Award No. 10352
Docket No. SG-9646

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Walter L. Gray, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen of America on the Missouri Pacific Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement when it failed to allow Mr. T. C. Fagan, regularly assigned Signalman at Arkadelphia, Ark., his pay in lieu of his annual vacation of three weeks for the year 1955, not taken due to his personal injury.

(b) The Carrier now pay T. C. Fagan three weeks pay in lieu of annual vacation that he did not receive in 1955. [Carrier's File VG-S 225-284]

EMPLOYES' STATEMENT OF FACTS: Mr. T. C. Fagan is the regularly assigned Signalman at Arkadelphia, Ark. Fagan worked for the Carrier 302 days in 1954 and having been employed by the Carrier for over 15 years was entitled to a vacation of three weeks in the year 1955.

On September 30, 1955, Fagan sustained a personal injury when he fell setting off his motor car while on duty for the Carrier. As a result of his fall, Fagan injured his back and sustained a hernia in the right inguinal region. He entered the Little Rock hospital on October 3, 1955, and was operated on October 7, 1955, for his inguinal hernia. He was subsequently released from the hospital on October 25, 1955, and remained under the care of the Carrier physician until he was released and ordered to resume work on January 9, 1956.

Under date of **February 7, 1956, T. C. Fagan** wrote **Signal Supervisor O. R. Thurston** relative to his vacation pay for 1955 that was due him for his earned vacation, but which he was unable to take due to his being under the care of the Carrier physician. Fagan's letter is reproduced as follows:

as constituting a vacation. We do not believe the Agreements require or contemplate separate payments for the same three weeks both as work days and vacation days when the Vacation Agreement itself provides that the vacation days are work days.

No amount of payment by the Carrier could restore to the claimant the opportunity to take a trip or engage in other activities he would have liked on a vacation in 1955. There is no Agreement requirement for the duplicate payment claimed for the same days. The Claim Department has made full reparation for the time lost, both as to work days and vacation days because for three weeks each of these days was one and the same day for which payment has already been made.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute arising over the right of one F. C. Fagan, a regularly assigned signalman of Arkadelphia, Arkansas to collect three weeks vacation pay for 1955 as provided for in the Agreement.

Mr. Fagan was injured in line of duty and was off work from September 30, 1955 to January 9, 1956. His vacation would have been due between September 30th and the end of 1955.

On February 7, 1956, after going back to work, Mr. Fagan wrote a very courteous letter to the Carrier's Signal Supervisor in which he made inquiry as to his vacation pay for 1955 and asked to be advised.

The Signal Supervisor wrote a letter on February 14, which was certainly one that should cause censure from his superiors for his uncalled for language in which he stated "You lost right to vacation by being off when due" etc.

We only quote a part of a most controversial letter. This was in poor taste to an Employe who had worked for 15 years. It cannot go unnoticed.

On February 18, 1956 the General Chairman wrote a letter, which he may have felt was filing a claim, for Mr. Fagan. This letter was to the Claim Agent and was never answered according to the record.

However the Agreement does have a provision that a claim shall be filed within a 60 day period. Unfortunately this was not complied with even though it may be argued the letter of February 18 by the General Chairman was a compliance with the 60 day rule. This was Mistake No. 1 on the part of the Organization and Mr. Fagan is bound by that mistake.

Then a settlement was made and agreed to by Mr. Fagan in which he was paid for all money due him see record page 27. This certainly acts as a bar to the claim made. It is quite possible Mr. Fagan did not so understand but he is bound by the terms of the settlement. This might well be called Mistake No. 2.

We are of the opinion that mistakes were made on both sides and what has happened in this case may be corrected in the future.

Morally Mr. Fagan may well be entitled to his vacation pay but this Board cannot deal in equity but must be bound by legal principles of law. See Awards 8797 (Daugherty) Award 8564 (Weston).

See also Awards 4322 (Elkouri) and 7631 (Smith).

We must hold that the claim is barred by failure of the Claimant to file his claim within 60 days and for the further ground the settlement made with him was full and complete settlement.

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

There was no violation of the Agreement and the claim is denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of February 1962.

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Award 10352 is a serious error and should be recognized as such.

Carrier's defense against the claim on procedural grounds was that the claim was not initially handled through proper channels and that it was not timely filed.

Carrier waived its right to this defense by not denying the claim on these grounds when it had the opportunity (Second Division Award 1552) and again when it suggested that the claim be reprogressed by the General Chairman and agreeing to give the claim "full consideration."

The Organization did not waive any of its procedural rights and, since it is shown that the carrier did not comply with the time limits of the August 21, 1954 Agreement, the claim should have been sustained.

The majority states:

> "Then a settlement was made and agreed to by Mr. Fagan in which he was paid for all money due him see record page 27. This certainly acts as a bar to the claim made."

This Board has often held that private agreements do not supersede collective Agreements.

Award 2602 of this Division dealt with a claim growing out of an arrangement between the Carrier and an employe whereby the latter agreed to waive certain provisions of the governing collective agreement relating to a lunch period. The carrier contended that under such circumstances it was not liable.

The Board, Referee Shake speaking said:

> "The Carrier's argument is highly persuasive and would appeal to the conscience of the referee, if he had any discretion in the matter. It appears, however, that no less an authority than the Supreme Court of the United States, has declared in the case of The Order of Railroad Telegraphers v. Railway Express Company (No. 343, decided February 28, 1944) that where collective bargaining agreements exist their terms cannot be superseded or varied by special voluntary individual contracts, even though a relatively few employees are affected and these are specially and uniquely situated. The Court based its decision upon the fundamental proposition that if it were otherwise 'statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually.' The decision is precisely in point, clear, positive and unequivocal, and we have no other choice than to apply the law of the land, as declared by the nation's highest tribunal. The Carrier will have to find whatever solace it can in the thought that it was motivated by a generous humane impulse, for the benefit of an unfortunate employee."

Many of our awards have reached the same result. See, for example Awards 218, 522, 524, 548, 732, 765, 946, 1214, 2217, 2731, 3785, 4461, 4924, 5444, 5460. There are many others.

Fourth Division Award 1041, Referee Dash:

> "The fact that the claim in this case was filed originally by a representative of the Organization and not by the named claimant is immaterial to the resolution of this issue. The Organization possesses the right under the Agreement to police all of the provisions thereof, and the reluctance of a particular claimant to press or prosecute a claim is not sufficient reason to deny full consideration of that claim. If a claim has merit, this Board will rule upon it regardless of the position the named claimant may take before or after the consideration thereof."

For these reasons the claimant's settlement did not preclude the Organization from processing a claim to this Board to enforce the terms of its agreement.

The majority further states:

> ". . . this Board cannot deal in equity but must be bound by legal principles of law. See Award 8797 (Daugherty) and Award 8564 (Weston).
>
> "See also Award 4322 (Elkouri) and 7631 (Smith)."

None of the awards cited sustains the statement that this Board "must be bound by legal principles of law." This Board has been established for the interpretation of agreements, which principle the cited awards do sustain.

The majority admits that "morally Mr. Fagan may well be entitled to his vacation pay . . . ."

The award is in error; therefore, I dissent.

/s/ W.W. Altus

W.W. Altus
Labor Member — Supplemental

REPLY TO LABOR MEMBERS' DISSENT TO AWARD 10352
DOCKET SG-9646

The obvious error of the Dissenter on the controlling issue is his intolerable conclusion that the Carriers' gracious consent to give "full consideration" to a claim that was barred constituted a waiver of the bar.

We would do the Employes a great disservice were we to sustain that conclusion, for this would tend to dissuade Carriers from being equally gracious in other cases where the Employes have failed to act in time and have thus invoked the bar of the Time Limit Rules.

The error in the Dissenters' other remarks is also obvious. The record clearly presents no issue as to private Agreements superseding collective Agreements. Claimant Fagan merely settled his personal injury claim against the Company, and in doing this he was following the admonition of his General Chairman who stated in his letter to Carrier's Chief Personnel Officer dated May 7, 1956:

> ". . . you firmly impressed upon me that future claims of this nature, in which loss of vacation was involved, should be made a part of the original settlement with the claim department. I had advised Mr. Fagan to that effect, . . ."

G. L. Naylor

R. E. Black

O. B. Sayers

R. A. DeRossett

W. F. Euker