Award No. 10577
Docket No. CL-9936

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Rules Agreement, effective May 1, 1942, except as amended, when during the early part of the year 1955 it removed the work of the preparation of blanket requisitions normally prepared on duplimat forms and duplicated on rotary duplimat machines in the Service Bureau, General Storekeeper Department, 15 North 32nd Street, Philadelphia, Pennsylvania, occurring within the Stores Department Seniority Roster and transferred such work to the Insurance Department, Pennsylvania Railroad, thereby denying employes of the Stores Department Seniority District, the right to perform this work in accordance with their seniority.

(b) That such work shall now be restored to the Stores Department Seniority District and Clerk Vincent F. McKeown and other employes adversely affected be reimbursed for all monetary loss sustained dating from sixty days prior to May 24, 1955 and until adjusted. (Docket 105)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representatives of the class or craft of employes in which the Claimants in this case held positions and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To the Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act, to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement in the instant case and that the Claimant is not entitled to the compensation which he claims.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

OPINION OF BOARD: This is a claim wherein the Organization alleges that the Carrier violated the Agreement by assigning work which it claims belongs to the clerks, in Carrier's Stores Department.

In addition to the issue on the merits the Carrier has raised certain procedural questions which it claims determines the issue without consideration of the substantive issues.

Carrier objects to the jurisdiction of the National Railroad Adjustment Board, Third Division, in this matter on the ground that the appeal herein was first presented to the Assistant Supervisor on May 24, 1955 and was denied by the Chief Clerk on July 11, 1955. No further action was taken on this claim until December 9, 1955, when it was appealed and on February 7, 1957, it was denied by Carrier's Manager, Labor Relations.

Carrier alleges that the claim and the appeal therefrom, together with the time limits involved, is governed by Article V, Sections 1(a) and (b) which reads as follows:

"ARTICLE V — CARRIERS' PROPOSAL NO. 7

Establish a rule or amend existing rules so as to provide time limits for presenting and progressing claims or grievances.

This proposal is disposed of by adoption of the following:

The following rule shall become effective January 1, 1955:

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."

Organization makes no point of the time element involved, but claims and alleges in its Rebuttal Brief to Carrier's Ex Parte Submission and in its argument here that the matter was not raised on the property and that Carrier's Manager-Labor Relations, made no issue of any time limits involved and that the case was progressed on its merits. Organization further contends that Carrier, in its Rebuttal Brief, made no denial of the claims set forth in Organization's Rebuttal Brief.

Carrier contends that the provisions of Article V are mandatory, rather than directory and that no action of the Carrier, short of express agreement can waive the requirements thereof and that all rules in the Agreement are before the Division and no rule need be specifically pleaded and the failure to observe any of the mandatory requirements of Article V may be placed in issue at any time.

The argument is that all procedural provisions of the Agreement for the initiation and progressing of claims and grievances are jurisdictional, and therefore that whenever in the record it finds that any procedural step was not taken within the time or in the manner provided in the rules, even if the matter is not raised by the parties, the Board has no jurisdiction of the case and must dismiss it. Admittedly, if this Board lacks jurisdiction of a claim or grievance the parties cannot confer jurisdiction by agreement or by failure to object.

A number of Awards of this Division have held that these procedural objections are jurisdictional and can be raised for the first time on appeal, either by the parties or by this Board. On the other hand, there are many Awards of this Division holding that procedural questions of this kind cannot be raised for the first time on appeal. For some time we have been faced with Awards holding differently on this question.

This Board is not a court, but like courts it derives its jurisdiction from a statute and not from contracts. It was established by the Railway Labor Act with definite powers and duties, i.e., jurisdiction, which can be limited only by statutory authority. The Act prescribes no statute of limitations, but even if it did, that would not constitute a jurisdictional matter. Certainly, if not even a statutory limitation is jurisdictional, a contractual obligation cannot be jurisdictional.

The source of the Board's jurisdiction is derived from an Act of Congress (U.S. Code, Title 45, Chapter 8) known as the "Railway Labor Act". Section 3 First (i) of said Act provides in part as follows:

> "(i) The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

There being no definitive interpretation of said quoted section of the law, we believe Congressional intent was to require only that the remedies on the property must first be exhausted in the general, common or ordinary way. (See Eckhart v. Swan Milling Company, v. Schaefter, 101 Illinois app. 510).

Section 3 First (u) authorizes the Board to "adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section." It seems clear that the Board cannot by rule either extend or limit its jurisdiction: at any rate, it has not attempted to do so, but after copying in its Rules of Procedure part of Section 3 First (i) has merely added: "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act * * *."

Jurisdictional means pertaining to jurisdiction and the meaning of the two terms, jurisdictional and procedural must be determined. Bouvier's Law Dictionary defines jurisdiction as follows: "The right to adjudicate concerning the

subject matter in a given case." To constitute this there are three essentials. **First:** the Court must have cognizance of the class of cases to which the one to be adjudicated belongs. **Second:** the proper parties must be present. **Third:** the point decided upon must be, in substance and effect, within the issue. There are a number of definitions of "jurisdiction" taken from corpus juris secundum, set out in Award 9578 (Johnson), which are herewith referred to.

Procedure has been defined in Bouvier's as "the method of conducting litigation and judicial proceedings. It includes in its meaning whatever is embraced in the three technical terms, pleadings, evidence and practice. And practice in this sense means those legal rules which direct the course of proceeding to bring parties into the Court and the course of the Court after they have been brought in."

It is clear to this Board that the questions raised here are procedural ones and as such are subject to defenses such as waiver. The bar of the statute of limitations is an affirmative defense and cannot be availed of by a party who fails, in due time and proper form, to invoke its protection. (34 American Jurisprudence, Limitation of Actions, Section 428: 53 Corpus Juris Secundum 936, Limitation of Actions, Section 13, Section 24, Finn v. United States, 123 U.S. 227.) Bouvier's Law Dictionary states, after defining waiver, "It is required of everyone to take advantage of his rights at a proper time; and neglecting to do so will be considered a waiver."

We hold under all the facts herein that the Carrier waived its right to invoke the Rule concerning time of appeal by not invoking it on the property at the time of the appeal to the Manager, Labor Relations. We will therefore, determine this case on the issues presented on the property.

The particular facts with reference to this claim are as follows:

"Prior to the year 1955 it was the practice for individual storekeepers on the property during the latter months of the year to forward to the office of the General Storekeeper blanket requisitions to cover certain of their requirements for materials and supplies for the subsequent year. Each of these blanket requisitions covered a single commodity required by the storekeeper in the course of the next year. Each requisition was to serve as a basis of an order to a supplier authorizing him to deliver the commodity ordered according to the individual storekeeper's needs during the course of the coming year.

The General Storekeeper's office would review each blanket requisition submitted and indicate any necessary corrections, such as a change in the name of the supplier, or eliminate any requisition which involved duplication. This work was done by the General Storekeeper or his assistants and not by clerks.

When the blanket requisition had been approved as submitted, or modified, it would be turned over to the Service Bureau for the preparation of the order. The blanket requisition had been prepared and submitted by the individual storekeepers on a duplimat form and was therefore ready upon receipt in the General Storekeeper's Office to be reproduced on the rotary and duplimat machine. If no change was made in the requisition it would be converted into an order by simply placing the form on the machine and running off the necessary copies. If changes were made they were indicated by the General Storekeeper

and were placed by the clerks on the duplimat form submitted by the individual storekeepers, and the forms were then placed on the machine by the clerks and run off. The work performed by clerks in the Service Bureau thus consisted of placing the duplimat form on the machines, and operating the machines to make the necessary copies. They also made any necessary changes in the forms before they were run off.

The orders were then removed from the machine and handed to the mail desk which distributed them as required to the suppliers, the individual storekeepers, the auditors, etc.

In 1955 the following changes occurred in the method of handling these orders.

Blanket requisitions submitted by the storekeepers for that year were checked by the Office of the General Storekeeper. They were then turned over to the Insurance Department which had IBM machines available. On the basis of the requisitions, IBM cards were prepared which covered each requisition, indicating by appropriate means the order number, commodity covered, supplier named, consignee (storekeeper) and other necessary information. The IBM cards were then placed in the IBM machine, the machine was then placed in operation and printed the necessary orders which were removed from the machine by the operator thereof. The work required in this process involved placing the cards in the IBM machines and the removal of the printed orders and cards after the machine had reproduced the orders.

Thereafter the orders were delivered to the mail desk which distributed them in the same manner as they had distributed orders prepared on the duplimat machines.

In subsequent years blanket requisitions were no longer required to be submitted by individual storekeepers. Instead, toward the end of the year, the IBM cards are placed in the IBM machines and run through. The machine prints the information coded on the cards onto a list broken down by separate regions, which list thus indicates all current orders. These lists are then sent to the Regional Storekeepers who are requested to indicate on them any changes or additions in their needs for the coming year. When these lists are returned, necessary changes are made on the IBM cards and it is then possible to produce the orders for the next year by merely placing the cards in the IBM machines, which print the orders in the requisite number.

The changed method thus eliminates the submission of individual blanket requisitions by the storekeepers on the property. It is no longer necessary to duplicate these requisitions on the machines in the Service Bureau. Instead orders are produced by the IBM machines in the Insurance Department. The Insurance Department is not a part of the Stores Department seniority district.

Prior to the year 1955 an average of 4,000 blanket requisitions per year was processed at the Office of the General Storekeeper and reproduced in the form of orders on the rotary and duplimat machines, as described above. The time required to perform the work in the Service Bureau was approximately 16 hours per month over a 5 month period. In other words, about 80 hours' work per year was involved.

The time required to produce approximately the same number of orders on the IBM equipment in the Insurance Department was approximately 14 hours total operation time which would be about 3 hours per month if it were performed over a 5 month period.

No clerical positions in the Service Bureau of the Stores Department were abolished as a result of this change in operations."

It is the claim of the Organization that Carrier violated Clerks Rules Agreement, effective May 1, 1942, particularly Rules 2-A-1(a), 3-A-1(a) and 3-E-1(a) and (b) which rules read as follows:

"2-A-1. (a) (Effective September 1, 1949) All new positions or vacancies known to be of more than thirty days' duration, will be bulletined on Wednesday, or on the succeeding working day when such Wednesday is a holiday, following the date they occur, in the seniority district, for a period of five days in places accessible to employes affected. Bulletin will show position, location, primary duties, tour of duty, start of work week, days of rest, rate of pay, symbol number where such number has been assigned to the position, and whether position or vacancy is of a permanent or temporary nature. A position which it is anticipated will be of six-months' or more duration will be bulletined as a permanent position. Copies of bulletins and notices of award will be furnished the Division Chairman.

Bulletins advertising seasonal positions in addition to stating that the position is of a permanent or temporary nature will also state it is a seasonal position.

Temporary vacancies which become permanent, through any cause, shall be re-bulletined."

"3-A-1. (a) Except as provided in paragraph (c) of this rule (3-A-1) and Rules 3-B-2, 3-D-1, 3-E-1, 3-E-2, 3-E-3 and 3-E-4, seniority begins at the time the employe's pay starts in a seniority district on a position covered by this Agreement."

"3-E-1. (a) Employes whose positions are transferred to another seniority district will, if they choose to follow such positions, carry their seniority with them and will retain and continue to accumulate seniority in their home seniority district. Employes not electing to follow their positions may exercise seniority in their home seniority district under Rule 3-C-1.

Employes transferring without their positions from one seniority district to another will rank in new seniority district from date of transfer, but will retain and continue to accumulate seniority in their home seniority district."

There is no dispute between the parties that the Clerk's Organization for many years had, as a part of their work, done the processing of blanket requisitions on rotary and duplimat machines operated by clerks in the Service Bureau now in the office of the General Storekeeper until the early part of

1955, when this work which required sixteen (16) hours a month over a five (5) month period, making a total of eighty (80) hours, was transferred by the Carrier to its Insurance Department of the Carrier where such work is now done on IBM machines which Carrier had in said Insurance Department and that such work thereafter was performed in approximately 15 hours over a five (5) month's period.

It is the claim of the Organization that the transfer of this work without negotiation or agreement constituted a violation of the Rules herein cited.

Carrier's position is that work was not transferred, but that its action constituted an elimination of work done by manual and mechanical means in the Service Bureau by being absorbed by an automatic machine. Carrier asserts it was within its rights and that the only rule which places a limitation on its rights is Rule 3-E-1, but that Rule is inapplicable since the rule deals only with positions. It has been held by the Board that positions and work are synonymous. Awards 9419, 4667.

It is further contended by the Carrier that if it is assumed there was a removal of work from the Stores Department, it is clear that the removal involved a very small amount of work.

In this particular case, it is true that the transfer of this work did not abolish the positions of the named and unnamed claimants, nor did it affect their pay: no new positions were established in the Insurance Department. The effect of this transfer did take 80 hours of work from the clerks in Carrier's Stores Department.

As to the contention of Carrier that only a small amount of work, i.e., 80 hours, is involved, there is no question but that this work belonged to the Clerks in Carrier's Stores Department. Work of a class is made of many small items of work and this Board has held that to "open the door at all is to invite a further entrance until it is completely open and the Agreement made ineffective." (Award 6284). The word position, when used in connection with an agreement, has been properly defined by this Division as: "positions which are subject to this Agreement are protected to the craft by the Agreement and since work is the essence of a position such work is the manifestation of the position and the identity of it is likewise protected to the craft." (Award 1314).

Several Awards have been cited wherein this Division has held that certain changes did not constitute the transfer of work from one seniority district to another seniority district but on the contrary they involved the installation of new equipment which eliminated certain work steps and therefore certain positions and these Awards have held that such changes do not constitute violations of the Agreement. Award 3051 involved a case where a reperforator instrument was installed in Carrier's Department which eliminated the retransmission of messages originating with another Carrier. In that case, it was held that no work was 'farmed out', and the installation of this labor-saving machine could not be construed as taking work from the scope of the Agreement. A similar holding was made in Award 4063, where the installation of a private line telephone circuit eliminated the need of a switchboard operator: Award 6416, wherein the installation of an automatic elevator eliminated the need of an elevator operator: and a number of other Awards, none of which involved the transfer of all or a certain portion of work to another Division where new equipment was available.

Award 9446 cited by Carrier is distinguishable from the instant case. It involved the installation of new equipment in one seniority district which eliminated certain work steps and therefore certain positions in another seniority district. Each district had previously performed parts of this and after installation of said new equipment continued to do so. New positions were established to handle the new work in both divisions. The nine who lost their positions were allowed, in accordance with the Rules, to bid for new positions in both districts, four in their same seniority district and five in the other district.

As stated in said Award, "It seems clear from the record that these changes did not constitute the transfer of work."

Carrier also contends that the claim should be disallowed because the action of the Carrier in transferring said work did not affect the pay of the Claimants and they suffered no wage loss. This claim is to enforce the seniority Rules of said Agreement and not for work performed. There was no monetary loss involved.

We hold that the removal of the work involved, without Agreement, was a violation of the seniority Rules of said Agreement and that such work should be restored to the Clerks in the Carrier's Stores Department, and the case is remanded to the parties for disposition, in accordance with this 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 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 Agreement was violated.

AWARD

Claim allowed as set forth in the Opinion and remanded to the parties for disposition in accordance with the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

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