Award No. 10460
Docket No. TE-9291

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, Referee

PARTIES TO DISPUTE:

CHICAGO GREAT WESTERN RAILWAY COMPANY

THE ORDER OF RAILROAD TELEGRAPHERS

STATEMENT OF CLAIM: (1) Carrier's file 0-114. Claim No. 70077-320 by the General Committee of The Order of Railroad Telegraphers on the Chicago Great Western Railway that:

> The Carrier violated the terms of the Agreement between the parties when it declined to pay the Agent-Telegrapher at Bondurant, Iowa, Mr. W. F. Lewis a "call" allowance for November 22, 1952, when on this date at 4:30 A. M., a time when the Agent-Telegrapher was off duty, the following message was sent to Train No. 43 at Bondurant by radio:
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> > from Oelwein Nov 22, 1952 to C&E No 43 at Bondurant . . . "Do not pick up at Highland . . ." Signed JFM.
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> This is a communication of record of which the work of handling belongs to the Agent-Telegrapher at Bondurant. And that,
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> (a) as a result of this violative act the Carrier shall now compensate Agent-Telegrapher W. F. Lewis in the amount of two hours pay at the time and one-half rate and for whom such compensation is claimed.

EMPLOYES' STATEMENT OF FACTS and POSITION OF EMPLOYES: The above Carrier described cases are not ready for consideration and action by your Board. They are a group of unsettled disputes involving this Carrier and this Organization which have not been handled to conclusion on the property and the right of this Organization to endeavor to settle them by further negotiations or by means other than National Railroad Adjustment Board pursuant to Article V, Section 5, of the Agreement of August 21, 1954, has been challenged by the Carrier in the Courts.

It is, therefore, our position that until the Courts have determined this matter and until these disputes have been handled as provided in Section 3, First (i) of the Railway Labor Act, as amended, they are not properly referable to your Board. Four hundred and eighty copies of this submission are being forwarded under separate cover to accommodate each of your thirty two files.

CARRIER'S STATEMENT OF FACTS: The Carrier and The Order of Railroad Telegraphers are parties to National Agreement signed at Chicago,

Illinois, August 21, 1954, between participating Eastern, Western and Southeastern Carriers and Employes represented by the Fifteen Cooperating Railway Labor Organizations signatory thereto. Attached hereto as Exhibit "A" is reproduction of Article 5—Time Limit on Claims Rule (effective January 1, 1955) of that Agreement, and which is made a part hereof. Section 2 of said Article 5 reads in part:

> "* * * 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."

The instant claim was appealed to Personnel Officer D. K. Lawson (highest officer designated by the Carrier to handle claims and grievances) by O.R.T. General Chairman L. M. Kingsbury under date of January 16, 1953 and was declined in writing in Personnel Officer's letter to O.R.T. General Chairman Kingsbury dated April 7, 1954, i.e., **claim was declined in writing prior to effective date (January 1, 1955) of Article 5** (Time Limit on Claims Rule). Consequently, the Employes had a period of twelve (12) months after January 1, 1955, or until January 1, 1956 in which to appeal to the appropriate board of adjustment before the claim herein became barred by the terms of Section 2, Article 5. No agreement was made nor was any understanding had by the parties hereto at any time, written, verbally or otherwise, with respect to extending the period in which the Employes could appeal to the appropriate board of adjustment. The Employes failed to appeal this claim to the Third Division, National Railroad Adjustment Board, prior to January 1, 1956.

POSITION OF CARRIER: There is a dispute between the parties hereto as to whether or not the claim herein is barred by the terms of the August 21, 1954 Agreement, Article 5, copy of which is attached hereto and made a part hereof—**sole purpose of this ex parte submission is to resolve that dispute.**

It may be noted from Carrier's Statement of Facts that the claim herein was denied by the Carrier's highest officer of appeal in letter dated April 7, 1954, and that by terms of Section 2, Article 5 of the August 21, 1954 Agreement, the Employes had a period of twelve (12) months after January 1, 1955 (effective date of said Article 5), or until January 1, 1956, in which to appeal to the appropriate board of adjustment before said claim became barred by the terms of Section 2, Article 5. The Employes failed to exercise their prerogative of appealing the claim herein to the appropriate board of adjustment on or before January 1, 1956, and due to that failure it is the Carrier's position and evidence is conclusive that the claim herein is now barred by the terms of Article 5 of the August 21, 1954 Agreement, and is null and void. The Third Division, National Railroad Adjustment Board, is, accordingly, requested to so find and deny the payment of this claim.

Exhibit "A" is attached hereto and made a part hereof as if fully set forth herein.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is one of 31 similar, but not identical, claims submitted by the Carrier to this Division on July 13, 1956. The claim is in the same form it was submitted initially by the Employes to the Carrier on the property.

The Carrier presented one argument on all 31 claims since it contends that the sole question in each is whether or not the claims are barred because they were not presented to the Division within the time limit provisions of Article V of the National Agreement of August 21, 1954.

The Employes agree that 6 of these 31 claims are barred by the Time Limit Rule of this Agreement, and request that they be dismissed, but they do not agree that the remaining 25 claims are so barred and request that they be considered on their merits. In any event, the Employes single out 3 claims as being distinctive from all the others and deserving of individual attention.

In view of the different grouping of claims on the procedural question involved, each will be decided independently with the first decision of each group serving as a reference for the others in the group.

The Time Limit Rule in the National Agreement of August 21, 1954 placed a contractual time limit on a previously unlimited statutory right to file claims with this Board. The determination of the meaning and intent of this rule is compounded by the fact that this claim, like dozens more, was referred to this Board in the period of transition from the unlimited right to the limited right to file claims, with all that is involved in making the old compatible with the new. In addition, the interpretation is made more difficult because, paradoxically, this claim was initiated, originally, by the Employes, but it was referred to this Division later by the Carrier, which argued that the Board had jurisdiction of the claim. Such contention was expressly rejected by the Employes. Still later, the positions were reversed so that now the Carrier contends that the Board does not have jurisdiction to hear the claim on its merits, while the Employes contend that it does have such jurisdiction.

It is agreed by the parties that this claim was initiated by the Employes prior to the effective date of the National Agreement of August 21, 1954 and that the claim was denied in writing by the highest designated officer of the Carrier on April 7, 1954, a date prior to the effective date of the Agreement, which was January 1, 1955. They disagree on the effect of subsequent actions.

The applicable provisions of Article V of the National Agreement are:

> "1(c) . . . 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."
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> "2 . . . 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."
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> * * * * *

"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."

According to the Carrier, the Employes had a period of 12 months after January 1, 1955, or until January 1, 1956, to appeal to this Division before the claim became barred by the terms of Section 2, Article V. Since no proceedings were instituted and no appeal was taken from the decision of the highest designated officer of the Carrier within the time limits prescribed, the Carrier contends that the claim should be barred. Further, it is the Carrier's position that the claim was barred absolutely, as of January 1, 1956, and that its submission of this claim to the Board on July 13, 1956 did not revive the original Employe claim, or waive the time limit requirements, or constitute an estoppel against the Carrier from seeking a determination from the Board that the claim was barred for failure to observe the applicable Time Limit Rule. "The sole purpose of the ex parte submission," the Carrier maintains, "is to resolve that dispute."

The Employes contend, however, that timely action was taken by virtue of an "appeal" to the President of the Carrier at a conference held on September 29, 1955 to discuss this and other unresolved claims. This appeal, the Employes contend, was within 9 months of the date of the decision of the highest designated officer of the Carrier and therefore constituted timely action under the terms of Section 5 of the Agreement.

As a separate contention, the Employes maintain that even if the claim had been barred by the Time Limit Rule, it should be considered on its merits, since the Carrier had taken inconsistent positions as to whether or not the claim was pending before the Board.

Having argued before a Federal Court that this claim was pending before this Board, in support of a restraining order from a scheduled strike, the Employes contend that the Carrier should not be free to plead now that such claim is barred by the Time Limit Rule, since the facts were the same in both proceedings. Stated affirmatively, it is the Employes' position that the Time Limit Rule applies only to the Employes and that when the Carrier filed this claim with the Board it did so under the unlimited rights of the Railway Labor Act and accordingly "revived" the Employes' original claim or, alternatively, that the Carrier waived the rule or is estopped from pleading it.

Employes also contend that the Carrier failed to observe the rules of procedure, as set forth in Circular No. 1, by not stating clearly the particular question upon which an award is desired, as is required in the "Statement of Claim". Since the claim involved is that of the Employes, it is maintained that the rules require a decision on that question regardless of the Carrier's contention that these claims are barred by the Time Limit Rule.

The Carrier makes the better case, overall, and its position should be sustained.

Examining first the Employes' case for waiver, estoppel or revival, it was held in Award 9867 (Rose), under very similar, if not identical, circumstances that there was no evidence to support a finding that the Carrier waived or was estopped from asserting the time limits as a bar to the claim because the submission by the Carrier in that claim was "solely" with regard to the time

limits involved. It is the Employes' position here, (if it was not their position in the claim under Award 9867) that this was not the sole reason for the Carrier's action. This view has merit.

It is not likely that the "sole purpose of this ex parte submission is to resolve that dispute" (referring to the timeliness of the claim), as stressed by the Carrier here. The record establishes convincingly that the Carrier considered the passage of the January 1, 1956 date, without further action by the Employes, as barring the claim involved. With knowledge that the Seventh Circuit Court of Appeals on February 6, 1956 had found that an injunction could be issued to restrain a strike where the disputes involved were pending before this Board, (229 F2d. 926) no more catalyst was needed than the Employes' notice to strike on July 18, 1956 for the Carrier to submit this and other unresolved claims to the Board on July 13, 1956. Accordingly, and despite Carrier protestations to the contrary, it is more likely that the Carrier had a substantive reason, related to restraining the strike, to submit this claim to this Board than solely to determine its timeliness. But no waiver of time limits, or revival of original claim, or application of the doctrine of estoppel should be construed from this action by the Carrier.

The equities do not line up on one side.

It is also clear from the record that the Employes did not mistake the importance of the passage of the January 1, 1956 date without further action on their part to preserve their claim. They consciously let this date pass without perfecting an appeal. Undoubtedly, litigation then underway before the Federal Courts on the question of the right to strike, while claims were pending before the National Railroad Adjustment Board, influenced their actions in this respect. The favorable—to the Employes—decision from a Federal District Court on the strike issue and the subsequent supporting decision by the Fifth Circuit Court of Appeals on February 10, 1956 (229 F2d. 901) hardly made the Employes' case hopeless in their differences with the Carrier.

The contrary decisions of the two Circuit Courts of Appeals, within days of each other, assured resolution by the Supreme Court. This was done in the Chicago River Case, decided in favor of the Carrier. **Brotherhood of Railroad Trainmen et al v. Chicago River and Indiana R. Co.,** 353 U.S. 30 (1957).

The sum and substance of the actions of the parties here were that they were locked in a struggle before the courts, each maneuvering and employing tactics designed to realize its ends and each having reason to believe that it would be successful in the contest.

Under these circumstances, there is no basis here to disturb the results of that litigation. What the outcome would have been if the restraining order, which was requested by the Carrier on the basis of a pending dispute before this Board, had been decided on its merits and not postponed and later dismissed, may only be speculated. In any event, this was a matter for the courts to decide. The concern here is to apply the existing contractual or statutory requirements to the facts.

On this there is no question. The Employes did not perfect an appeal within the time or in the manner prescribed by the National Agreement of August 21, 1954.

The record establishes that the claim was declined by the highest officer designated to handle claims by his letter of April 7, 1954, which was prior to

the effective date of the Agreement. No proceedings were instituted and no appeal was taken from such decision "by the employe or his duly authorized representative" within the time limits prescribed and as provided in Section 2 of Article V of the Agreement.

Ample precedent for barring a claim for failing to perfect an appeal within applicable time limits is provided in our **Awards 9867 through 9911** (Rose) and **Award 8384** (Without Referee); **Second Division Award 2435** (Without Referee); and **Fourth Division Awards 1246 through 1259** (Shugrue).

Employes' contention that timely action was taken under the provisions of Section 5 of the Agreement by virtue of an appeal to the President of the Carrier at a conference held on September 29, 1955, to discuss this and other claims, cannot be sustained. First, the action referred to in Section 5 must be instituted "within 9 months of the date of the decision of the highest designated officer of the Carrier". Said conference was not held within 9 months of the date of such decision, which was issued on April 7, 1954. Section 5 of the Agreement stands alone; it does not provide that action must be taken from the effective date of the rule as is provided in Section 2.

Second, and in any event, the claim is barred because the conference did not constitute an appeal within the terms of the Agreement. In many awards the contention that further handling after the decision of the Carrier's highest officer extends time limit provisions has been rejected. Our **Award 8086** (Beatty); **First Division Award 19965** (Without Referee); and **Fourth Division Award 1244** (Shugrue). The key to extension of time limits is agreement by the parties. No such agreement was made here, explicitly or implicitly.

With respect to the failure of the Carrier's submission to comply literally with Board Circular No. 1, reference is made to **Award 9867** (Rose) where the same question was examined. We agree with the opinion there that "Such variance in form cannot be regarded as fatal."

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 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 claim is barred by Section 2 of Article V of the National Agreement of August 21, 1954.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

SPECIAL CONCURRING OPINION TO AWARD NO. 10460, DOCKET NO. TE-9291

The Opinion of Board in Award 10460 states as follows:

"* * * In addition, the interpretation is made more difficult because, paradoxically, this claim was initiated, originally, by the Employes, but it was referred to this Division later by the Carrier, which argued that the Board had jurisdiction of the claim. Such contention was expressly rejected by the Employes. Still later, the positions were reversed so that now the Carrier contends that the Board does not have jurisdiction to hear the claim on its merits, while the Employes contend that it does have such jurisdiction."

Carrier maintained the consistent position throughout the record that the Board has jurisdiction over the dispute and that the claim therein is barred under Article V of the August 21, 1954 National Agreement. Award 10460 correctly sustains the position of Carrier.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ T. F. Strunck

LABOR MEMBER'S COMMENT IN RE "SPECIAL CONCURRING OPINION TO AWARD NO. 10460, DOCKET NO. TE-9291"

About the year 200 B.C. Plautus, the matter-of-fact philosopher, solemnly recorded the following observation:

"To blow and swallow at the same moment is not easy."

The truth of that tid-bit of wisdom is amply demonstrated by the Carrier Members in their effort to avoid the facts as stated in the excerpt they quote.

No amount of semantical gymnastics will change either the fact that the parties did reverse their positions concerning "jurisdiction" of the Board, or the argument made to the referee by the Carrier Members. At any rate the Carrier Members assured adoption of the award by voting with the referee against the Labor Members.

J. W. Whitehouse
Labor Member.