Award No. 11496
Docket No. CL-11127

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY

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

(a) That Carrier failed to comply with Article V, Appendix No. 4 to the parties' agreement of February 1, 1938, which is a reproduction of the National Agreement dated Chicago, August 21, 1954, in handling claims filed by and on behalf of E. L. Hord, General Clerk, and J. P. Dexheimer, Yard Clerk, Taylorville, Illinois.

(b) That claims of E. L. Hord, General Clerk and J. P. Dexheimer, Yard Clerk, be allowed as presented, i.e.;

1. Hord's claim for a call or two hours' pay at overtime rate for Saturday, July 20, 1957 and Saturdays of each week thereafter until the rule violation was corrected on January 27, 1958.

2. Dexheimer's claim for a call or two hours' pay at overtime rate for Monday, July 15, 1957, and the Mondays of each week thereafter until the rule violation was corrected on January 27, 1958; also one hour at overtime rate for Tuesday, July 16, Wednesday, July 17, Thursday, July 18 and Friday, July 19, 1957 and for the Tuesdays, Wednesdays, Thursdays and Fridays of each week thereafter until the rule violation was corrected on January 27, 1958.

EMPLOYES' STATEMENT OF FACTS: Prior to July 12, 1957, the Carrier maintained the following clerical positions at Taylorville, Illinois:

One General Clerk, rate $17.41 per day — assigned hours 8:00 A. M. to 5:00 P. M. Monday through Friday with Saturdays and Sundays as rest days. Five day per week position. Assignee, E. L. Hord.

All data in support of the carrier's position in connection with claims has been presented to the duly authorized representative of the employes and is made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The question presented is whether Carrier failed to comply with Article V 1. of the National Agreement of August 21, 1954.

The merits of the Claim are not before us.

The pertinent provisions of Article V are:

"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 disallowanced 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.

"(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes . . ."

THE FACTS

Individual claims were filed by Claimants with Carrier on August 19 and 20, 1957. These claims were denied by the Assistant Superintendent of Transportation and Equipment on October 2, 1957. Appeal was perfected to the Superintendent Transportation and Equipment, herein called Superintendent, on November 27, 1957. He did not disallow the claims in writing until April 18, 1958 — more than 60 days after the appeal was filed. The Superintendent's disallowance was appealed, on June 15, 1958 to the Manager of Personnel.

This last appeal was for allowance of the claim as presented citing Article V 1. as controlling. It was disallowed on June 27, 1958.

While the claims were pending before the Superintendent a conference between the parties was held on December 17, 1957 which was recessed for the development of additional facts. Conferences scheduled for December 23 and 26, 1957 were cancelled. The parties did meet on March 28, 1958 and entered into a Joint Statement of Facts on April 17, 1958. As set forth, **supra,** the Superintendent disallowed the claim, in writing, the following day.

CONTENTIONS OF THE PARTIES

The Employes contend that the Superintendent, on appeal, having failed to disallow the claims within 60 days from the date the appeal was filed with him, failed to comply with Article V 1; and, therefore, the claim, by mandate of that Article, must be allowed as presented.

Carrier contends that: (1) Employes, by attending conferences, after the 60 day period had run, at which the merits were discussed, waived the time limitation prescribed in Article V 1; and, (2) the appeal to the Manager of Personnel on the predicate of a violation of Article V 1. was not timely made — asserting that Article V 1. requires that the appeal be taken within 60 days from the date on which the time limitation expired as to the Superintendent.

RESOLUTION OF THE ISSUES

The only way the time limitations established in Article V 1. can be extended is "by agreement" of the parties (Article V 1. (b)). When Carrier proffers an affirmative defense that such an agreement was entered into, it has the burden of proof. The evidence, in this case, upon which Carrier relies is the postponement of conferences within the 60 day period and the holding of conferences on the merits after the expiration of the time limitation. This evidence does not prove an "agreement," expressed or implied, to extend the time limitations.

The Carrier's argument that a discussion on the merits of a case, after Carrier's failure to comply with the time limitation requirements, constitutes a waiver of such limitations, is wholly unrealistic. It is opposed, indeed, to the underlying enunciation of legislative directive in The Railway Labor Act; specifically, the parties should "exert every reasonable effort to make and maintain agreements." (RLA Sec. 2 (1), First and Second). We repeat, the only way the time limitations prescribed in Article V 1 can be extended is "by agreement" of the parties. This is not harsh. The parties are conclusively presumed to have knowledge of the requirements of the contract.

Carrier's contention that Employes are required to file an appeal within 60 days of the Carrier's failure to comply with a time limitation finds no support in Article V 1. The time limitation as to appeals is found in 1 (b) of Article V. It provides that the appeal "must be taken within 60 days from receipt of notice of disallowance." Since the written notice of disallowance by the Superintendent, in this case, was dated April 18, 1958; and, appeal therefrom was filed within 60 days thereafter (June 15, 1958), the appeal was timely filed.

We find, upon the record, that Carrier has failed to prove that the time limitations prescribed in Article V 1 were extended "by agreement" of the parties. Also, we find that the Superintendent did not disallow the claim, in

writing, within 60 days from the date the appeal was filed with him. Therefore, upon the foregoing reasons and findings we must, by mandate of Article V 1, sustain the claim "as presented".

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 Carrier violated the Agreement.

AWARD

Claim sustained as presented.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of June 1963.

CARRIER MEMBERS' DISSENT

to

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The Majority erred in their conclusion in this case, particularly when they state that Carrier did not prove the time limits had been extended "by agreement". The Majority also incorrectly concluded the Petitioner's conduct did not constitute waiver when the facts clearly showed that the Organization discussed the claims solely on the merits with no hint of a time limit question involved subsequent to the time limit period having expired.

The Majority was referred to Second Division Award 3685 (Johnson), involving the precise question and factual situation which we were faced with here, and there the Board found that the parties' conduct "evidence or constitute an agreement to extend the time limit, which had already run." The similarities in the two cases are so clearly apparent, there is no reasonable excuse for failing to follow the award.

As stated, the Majority also failed to acknowledge the application of the doctrine of waiver to our facts when it clearly applied and called for a dismissal award. The facts show that the claim was handled on its merits at two successive conferences and the Joint Statement of Agreed Upon Facts was completed, all after the date when the alleged violation of Article V by Carrier occurred. Yet, Petitioner never mentioned the Article V violation at any point during the course of these conferences. Indeed, it was not mentioned until

June 12 and the conferences were held in March and April. In Award 11126, the Board seized upon Carrier's failure to discuss the procedural defects at one point as constituting a waiver by Carrier. If our awards are to earn the respect to which sound decisions are entitled, then we must apply the principles regardless of the identity of the offending party. In this case, the Organization waived any objection they had to an alleged Article V violation allegedly committed by the Carrier when they discussed the claims involved — on their merits — with no reference whatsoever to an Article V infraction. In this respect, the present award is also in error.

For the reasons stated above, we dissent.

W. F. Euker

R. E. Black

R. A. DeRossett

G. L. Naylor

W. M. Roberts