Award No. 10420

Docket No. CL-10412

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

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

THE RIVER TERMINAL RAILWAY COMPANY

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

(1) The Carrier violated the Clerks' Agreement effective March 18, 1953 and the joint agreement signed at Chicago, Illinois August 21, 1954, when it failed to render a decision in appeal taken with the Personnel Director of the Carrier on November 19, 1956, within the 60-day time limit provided, and

(2) The Carrier shall now be required to pay claim of Clerk M. J. Kieran for eight hours at punitive rate for June 14, 1956 and subsequent dates and claim of Clerk J. W. Jordan for eight hours for June 20, 1956 and subsequent dates.

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of all that craft or class of clerical, office, station and storehouse employes in which the Claimants in this case hold positions and The River Terminal Railway Company hereinafter referred to as the Brotherhood and the Carrier, respectively.

Clerk M. J. Kieran presented to the officer of the Carrier authorized to receive same, claim for June 14, 1956 reading as follows:

"Please allow 8 hours pay at time and one half because a person not under the scope of our agreement is performing clerical work which is under the scope of our agreement and I was available, willing and capable of performing the duties for which the time is claimed and I was not called upon to do so."

Identical claims were subsequently filed by Clerk Kieran for additional dates.

Likewise, Clerk J. W. Jordan presented to the officer of the Carrier authorized to receive same, claim for June 20, 1956 reading as follows:

On the facts herein presented, the Carrier respectfully urges that the claims be denied.

OPINION OF BOARD: On June 14, 1956, M. J. Kieran, a clerk employed by the Carrier presented the following claim to the Secretary and Treasurer of the Carrier:

> "Please allow 8 hours pay at time and one half because a person not under the scope of our agreement is performing clerical work which is under the scope of our agreement and I was available, willing and capable of performing the duties for which the time is claimed and I was not called upon to do so."

Mr. Kieran later filed claims for additional days, but the time and the dates for those additional claims are nowhere in the record.

J. W. Jordan, also a clerk, filed his claim with the Secretary and Treasurer of the Carrier for June 20, 1956, as follows:

> "Allow 8 hours account of R. Pickryl performing the clerical duties which is a violation of our scope rule."

Mr. Jordan filed another claim for September 8, 1956, which read as follows:

> "Allow eight hours pay for each and every day that R. Pickryl works as the car expediter, which is not covered by another claim."

All of the claims filed by Mr. Kieran and Mr. Jordan were denied by the Secretary and Treasurer of the Carrier by letter dated September 20, 1956. Up to this point, both parties admit that the filing of the claims and the Carrier's denial were timely.

On November 19, 1956, the General Chairman of the Organization wrote a letter to the Personnel Director of the Carrier appealing the decision of the Secretary and Treasurer. The Record shows that this letter, addressed to Mr. L. R. Pickryl, the Personnel Director of the Carrier, and a copy addressed to Mr. E. A. Esper, Secretary and Treasurer of the Carrier, were mailed by certified mail on November 19, 1956. Photostatic copies of the certified mail receipts showing the names and addresses of each of the Carrier representatives and the mailing date of November 19, 1956, are in the record. The Carrier claims that it did not receive this appeal letter until November 21, 1956. It should be noted that November 19, 1956, was a Monday.

A conference was held on January 16, 1957. The Organization claims that no decision was made as a result of that conference. There is nothing in the record to indicate that a decision was rendered either orally or in writing immediately after such conference. On July 24, 1957, the Organization wrote to the Personnel Director of the Carrier requesting that the Carrier refer to the Organization's letter of November 19, 1956, and stated that because no answer had been received to the Organization's appeal, that the Organization has "no alternative but to demand settlement on the basis of the 60 day time limit provided in Article V, of the Agreement signed at Chicago, Illinois, on August 21, 1954, between Participating Eastern, Western and Southeastern Carriers and Employes Represented by the Fifteen Cooperating Railway Labor Organizations signatory thereto and to which agreement we are parties."

On August 27, 1957, the Personnel Director scheduled a conference for September 19, 1957, to discuss the claims now before this Board as well as others. During that conference the General Chairman "insisted claims be allowed from the date of the original claims until August 16, 1957, at which date the basis for claims ceased." On September 30, 1957, the Personnel Director denied the claims, but gave no reason for such denial.

Both parties rely on the interpretation of Article V—Carriers' Proposal No. 7 in the Agreement signed at Chicago, Illinois, dated August 21, 1954, which reads 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 employe 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 employe 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.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier, shall govern the appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. 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.

2. With respect to all claims or grievances which arose or arise out of occurrences prior to the effective date of this rule, and which have not been filed by that date, such claims or grievances

must be filed in writing within 60 days after the effective date of this rule in the manner provided for in paragraph (a) of Section 1 hereof, and shall be handled in accordance with the requirements of said paragraphs (a), (b) and (c) of Section 1 hereof. With respect to claims or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pursuant to paragraphs (b) and (c) of Section 1 of this rule the claims or grievances shall be barred or allowed as presented, as the case may be, except that 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) of Section 1 hereof before the claim or grievance is barred.

3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

4. This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employes they represent.

5. This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to requests for leniency.

The Organization contends that the Carrier failed to comply with Sections 1 (a), (b) and (c) of said Agreement in that the Carrier did not deny the claims on appeal "within 60 days from the date same are filed" and that the claims are, therefore, allowed as provided in said Section 1 (a).

The Carrier contends that the claims are barred and that this Board has no jurisdiction to consider such claims because:

1—The claims which the General Chairman of the Organization sought to appeal in his letter of November 19, 1956, are not the same claims which were originally filed by the claimants, Kieran and Jordan, and which were originally presented on the property to the Secretary and Treasurer of the Carrier.

2—The Organization did not appeal from the denial of the claims within the 60 day period as provided in Section 1 (b) of said Article V. The Carrier argues that the Agreement provides that appeals "must be taken within

sixty days from the receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision." Since the Secretary and Treasurer's notice of denial was received by the Organization on September 21, 1956, and since the letter of appeal from Organization was not received by the Carrier until November 21, 1956, more than sixty days had elapsed "from receipt of notice of disallowance" and, therefore, the Carrier was not "notified in writing within that time of the rejection of his decision".

3—Since the claims which the Organization attempted to appeal from the Personnel Director were defective, it is immaterial whether the Carrier failed to deny the appeal within the 60 day period as provided in Section 1 (a) of Article V of the August 21, 1954, Agreement.

4—The question of Board's jurisdiction may be raised at any time during the proceedings and need not necessarily be raised on the property.

The Organization's case is based solely on the Time Limit Rule as provided in Article V of the August 21, 1954, Agreement. The merits of the case are not set out or argued in the Organization's submission. The Board has no alternative but to decide the issues as presented on the interpretation of Article V of the August 21, 1954 Agreement.

Both parties have cited a total of more than 65 Awards by this and other Divisions of the National Railroad Adjustment Board to support their respective positions. On some of the interpretive issues there are conflicting opinions; some can easily be differentiated, others are immaterial to the specific issues involved, and still others were decided upon factual issues which are not here involved. This Division has adopted more than 10,000 Awards. Ninety-one bound volumes contain more than 9500 of such Awards. Yet there is no subject index, no annotations, and no table of cases available to the Referee for independent research. There is no question but that both parties have cited every Award known to them to support their contentions. The fact remains that the partisan members of the Board are extremely busy with a heavy load of cases to review and prepare. They do not have the time to research each case as thoroughly as it should be. The Referee, who has the initial responsibility to prepare the Award for the Board's consideration, must make his determination after considering only those Awards which the parties cite, together with any others with which he has become familiar while sitting with the Board. This is unfortunate. He is frequently aware that a certain interpretation should exist, but he has no means to search out the probable existence of an Award or Awards which may or may not support his theory of the case.

Nonetheless, this Board has the responsibility to decide each and every case presented to it. The issues in this case, like all others, must be analyzed, considered and determined on the basis of the Railway Labor Act, the record, the Agreement, the preponderance of Board decisions and upon logic, experience and reason in labor-management relations.

The record is clear that the Carrier did not reply in writing within 60 days from the receipt of the Organization's appeal. The letter of the Organization's General Chairman to the Carrier's Personnel Director was dated November 19, 1956. The written denial of the claims from the Personnel Director was dated September 30, 1957. There is nothing in the record to show that the parties agreed to extend the time for reply nor is there any claim that the Organization waived the contract requirements. Up to this

point it is clear that the Carrier did not comply with Article V of the August 21, 1954, Agreement.

The question then is whether the Organization complied with the same Agreement and whether the claims are properly before the Board. We shall consider each of the Carrier's contentions as previously noted.

1. Are the claims before this Board the same as those which were initially presented to the Carrier on the property, and if not, are the claims properly before the Board? The original claim made by Claimant, M. J. Kieran on June 14, 1956, is for "8 hours pay at time and one half because a person under the scope of the agreement was performing clerical work which "rightfully belonged to the Claimant (R 2). The record states that Mr. Kieran subsequently filed "identical claims" for "additional dates". These dates are nowhere mentioned in the record. The Claimant, J. W. Jordan, filed a claim for June 20, 1956, which requested that he be paid "8 hours account of R. Pickryl performing clerical duties which is a violation of our scope rule." He also filed another claim for September 8, 1956, which requested 8 hours pay because "R. Pickryl works as car expediter which is not covered by another claim." The claims appealed by the Organization to the Carrier's Personnel Director read as follows:

> "(a) Claim of Clerk, M. J. Kieran, for eight hours at punitive rate for June 14, 1956, and subsequent dates account Yard Master R. Pickryl performing clerical duties in violation of the provisions of the Clerks' Agreement.
>
> (b) Claim of Clerk J. W. Jordan for eight hours for June 20, 1956, and subsequent dates account Yard Master R. Pickryl performing clerical duties in violation of the Clerks' Agreement."

The claims presented on appeal differ from those presented on the property in that those appealed include "subsequent dates" to those specific dates contained in the original claims presented on the property.

The Carrier urges that the Board should dismiss the claims because they are not the same as those presented on the property and because they are vague, uncertain and indefinite.

In Award 9684 (Elkouri) the claim originally was filed with the improper "officer of the Carrier authorized to receive the claim . . ." That was the situation which prevailed in Award 8889 (McMahon). This is not the case here where the claims were originally filed with the proper authorized officer of the Carrier. In the case involved in Award 3549 (Stone) of the Second Division, the claim was filed on behalf of "sixteen (16) electricians whose names appeared on the L & N Radnor Shop Overtime Board. The Second Division of the Board held:

> "This claim as submitted is so vague, indefinite and uncertain as to make it apparently impossible to compute with certainty the amount intended to be claimed, and, if computed, it would be impossible to determine with certainty the names or identity of the several claimants in whose behalf the claim was intended to be presented and the specific amount intended."

In Award 9250 (Stone) the employes involved in the claim "are neither named nor identified".

No facts or circumstances justifying the findings are disclosed in Award 9623 (Johnson) and Board Award 9833.

The Board in Award 8858 (Bakke) said:

> "The claim as is noted, has reference to train order No. 221. The record shows that the claim based on that number was paid. The claim now before us, i.e., No. 226, which did arise at Pewamo, Michigan, was not raised on the property, hence not in line for progression to this Board."

In the case now before the Board the claimants were identified in the original claims handled on the property and in the appeal of the Organization. Likewise, the June 14, 1956, claim date for M. J. Kieran and the June 20, 1956, date for J. W. Jordan were known to the Carrier on the property and are contained in the claims before this Board. Does the claim for pay on behalf of the same claimants for "subsequent dates" nullify the original claims filed on the property? We think not.

This Board has said in Award 8205 (Wolff) that it "has consistently ruled, absent special circumstances, that it will only consider the original claim, devoid of new matter requesting additional monetary adjustment." In that case the Organization sought to amend the original claims to cover additional time. The original claim processed on the property was sustained. The Board limited its considerations only to the original claim. See also Awards 7445 (Shugrue), 8158 (Smith), and 7030 (Carter).

Award 3256 (Carter), held that the mere fact that the Organization amended the claims for additional reparations does not change the identity of the claim. The Board affirmed this principle in Award 5077 (Coffey). An examination of all the pertinent Awards on the subject leads to the conclusion that it is more practicable, more equitable and a better interpretation of Article V of the August 21, 1954, Agreement to hold that the mere inclusion in the appeal by the Organization of a request for pay for "subsequent dates" does not invalidate the claims. Award 3256 aptly held that "it was not intended by the Railway Labor Act that its administration should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes.

The facts now before the Board can be distinguished from those in Award 10078 (Begley) where the Board dismissed the claim because the claim before the Board was different from the one presented on the property. In the latter case (Award 10078) the claim on the property was for 8 hours at overtime rate in behalf of named individuals and specified dates. The claim presented to the Board was on behalf of "the senior qualified extra Telegrapher, or if no extra Telegrapher is available, then the senior idle regularly assigned Telegrapher at the nearest location . . ." In this case the individuals and the original specified dates are the same in both the original claims presented on the property and before this Board. Here the only difference is that the claims before the Board includes a request for pay for " subsequent dates." This is not such a defect which justifies a dismissal of the total claim.

Section 3 of Article V of the August 21, 1954, Agreement permits the filing of one claim for a continuing violation of any agreement. The original claim filed on the property by M. J. Kieran is for overtime or punitive pay for June 14, 1956, "because a person not under the scope of our agreement

is performing clerical work which is under the scope of our agreement. . . ." The original claim filed on the property by J. W. Jordan for 8 hours pay for June 20, 1956, because one, R. Pickryl was performing "clerical duties which is a violation of our scope rule." This is not sufficient to indicate with any degree of certainty that the claims involved "an alleged continuing violation of the agreement". There is nothing in the record to indicate that the alleged violations were continuing as required in Section 3 of said Article V. The persons wrongfully performing clerical work could have been taken off such job immediately; R. Pickryl may or may not have wrongfully performed clerical duties continuously. While a continuing violation of the agreement does not necessarily mean such a violation must be for a period of consecutive days, nevertheless, the record must show that the contract violation was a continuing one. Since this has not been done, those parts of the claims which are for "subsequent dates" must be dismissed.

The mere dismissal of part of a claim does not invalidate it entirely. Both claims for June 14, 1956, and for June 20, 1956, were properly presented and processed. The Carrier was at all times well aware of the nature of those claims. The fact that the claims taken on appeal were broader does not excuse the Carrier from complying with Section 1 (a) of Article V and replying to the appeal within the time limit therein provided.

No dates are noted in the record when additional claims were filed by M. J. Kieran. Such claims are invalid because they are uncertain, indefinite and not easily ascertainable. The claim of September 8, 1956, filed by J. W. Jordan is invalid because there is nothing in the record to show that the work of car expediter performed by R. Pickryl rightfully belongs to Jordan. These, too, do not meet the requirements of Section 1(a) of Article V. The only valid claim properly before the Board is for "8 hours at time and one half" for June 14, 1956, for Claimant, J. J. Kieran and for 8 hours pay for June 20, 1956, for Claimant, J. W. Jordan.

2. The Organization appealed the claims within the 60 days as provided in Section 1(a) of Article V. Award 3545 (Bailer) Second Division, which was cited by the Carrier, is precisely in point. In that case the Board cited a rule of law form 86 Corpus Juris Secundum which is:

> "The general rule (in law) is that the time within which an act is to be done is to be computed by excluding the first day and including the last, that is the day on which the act is to be done. . . . Thus if something is to be done 'within' a specified time 'from' or 'after' a given date or a certain day, the general recognized rule is that the period of time is computed by excluding the given date or the certain day and including the last day of the period, and, similarly, if something is to be done 'within' a specified time 'from' or 'after' a preceding event, or the day an act was done, the day of the preceding event or on which the act was done must be excluded from the contract."

In that case the Carrier claimed that the Organization did not institute proceedings before the Division "within 9 months from the date" of denial of the claim as required by Section (c) of Article V of the Agreement of August 21, 1954. The claim was denied by letter dated September 30, 1957. The Appeal to the Board was made by a letter dated June 30, 1958. The Board held that the 9 month period "began October 1, 1957, and expired at midnight on June 30, 1958. Since it took appeal action on the latter date,

the Organization properly invoked the jurisdiction of the Board over the instant claim.

In the case before this Board the Carrier's letter of disallowance was dated September 20, 1956, and the Organization's letter of appeal is dated November 19, 1956. Applying the rule adopted in Award 3545, the 60 day period began September 21, 1956, and expired at midnight on November 19, 1956. Thus, the Organization appealed "within 60 days" as required by Section 1(b) and (c) of Article V of the August 21, 1954, Agreement. The Carrier's emphasis on the dates when the letters were received rather than the dates they bear is erroneous.

3. Since the Board has found that the appeal to the Personnel Director is valid and timely, it is not necessary to discuss Carrier's position under this item.

4. Considerable emphasis is made by the Carrier that it has the right to raise the question of jurisdiction at any time during the proceedings and that it is not required to raise it first in the record before the Board. In Award 8383 (Vokoun) the Board held that the "Carrier may raise the issue at any time." The same was held in Award 8797 (Daugherty) in Award 9789 (Weston) and others.

A more considered opinion is in Award 9578 (Johnson). The Board took considerable effort to review this subject. Numerous Awards, the Railway Labor Act and court decisions were examined. The Board, in an exhaustive analysis, concluded as follows:

> "Thus awards which hold the procedural limitations in contracts are jurisdictional of this Board seem erroneous. Such provisions limit, not the Board but the parties, and like other contractural provisions, whether procedural or substantive, are waived unless invoked by a party himself, or by his representative in 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."

The following awards are cited to support this view: Award 1552 (Wenke), 2786 (Mitchell), 3269 (Carter), 5140 (Coffey), 5147 (Boyd), 5227 (Robertson), 6500 (Whiting), 6744 (Parker), 6769 (Shake), 8225 (Johnson), 8572 and 8573 (Sempliner), 8674 and 8675 (Voukoun), 8685 (Lunch) and 8807 (Bailer).

On the basis of the above, we necessarily conclude that the Carrier violated the August 21, 1954, Agreement when it failed to reply to the Organization's appeal within time limits prescribed therein and that only that part of the Organization's claims are properly before the Board which were presented on the property.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

1. That the Carrier violated the Agreement of August 21, 1954, by not replying to the Organization's appeal of September 19, 1960, within the prescribed 60 days.

2. That the claim of M. J. Kieran for eight hours pay at time and one-half for June 14, 1956, and the claim of J. W. Jordan for eight hours for June 20, 1956, is sustained.

3. That the claims for pay for M. J. Kieran and J. W. Jordan for dates subsequent to those mentioned in 2 above are dismissed.

AWARD

The claim sustained in accordance with the Findings 1 and 2 and dismissed in accordance with the Finding 3 above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March, 1962.