

Award No. 12633

Docket No. MW-11752

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The Chief Engineer failed to comply with the procedural requirements of Section 1 (c) of Article V of the August 21, 1954 Agreement in his handling of the claim (Carrier's file, Case No. 1.59 M.W.) which was appealed to him by former General Chairman McGuire on May 15, 1956.

(2) Because of the violation referred to in Part (1) of this claim, the Carrier now be required and directed to allow the claim as presented and appealed.

EMPLOYEES' STATEMENT OF FACTS: In a letter dated February 20, 1956, a claim was presented to Division Engineer Crowley (the Carrier officer authorized to receive it) which reads:

**"February 20, 1956
1-11**

Mr. E. E. Crowley
Division Engineer
Delaware and Hudson Railroad Corporation
Albany 1, New York

Dear Sir:

On January 30, 1956, and on various dates subsequent thereto employees having no seniority in the Maintenance of Way Department have been required to remove snow and ice from switches at numerous locations on the Champlain Division, which work has heretofore been performed by track forces.

Will you please advise whether or not it will be agreeable to discontinue having trainmen perform this work and to allow track forces who were deprived of the opportunity of performing such work, a wage adjustment to provide them with pay for the same

employees were claiming an award because of the alleged failure of the Company to deny the claim within the 60-day time limit in Article V, the Carrier urging that the claim was not properly presented because the grievred employee was not named. The Board stated:

'We are of the opinion that the 60-day period mentioned in the above agreement is mandatory and not directory, but such provision does not come into existence unless and until a valid claim is filed.'

The Claim was denied.

This Board must uphold the agreement made in Article V, and under the facts presented we hold that the 'notice in writing' is mandatory and not regulatory and that the alleged notice in the record at the investigation was not such notice as was contemplated by the parties in presenting this grievance. There was no notice to the Carrier instituting the grievance, and therefore, there was a failure to properly present this claim, and the Carrier may raise that issue at any time."

Carrier respectfully requests that claim be denied or dismissed.

(Exhibits not reproduced.)

OPINION OF BOARD: An analysis of the facts of record discloses the following:

The claim, in general terms, was initially presented to the Carrier on February 20, 1956;

It was denied on March 27, 1956;

This denial was appealed by the Organization on May 15, 1956;

August 10, 1956, the claim was discussed in conference;

August 13, 1956, the Organization furnished dates and locations where trainmen were used instead of track forces;

October 11, 1956, the Carrier again discussed the claim in conference with the Organization;

October 22, 1956, the Organization furnished the Carrier with some additional information concerning the matter in dispute;

February 25, 1958, Carrier again requested the Organization to furnish some additional information, including the names and occupations of the employees involved;

Note especially that on April 1, 1958, the Organization complied with Carrier's request of February 25, 1958, and supplied detailed information as is set forth in the Organization's letter of April 1, 1958, which contains an attachment of two pages;

May 22, 1958, the Organization requested a reply to its letter of April 1, 1958;

May 26, 1958, Carrier requested further discussion at the next conference between the parties;

January 6, 1959, the claim was again discussed in conference;

Note particularly that on January 14, 1959, the Carrier's Chief Engineer made a proposal to settle the matter;

The Organization's General Chairman advised the Chief Engineer on March 6, 1959, that the settlement proposal was unsatisfactory and requested payment in accordance with Article V of the August 21, 1954 Agreement;

March 6, 1959, the Organization appealed to the Carrier's Manager of Personnel, asserting forfeiture as of July 15, 1956, because of the Carrier's Chief Engineer's failure to render a decision on the appeal to him dated May 15, 1956;

May 1, 1959, Carrier's Manager of Personnel denied the claim;

After notifying Carrier on January 22, 1960, that it would submit the dispute to the Board, finally, the same was so submitted on February 19, 1960.

The parties to the instant case both agree that the matter is not before the Board on the merits, but issue has been joined solely on two narrow procedural points, viz: — the Organization contends that the Carrier did not comply with the time limit requirement of making a written dismissal within 60 days as required by Article V of the National Agreement of August 21, 1954; the Carrier takes the position that the claim was defective ab initio because it was for unnamed employees and was otherwise vague and indefinite.

The record shows that between the time when the initial claim was filed by the Organization, February 20, 1956, and April 1, 1958, the Organization did, in fact, provide the Carrier with detailed, specific information, including the names and occupations of the employees involved and the dates and hours of work when the Organization alleges the Claimants should have been called to perform the work in question. (See, especially, Petitioner's letter to the Carrier's Chief Engineer, dated April 1, 1958.)

The record also shows that the parties were discussing the instant claims on the merits from February 20, 1956, until January 14, 1959, at which time Carrier made a concrete proposal to the Organization to settle the matter. At no time during this period did either of the parties affirmatively raise the procedural questions which form the basis for the narrow issue presented to the Board by the parties. The Organization's General Chairman advised the Carrier on March 6, 1959, for the first time on the property that the settlement proposal was unsatisfactory, and requested payment in accordance with Article V of the August 21, 1954 Agreement. We, therefore, hold that the procedural objections of both Carrier and the Organization were waived as to the entire period from February 20, 1956 until March 6, 1959. On March 6, 1959, the Organization appealed to the Carrier's Manager of Personnel, asserting forfeiture as of July 15, 1956. Thereafter, and well within 60 days, on May 1, 1959, the Carrier's Manager of Personnel denied the claim.

Both parties were guilty of laches and by actively participating in discussions of the dispute on the merits, we hold that both parties also waived their respective procedural points which form the basis of the instant case before the Board. See Second Division Award 3685 and Awards 10576, 11752, 6769, 9492, 11570 and 11338.

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 procedural points urged by both parties are without merit and are hereby dismissed.

AWARD

Under all the above circumstances, the claims will be dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1964.