Award No. 13097
Docket No. TE-11519

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Levi M. Hall, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY

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

1. Carrier violated the agreement between the parties when it failed and refused to pay C. G. Johnson his regular pay on September 30, 1958 which in transit to transfer to another position.

2. Carrier shall compensate C. G. Johnson in the amount of one day's pay at the rate of second shift telegrapher position at Gest Street Yard, Cincinnati, Ohio.

EMPLOYES' STATEMENT OF FACTS: The agreements between the parties are available to your Board and by this reference are made a part hereof.

Mr. C. G. Johnson was the regularly assigned occupant of Relief Position No. 1, Gest Street Yard, Cincinnati, Ohio with the following assignment:

Sunday	First trick	7:00 A. M. to 3:00 P. M.
Monday	First trick	7:00 A. M. to 3:00 P. M.
Tuesday	Second trick	3:00 P. M. to 11:00 P. M.
Wednesday	Second trick	3:00 P. M. to 11:00 P. M.
Thursday	Third trick	11:00 P. M. to 7:00 A. M.

Friday and Saturday — rest days.

On September 9, 1958 the following job bulletin was issued by the Chief Dispatcher at Somerset, Kentucky:

(2) Under the hours of service law, had Claimant Johnson worked the second trick telegrapher position at Cincinnati, 3:00 P. M. to 11:00 P. M. on Tuesday, September 30, 1958 he could not have worked an eight-hour assignment beginning at 7:00 A. M. on the following day, regardless of whether such assignment be at Cincinnati, Burgin, or at any other point on the CNO&TP seniority district.

(3) Claimant Johnson's five-day relief telegrapher assignment at Cincinnati consisted of two days on the first trick Sunday and Monday, two days on the second trick Tuesday and Wednesday, and one day on the third trick on Thursday, with rest days of Friday and Saturday. Carrier shows below how claimant would have worked during the seven-day period beginning Sunday, September 28, 1958, had he remained on the relief assignment at Cincinnati, and how he actually worked during the same period as a result of transferring in the exercise of his seniority and bidding rights to the vacancy in the agent-telegrapher position at Burgin:

Cincinnati		Cincinnati – Burgin
7:00 A. M. to 3:00 P. M.	Sun., Sept. 28	7:00 A. M. to 3:00 P. M.
7:00 A. M. to 3:00 P. M.	Mon., Sept. 29	7:00 A. M. to 3:00 P. M.
3:00 P. M. to 11:00 P. M.	Tues., Sept. 30	—
3:00 P. M. to 11:00 P. M.	Wed., Oct. 1	7:00 A. M. to 4:00 P. M.
11:00 P. M. to 7:00 A. M.	Thurs., Oct. 2	7:00 A. M. to 4:00 P. M.
Rest day	Fri., Oct. 3	7:00 A. M. to 4:00 P. M.
Rest day	Sat., Oct. 4	Rest day
5 days	Total	5 days

From this it is readily apparent that, in transferring to the vacancy at Burgin in the exercise of his seniority and bidding rights, claimant worked the same number of eight-hour days that he would have worked had he elected not to apply for the position at Burgin. It is also quite evident that the provisions of Rule 14 of the printed agreement were not violated and had no application, since claimant lost no time or compensation whatever in transferring to the assignment on which he placed himself.

For the reasons set forth herein, carrier has shown that the claim should be dismissed account not discussed in conference as required by the Railway Labor Act and the regulations contained Circular No. 1 of the Adjustment Board, and further that the claim is wholly unsupported by the provisions of the effective agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: Before entering into a consideration of this claim on the merits it would be well for us to review the question presented by the Carrier as whether or not this dispute is properly before us inasmuch as the matters involved herein were not handled or considered in conference on the property by the duly authorized representatives of the Employes and the Carrier, as required by Section 2, Second of the Railway Labor Act, approved June 21, 1934, and Circular No. 1 of the National Railroad Adjustment Board, issued October, 1934. There has been a divergence of opinion in the awards of the Third Division on this subject.

Provisions of the Railway Labor Act directly pertaining to the necessity of holding a conference between parties to a dispute are contained in Section 2, First, Second and Sixth which are, as follows:

> "First. **It shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements** concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof.
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> Second. **All disputes between a carrier or carriers and its or their employes shall be considered,** and, if possible, decided, with all expedition, **in conference between representatives designated and authorized so to confer,** respectively, by the carrier or carriers and by the employes thereof interested in the dispute.
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> Sixth. In case of a dispute between a carrier or carriers and its or their employes, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, **it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employes, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held:** . . . And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." (Emphasis ours.)

Circular No. 1 of the National Railroad Adjustment Board — Organization and Certain Rules of Procedure — provides, as follows:

> "First. **It shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements** concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof.
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> Second. **All disputes between a carrier or carriers and its or their employes shall be considered,** and, if possible, decided, with all expedition, **in conference between representatives designated and authorized so to confer,** respectively, by the carrier or carriers and by the employes thereof interested in the dispute." (Emphasis ours.)

It is extremely important that the word "shall" is used both in Section 2, Second, of the Railway Labor Act and in Circular No. 1 of the National Railroad Adjustment Board adopted to effectuate the enforcement of the provisions of the Railway Labor Act. That a meeting of the parties is contemplated is indicated in Section 2, Sixth, of the Railway Labor Act wherein it is stated that "within ten days after the receipt of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held . . ."

It has been indicated in a number of awards of this Division that no conference on the property is necessary before appealing to this Board for the following reasons: (1) Because the issue was not raised on the property it cannot be considered here; (2) that where there has been a final declination of a claim by the highest authorized personnel officer of a Carrier it would be a vain gesture to hold a conference; (3) that Carrier not having, itself, requested a conference, cannot defeat consideration of the claim here; (4) that the Railway Labor Act and Circular No. 1 do not make it mandatory that a conference be held between the parties prior to submitting it to the Board and that a conference is only necessary when requested by one of the parties.

Some of these holdings have indicated that such views were expressed for equitable considerations. This Board has no equitable jurisdiction.

In answer to the first (1) contention, the question of a failure to hold a conference could not have been presented until the Submission of matters in dispute to this Board.

It is quite significant that in the Railway Labor Act the word **"shall"** is used in Section 2, First, and, more particularly, in Section 2, Second, as follows: **"All disputes between a carrier . . . and its . . . employes shall be considered . . . in conference** between representatives designated and authorized so to confer." (Emphasis ours.)

The word "shall"; generally, and as therein used is not a permissive word but is a directive and a mandate. It means, positively, that a conference be held whether or not the one requesting or demanding such a conference considers it a vain or useless thing. In the instant case there is no claim that any conference was held nor that any was requested by the Organization. The Organization is the moving party before this Board. If the Petitioner wants to invoke the action and assistance of this Board in adjusting a dispute between the Petitioner and the Carrier, Petitioner must demonstrate that every effort to settle this claim has been exhausted on the property and that includes the requirement of the Railway Labor Act that a conference be held between the parties. It wasn't up to the Carrier to do so as Carrier is not the moving party before this Board (the record discloses Carrier did suggest a conference).

Petitioner relies on Award 10675. In that award, after having made the following statement:

> "As the Carrier contends, Section 2, Second of the Act expressly requires all disputes to be considered in conference before being considered by the Board. Without more, an almost unimpeachable argument could be made that such a conference is a condition precedent to review by the Adjustment Board. Especially is this true because Congress intended it to be this way.",

an attempt is made to indicate that Section 2, Sixth, of the Railway Labor Act reads into Section 2, a qualification of Section 2, Second, and that, consequently, a conference is only necessary when requested and is not mandatory. If we accept this conclusion we would have to indulge in the following assumption — that the simple procedure for setting up a conference as outlined in paragraph Sixth was intended to conflict with the mandatory provisions in paragraph Second. This is contrary to the accepted rules of statutory construction. It is a rule of construction that any reasonable interpretation of two provisions in a statute that will avoid conflict between the two must be adopted in preference to a construction that creates conflict.

The Sixth paragraph merely sets up a method of procedure and provides time limits in which to hold a conference in the event a request is made for a conference. In the instant case had the Carrier denied a request by employes' representative for a conference, or had through dilatory tactics failed to hold one when requested, a different problem would have been presented to the Board. See the following awards: Award 10852 – McGrath; Award 10939 – McMahon; Award 11136 – Moore; Award 11434 – Rose; Award 11484 – Hall; Award 11737 – Stark; Award 11896 – Hall; Award 12290 – Kane; Award 12468 – Kane; Award 12499 – Wolf.

For the foregoing reasons we are compelled to dismiss this cause.

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 does not have jurisdiction over the dispute involved herein.

AWARD

Claim dismissed for want of jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of November 1964.

**DISSENT TO AWARD 13097,
DOCKET TE-11519**

In my opinion this award does not represent a proper functioning of the Adjustment Board, therefore, I feel obliged to state my reasons for disagreeing with it.

But first I wish to make it clear that I have no quarrel with the general idea that personal conferences between representatives of management and employes is the best method of handling grievances. However, like all generalities, this one has exceptions. There are simple grievances where the facts are not disputed, involving a mere difference of opinion, which can very well be handled as effectively by correspondence, telegram, telephone conversation or other means of communication as by personal face to face conference. Numerous awards support this view.

The important thing is that an honest effort shall have been made in good faith by the parties to acquaint each other with their respective positions in an endeavor to reach agreement. The means employed obviously ought to be incidental. But the majority here has said that no matter how thoroughly

the parties have explored their difference of opinion, no matter to what lengths they have gone trying to settle the dispute it all goes for naught if they have not talked to each other personally and literally "across the table".

It reaches this conclusion by what I am forced to consider as specious reasoning and lack of a proper measure of objectivity.

It notes and emphasizes certain portions of Section 2, First, Second and Sixth, of the Railway Labor Act, but reaches conclusions that are inconsistent with the language of these sections.

Section 2, First, plainly enjoins both carriers and employes to exert every reasonable effort to "settle all disputes". It makes no distinction. The parties are equally obligated to comply. But in this award the majority holds that only the Employes ". . . must demonstrate that every effort to settle this claim has been exhausted on the property. . . . It wasn't up to the Carrier to do so. . . ." I believe this clearly supports my view that both specious reasoning and less than complete objectivity led to the decision.

The majority disagrees with the conclusion of Award 10675 on the ground that:

> " . . . It is a rule of construction that any reasonable interpretation of two provisions in a statute that will avoid conflict between the two must be adopted in preference to a construction that creates conflict."

I do not question the truth of that statement. But I do question the manner in which it is applied to the case here. It was applied as if there were no other rules of construction that could be applied. The majority has ignored an equally well known and applicable rule that requires an interpretation giving value to each word if possible. The interpretation here adopted renders ineffective that part of Section 2, Sixth, concerning "notice of a desire on the part of either party to confer . . .".

The majority committed further error, in my opinion, when it accepted the Carrier's assertion that it "suggested" a conference. Specifically, I refer to the parenthetical statement that "the record discloses Carrier did suggest a conference". The record discloses that on January 26, 1959, the Carrier's highest appellate officer wrote to the General Chairman detailing the facts, stating his position concerning the single rule involved, and definitely declining the claim. No mention of a conference, either as a suggestion or otherwise was made. This was the final decision starting the running of the time for appeal to the Board. Then, in its ex parte submission, the Carrier says that another letter, dated February 25, 1959, was written to the General Chairman in which it was "suggested that the claim be listed for discussion in conference . . .". This alleged letter was not introduced into the record.

True, the Employes did not challenge this assertion by the Carrier. And I do not mean to charge misrepresentation. But assertion is not proof. And I am increasingly disturbed by the alacrity with which carriers' assertions are accepted while the employes are put on strict proof.

Returning now to the language of the Railway Labor Act concerning conferences, and assuming, arguendo, that the majority is correct in holding that a "conference" is a condition precedent to submission of a dispute to this Board, does it follow that a personal confrontation is necessary. If so, then "handling on the property" is not completed so as to start the running of time limit

periods until such a confrontation has taken place. In that case all the awards which hold that a conference held subsequent to the first declination of a claim by a carrier's highest officer does not stay the running of the time limit provisions are in error.

Webster's New Collegiate Dictionary (officially provided for use of Board Members) defines the word conference as:

> "Formal consultation or discussion; interchange of views; also, a meeting therefor."

Obviously a "conference" basically entails consultation, discussion, interchange of views. These things can be done in a meeting between the parties, of course. But can they not also be done by correspondence or other means of communication? I believe it is the basic components of the term "conference" that was intended by Congress to be observed. In that sense there certainly was a "conference" between the parties to this dispute.

Finally, even if the view of the majority that the word "conference" must be read as if it has no other meaning than the one indicated in the dictionary as being incidental — "also, a meeting . . ." — is entitled to prevail, the disposition of this particular claim is highly questionable.

Falure of the parties to comply with the procedural requirements, as set out in Section 2, First, Railway Labor Act, should not operate to the advantage of either. The dispute involved both parties. Both were commanded to exert every reasonable effort to settle it. If they failed to comply they should be left in neither better nor worse position than they occupied when the failure occurred. We should have said, in effect, "a plague on both your houses", and remanded the dispute to the parties.

I strongly urged such a disposition of the case, but was rebuffed. Thus the Carrier has been given an unearned advantage never contemplated by the Railway Labor Act — and I dissent.

J. W. Whitehouse
Labor Member