

Award No. 10392

Docket No. MW-9465

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Arthur Stark, Referee

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

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

(1) The Carrier violated the effective Agreement when, on June 3, 1955, it assigned other than a Roadway Machine Operator to the operation of a Kershaw Ballast Regulator while in movement from Walker to Joliet and From Joliet to Chicago Heights.

(2) Roadway Machine Operator A. J. Delgado be allowed eight hours' straight time pay because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On June 3, 1955, the usual and customary work of a Roadway Machine Operator was assigned to and performed by Track Supervisor F. T. Berta.

Specifically, the work consisted of the operation of a Kershaw Ballast Regulator while in movement from Walker to Joliet and from Joliet to Chicago Heights. The Track Supervisor consumed a total of eight hours in the performance of the aforementioned work.

The claimant, Mr. A. J. Delgado, who was regularly assigned to the position of Roadway Machine Operator, was available, fully qualified and could have performed the above referred to Roadway Machine Operator's work.

The Agreement violation was protested and the instant claim filed as follows:

"June 3rd, 1955

Mr. H. W. Lane Rm.
Joliet, Ill.

Time slipping Track Supervisor Frank Berta, for 8 hrs. Machine operating pay for running Kershaw Ballast Regulator from Walker to Joliet & Joliet to Chicago Hts.

Yours,

/s/ A. J. Delgado
Acct. No. 17105"

of the date of alleged violation within the time permitted for filing claims now bars this claim through operation of Article V of the August 21, 1954 agreement.

2. That Mr. Woods' letter of September 8, 1955, did not constitute an appeal of the Carrier's decision relative to the Claimant's letter of June 3, 1955, and the failure to make a proper appeal within the time limit now bars the claim for further consideration.

3. That regardless of the Carrier's aforementioned arguments the claim must be denied in accordance with the second paragraph of Rule 62 of the basic agreement since there was no pecuniary loss suffered by the Claimant as a result of the act or acts complained of.

4. That the claim as presented to the Board was never progressed on the Carrier's property and is therefore not a proper subject for the Board's consideration.

In view of the foregoing, the Carrier asks that this claim be dismissed in its entirety.

All material data included herein have been discussed with the Organization either in conference or in correspondence.

OPINION OF THE BOARD: In June, 1955 Claimant A. J. Delgado was assigned as a temporary Roadway Machine Operator in the Maintenance of Way Department. On June 3 Track Supervisor F. T. Berta, whose job is not covered by the Agreement, operated a Kershaw Ballast Regulator for eight hours. (Delgado was working at the time.)

On the same day, June 3, Delgado submitted this letter to Roadmaster H. W. Lane:

"Time slipping Track Supervisor Frank Berta, for 8 hrs. Machine operating pay for running Kershaw Ballast Regulator from Walker to Joliet & Joliet to Chicago Hts."

On July 14 Lane returned Delgado's letter, stating in part:

"I have your letter dated June 3, 1955, advising that you are time-slipping Track Supervisor F. T. Berta for operating Kershaw ballast regulator in transit from Walker to Joliet and Joliet to Chicago Heights.

"I wish to point out that your letter of June 3, 1955, fails to specify the time that this alleged violation occurred. It is not our policy to accept as time claims, letters which do not on their face fully identify the act or acts referred to. Inasmuch as this is true, your letter of June 3, 1955, will not be considered a time claim and, accordingly, the original of that letter is returned to you herewith.

Lane also told Delgado that his monetary claim was improper and should be denied under the second paragraph of Rule 62 ("Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation"). Since Delgado had been fully employed throughout the period preceding his June 3 letter, Lane held, the employe did not suffer any monetary loss.

On September 8 D. L. Woods, B. M. W.'s General Chairman, wrote Chief Engineer S. H. Shepley requesting that Delgado's claim be allowed since Rule 62 was no longer in effect. A copy of Wood's letter was sent to Roadmaster Lane to "Confirm Mr. Nordstrom letter to him that his decision is rejected."

Shepley replied on October 31. In rejecting Wood's request he stated, in substance: (1) Delgado's June 3 letter did not constitute a time claim since it failed to specify the time of the alleged violation; (2) Delgado failed to comply with 60 day filing requirement; (3) Wood's September 8 letter did not constitute an "appeal" within the meaning of Article V, Section 1(b) of the 1954 Agreement; (5) Rule 62, in any event, barred a claim by Delgado.

On December 22 General Chairman Woods rejected Shepley's decision and appealed the matter to Assistant Vice President R. T. Brasel. On February 23, 1956 this appeal was denied.

There is a basic procedural defect in this case, in our judgment Delgado, in his original complaint, failed to mention the day or date on which the alleged infraction occurred. While one might expect Management to have been aware of this date, the evidence shows that on July 14, 1955 it raised the question and, in effect, invited Delgado to re-submit his claim with greater specificity. This he failed to do.

By August 3, 1955—60 days from the date of the occurrence—no claim was submitted setting forth the facts and allegations in sufficient detail for Management to make an intelligent effort at settlement or resolution. Article V, Section 1(a) provides in relevant part:

"All claims or grievances must be presented in writing by or on behalf of the employe involved . . . within 60 days from the date of the occurrence on which the claim or grievance is based."

There is no explanation of why Delgado did not respond to Management's July 14 prompting. Nor was the defect in filing corrected by later actions since no date was specified in any of the Brotherhood's subsequent appeals. (On September 8, the General Chairman referred only to Management's Rule 62 argument; on December 22 he again mentioned Rule 62 as well as another Management's argument regarding appeals.) Not until October 29, 1956 did the B. M. W. signify that June 3, 1955 was the critical date—this in its letter to the N. R. A. B.

Had the original omission been overlooked by Management, or had the question not been raised in a timely manner, or were we to believe that the missing information was trivial and unimportant, we might be warranted in setting aside the procedural objection. But, under all the circumstances present here, such action is not justified.

The Brotherhood argues that no weight should be accorded this argument since, on prior occasions, the Carrier has made no objection to the validity of claims which omitted the date of alleged violations. Of course, the Carrier may waive its right to protest a procedural defect whenever it desires. But that does not deprive it of the right to ever again raise the question in another case. Moreover, we note (1) Only one instance was mentioned by the Brotherhood, and (2) That arose in 1953, prior to negotiation of Article V.

This claim, then, will be dismissed without consideration of 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 Employee involved in this dispute are respectively Carrier and Employee 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 for reasons stated in the Opinion the claim must be dismissed.

AWARD

Claim dismissed.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 7th day of March, 1962.