Award No. 12767
Docket No. MW-11781

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on June 22, 23, 24 and 25, 1958 it used employes from Section No. 64 (Grayville) to patrol track during overtime hours on Section No. 66 (Stewartsville), instead of using available employes from Section No. 66.

(2) Trackman Paul Hoehn, Jr., and R. M. Gentz, regular employes from Section No. 66 each be allowed pay at time and a half rate for each hour consumed by employes from other Sections in performing the overtime work referred to in Part (1) of this Claim.

EMPLOYES' STATEMENT OF FACTS: The Claimants were regularly assigned to Section No. 66 at Stewartsville.

During overtime hours on June 22, 23, 24 and 25, 1958, the Carrier assigned and used two employes, who were regularly assigned to Section No. 64 at Grayville, to patrol the tracks on the territory comprising Section No. 66.

The Claimants were available, ready and willing to perform overtime service on the territory comprehended in their Section (No. 66), but were not called or notified to do so.

The Agreement violation was protested and the instant claim was filed in behalf of the claimants. The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated September 1, 1934, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1 reads:

"Seniority begins at the time the employes' pay starts."

OPINION OF BOARD: Preliminarily, and before the instant case can be reached on the merits, the Carrier has raised a threshhold question to the effect that the Board lacks jurisdiction. Carrier alleges that the Organization did not appeal this claim to the Board until February 1, 1960, which is not within the nine (9) month limitation provided in the Agreement.

The facts, as they pertain to this procedural question, are as follows: The record reveals that the instant claim was declined by the Carrier's highest designated officer on May 1, 1959. The Organization did not appeal the said claim to the Board until February 1, 1960.

Paragraph 1 (c) of Article V of the National Agreement dated August 21, 1954, in pertinent part, reads as follows:

> "(c) The requirements outlined in paragraph (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. All claims or grievances involved in a decision by the highest designated officer **shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board * * *.**" (Emphasis ours.)

It is the Carrier's contention that the nine months time limit expired on January 31, 1960 and that therefore, under the facts in the instant case, the Brotherhood instituted the instant proceedings one day late and, accordingly, the Adjustment Board is without jurisdiction to decide the case.

The threshhold question turns on the legal interpretation of the meaning of the words "* * * shall be barred **unless within 9 months** from the date of said officer's decision proceedings are instituted * * *." In support of its position, Carrier calls to our attention **In Re Custer,** 55 F (2d) 718:

> "The term 'months' employed in statutes, and not appearing to have been used in a different sense, denotes a period **terminating with the day of the** succeeding month numerically corresponding to the day of its beginning, **less 1. 5 Words and Phrases, First Series,** page 4575." (Emphasis ours.)

In further support of its position, Carrier cites, to the same effect, **Baxter v. Bevil Phillips & Company,** 219 F. 309.

The Organization resists Carrier's interpretation of the 9 months time limit by setting forth, in its Oral Argument, Carrier's citation of the Custer case, discussed supra, as follows:

> "* * * it will be noted that the term 'months' is defined as the period which terminates **with the day of the succeeding month which numerically corresponds to the day of its beginning.**"

The Board wishes to call attention to the fact that the above portion of the language of the Custer case, quoted by the Organization, is not accurate in that it is incomplete, viz: after the word "beginning" there is a comma, not a period, and the balance of the sentence contains two significant additional words, viz: — "less 1". The Organization cites in support of its position and

interpretation Awards 5187 and 9578, but these citations are not apposite because both of them deal with the interpretation of time limits which deal only with "days" and not "months" or a longer period like "years".

After the Board released its Award in the instant case, the Organization submitted a Supplemental Brief which contains copious references to cases not previously called to our attention. It contended that we were in error on the law and requested a reconsideration of the first proposed Award and a decision on the merits of the case.

A careful study has been made of the material contained in this Supplemental Brief and further study was made of additional court cases not cited in the said Brief.

The point at issue is whether or not the computation in the instant case should have been measured from May 1, 1959 (on which date the claim was disallowed by the Carrier's highest officer) or whether the actual day of declination should be excluded from the computation thus causing the measuring of time to commence on May 2, 1959.

The pertinent portion of the provisions of Article V to be construed reads:

> "* * * Unless within nine months from date of said officer's decision, proceedings are instituted * * *."

In **Taylor v. Brown,** 147 U. S. 640, the Supreme Court held, in computing the time during which the alienation of public land acquired by an Indian under the provisions of a statute of March 3, 1875 is forbidden, the day of the issue of the patent should be included. The decision contains the following discussion:

> "* * * in **Arnold v. U. S.,** 9 Cranch, 104, 120, * * * it was held that a statute providing that it should take effect 'from and after the passing of this act' took effect immediately, Mr. Justice Story said that 'it is a general rule that when the computation is to be made from an act done, the day on which the act is done is to be included * * *.
>
> Possibly the language is susceptible of being construed to mean that the land should be inalienable on the day of the issue of the patent and for five years after that date, two periods of time, but we are of the opinion that the more natural and the true construction is that only one period is referred to, and that the day the patent issued should not be excluded. The limitation on alienation was to be on the first day not subject to alienation, and so to remain until the five years had expired." (Emphasis ours.)

Shepard's Citations, starting with 147 U. S. 640, under the heading: "Time Computation — Inclusion of First Day" cites to the same effect **Honolulu Transit Co., v. Wilder,** 211 U. S. 137 and **Lanham, Administrator of Lanham, et al., v. McKeel,** 244 U. S. 583.

Based on the above cases the Board finds that in order to have avoided the time limitations, the Organization must have filed its appeal before midnight on January 31, 1960. Since it waited one day too long, the time limits expired at midnight, January 31, 1960, and the claim is therefore barred.