Award No. 15723
Docket No. CL-16653

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Wesley Miller, Referee

PARTIES TO DISPUTE:

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

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6157) that:

1. Carrier violated rules of the Clerks' Agreement when it disqualified Mr. W. R. Henderson from position of Senior Rate Clerk in the System Freight Agency on September 14, 1965.

2. Mr. W. R. Henderson shall now be restored to position of Senior Rate Clerk in System Freight Agency with all rights and privileges unimpaired and paid for all time lost, starting September 15, 1965 and continuing until he is returned to service.

EMPLOYES' STATEMENT OF FACTS: On January 1, 1964, the System Freight Agency was created at the General Offices of The Denver and Rio Grande Western Railroad. A Memorandum of Agreement between The Denver and Rio Grande Western Railroad Company and the Brotherhood of Railway Clerks was signed on November 4, 1963, establishing the System Freight Agency. This Agreement reads, in part, as follows:

"* * * This will result in certain work now being performed at local freight stations on the Colorado and Utah Divisions being transferred to the System Freight Agency and certain work will be abolished. . . . The fundamental scope and purpose of this agreement is to allocate the positions created as a result of the establishment of the System Freight Agency to the seniority rosters affected and to provide protection for defined employes affected by the transfer of work as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment solely due to and resulting from such transfer.

The number of positions transferred or abolished at each location will be figured as a percentage of the total of all positions transferred or abolished other than excepted positions.

(b) The following number of positions are expected to be discontinued and percentage is figured accordingly:

2. Mr. W. R. Henderson shall now be restored to position of Senior Rate Clerk in System Freight Agency with all rights and privileges unimpaired and paid for all time lost, starting September 15, 1965 and continuing until he is returned to service.'

Following receipt of my letter dated September 26, 1966, File CL-4-66, stating that Carrier's records in this case show timely denial of the claim, you advised that you would arrange for a conference to resolve the issue of timely denial as soon as your time and commitments would permit.

Imagine my surprise when informed by Grand President Dennis that the case has been progressed to the Third Division, National Railroad Adjustment Board, prior to Railway Labor Act procedures and requirements being fulfilled on the property.

Yours truly,

/s/ E. B. Herdman
Director of Personnel

JWL:pf"

Employes have not held conference on the property concerning the issue of timely denial of their appeal by the Director of Personnel.

OPINION OF BOARD: On September 9, 1965, the individual Claimant, Mr. Henderson, exercised his seniority, and displaced another employe as Senior Rate Clerk, System Freight Agency, Denver, Colorado. On September 14, 1965, Mr. Greear, the Manager of this Agency, wrote Mr. Henderson that he was disqualified and released effective with the end of the shift that date. Mr. Henderson asked for in writing and was granted a formal Investigation Hearing which was held in Mr. Greear's office October 1, 1965. Mr. Henderson appeared at this hearing in person and with an Organization representative of his choice, Mr. Gallo. Mr. Eno presided. Mr. Greear and one other witness testified in support of Mr. Greear's September 14th decision. Mr. Henderson testified in his own behalf. On October 8, 1965, Mr. Greear wrote Mr. Henderson that the investigation sustained the disqualification. The Manager further added in this letter that the original decision disqualifying Mr. Henderson remained effective.

Although this is a difficult issue to resolve, we do not believe the present claim is before us for decision in regard to the basic merits of the grievance. We conclude that on September 6, 1966, the Organization elected to stand on procedural grounds, namely, that Carrier failed to comply with the Time Limit Rules of Article V of the August 21, 1954 National Agreement.

Consequently, we do not reach the issues pertaining to Mr. Henderson's ability to qualify for the position in question, i.e., whether he was afforded sufficient time and sufficient managerial cooperation.

The Brotherhood appealed the decision of Mr. Greear, the Manager of the System Freight Agency, to Mr. Norwood, the Superintendent of the Denver and Rio Grande Western Railroad Company, by letter dated October 20, 1965. In this letter the appeal is made and the basic claim presented

fully. The claim was denied by Mr. Norwood in a letter dated November 12, 1965. **The record shows this letter makes no complaint that the grievance procedure was improper.** The Organization appealed Mr. Norwood's denial to Mr. Herdman, the Director of Personnel of the Carrier, by letter dated January 7, 1966. The record indicates this letter was not received by Mr. Herdman until January 10, 1966. Mr. Herdman wrote the final denial letter on March 11, 1966. It is not contended that the Organization received this denial letter on March 11, 1966. It must be concluded the denial letter was received by the Organization one or more days after it was mailed, for usually two or three days had transpired between the date of mailing and the date of receipt, e.g., the appeal letter to Mr. Herdman was dated January 7, 1966, but not received by him until January 10, 1966.

The foregoing events resulted in a failure of the Carrier to comply with the Time Limit Rules of Article V, and dictates a finding that Part 1 of the Claim should be sustained and that Part 2 thereof should be sustained for the time period covering September 15, 1965, to and including March 11, 1966.

We must reach the above and foregoing conclusion unless we accept one or more of the Carrier's defenses in regard to procedure. These defenses in the main are:

1. That the claim was not properly filed in the first instance.

2. That a conference was not held on the property in regard to the issue of time limits. And, that procedural defects could be raised by either party with the other at any time before the filing of a notice of intent to submit the dispute to the Third Division — reference being made by Carrier to NDC Decision 5.

3. That Carrier made a timely denial.

4. That, in any event, the Claimant had the duty to mitigate his damages, and that he declined to do this by turning down positions offered him by the Carrier during a period of time up to October 28, 1965, when he was dropped from the service for failure to protect a position to which he had been assigned under the Agreement.

Briefly, we are of the opinion that these defenses are insufficient to justify a dismissal or denial decision, except in regard to limiting Carrier's financial liability up to the time period prior to Carrier's March 11, 1966 final letter of declination.

As to the launching of the Claim initially, Carrier contends the grievance should have been filed with Mr. Greear, the Manager of the System Freight Agency. If there is an exception to the routine order, this case is an outstanding example. Mr. Greear was the officer who disqualified the Claimant initially (four days after he had been on the job), he appeared as a witness against Claimant at the Investigation Hearing, October 1, 1965 [which Hearing was at his office], and on October 13, 1965, Claimant belatedly received a letter from Mr. Greear stating the investigation confirmed the correctness of Mr. Greear's first decision, and that the disqualification of Mr. Henderson as Senior Rate Clerk remained in effect. We cannot escape the fact that at this point the Manager of the System Freight Agency had

already made two written decisions disqualifying Claimant. It is difficult to understand the contention that in view of all of the foregoing circumstances, it was essential that Mr. Greear should have been in the position of declining a grievance a third time before it could be processed. Rule 24 (d) of the Agreement of the Parties provides, in part, as follows:

> ". . . The initial appeal from **the decision of the officer whose decision is appealed** must be made in writing . . . and a copy furnished to **the officer whose decision is appealed.**"
> (Emphasis ours.)

Mr. Greear was the officer whose decision was appealed, and the record shows that when Claimant appealed the decision against him to Mr. Norwood, the Superintendent of the Carrier, on October 20, 1965, carbon copies were simultaneously mailed to Mr. Greear, Manager of the System Freight Agency, and Mr. Herdman, Director of Personnel, the officer empowered to make the last decision in the grievance procedure on the property. By letter of November 12, 1965, Mr. Norwood declined the claim, stating:

> "Hearing upholds decision and action taken; therefore, claim is denied."

This written declination, a carbon copy of which was mailed Mr. Greear, makes no contention that incorrect procedure is involved. The claim was accepted and decided on the merit issue alone.

It should be remembered that shortly after October 20, 1965, the Manager of the System Freight Agency, the Superintendent of the Carrier, and the Director of Personnel were all cognizant of the nature and substance of the Claim and the manner in which it was being processed. Months passed without Carrier's objecting to procedure. Finally, on March 11, 1966, the Director of Personnel wrote a letter to the General Chairman, denying the Claim on procedural grounds, stating, in part: "Mr. Greear's decision has never been appealed properly or timely." By the time this letter was received, the 60 days' time limit for declining a claim under Article 5 of the National Agreement of 1954 had expired. At panel hearing, it was contended ably that since the Claim was still on the property, the issue of noncompliance with the requirements of Article 5 could yet be raised, and NDC Decision 5 was cited as support for this argument. NDC Decision 5 was issued March 17, 1965. Granting that the issue of a procedural defect may be "raised" (or presented) while the Claim is still on the property, the right to raise it belatedly does not mean that the new argumentation must necessarily be accepted as correct and meritorious. We accept the legality of the presenting of the procedural exception out-of-time, but in considering its merits, we deem the point weakened by circumstances akin to estoppel and implied waiver over a considerable period of time. For this and other reasons indicated above, we find the argument that the claim at hand was not properly initiated is untimely and lacking in merit. It is, therefore, rejected. Award 15408 (Lynch). As to the running of the time limits, Award 24 of Special Board of Adjustment No. 564 is cited with approval. And, also, Award 14502 (Dorsey).

The neutral referee has read the numerous Awards presented in behalf of the Carrier. These were found to be distinguishable from the case at hand in varying degrees. A few examples are: Awards 4027 (Second Division –

Johnson), which states, in part: ". . . and the objection was not waived by the Carrier but on the contrary was raised by it **at the first opportunity.**" (Emphasis ours); Award 12490 (Ives), which states, in part: "Thereafter, the **Carrier carefully preserved its exceptions to the Claim during its further progress on the property . . . and no valid basis for implying waiver has been established.**" (Emphasis ours.) Award 9684 (Elkouri) states: "Nor does the Record indicate **any** adequate basis for finding a waiver by the Carrier . . ." (Emphasis ours). Special Board of Adjustment 685 in its decision of January 12, 1965, states in part that one of the Carrier's officers in the chain of appeal "was never notified of the rejection of his decision." Award 11575 (Hall) did not involve a continuing claim, but, instead, had a definite termination date, in contrast to Award 15408. Many other examples could be mentioned, but to do so would be needless indulgence in detail.

Mr. Greear either did or did not study and decide upon the case at hand. If he did (and we are convinced this is the truth of matter) Carrier cannot be heard to complain that he was by-passed. On the other hand, if events made it impossible and/or unreasonable for Claimant to process his claim at the first step, where he should have had the opportunity to obtain an independent decision, then Claimant would not have had the benefit of due process of law, i.e., an independent review of his claim at Step 1. This is why we are convinced Mr. Norwood, as Superintendent, accepted and acted upon this Claim at Step 2 without questioning the procedure used by the Employes. It is reiterated that when this Claim was sent to Mr. Norwood, all concerned had notice of the procedure being used, namely, Mr. Greear and Mr. Herdman. Implied waiver existed from then until after the time limit rules for declination had expired. After expiration of the mandatory time rule, the procedural issue was raised. But, as in Award 15408, we conclude that although the procedural issue could still be raised, we cannot accept this untimely argumentation as meritorious or persuasive.

It is contended by Carrier and in behalf of Carrier that conferences were not held on the property in regard to all of the key issues involved, including Article 5 of the 1954 National Agreement. We have scrutinized the Record, and believe it shows sufficient conferences were held by the parties on all issues prior to submission to this Division. A fair distinction can be made between adequate conferences and interminable conferences. We interpret Paragraph Second of Section 2 of the Railway Labor Act to provide that conferences be expeditious.

In regard to mitigation of damages (here a job opportunity was apparently available October 28, 1965), the neutral referee is inclined to follow Award 15408 and other recent Awards, such as 14502, where the claim is a continuing one and Article 5 of the 1954 National Agreement is involved and NDC 16 is applicable. These decisions do not delve into mitigation of damages, but, on the contrary, grant relief by a prescribed formula. We do not reach the issue of mitigation of damages under the particular circumstances of this case.

Since this decision turns on Carrier's violation of the time limit rule of the National Agreement, Carrier's violation of Rule 24 (a) of Article IV of the Agreement of these parties requires no remedial action. This Award grants relief which cures that particular defect.

Therefore, this Claim is allowed in part and denied in part — as indicated above.

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

I. That the Employes elected on the property to base this Claim upon procedural issues.

II. That the time limit rules of Article 5 of the 1954 National Agreement were violated by Carrier.

III. That the Claim shall be allowed as presented, **except that Carrier's financial liability is terminated as of March 11, 1966.**

AWARD

Claim approved in part and denied in part, as indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15723 IN DOCKET CL-16653

The Board has exceeded its jurisdiction in this case by allowing compensation after October 28, 1965, because Claimant refused to return to service, and under the express language of Rule 17 (b) he:

"* * * will be considered **out of service.**" (Emphasis ours.)

This means he voluntarily relinquished his seniority rights. Therefore, Claimant lost his employe status under the contract effective on that date.

Not being an employe subsequent to October 28, 1965, Claimant was no longer under either the Railway Labor Act or the collective bargaining agreement, including Article V under which the Board has allowed compensation after that date.

The jurisdiction of this Board under the Railway Labor Act is limited to disputes involving employes, and in disposition thereof the interpretation and application of collective bargaining agreements. Here the Board allowed compensation to a non-employe under a contract which no longer applied

to him and which this Board lost its power to apply. This failed "to comply with the requirements of the Act" and is void "for failure of the order to * * * confine itself to matters within the scope of the Division's jurisdiction." (Quotes from Sections 3 First (p) and (q) Railway Labor Act, as amended June 20, 1966.)

T. F. Strunck
R. E. Black
P. C. Carter
G. L. Naylor
G. C. White

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 15723 (DOCKET CL-16653)

The first three (3) paragraphs of the Carrier Members' dissent to Award 15723 contains a re-hashing of the arguments contained in the Carrier Members' memorandum presented to the Referee in panel discussion. Therein, the Carrier Members contend that Claimant allegedly "relinquished his seniority rights" on October 28, 1965 and, therefore, should be allowed no compensation thereafter.

I direct attention to Award 5348, in which Francis J. Robertson participated as Referee, and we find the following well-reasoned holding:

> "Carrier objects to this Board's jurisdiction because of the resignation of claimant while this claim was pending. We do not consider that as a bar to our acceptance of jurisdiction. He was an employe at the time of the rule violation. As said by Referee Carter in Award 4461, the Organization has the authority to police the Agreement. Unless penalties and wage losses can be asserted by the Organization, its primary method of compelling enforcement of its Agreement is gone. The fact that the claimant may have died since the claim first arose was not considered as a bar or a determination of the claim on the merits in Award 5190; nor that the individual involved disclaimed any right to reparations (Award 4461). The same principles apply with respect to an employe who has resigned after the occurrence of the violation."

With respect to the provisions of Article V, August 21, 1954 Agreement: There is no ambiguity in the language thereof. Yet, at this late date, the Carrier Members are still arguing the intent. Article V is now nearly thirteen (13) years old. It has been interpreted, we can say without too much fear of contradiction, on every Carrier in the country whose Agreements with the various Organizations contain that Article.

The provisions thereof have many times defeated the Employes' claims for lack of compliance therewith. In those instances, Carriers and their representatives on the Board accept such decisions with "open arms."

The day should sometime arrive when the provisions of Article V, August 21, 1954 Agreement, are no longer questioned by the Carriers and the Employes, parties thereto, or by their respective representatives on the Third Division.

Referee Levi M. Hall stated in Award 10500:

"Had the Carrier desired to controvert the facts involved in the dispute or attacked the validity of the claims, it would have been a simple matter for it to have done so by denying or disallowing the claims in writing within a period of sixty days. This procedural section is mandatory rather than directive in that a definite penalty is provided therein for failure to write disallowance of claim within sixty days — THE CLAIM TO BE ALLOWED AS PRESENTED * * *." (Referee Hall's emphasis.)

Carrier here could have estopped its liability simply by a mere compliance with the 60-day provisions of Article V. This it failed to do and, therefore, cannot now be heard to complain for its own lack of foresight.

The Award is correct; the Carrier Members' dissent does not detract one iota therefrom.

C. E. Kief
Labor Member
8-2-67

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