Award No. 10069

Docket No. CL-9687

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

NORTHERN PACIFIC RAILWAY COMPANY

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

(1) When, on March 26, 1956, the position of Assistant Chief Clerk in the office of Auditor of Freight Accounts, St. Paul, Minnesota, was awarded to a junior employe, Mr. G. P. Hoolihan, instead of to the senior bidder, Miss Ann Gross.

(2) That Miss Ann Gross be assigned to the position of Assistant Chief Clerk and that she be compensated for all monetary loss suffered.

EMPLOYES' STATEMENT OF FACTS: Under date of March 26, 1956, the position of Assistant Chief Clerk in the office of Auditor of Freight Accounts at St. Paul, Minnesota (rate $18.984 per day) was advertised on Bulletin No. 8290, the effective date of the vacancy being shown as April 2, 1956.

The position was awarded to Mr. G. P. Hoolihan, who has a seniority date of May 19, 1920. The application of Miss Ann Gross, whose seniority date is July 19, 1916, was not given proper consideration.

The position of Assistant Chief Clerk, as in other Accounting Offices, is under the direction of the Chief Clerk and there are a number of such positions in the Accounting Department. They are bulletined positions, fully covered by the rules of the Clerks' Agreement. Up to the time of this grievance, there had not been any extraordinary talent required of the successful applicants for such positions. In fact, the position of Assistant Chief of the Government Bureau in this same office is a position which requires more knowledge, together with considerable supervisory ability, and claimant has held not only the Assistant Government Bureau Chief's position but also, for weeks at a time, acted as Government Bureau Chief when the Bureau Chief, Mr. Gran, was seriously ill. There was no complaint from the Carrier regarding the supervisory ability of the claimant when she assumed the responsibility of supervising the entire Government Bureau. Moreover, during August of 1956, she bid for and was assigned to the very important position of Bureau

claim has been presented to the duly authorized representative of the Employes and is made a part of the particular question in dispute.

OPINION OF BOARD: The gist of this claim is that Carrier violated the Agreement by not assigning Claimant to vacancies that occurred on four different occasions between March 26, 1956, and January 2, 1957, in the position of Assistant Chief Clerk in the office of Auditor of Freight Accounts at St. Paul, Minnesota. Much of the dispute centers on the meaning of Rule 15, the Promotion provisions of the Agreement and the parties have submitted arguments and awards in support of their respective positions.

Quite apart from the substantive aspects of the case, however, it appears beyond dispute that Carrier violated the agreement by rejecting petitioner's request for a hearing of Claimant's complaint. Rule 55 of the Agreement is headed "Discipline And Grievances" and after providing for an investigation and appeals procedure in discipline and dismissal cases, specifically prescribes in subparagraph (f) as follows:

> "An employe who considers himself otherwise unjustly treated shall have the right of hearing and appeal as provided in this Rule 55 if written request is made to his immediate superior within ten (10) days of cause for complaint."

There is no question but that Claimant was never accorded the hearing contemplated by Rule 55. In our opinion, this provision plainly and unambiguously applies to grievances of the type in question as well as disciplinary cases and any possible doubt regarding this point is dispelled by the wording of the Rule's heading and the use of the word "otherwise" in the provisions sweeping requirement. Carrier failed to comply with the investigation rule of the Agreement and we do not regard the violation as inconsequential.

Carrier's contention that the request for hearing does not comply with prescribed time limits was not raised on the property and in line with the great majority of prior awards (among others, 8685, 8484, 8411, 6744), will be deemed waived since Petitioner was afforded no opportunity to explain or discuss the objection on the property and a question of this Board's fundamental jurisdiction is not involved.

There is no evidence to support Carriers assertion that Petitioner abandoned on appeal its request for a hearing. That request was made by the Division Chairman in writing and with clarity and certainty. It was rejected by a letter signed by the Auditor of Freight Accounts without mention of any non-compliance with time limit requirements. Those documents were before the Carrier and Petitioner at all times and the denial of the request for hearing was in issue throughout all appeal stages, in the absence of affirmative evidence that Petitioner had abandoned its request.

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 Agreement has been violated.

AWARD

The Claim will be sustained. See Awards 9854 and 9415.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of September 1961.

DISSENT TO AWARD NUMBER 10069, DOCKET NUMBER CL-9687

Sub-paragraph (f) of Rule 55 of the Agreement provides that an employe who considers himself otherwise unjustly treated has the right of hearing and appeal if written request is made to his immediate superior within ten calendar days of cause for complaint. Sub-paragraph (g) of the Rule permits time limits' extension by mutual agreement.

The alleged cause for complaint occurred on March 30, 1956, and request for hearing was made on April 16, 1956, long after the allowed ten calendar days. The request was declined by the Carrier on April 17, 1956, and never again became an issue on the property. Consequently, the Carrier rightly considered the request abandoned.

The Opinion of Board in this Award 10069 erroneously states that " * * * it appears beyond dispute that Carrier violated the agreement by rejecting petitioner's request for a hearing of Claimant's complaint." and that " * * * the denial of the request for hearing was in issue throughout all appeal stages, in the absence of affirmative evidence that Petitioner had abandoned its request."

Obviously, a timely request for a hearing under Rule 55, sub-paragraph (f), was not made, so the primary condition for the right to a hearing thereunder was not met by the employe or her representative. Furthermore, no agreement to extend the time limits of the Rule was shown or alleged to have been requested and no extension was granted. There is no provision for waiver of the time limit requirement and Carrier at no time expressly agreed to waive same.

In the Opinion of Board in our Award 8564, this same Referee expressed the following observation of fact, which is so fundamental as to practically defy contradiction:—

> "The Carrier at no time expressly agreed to waive the requirement and the only question that remains with repsect 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."

In th instant case the Petitioner did not comply with a positive requirement, expressly made a condition precedent, to the right of hearing and appeal under Rule 55. Petitioner, not the Carrier, was at fault in this untimely request for hearing. Therefore, Award 10069 is patently in error and for this reason we dissent.

/s/ J. F. Mullen
/s/ P. C. Carter
/s/ R. A. Carroll
/s/ W. H. Castle
/s/ D. S. Dugan

LABOR MEMBER'S REPLY TO CARRIER MEMBERS' DISSENT TO AWARD NO. 10069, DOCKET NO. CL-9687

There is evidence of a probative character in the record conclusively showing that the Employes' requested an unjust treatment investigation under Rule 55(f) and that such request was denied without qualifications. In fact, the plea that the request came too late was not made on the property. This defense was not raised by the Carrier until after the dispute was referred to the Board. For that reason, it was not admissible and the Award properly so held. In addition to the awards cited therein on the inadmissibility of such matters, see my Dissent to Award 9189 and "Answer to Carrier Members' Reply", also, Awards 9314, 9315, 9578, 9579 (Johnson); 9334, 9936, 9965, 10015, 10067 (Weston); 9393 (Hornbeck); 9419, 9552 (Bernstein); 9505, 9506, (Elkouri); 9647, 9746 (Crowther); 9951 (LaDriere); 10025 (Larkin); 10034, 10036, 10061, 10109 (Daly); 10074, 10075, 10076 (Webster); 10079 (Begley). In Award 9578 supra, after a careful review of the subject, Referee Johnson stated:

"Thus awards which hold that procedural limitations in contracts are jurisdictional and limit the jurisdiction of this Board seem erroneous. Such provisions limit, not the Board but the parties, and

like other contractual provisions, whether procedural or substantive, are waived unless invoked by a party himself, or by his representative in the litigation, and not by the tribunal or its members. This applies to all contracts, including ordinary union agreements as well as the special Chicago Agreement of August 21, 1954."

That the Dissenters take an inconsistent position on this question is obvious from a comparison of the positions they take here and that which they asserted in their Dissent to Award No. 9988, Docket No. TE-6800.

It will be noted that Award No. 8564 covered a situation where the procedural defect was raised on the property before the dispute was submitted to the Board. Consequently, the Board did not decide the question that was before the Division here.

There is not a scintilla of evidence in the record supporting the Dissenters' and Carrier's assertions that the Employes had "abandoned" their request for an unjust treatment investigation under Rule 55(f). Quite the contrary, the request was in writing and could only have been "abandoned" in writing. The correspondence exchanged between the parties, where the issues had been joined, was a part of the dispute during the entire handling of the controversy on the property. This Division cannot rightfully refuse to consider such matters upon the Carrier's assertion that the request had been "abandoned", without factual evidence in support thereof. Award 10069 properly held that:

> " * * * Those documents were before the Carrier and Petitioner at all times and the denial of the request for hearing was in issue throughout all appeal stages, in the absence of affirmative evidence that Petitioner had abandoned its request."

The Dissenters are here engaging in speculation and conjecture, something they have stated the Board was not authorized to do.

That the Award properly held Carrier violated Rule 55(f) when it refused the Employes' request for an unjust treatment investigation, is self-evident from this Division's Awards 9415 and 9854.

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