Award No. 10138
Docket No. MW-8892

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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

(1) The claim presented by Mr. J. J. Sheets on May 1, 1955 for damages caused to his private property account of rough handling given to his outfit car should have been allowed, as presented, account of said claim not being disallowed as required by or in conformance with Section 1 (a) and (c) of Article V of the August 21, 1954 Agreement;

(2) The Carrier be required and ordered to allow Mr. Sheet's claim for $78.45 as presented on May 1, 1955.

EMPLOYES' STATEMENT OF FACTS: Under date of May 1, 1955, Roadway Equipment Operator John J. Sheets Jr., filed the following claim with the Carrier's Division Engineer, Mr. E. P. Hackert:

"5-1-55
Tabernash, Colo.

Div. Eng.
Denver.

On April 15, I billed my outfit cars to North Yard. On the 18th, I started my vacation. When I returned to my outfits on Sat. the 30th of April, they were all torn up. I had tied them down extra good as I was going on vacation. The following things were broken or damaged as result of this move.

1	set dishes	$ 5.95
1	Shick electric razor	24.50
1	table lamp	5.00
1	Birdseye Maple bed	30.00

may by agreement in any particular case extend the 9 months' period herein referred to."

The Carrier holds the provisions of Sections 1 (a) and (c) of Article V of the August 21, 1954 Agreement — which have no bearing on the case at issue — were fully complied with.

Here we have a case that is not covered by any provision of the current Maintenance of Way Agreement nor by any settlement in connection therewith, yet the Brotherhood contends that Sections 1 (a) and (c) of Article V of the August 21, 1954 Agreement requires payment of the claim. The Brotherhood has not cited, and cannot cite, any rule of the current working agreement which has been violated. Even among men inclined to be unreasonable, it is obvious that Sections 1 (a) and 1 (c) of Article V of the August 21, 1954 agreement would have no bearing on or application to a claim not supported by any rule of the agreement. The Brotherhood has not proven and cannot prove that those signatory to the August 21, 1954 Agreement intended that Sections 1 (a) and (c) of Article V had application to any and all claims — whether they had any merit or not — although the provisions of Sections 1 (a) and (c) were complied with — simply because the replies of the various officers of the Carrier to the Brotherhood's letters in connection therewith did not suit the Organization.

The Carrier again contends your Honorable Board has no jurisdiction in this dispute. As previously stated, there is no rule in the Agreement which supports the claim of the Employes and this claim has not been prosecuted on the basis of any rule or practice.

To sustain the claim of the Employes would be to establish a new rule which power is not vested in your Board by the Railway Labor Act.

The Carrier holds Awards 2119, 8183 and 11444 of the First Division of the National Railroad Adjustment Board, covering similar cases supports its action in the case at hand.

The claim should and must be denied.

All data in support of Carrier's position has been presented to the Brotherhood and made a part of the particular question in dispute. The Carrier reserves the right to answer any data not heretofore presented to it.

OPINION OF BOARD: The Carrier contends that the instant claim does not come within the jurisdiction of this Board and cites Section 1(i) of The Railway Labor Act to support its position.

Section 1(i) reads as follows:

"The disputes between an employee or group of employees and a carrier 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 disputes 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 disputes."

The word "grievance" as used in the above excerpt is assumed to have the generally accepted meaning of that term since The Railway Labor Act does not otherwise specify, limit or define its meaning.

Webster's New International Dictionary — Second Edition — Unabridged — defines the word "grievance" as follows:

"1. Suffering, or grief, or its infliction; affliction. Obs."

"2. Aggrieved state; anger; displeasure. Obs."

"3. A cause of uneasiness and complaint; a wrong done and suffered; that which gives ground for remonstrance or resistance, as arising from injustice, tyranny, etc; injury."

Less officially, a grievance can be simply described as a real or fancied wrong.

Considering the word "grievance" in accordance with the above definitions, there can be little doubt that the present case concerns a dispute growing out of a real or fancied wrong.

The Railway Labor Act — according to Section 1(i) — definitely brings all "disputes between an employee or group of employees and a Carrier or Carriers **growing out of grievances . . .**" within the jurisdiction of this Board. (Emphasis supplied.)

Further indication of the Board's jurisdiction in the present case is cited in the case of the Pennsylvania Railroad Co. vs. Day, 360 U.S. 548, wherein the Court held:

"The National Railroad Adjustment Board was established as a tribunal to settle disputes arising out of the relationship between carrier and employee."

The Carrier member also cited Referee Carey's recent Award No. 10119 to support Carrier's position.

In that Award, the Organization's General Chairman asked the Carrier to provide a first-aid kit and a thermo water can on all Signal Maintainers' motor cars.

There was no contractual duty or obligation on the part of the Carrier to answer the General Chairman's request, because it was not a claim or grievance.

We believe Referee Carey rightly held that "We conclude that the letter of July 23, 1956 did not constitute a claim or grievance within the meaning of Article V of the August 21, 1954 Agreement and that failure to disallow such request did not violate that Agreement."

The Carrier also contends that the Organization "has not cited, and cannot cite, any rule of the current agreement which has been violated."

If there were no grievance, this position would be valid, but since it has been established that there is a grievance involved, it must obviously follow that provision of the Agreement concerning the handling and processing of grievances must necessarily be applicable.

Article V, Section 1(a) of the August 21, 1954 Agreement provides 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 employee 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 employee 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 contentions of the Carrier as to other similar claims or grievances. (Emphasis supplied.)

The present grievance definitely comes within the purview of the provisions, supra.

If the Carrier considered the grievance as a "fancied" but not a "real" wrong, it was priviledged, according to the Agreement, to reject the claim within the prescribed period.

The Carrier claims that the receipt of the grievance was July 28, 1955 — rather than May 1, 1955 — the date the grievance was addressed to the Carrier. The Carrier, however, has failed to prove this statement, or to disprove the dispatching date of the original claim, introduced in duplicate by the Carrier.

In the absence of such proof or reliable indications of proof — the Carrier must be considered to have violated Article V, Section 1(a) of the August 21, 1954 Agreement.

We must keep in mind that the current Agreement does not specify that all claims must be reasonable, justified or merited. It is clearly not the function of this Board to determine the claim's merits or validity. Neither is it our function to indicate the forum or area where a claim should be properly heard or processed.

Accordingly, we make no findings on the merits of this claim or determine what would have been its disposition before this Board if the Carrier had handled the claim expeditiously on the property. We must sustain the claim on the procedural grounds set forth in the Opinion.

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 here; and

The Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1961.

DISSENT TO AWARD 10138 — DOCKET MW-8892

This far-reaching award is amazing in the scope of its error. The National Railroad Adjustment Board, which has until now, concerned itself with labor disputes, is by this award made the forum for determination of Tort claims. The claim here was one for damages against the Carrier account alleged destruction and loss of the Claimant's personal property, while located in an outfit car while the Claimant was on vacation.

The Referee, who is the author of this award, completely ignored, though it was called to his attention more than once, that the word "grievance" as used in the Railway Labor Act and in the Collective Bargaining Agreement, is confined by the very name of the Railway Labor Act to **Labor** disputes between Employes and Carriers. Labor contracts executed under the Act can rise no higher than their source. To treat, as this Referee does, an employe's claim, such as this, against a carrier as a "grievance" does violence not only to the established concept of labor relations, but would make the Federal Employers Liability Act and State Laws drafted to cover Tort claims idle acts on the part of the legislatures which enacted them.

This Referee imposes the Time Limit provisions of the June 21, 1954 Labor Agreement to a Tort claim for damages and tells the Carrier you didn't decline it within 60 days and therefore must pay it as presented. The statutes of limitation on this type of claim running as high as ten years in some states are nullified with one sweep of the pen and the August 21, 1954 Time Limitations of 60 days are subsituted instead; something never intended nor even imagined by the parties who agreed to Time Limitations in the handling of labor disputes on that date.

It is elemental that the determination of a Tort claim hinges on a finding of the presence or absence of negligence. This award, however, changes all that and holds the Carrier liable even though there is not one scintilla of evidence in the record on the question of negligence.

The claim against the Carrier here was for reimbursement for broken dishes and other personal property allegedly lost by the Claimant. What

is next? Are we also to be the forum to determine personal injury and death claims? Apparently yes, if this Referee's thinking were to prevail for it would involve a "grievance" as he sees it.

For the foregoing reasons, we could not disagree more with the erroneous premise of this award and must therefore vigorously dissent.

D. S. Dugan

P. C. Carter

R. A. Carroll

W. H. Castle

J. F. Mullen

ANSWER TO CARRIER'S DISSENT TO AWARD NO. 10138 — DOCKET NUMBER MW-8892

The egregious error in this dissent is the complete disregard of the language and pertinent provisions of The Railway Labor Act and the controlling Collective Bargaining Agreement.

The Carrier states that the word "grievance" as used in The Railway Labor Act and in the controlling Agreement is confined to labor disputes. This is quite obviously so, but one wonders by what unilateral authority the Carrier can so — sweepingly define what is or summarily dismiss what is not — a labor dispute. The term "labor dispute" is a decidedly broad one, and it must be noted that neither The Railway Labor Act nor the controlling Agreement specifically define what constitutes a "labor dispute".

In the absence of specific definitions, the Referee fails to see any fault in the use of Webster's Dictionary definition of a "grievance" or the generally accepted version of a grievance as a real or fancied wrong.

The Railway Labor Act irrefutably supports our position. Pertinent sections of that Act read as follows:

"General Purposes"

"(5) to provide for the prompt and orderly settlement of **all disputes growing out of grievances. . . .**" (Emphasis supplied)

"General Duties"

"First. **. . . and to settle all disputes, whether arising out of the application of such agreement or otherwise, . . .** (Emphasis supplied)

"Second. **All disputes between a carrier or carriers and its or their employees shall be considered, . . .**" (Emphasis supplied)

"National Board of Adjustment — Grievances — Interpretation of Agreements"

"Sec. 3 (i) **The disputes** between an employee or group of employees and a carrier or carriers **growing out of grievances. . . .**" (Emphasis supplied)

Article V, Section 1 (a) of the controlling Agreement supports the above position by failing to define what constitutes a claim or grievance, and in addition puts a 60-day time limit within which a Carrier must act on all claims or grievances. Article V, Section 1 (a) reads as follows:

> "**All claims or grievances must be presented in writing** by or on behalf of the employee 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 employee or his representative) **in writing of the reasons for such disallowance. If not so notified the claim or grievance shall be allowed as presented. . . .**" (Emphasis supplied)

There is no doubt that the present dispute — or claim — has grown out of an employe's grievance and, accordingly, lies within the jurisdiction of this Board.

The dissent's repetitious reference to torts, to statutes of limitation, to broken dishes and to personal property loss is perhaps intended to rationalize the Carrier's failure to follow the prescribed procedure quoted above — or may even be intended as a smoke screen to obscure the Carrier's guilt in not complying with its contractual obligations.

Otherwise, the reference has no applicability whatsoever, because the award is not concerned with the validity of the claim — or the lack of it — but merely with the failure of one of the parties to live up to the terms of the controlling Agreement.

It is especially difficult to understand the Carrier's position in this dissent, since a Second Division Award (3637) held, without dissent, that:

> "However, the carrier's error is in assuming that Article V of the August 21, 1954 Agreement contemplated that it could prejudge the issues presented to it as claims or grievances and refuse to answer those that it considered were not appropriate. Article V requires a denial in those instances and reasons for denying."

The finding of Referee Watrous in the above Award that the Carrier is not vested with the right to prejudge whether an issue presented be a claim or a grievance is precisely similar to the present findings. Yet the same Carrier Member accepted the earlier Award and rejects the current one.

Such patent inconsistency cannot be explained by torts or personal property or statutes of limitation — or indeed by questioning a decision based purely and logically on the facts. Perhaps such action on the Carrier's part represents its attempt to stand firmly on quicksand.

/s/ J. Harvey Daly