) . . . 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 or a system, group or regional board of adjustment that has been agreed to by the parties hereto 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.
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> "(d) . . . in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) hereof before the claim or grievance is barred."

The record establishes that the claim was declined by the highest officer of the Carrier designated to handle claims by his letter dated November 11, 1954, which was prior to the effective date of Rule 40. No proceedings were instituted and no appeal was taken from such decision "by the employe or his duly authorized representative" — the Organization — within the time limits prescribed and as provided in Rule 40 (d).

Even though it had been denied by the Carrier's highest designated officer, the Organization endeavored to obtain settlement of the claim here, and the other claims referred to, by further negotiations or by means other than the Board which the Organization believed available pursuant to Article V, Section 5 of the August 21, 1954 Agreement (Rule 40 (g) of the Agreement between the parties). The Carrier challenged the right of the Organization to resort to such other means for adjustment of the claims. This is evidenced by the court action instituted by the Carrier against the Organization.

There can be no doubt that this contest between the parties grew out of the claims which the Organization sought to settle and out of the Agreement referred to. As a result, such controversy necessarily involved "disputes . . . growing out of grievances or out of the interpretation of application" of the parties' Agreement within the meaning of Section 3, First (i) of the Railway Labor Act.

The Supreme Court has read the Act to mean that such disputes may be referred to the procedures of this Board by either disputant and that absent agreement of the parties, recourse to other procedures for adjustment of such disputes is precluded. **Brotherhood of Railroad Trainmen et al v. Chicago River and Indiana R. Co.,** 353 U. S. 30, 33-35 (1957). On consideration of the record of the legislative history of the provisions of the Act creating the Board, the Court observed (**supra,** 39):

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our reading of the Act is therefore confirmed, not rebutted, by the legislative history."

For these reasons we are not persuaded by the Employes' contentions bottomed on the view that the Carrier failed to raise a dispute on the property as to whether Article V (Rule 40) barred it from submission of the Employes' claim here.

In addition, the application of the time limits prescribed in Rules 40 (c) and (d) is clear beyond question on the face of these provisions. The 9 months and the 12 months limits are stated therein to apply to further proceedings or an appeal on the claim "by the employe or his duly authorized representative". Manifestly, the parties to the Agreement recognized that after a decision thereon by the Carrier's highest officer, only the "employe" and "his duly authorized representative" may be interested in or concerned about pressing the employe's claim further.

It is also clear that Rules 40 (c) and (d) bar our consideration of the merits of claims when the time limits therein prescribed have elapsed.

Contrary to the contentions of the Employes, the record does not permit us to reach the merits of the claim here on the basis of the doctrines of waiver or estoppel. Unlike Awards 323, 371, 3891 and 5558, where the Carriers joined in submissions on the merits of the claims, and unlike Awards 6744 and 6769, where the Carriers proceeded to the merits of the claims without regard to procedural irregularities, the record in this case clearly establishes that the submission here by the Carrier is "solely" with regard to the time limits provided in Rule 40. There is no evidence to support a

finding that the Carrier waived or is estopped from asserting the time limits as a bar to the claim.

Reference is made to the failure of the Carrier's Submission to comply literally with Board Circular No. 1. In its Submission, the statement of the question upon which the Carrier desires an award appears under "Carrier's Position" instead of under "Statement of Claim" as required by the Circular. Such variance in form cannot be regarded as fatal.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Rule 40 (d) of the Agreement.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 23rd day of March, 1961.