Award No. 10423
Docket No. CL-10413

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

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

(1) That the Carrier violated the agreement between the Brotherhood and the Carrier effective August 15, 1939, as reprinted May 1, 1955, when it permitted and required an employe beyond the scope of the effective agreement, Agent I. W. Howe, to perform the duties of the position of Clerk, Hayfield, Minnesota, while the regular incumbent thereof, Mr. F. Fuller, was on vacation on certain dates in October 1956 set forth in paragraph (2) hereof, such duties being those which are normally and customarily performed by employes covered by the scope and operation of the agreement effective between the parties; and

(2) That the Carrier shall now be required to compensate either of the Clerks, namely, E. J. Pomerleau, L. C. Anderson, S. Schlappi, H. C. Raadt, W. H. Colby, P. Korpal, M. L. Meek, F. C. Chambers, J. B. Thorie, or their successors, for eight (8) hours at the rate of the position of Clerk, Hayfield, Minnesota, for October 1, 2, 5, 8, 10, 12, 15, 17 and 19, 1956 due to Carrier's failure to permit their performance of the duties of the Clerk's position for which they were qualified and available at various times during that period for which this claim is filed.

EMPLOYES' STATEMENT OF FACTS: On October 1, 1956, the incumbent of the clerical position at Hayfield, Minnesota, Mr. F. Fuller, was permitted to begin his vacation. Beginning October 1, 1956, Carrier permitted and required an employe beyond the scope of the agreement, Agent Howe, to perform the duties of the clerical position on October 1, 2, 5, 8, 10, 12, 15, 17 and 19, 1956 and compensated the Agent at the rate of the Clerk's position.

"Rule 25 of the effective Agreement regards application of seniority rights to temporary vacancies. This rule is not applicable to this case inasmuch as this involves a man who was on vacation. Rule 12(b) of the Vacation Agreement specifically states that a vacation absence will not constitute a vacancy under the terms of any Agreement." (Award 5827)

"While the Respondent had the right to work regular employes on the dates in question on claimant's relief assignment, such action was not contractually mandatory." (Award 5697)

The record shows that Carrier's primary purpose was to provide Clerk Fuller a vacation in accordance with terms of the Vacation Agreement. In this connection Carrier has shown below excerpt from Referee Morse's decision on Question No. 3, meaning and intent of Article 4(b) of Vacation Agreement:

"The parties should never forget that the primary purpose of the vacation agreement was to provide vacations to those employes who qualify under the vacation plan set up by the agreement. Any attempt on the part of either the carriers or the labor organizations to gain collateral advantages out of the agreement is in violation of the spirit and intent of the agreement."

In order to afford Clerk Fuller his vacation in accordance with the Vacation Agreement, Carrier has been required to compensate relief employes 15 days' pay. Claim of the Employes contemplates that nine regular assigned clerks each be allowed nine days' pay or a total of 81 days' pay over and above compensation previously allowed. In view of the record, it is clear that the Employes by their action in this case are attempting to gain collateral advantages out of the agreement "in violation of the spirit and intent of the agreement."

In conclusion, Carrier again asserts that claim of the Employes in the instant case is wholly without support under the contractual agreement and should therefore, be either dismissed or denied in its entirety.

Carrier affirms that all data in support of its position has been presented to the other party and made a part of the particular question in dispute.

OPINION OF BOARD: F. T. Fuller was the regular assigned Yard Clerk at Hayfield, Minnesota, who worked from 7:15 P. M. to 4:15 A. M. on Monday through Friday. This position was filled on Saturday and Sunday by R. Iverson, a furloughed Clerk. Fuller's three week vacation began on October 1, 1956. Carrier claims there was no furloughed clerk available to relieve Fuller during the vacation period, that furloughed clerk Iverson would not accept a full assignment, but agreed to work the scheduled hours on Tuesdays and Thursdays, in addition to Saturdays and Sundays, and that it was, therefore, obliged to accept the offer of Agent, I. H. Howe to work on Monday, Wednesday and Friday nights in addition to his regular tour of duty on those days.

On December 1, 1956, the Organization's General Chairman filed a claim on behalf of the nine Claimants for a day's pay at time and one-half the rate of the Clerk position at Hayfield, Minnesota, for October 1, 2, 3, 4, 5

"and all subsequent days that the Agent at Hayfield, Minnesota, was permitted to perform work within the scope of (our) agreement."

The Carrier's Assistant Superintendent replied on January 2, 1957, that "diligent effort was made to locate personnel in Hayfield, who would accept the position Mr. Fuller is assigned. However, we were not successful in finding someone to handle the position, therefore, we used Mr. Iverson, who is a relief clerk at Hayfield, to fill the position and allowed Mr. Howe to fill in on the extra days, outside of his regular assignment as Agent at Hayfield."

On January 4, 1957, the General Chairman replied to the Assistant Superintendent requesting that he be advised of the name of the employe who was hired as vacation relief clerk. There is nothing in the record to indicate why this letter was written since the Carrier's position and the vacation replacements were noted in Carrier's letter of January 2, 1957. In any event, the record shows no reply to the Organization's letter of January 4, 1957.

This claim was handled on the property up to and including Carrier's Assistant to the President who, under date of April 24, 1957, declined the claim.

On January 16, 1958, the Organization sent a notice to the Board of intent to file an ex parte submission. On January 24, 1958, the Organization sent a corrected notice amending the claim on behalf of the same nine employes but for "eight (8) hours at the rate of the position of Clerk, Hayfield, Minnesota, for October 1, 2, 5, 8, 10, 12, 15, 17 and 19, 1956, due to Carrier's failure to permit their performance of the duties of the Clerk's position . . ."

The issue of a third interest was raised. The Secretary of this Board, accordingly notified The Order of Railroad Telegraphers by U.S. Certified Mail on May 16, 1961, of the pendency of this dispute. The latter Organization by letter dated May 22, 1961, disclaimed any interest on its own behalf or on behalf of the employes it represents.

The Organization contends that the assignment of Agent Howe to replace Fuller on Monday, Wednesday and Friday during Fuller's vacation was beyond the scope of the Agreement effective August 15, 1939, as reprinted May 1, 1955.

The Organization did not comply with Rule 40(a) which requires that all "claims or grievances must be presented in writing by and on behalf of the employe involved, to the officer of the Carrier authorized to relieve same, within 60 days from the date of the occurrence on which the claim or grieveance is based." Fuller's vacation started October 1, 1956. The claim was initiated on December 1, 1956. The procedural defect was raised on the property by letter from D. K. Lawson, Assistant to President, to the Organization's General Chairman. This letter dated April 24, 1957, said, in part:

> "This claim is without merit for a number of reasons. In the first place, claim dated October 1, 1956, was not appealed to any officer of the Company authorized to relieve same within 60 days as required by Rule 40 and claim for that date is now barred from further progression."

Nowhere in the proceedings, either on the property, or elsewhere does the Organization directly challenge this procedural defect or make reply thereto.

Rule 40(e) does provide that a claim for an alleged continuing violation may be filed at any time during such continuing violation. The question here is whether the claim involved in this proceeding is based on a continuing violation as contemplated in this Rule 40(e).

There are no clear cut decisions by this Board or Boards of other Divisions defining with any degree of certainty what constitutes a "continuing violation". Perhaps, this is as it should be because the parties may not always have had a meeting of minds on such a definition as it applies to the numerous contracts containing this procedural provision.

It should be remembered that Rule 40 is identical with Article V of the Chicago Agreement dated August 21, 1954, which is an integral part of the Agreements between many Carriers and many Organizations. Undoubtedly, this August 21, 1954 Agreement was negotiated between representatives of the such Carriers and Organizations and those representatives must have discussed the meaning and intent of "continuing violation." Yet, there is no evidence of this alleged understanding in the record, nor stated in the few Awards which considered this problem. Most of the Awards involving this contract obligation are concerned with the problem of properly named Claimants and not with the fundamental problem of time limits as set out in other sections of Rule 40.

The best review of this problem is in Award 17, Special Board of Adjustment No. 313. That Special Board held, in substance, that "an act or neglect or an assignment which occurred once, although the consequences or damages may have continued on" is not a continuing claim.

In Award 3627 (Carey) the Second Division found as follows:

> "The claim is that the Carrier should have bulletined the position at El Dorado, Kansas, when it was vacated on August 5, 1957, as provided in Rule 137(b). It was initially presented to the Carrier on November 13, 1957. The Carrier maintains that the claim was not filed in time.
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> "Article V, Section 1(a) of the Agreement of August 21, 1954 provides that claims must be presented by or on behalf of the employes involved within 60 days from the date of the occurrence on which the claim is based. The employes refer to Section 3 of Article V of the August 21, 1954 Agreement in which it is provided that a claim based on an alleged continuing violation of any agreement may be filed at any time so long as such alleged violation continues. The position at El Dorado was abolished September 27, 1957.
>
> "We think that this claim does not properly fall within the spirit or intent of the provision concerning alleged continuing violations of an agreement . . .
>
> "On the facts and circumstances shown of record in this case we think it unrealistic to hold that the failure to bulletin the August 5 vacancy was a continuing violation."

In the case before the Board, Clerk, Fuller started his three week vacation on October 1, 1956. In the Organization's ex parte submission they state as follows:

> "Beginning October 1, 1956, Carrier permitted and required an employe beyond the scope of the agreement, Agent Howe, to perform the duties of the clerical position on October 1, 2, 5, 8, 10, 12, 15, 17, 19, 1956 and compensated the Agent at the rate of the Clerk's position."

The vacation period is for a stated time. There is only one vacation period just as there is only one job vacancy when an employe resigns. In both cases the Carrier is required to make assignments in accordance with the applicable provisions of the Agreement. In both cases the assignment occurs once, although the consequences of such a violation by the Carrier may be a continuing one. It is not the continuing monetary liability, but rather the alleged wrongful assignment which determines whether a claim is a "continuing violation." The alleged wrongful assignment of Agent Howe to replace Fuller during his vacation was made on October 1, 1956 as admitted by the Organization. The claim here should have been filed not later than November 30, 1956 as required by Rule 40(a). Instead it was initiated on December 1, 1956.

The Organization cited Awards 951 (DeVane), 2204 (Swaim), 4191 (Carter), 4788 (Robertson), 6688 (Leiserson), 6718 (Shake), 7823 (Coffey), 9578 (Johnson) and Award 38, Special Board of Adjustment No. 259 to support its argument that the claim in this case is a continuing one. In Award 951 the Board held that a claim for monetary loss where second and third trick telegrapher positions were discontinued, was a continuing violation. A pro-rata claim was allowed as a continuing claim in Award 2204 because the Claimant was not allowed to work Mondays in violation of the Agreement. No procedural question was involved in Award 4191. In any event, the Carrier in that case took an employe off a 7 day position to work the rest day of another 7 day position. The claim in Award 4788 was for specific dates when train orders were received and copied by telephone from train dispatchers by conductors and others and not by the Clerk-Operator. In Award 6688 the claim for overtime in excess of 8 hours in a day was properly sustained by this Board as a continuing claim in Award 6718. In Award 7823 this Board properly held that a claim for 30 minutes a day at time and a half was a continuing claim because the Carrier did not schedule a 30 minute lunch period as required by the Agreement. No procedural objection was raised on the property or in the record in Award 9578. It was raised for the first time by a Carrier Board member at the Panel Hearing. In Award 38 of the Special Board of Adjustment No. 259, the Special Board held that the Carrier violated the Agreement when it abolished the position of Agent at Vernon and had the Agent at Oneida spend 2 hours at Vernon within his regular 8 hour tour of duty, daily except Saturdays, Sundays and Holidays. This, the Board held was a continuing claim.

The facts and circumstances in the case now before the Board are distinguishable from those in the Awards cited by the Organization. We are inclined to the principle laid down in Award 17, Special Board of Adjustment No. 313 and Award 3627 of the Second Division previously discussed.

It is with considerable reluctance that the Board is obliged to dismiss this claim because of the procedural defect. The interest of both parties

would have been better served if this case could have been considered on the merits. The Board, however, has no alternative. The parties are signatories to an agreement which provides for procedural time limitations. We have no right to avoid it since there is no waiver in the record by the Carrier.

There is no purpose for the Board to rule on other procedural and jurisdictional questions raised by the Carrier or to consider the merits.

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

That the Board has no authority to consider this claim on the merits, and it must, therefore, be dismissed.

AWARD

Claim is dismissed.

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.

DISSENT TO AWARD 10423, DOCKET CL-10413

It is our belief, and we so contend, that the Majority erred in its decision when it held that:

> "The vacation period is for a stated time. There is only one vacation period just as there is only one job vacancy when an employe resigns. In both cases the Carrier is required to make assignments in accordance with the applicable provisions of the Agreement. In both cases the assignment occurs once, although the consequences of such a violation by the Carrier may be a continuing one. It is not the continuing monetary liability, but rather the alleged wrongful assignment which determines whether a claim is a 'continuing violation.' The alleged wrongful assignment of Agent Howe to replace Fuller during his vacation was male on October 1, 1956 as admitted by the Organization. The claim here should have been filed not later than November 30, 1956 as required by Rule 40(a). Instead it was intiated on December 1, 1956."

It is our contention that the claim is a continuing one; it occurred on October 1, 1956 and it likewise occurred or reoccurred on subsequent dates, namely; October 2, 5, 8, 10, 12, 15, 17 and 19, 1956.

/s/ C. E. Kief 3/16/62

C. E. Kief
Labor Member