

Award No. 10500

Docket No. MW-9725

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

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

(1) The Carrier's Engineer Maintenance of Way failed to comply with the procedural requirements outlined in Paragraph (a) of Section 1 of Article V of the August 21, 1954 Agreement in his handling of the claims which were appealed to him and identified in General Chairman Jones' record as:

"Claimant	File Number	Claimant	File Number
W. A. Henson	200-397-C	Bennie I. Edwards	200-410-C
Harry Needham, Jr.	200-395-C	Earl McGee	200-417-C
C. G. Needham	200-394-C	Richard I. Boone	200-388-C
Troy N. Hairrel	200-238-C	A. R. Smithart	200-131-LA
Odis D. Smithart	200-081-EL	M. V. Dale	200-214-C
J. W. James	200-215-C	Woodrow Gwinn	200-378-S
Frank Argo	200-351-U	Charles Kirk	200-416-C
Andrew Taylor, Jr.	200-405-C	Woodrow W. Weaver	200-382-D

(2) Because of the procedural defect referred to in Part (1) hereof, the above referred to sixteen claims are to be paid in full, as presented, handled, and appealed."

EMPLOYEES' STATEMENT OF FACTS: Each of the sixteen claims referred to in Part (1) of the Statement of Claim was initially presented (see Employees' Exhibit A) and subsequently appealed on the property in the usual and customary manner, each claim having been individually and separately handled up to and including the Carrier's Engineer Maintenance of Way, Mr. P. O. Ellis.

In a letter dated January 4, 1956, Mr. Ellis acknowledged receipt of all the claims, except the claim in behalf of Woodrow W. Weaver, appealed to him as follows:

All data submitted in support of the Carriers' position have been heretofore submitted to the employees or their duly accredited representatives.

The Carriers request ample time and opportunity to reply to any and all allegations contained in Employees' and Organization's submission and pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, deny each and every, all and singular, the allegations of the Organization and employees in alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons, the Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and each of them, respectfully request the Third Division, National Railroad Adjustment Board, deny said claim, and grant said Railroad Companies, and each of them, such other relief to which they may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is based on Claimants' contention that the Carrier failed to give written notice, within sixty days, of the reason for the disallowance of claims filed December 5, 1955, on behalf of sixteen Claimants. Petitioner relies on Section 1 (a), Article V of the National Agreement, 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 employees 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 employee 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." (Emphasis ours.)

The Carrier contends that Section 1 (a), Article V of the National Agreement has no application here for the following reasons—(1) at the time of the presentation of the alleged claims Employees were no longer in the employ of Carrier, were not Employees; (2) not being Employees they could not properly be represented by the Brotherhood of Maintenance of Way Employees; (3) Claimants did not, under Section 1 (a), file claims within sixty days of the occurrence on which the claim is based and no dispute exists; (4) the decision of the Chief Operating Officer of the Carrier became binding on June 21, 1957, the Claimants having failed to institute proceedings before this Third Division within nine months of that date in accordance with the provisions of the National Agreement.

It appearing from the record that the extra gang crew was permanently laid off by Carrier on December 9, 1955, the first two contentions of Carrier can be summarily dismissed as it has been repeatedly held that it is only

necessary that the Claimant be in the employ of the Carrier at the time of the violation of the Agreement, commencing October 17, 1955, to be eligible to present a claim. (See Award 4461—Carter; Award 5348—Robertson.)

In considering the third objection to the allowance of these claims by the Carrier it might be enlightening to review briefly what gave rise to this claim. On March 23, 1955 a Circular 69 was issued by the Carrier in effect setting up an extra gang with "headquarters Atoka, Oklahoma, without outfit cars." The Carrier contends that the claims are based on the issuance of Circular No. 69, March 23, 1955, and over eight months had elapsed without any claim having been made for any violations. The Claimants, however, contend that no violation of any Agreement took place until October 17, 1955, when Claimants were required to end and start their days work at points other than their headquarters at Atoka. Viewing the claims presented Carrier on December 5, 1955, in their entirety there can be little question but that Claimants were making claims for violations commencing October 17, 1955, and that December 5, 1955 was well within the sixty day time limit provided for by Article V, Section 1 (a). On January 4, 1956, Mr. Ellis, Carrier's Engineer Maintenance of Way, acknowledged receipt of the claims by the Carrier.

It would appear from the reading of the claims, on their face, they are valid ones. Had the Carrier desired to controvert the facts involved in the dispute or attacked the validity of the claims it would have been a simple matter for it to have done so by denying or disallowing the claims in writing within a period of sixty days. This procedural section is mandatory rather than directive in that a definite penalty is provided therein for failure to write disallowance of claim within sixty days—the claim to be allowed as presented. We make no findings on the merits of this claim or determine what would have been its disposition before this Board if the Carrier had handled the claim expeditiously on the property. (See Award 9492—Rose; 9253—Weston; 10138—Daly.)

This brings us to the fourth and last objection by the Carrier to the allowance of these claims. The Chief Operating Officer of the Carrier denied these claims September 21, 1956. The Petitioner filed with the Board an intention to file an ex parte submission of the dispute on June 19, 1957, within the nine months period allowed after the disallowance of the claims. The Third Division has held repeatedly and consistently that the filing of the notice of an intention to present an ex parte submission constitutes the institution of the proceeding here. (See Award 9059—Johnson; Award 9307—Schedler; Award 10075—Webster). Like holdings have been made by the Second Division.

The Carriers argument that the Boards rule and awards are voided by Section 3, First (i) of the Railway Labor Act is amply met in Award 9059 (Johnson) on pages 10 and 11 therein, and that part of Award 9059 is made a part of this opinion by reference.

We must sustain the claims on the procedural grounds set forth in the Opinion.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April 1962.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Interpretation No. 1 to Award No. 10500

Docket No. MW-9725

Name of Organization:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Name of Carrier:

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

Upon application of the Organization involved that this Division interpret said Award in the light of a dispute between the parties as to its meaning and application, as provided in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The question proposed by the Organization for the interpretation is—Was it the intent of the Board to sustain parts (1) and (2) of the Employees' Statement of Claim in its entirety or was it to require the Carrier to pay only parts of the claims identified.

It is the contention of the Carrier that the only claims and amounts involved in and covered by the Award were those specifically evidenced by the record as having been initiated and presented by the Claimants on December 5, 1955, which have been paid in full.

Among other points raised by the Carrier in its original submission was one in which Carrier contended that the claims were not presented within sixty days after the violation of the Agreement as provided for in the Agreement. Copies of the claims for the Employees concerned were presented as bearing on the point as to whether or not these claims had been initiated by the Claimants within the sixty day period and apparently for that purpose alone and were so considered.

The basis for all of the claims submitted on behalf of the Employees was that members of the gang were required to start their day's work at points other than their designated headquarters at Atoka, commencing October 17, 1955, which was in violation of the Agreement. Each Claimant had but one claim for all the compensation due to the Employee by reason of Carrier's violation of the Agreement which has been hereinbefore alluded to. It appears

conclusively from the original record that communications were addressed by the General Chairman concerning these claims to Carrier's Engineer-Maintenance of Way on December 20 and December 27, 1955, and on January 3, 1956, and the receipt of the same was acknowledged. It has been heretofore determined that none of the claims nor any part of them were allowed by the Carrier nor did Carrier give any reason for the disallowance of these claims within the period required by the Agreement.

Each of the Employees named in the Statement of Claim had but one claim which included everything that had been submitted to the Carrier and processed up to and including January 3, 1956. Part (2) of the Statement of Claim presented is specific—the above referred sixteen claims are to be paid in full as **presented, handled and appealed.** (Emphasis ours.)

Referee Levi M. Hall, who sat with the Division as a member when Award 10500 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 17th day of April, 1963.