Award No. 10532
Docket No. TE-8702

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE TEXAS & PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Texas and Pacific Railway, that:

1. The Carrier violated and continues to violate the agreement between the parties when, on or about December 30, 1954, it declared abolished the position of third shift operator in "AC" El Paso, Texas, and the same time declared abolished the relief assignment in the same office, without in fact discontinuing the work of the positions, and required and permitted work still in existence to be performed by employes not covered by the scope of the Telegraphers' Agreement.

2. The Carrier violated Article V of the August 21, 1954 Agreement when it failed to notify in writing the representative of the employes, within 60 days from date on which claim was filed, of the reasons for disallowance and having failed to so notify, it refused to allow the claim as presented.

3. The Carrier shall now restore the Third Shift Operator position and the Relief Assignment at El Paso, Texas.

4. The telegraphers who were displaced by the action of the Carrier at El Paso, Texas, shall be compensated for all time lost, from January 9, 1955, to the date that the positions are restored.

5. Any other telegrapher or telegraphers on the seniority district who have been or may be displaced as a result of this action, shall be made whole for time lost and expenses incurred as a result of the violative acts of the Carrier.

EMPLOYES' STATEMENT OF FACTS: On December 30, 1954, third shift operator position at El Paso, Texas Yard, was declared abolished by the Carrier, however, an investigation revealed that the work of the position was not discontinued but that employes not covered by the agreement were

The Carrier respectfully urges that the claim should be dismissed for the reasons set forth in Part I hereof. In the alternative, it should be denied for the reasons set forth in Part II, above.

(Exhibits not reproduced.)

OPINION OF BOARD: On December 30, 1954, third shift operator position at El Paso, Texas, was declared abolished by the Carrier. It is the claim of the Employes, that the work of the position was not discontinued but that employes not covered by the Agreement were required to perform the work. Claim for the violation was made on March 5, 1955, in a letter from General Chairman to the Superintendent claiming that the Agreement was violated when the Carrier abolished the third trick operator at El Paso. The Superintendent declined the claim to the General Chairman in a letter dated May 9, 1955. On June 5, 1955, the General Chairman wrote the Superintendent requesting that the claim be allowed on the basis the Superintendent failed to render a decision within 60 days of presentment of the claim as required by the Time Limit Rule (Article V) of the August 21, 1954 Agreement.

In reply dated June 17, 1955, the Superintendent abvised the General Chairman that the claim was improper in the first instance inasmuch as it was for unnamed employes and was not presented within 60 days of January 1, 1955, the effective date of Article V of the August 21, 1954 Agreement.

We quote the pertinent part of Section 2 of Article V of the August 21, 1954 Agreement, which became effective on January 1, 1955:

> "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 . . ."

The record shows that no claim for the abolishment of the position, which occurred on December 30, 1954, was filed prior to January 1, 1955. Under Section 2, of the August 21, 1954 Agreement, which became effective January 1, 1955, it was required that the claim be filed within 60 days after January 1, 1955.

The claim in this case was first presented on March 5, 1955 which was in excess of 60 days after January 1, 1955. There is no dispute in regard to the late filing of the claim. The Claimant contends that the Carrier failed to raise the question that the claim was not filed within the 60 days on the property and by so doing waived this defense. They cite among other Awards, Award #10059, which is a case involving a three and a quarter years delay in progressing the claim.

This is a case under an Agreement that requires the filing of the claim within a specific time. There was no claim here because it was not filed within the time required, and there being no claim, it was not necessary to deny same within the 60 day period.

But the claimants contend that in this case, the claim is a continuing claim and that under Section 3, such a claim may be filed at any time, the claimed reparation, however being limited to 60 days prior to the filing date.

With this we cannot agree, the act complained of was the Carrier's action in abolishing the position and transferring work to employes not covered by the Agreement. This took place on one date, to wit December 30, 1954; if there was a violation of the Agreement it took place on that day and no other.

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.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of April 1962.

DISSENT TO AWARD 10532, DOCKET TE-8702.

Egregious error is so patently manifest here that little comment is necessary.

The action complained of was not the abolishment, per se, of the position, but the resultant, and continuing action of requiring employes not covered by the telegraphers' agreement to perform communication work which the petitioning employes believed and contended was reserved to them by the terms of their agreement.

Section 3, Article V, August 21, 1954, Agreement was plainly intended to apply to a situation such as this, the majority's unsupported disagreement notwithstanding.

Further error consists of the wholly unsupported conclusion that the fancied late filing of the claim resulted in no claim so that "it was not necessary to deny same within the 60 day period." The rule makes no such fantastic provision. It merely requires notice of disallowance — if that is the decision — with reasons, within 60 days, regardless of whether the claim is — or is finally held to be — good, bad, indifferent, proper or improper.

The holding of the majority simply and improperly provides the Carrier with a defense to which it was not entitled either in logic or under the agreement.

For these reasons I must express vigorous dissent.

J. W. WHITEHOUSE
Labor Member

ANSWER TO LABOR MEMBER'S DISSENT TO AWARD 10532 — DOCKET TE-8702

The dissent here fails to recognize two basic principles correctly set forth in the Award in this case, viz: first, Article V, Section 3 (continuing violations) does not apply to a situation such as that here involved where the violation was the abolishment of a position which occurred on a specific date, **Fourth Division Award 943** (Carey) where he said —

> "The general rule which is uniformly recognized is that, unless a statute of limitations or an agreement of that character specifically provides otherwise, the period of limitation begins to run at the time when a complete cause or right of action accrues or arises."

and secondly, a claim that requires a timely rejection must be one that is properly filed initially. The dissent erroneously says that timely rejection of a claim is required "whether the claim is — or is finally held to be — good, bad, indifferent, proper or improper." Awards 9684, 9250 and 8889 of this Division hold directly to the contrary and properly so.

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ T. F. Strunck