Award Number 17908
Docket Number CL-18165

THIRD DIVISION

Francis X. Quinn, Referee

PARTIES TO DISPUTE:

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

NATIONAL RAILROAD ADJUSTMENT BOARD

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6547) that:

1) Carrier violated the provisions of Rule 36, 1(a), of the Clerks' Rules Agreement when it failed to decline claim filed under date of September 8, 1967 in behalf of occupants of Gateman positions at Milwaukee, Wisconsin, within sixty (60) days from the date filed.

2) Carrier shall be required to allow the claim as presented.

EMPLOYES' STATEMENT OF FACTS: On May 10, 1966 Carrier issued Bulletin Nos. 106, 107 and 108, advertising Gateman Positions 0580, 0579 and Swing Position 10, to employes in Seniority District No. 24 at the Union Depot, Milwaukee, Wisconsin. Included in the brief list of principal duties, the following language appeared: "Standard watch & uniform required." See Employes' Exhibits "A", "B" and "C".

On May 17, 1966, General Chairman H. C. Hopper wrote to Mail and Baggage Agent E. C. Kurtzhalts and Vice President-Labor Relations, S. W. Armour, in an attempt to correct this new requirement. See Employes' Exhibits "D" and "E" respectively.

Carrier did not respond to either of the aforementioned letters and on September 7, 1966, December 6, 1966 and March 21, 1967, the General Chairman traced Mr. Amour for a reply to his letter of May 17, 1966, and to date has not received any response. See Employes' Exhibits "F", "G" and "H" respectively.

On May 8, 1967 the General Chairman again traced Mr. Amour for a reply. See Employes' Exhibit "I", and after receiving no response, on September 8, 1967 the following claim was presented to Mail & Baggage Agent, Mr. E. C. Kurtzhalts who is the officer to receive claims in the first instance in District No. 24:

"Claim of the System Committee of the Brotherhood that:

1. Carrier violated, and continues to violate, the Clerks' Rules Agreement when it established Gatemen positions at the Union

Copy of General Chairman Hopper's aforementioned letter to Mail & Baggage Agent Kurtzhalts under date of September 8, 1967 is attached hereto as Carrier's Exhibit "A".

Mr. Kurtzhalts did not reply to General Chairman Hopper's letter dated September 8, 1967 (Carrier's Exhibit "A"), however, this, for reasons that will be fully explained in "Carrier's Position", did not constitute a violation of Rule 36 1(a), of the Clerks' Rules Agreement on the part of Mr. Kurtzhalts, or the Carrier, as the employes erroneously allege.

Attached hereto as Carrier's Exhibits are copies of the following letters:

Letter written by Mr. S. W. Amour, Vice President-
Labor Relations, to Mr. H. C. Hopper, General
Chairman, under date of February 16, 1968 .....Carrier's Exhibit "B"

Letter written by Mr. Amour to Mr. Hopper under
date of July 15, 1968 .....Carrier's Exhibit "C"

(Exhibits Not Reproduced)

OPINION OF BOARD: Upon consideration of the collective bargaining agreement, exhibits introduced and the briefs submitted, it is determined that the Carrier did not violate the intent and practice of Rule 36, 1(a).

The correspondence which sought clarification of the intent and meaning of Bulletins 106, 107, 108 evolved into a demand that has no basis in the Agreement. Where we can establish that no past practice or agreement required reimbursement "of an amount equal to that expended by each incumbent of a Gateman position for a standard watch and uniform", we can affirm that it is not the kind of claim or grievance envisioned in Rule 36, 1(a). Failure to disallow this request did not violate Rule 36, 1(a). However common courtesy in answering repeated mail would seem an expected practice in a modern labor-management relationship.

We are unable to find any contractual support for the claim 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 rsspectively 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 8th day of May 1970.

LABOR MEMBER'S DISSENT TO AWARD NO. 17908) (DOCKET CL-18165)

The Board was not requested to find a

"basis in the Agreement"

for the claim; was not requested to

"establish that no past practice or agreement required reimbursement";

was not requested to

"affirm that it is not the kind of claim or grievance envisioned in Rule 36, 1(a)";

was not requested

"to find any contractual support for the claim presented".

all of which statements are included in the award.

This Board's jurisdiction is limited to the issue or issues presented to it for adjudication which had heretofore been handled between the parties on the property. What we as a body—or any one of us—might or might not think is right or wrong or equitable has no place in the decisions of this Board. Equity is not within our jurisdiction. The jurisdiction of this Board—and its Members, of which the Referee is one is limited to the language of the rules of the Agreement under consideration and/or the interpretations placed on those rules either by the parties or by this Board.

On May 10, 1966, three bulletins were issued, after which the Employes registered a grievance because of Carrier's unilateral requirements noted on the bulletins ("standard watch & uniform required") as a prerequisite to obtaining such positions. No reply was received to their written grievance. After many additional letters were written without receiving reply, claim was filed in writing on September 8, 1967 (R32, 33, 34) "in behalf of Gatemen at the Union Depot in Milwaukee for reimbursement of an amount equal to that expended by each incumbent for a standard watch and uniform."

Carrier prejudged the claim on its merits and refused to reply thereto, even though the Employes' Representative traced the Carrier officers many times requesting a reply to the claim. The award merely admonishes Carrier with a conclusion that **"common courtesy in answering repeated mail would seem an expected practice in a modern labor-management relationship".**

First, these letters were not **"repeated mail,"** they represented a **"grievance"** and the award ignores the word "grievance" contained in Rule 36.

"Expected practice" has nothing to do with it. Before the National Agreement of August 21, 1954, such "practice" consisted of the following:

All parties involved in handling claims and grievances on the railroads were derelict in their duties—be it the representatives of labor or of carrier. They ignored letters they received, resulting in claims becoming so stale that they mildewed. Claims which were filed with the Adjustment Board were so old they had whiskers and, in a majority of such disputes, the Claimants or grievants were long gone from the railroad, either by reason of death, retirement, dismissal, or various and sundry reasons. When and if these ancient

claims or grievances were adjudicated by the Board, such involved employes reaped no benefits whatever because they were either deceased, dismissed or retired from carrier service. This "practice" had to be stopped.

The Fifteen Cooperating Railway Labor Organizations served certain proposals under Section 6 of the Railway Labor Act, upon Participating Eastern, Western, and Southeastern Carriers, their notices dated on or about May 22, 1953; likewise, within a 30-day period thereafter the participating Carriers served subsequent proposals under the same law upon such participating organizations. Direct negotiations were to no avail; and, as a result, hearing was conducted by Presidential Emergency Board No. 106 which, on May 15, 1954, filed its report with the President of the United States, consisting of its findings and recommendations. The Agreement consummated therefrom was signed by all participants, effective August 21, 1954.

Included therein was Article V—Carriers' Proposal No. 7, which read:

"Establish a rule or amend existing rules so as to provide time limits for presenting and progressing claims or grievances."

Article V was disposed of by the Emergency Board and became effective January 1, 1955. There was no longer an "expected practice"—the time limit rule was not mandatory on all participants. This Carrier and this Organization are signators to that Agreement and to Article V, the language of which is incorporated in their Agreement as Rule 36, titled "Claims **and** Grievances". The "and" in the title of the rule denotes two (2) categories, so the words are not synonymous.

"Expected practice" no longer applies. Rule 36 of the parties' Agreement does apply. Notwithstanding the date a grievance is written, the reason it is written, by whom it is written—be it real or fancied either by an employe or in his behalf by a duly accredited representative:

"* * * the carrier **shall**, within 60 days from the date same is filed, notify whoever filed the claim **or** grievance * * * in writing of the reasons for such disallowance. **If not so notified,** the claim **or** grievance **shall be allowed as presented** * * *."

That language is **mandatory—not permissive.** It was incumbent upon Carrier to answer this **grievance. "The correspondence which sought clarification of the intent and meaning of Bulletins 106, 107, 108"** (language from the award) **falls** in the category of **"grievance"**, which is defined in Webster's New World Dictionary, College Edition, as: "a circumstance or condition thought to be unjust and ground for complaint or resentment; complaint or resentment, or a ground for this against a wrong, real or imagined."

Many awards were furnished by the Labor Member in the initial panel discussion. The Referee chose to follow three isolated awards—notwithstanding that they came nowhere near representing this Board's conclusions on the subject. In re-argument requested by the Labor Member, the following Awards were again referred to, representing the majority line of decisions on this subject:

Award 10138—Referee J. Harvey Daly—Adopted Oct. 27, 1961

"If the Carrier considered the grievance as a 'fancied' but not a 'real' wrong, it was privileged, according to the Agreement, to reject the claim within the prescribed period.

* * * * *

We must keep in mind that the current Agreement does not specify that all claims must be reasonable, justified or merited. It is clearly not the function of this Board to determine the claim's merits or validity. Neither is it our function to indicate the forum or area where a claim should be properly heard or processed.

Accordingly, we make no findings on the merits of this claim or determine what would have been its disposition before this Board if the Carrier had handled the claim expeditiously on the property. We must sustain the claim on the procedural grounds set forth in the Opinion."

Award 3637—Referee Watrous (Second Division) Adopted—January 13, 1961

"However, the carrier's error is an assuming that Article V of the August 21, 1954 Agreement contemplated that it could prejudge the issues presented to it as claims or grievances and refuse to answer those that it considered were not appropriate. Article V requires a denial in those instances and reasons for denying."

Award 1657—Referee Weston (Fourth Division) Adopted—June 20, 1962

"We are not impressed by Carrier's contentions regarding the merits or defective nature of the claim. As we read the provision, Article V makes it quite apparent that irrespective of its merits the claim is to be sustained if Carrier has not complied with the necessary time limits. The statement of claim is sufficiently clear and definite and the claimants are specifically named and indentifiable. If there is any defect in the parties, thatis precisely the sort of thing that should have been mentioned in a timely denial by Carrier's superintendent so that both parties could have explored and addressed themselves to the question, as Article V and the grievance provisions contemplate."

Award 10500—Referee Hall—Adopted April 3, 1962

"The Carrier contends that Section 1 (a), Article V of the National Agreement has no application here for the following reasons * * * (3) Claimants did not, under Section 1 (a), file claims within sixty days of the occurrence on which the claim is based and no dispute exists; * * *.

* * * * *

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. We make no findings on the merits of this claim or determine what would have been its disposition before this Board if the Carrier had handled the claim expeditiously on the property. (See Award 9492—Rose; 9253—Weston; 10138—Daly).

* * * * *

We must sustan the claims on the procedural grounds set forth in the Opinion."

Award 9760—Referee LaDriere—Adopted December 16, 1960

"* * * we need only emphasize the one controlling and overriding issue in this case—and that is, whether within sixty days of the filing of the claim (in October, 1955) it was disallowed and the employe 'notified in writing of the reason for such disallowance'. (Article V, Section 1 (a).) And 'If not so notified, the claim or grievance shall be allowed as presented * * *.'

The Carrier asserts that the original claim must be a valid one and cites a number of Awards having to do largely with claimants whose names were undisclosed; the Employes on the other hand refer to Awards holding that under these or similar circumstances no consideration shall be given by the Board to the claim on the merits. (Award 6789—Shake, Award 4529—Wenke, Award 7713—Smith, Award 8318—Daugherty, Award 8412—Daugherty, Award 3280—Carey, Second Division, and Award 19343—Roberts, First Division.)

Obviously, there is hardly a way to determine the issue of validity of a claim without a hearing; and if a hearing on the merits is necessary then the rule that if a disallowance is made and claimant 'not notified in writing of the reasons for such disallowance' within sixty days the claim 'shall be allowed as presented', is not worth the paper on which it is written and before long the allowance by force of the rule will disappear in favor of finding on the merits only.

Under Article V, Section 1 (a) of the August 21, 1954 Agreement the claim should be sustained."

Award 12233—Referee Engelstein—Adopted February 20, 1964

"Carrier admits that the claim was not disallowed within 60 days after it was presented, but it maintains that it was not obligated to answer an unfounded claim. Carrier had an opportunity to avail itself of the privilege of proving that the claim did not have merit if it had acted within the 60 day prescribed period. Since it failed to do so, the claim must be allowed. Our position is consistent with that of Award No. 10138."

Award 12472—Referee Kane—Adopted April 30, 1964

"* * * In reply to the violation of Article V of the Rules, the Carrier contended that it was doubtful that the Time Limit Rule is of any significance in this proceedings. Such procedure need only be followed when a claim has a color of substance which is lacking in this dispute.

A review of the record, supporting evidence and the Awards of this Board reveals that the contentions of the Complainant are well taken. The Rules, as exemplified in Article V, requires the Carrier to respond within 60 days from the date the claim or grievance is filed by notifying the Claimant or his representative in writing, the reasons for the disallowance of such claim or grievance. This requirement is mandatory, not a matter of choice, or dependent upon the type or quality of the claim. This notification in writing within

60 days from the date the claim or grievance was filed was not done in this dispute.

Thus, the Agreement was violated, as the contentions of the Carrier are not supported by the Rules."

Award 11174—Referee Dolnick—Adopted February 28, 1963

"There is nothing in the Railway Labor Act, nothing in the Rules of Procedure of the National Railroad Adjustment Board, nothing in the National Agreement of August 21, 1954, nor in the Rules of the Agreement between the parties, which justifies Carrier's refusal to accept this claim. * * *.

The Carrier refused to accept the claim which occurred on October 23, 1956. It never disallowed it. * * *.

* * * * *

At no time did the Carrier decline the claim on its merits. For that reason we are obliged to hold that the Carrier has failed to notify the Employes that the claim was disallowed in accordance with Section 1(a) of the Article V of the National Agreement and we are obliged to hold that the claim of October 23, 1956 is allowed. * * *."

Award 12473—Referee Kane—Adopted April 30, 1964

"* * * In reply to the issue raised by the allegation that Article V had been violated, the Carrier contended that the rule only applies to substantial claims, rather than those without substance.

* * * * *

The only issue presented in this dispute was the violation of Article V, and that violation was not denied by the Carrier. Thus, we are unable to rule on the issue of the violation of the Rule on other occasions than presented in this claim or the question of when the claim should be terminated, as those issues were not placed in issue in this claim."

Award 12474—Referee Kane—Adopted April 30, 1964

"In reply to the allegation that Article V had been violated the Carrier did not deny it but contended it only applied when the claim had substance. * * *.'

* * * * *

Was Article V of the Agreement violated? Our answer is Yes. The Carrier failed to respond to the notice of Appeal within 60 days of receipt of said notice. In addition the Carrier has never denied its failure to reply to the appeal within 60 days. Furthermore, in all these Dockets no reason or explanation was given for such failure to respond. The issue of the Time Limit Rule, Article V, was raised on the property at all levels and efforts were made to obtain a decision on the appeal but such efforts proved fruitless.

Thus we are of the opinion that the Agreement was violated, specifically Article V. However, we are resolving this dispute not on the merits but rather on the procedural defects which have not been denied or explained."

"Award 4594—Referee Daly (Second Div.) Adopted December 9, 1964

"The record establishes that the Carrier did violate the 60 day time limit provision, and the claim could, of course, be sustained on that basis. The Carrier's defense "that the claim is, * * * one not properly covered by the Agreement' is unsound and unacceptable, because the Carrier doesn't have the right to prejudice a claim's validity. * * *."

Award 14759—Referee Ritter—Adopted September 22, 1966

"* * * The Company contends that the day's pay is not proper, because the claim was not supported by the agreement rules. In this case, it is immaterial whether the claim was valid or not. We are not concerned here with the merits of the claim, but applicability of the Time Limit Rule. In the dispute that resulted in Award 10138, the Board said:

> 'If the Carrier considered the grievance as a "fancied" but but not a "real" wrong, it was privileged, according to the Agreement, to reject the claim within the prescribed period.'

Since it is admitted here that there was a default by the Assistant Superintendent, the Carrier became obligated to allow the claim as presented. Claimant S. M. Davis, is entitled to the further sum of $12.65."

Award 16564—Referee Dorsey—Adopted September 11, 1968

"Carrier states its position as:

> 'There is no rule or agreement with the Clerks, or any other organization, requiring reimbursement of loss of earnings to employes while attending military encampment. Therefore, the claim for reimbursement to Claimant was not a matter subject to handling under Rule 21, and the fact that reply was not made within sixty days cannot constitute a violation of that rule.'

Rule 21 of the confronting Agreement, which is a reproduction of Section V, 1 (a) of the National Agreement of August 21, 1954, contractually obligates a Carrier to disallow a 'claim or grievance' within 60 days of its filing, giving its reasons for disallowance in writng, under pain of allowance 'as presented' if those procedural requirements are not complied with. There are no exceptions. A Carrier may not disregard a filed claim because it, in the Carrier's opinion, is: (1) without merit; (2) is not supported by the Rules Agreement; or, (3) is not a dispute within the contemplation of the Railway Labor Act. Carrier's obligation to deny any claim filed within 60 days of filing, giving its reasons for disallowance in writing, is, by application of Rule 21, absolute. Since Carrier failed in this contractual obligation we are compelled, by Rule 21, to sustain the instant claim as presented."

Award No. 1 of Public Law Board No. 34, Chairman Dorsey

"It is the Carrier's duty equally with the Organization to maintain the Agreement and there is no obligation on the part of the claimant or the Organization to submit 'written proof' when filing a claim. * * *.

* * * * *

> The filing of the claim is in effect a pleading which alleges facts, the ultimate issue as to violation of the Schedule Agreement and the remedy prayed for. Upon its receipt, Title I, Section 2 First of the Railway Labor Act requires Carrier to investigate the alleged occurrence. Carrier is given 60 days within which to make such investigation and to allow or disallow the claim. Should it decide to disallow, Article V requires it to set forth its reasons in writing. Thus, the issues are framed and Employes are only then put to their proof as to disputed facts and/or interpretation and application of the Agreement they allege to have been violated. * * *."

In re-argument, the author hereof again discussed the bulletins issued by Carrier, Nos. 106, 107 and 108 dated May 10, 1967. Carrier issued those bulletins in accordance with the provisions of Agreement Rule 9—Bulletined Positions. This rule carries a "Note" which incidated (page 40 of the printed Agreement) the "FORM FOR BULLETINING POSITIONS UNDER THE CLERKS' AGREEMENT." Carrier complied with Rule 9 and furnished all information it was required to furnish to employes who might desire to bid for such positions. But, in addition to the agreed-to information, Carrier unilaterally added requirements for the positions which were not agreed to, i.e., "Standard watch uniform required". Thus, Carrier made that statement a part of the standard form for advertising the positions of "Gatemen". The "FORM" (page 40 of printed agreement) contains no space for such requirements, and no agreement is in existence between the parties—either specific or inferred—that employes who were aspirants to any position under the Agreement would be required, as a prerequisite to their obtaining such position, to personally own a device necessary in the performance of the duties of such position.

Carrier added such requirements—a unilateral action—which created a grievance, activating the unambiguous provisions of Rule 36 Claims and Grievances; when such grievance was presented to Carrier in writing, the Employes had every right to not only expect, but to receive, an answer. None was given.

Carrier ignored the grievance, failed to answer the grievance, refused to answer the grievance; Carrier subsequently ignored the claim, failed to answer the claim; refused to answer the claim.

One issue was before this Board for decision; DID CARRIER VIOLATE THE PROVISIONS OF RULE 36—CLAIMS AND GRIEVANCES. The Referee was requested to reconsider his proposed Award in this Docket CL-18165 in view of all above, but his proposed award was unchanged and was adopted by the Majority, the Referee plus the Carrier Members, for which I register this Dissent.

/s/ C. E. KEIF
C. E. Keif, Labor Member
June 3, 1970

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.