

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19422

Docket Number CL-19358

William M. Edgett, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE:

(  
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6945)  
that:

1. Carrier violated the Clerks' Agreement when, effective April 29, 1969, it required and permitted Yardmasters at North Yard and Leewood Yard at Memphis, Tennessee, to make ground checks of cars in the Yards in violation of Rules 1, 2, 3, 5, 21, 25, 45 and related rules of the Clerks' Agreement.

2. Carrier violated the Clerks' Agreement when the Carrier officers failed to render decision within the sixty day time limit prescribed by Rule 43 of the Clerks' Agreement, when the claims were initially filed and again when claims were on appeal.

3. The Carrier shall be required to compensate claimants as follows, until the violation is corrected and the work involved is returned to the scope and operation of the Clerks' Agreement:

(a) PICL Clerk W. A. Rasbach, for eight hours at the punitive rate of \$4.725 per hour, or \$37.80 per day (\$38.94 per day effective July 1, 1969) for April 29, 1969 through March 29, 1970, account violation of Rule 43 as cited in Item 2 above, and with claims continuing on the same basis for each subsequent work day, seven days per week account violation of Rule 1 and related rules cited in Item 1 above.

(b) Utility Clerk H. D. Patrick, for eight hours at the punitive rate of \$4.725 per hour, or \$37.80 per day (\$38.94 per day, effective July 1, 1969) for April 29, 1969 through March 29, 1970, account violation of Rule 43 as cited in Item 2 above, and with claims continuing on the same basis for each subsequent work day, seven days per week account violation of Rule 1 and related rules cited in Item 1 above.

(Note: Claims are subject to any subsequent general wage increase.)

OPINION OF BOARD: At the outset, we must dispose of several questions concerning the application of the time limit provisions of the applicable Agreement, inasmuch as the Organization contends that the dispute is properly before this Board on both the time limit issue and the merits; and the Carrier argues that the Organization abandoned the claim on its merits when an alleged time limit violation occurred.

The sequence of correspondence in the Record is as follows:

A continuing claim was filed June 2, 1969 with Carrier's Assistant Superintendent, claiming the Agreement was violated, retroactive to April 29, 1969, account yardmasters at the North Yard and Leewood "are permitted and required to go out into the yard and make a ground check of each car in every track in the yard, writing down initials and numbers, whether loads or empties, etc. No answer was timely received to the claim.

On October 14, 1969, the Division Chairman addressed a letter to the Carrier Officer with whom claim was filed, pointing out that the claims had not been declined within sixty days and were "payable as claimed without regard to the merits."

On October 21, 1969, the Assistant Superintendent sent two letters to the Division Chairman which were postmarked October 24, 1969 and received by the Division Chairman on October 26, 1969, denying the claims.

On November 5, 1969, the matter was appealed to the Carrier's Superintendent. This appeal letter did not mention the merits of the claim, but insisted that the claims were due **and payable under the provisions of Rule 43, the Time Limits rule.**

On December 26, 1969, the Superintendent denied the claims, stating in part:

"In any event the payment of any claim would cease October 25, 1969 when you admit you received the Carrier's letter of declination and furthermore the claim has not been appealed on its merit but by alleging the Carrier violated the time limit rule by not timely declining the claim, therefore, as you have not progressed the claim on its merit the issue involved has evidently been abandoned by the Organization."

On January 9, 1970, the matter was appealed to the Carrier's General Manager. This letter did not mention the merits at all, the penultimate paragraph read:

"Since these claims were not declined within the time limits, then they are due and payable until the date the declination was finally received by the Division Chairman on October 26, 1969."

Eleven days later, on January 20, 1970, the January 9th letter was amended, and exception was taken to the above-quoted portion of the December 26, 1969 denial by the Superintendent, contending that the merits issue had not been abandoned by the Organization.

On March 27, 1970, the General Manager denied the claim. On April 3, 1970, the matter was appealed to Carrier's Director of Labor Relations.

Before this Board, Petitioner contends that the claim is payable through March 29, 1970 account of the two violations committed by Carrier under the time limit rule, i.e., the belated denial of the Assistant Superintendent made in his letter of October 21, 1969, and the belated denial of the General Manager made in his letter of March 27, 1970; and, further, that the claim is payable on its merits thereafter until the alleged violation is corrected.

The Carrier argues, first, that the claim was out of time when initially presented on June 2, 1969 inasmuch as the transactions which gave rise to the claim occurred on January 6, 1969 when the PICL system was placed into effect. They next argue that any payment under the time limit rule is unwarranted unless the alleged violation forming the basis of the claim was subsequently found to exist. Third, Carrier argues that, in any event, liability on the claim ceased effective October 26, 1969, the date the Organization received the Assistant Superintendent's denial. Finally, they argue that the meritable portion of the claim was abandoned by the Organization in its appeal during the period November 5, 1969 to January 20, 1970.

We will take up Carrier's defenses first. Notwithstanding the fact that the PICL system was placed into effect on January 6, 1969, the Organization's claim is based on an alleged Agreement violation commencing April 29, 1969. They do not claim that the institution of the PICL system, in and of itself, violated the Agreement. They claim that on April 29, 1969, an employee not covered by their Agreement performed work subject to their Agreement. We will hold that the claim was timely filed.

Carrier's second argument that a time limit violation is not allowable unless the meritable violation is subsequently found to exist is, in fact, asking us to ignore the clear provisions of paragraph (a) of Rule 43, which mandates:

" \* \* \* Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

In connection therewith, we have firmly established that a Carrier is not permitted to prejudge the merits of a claim and fail to answer because, in its opinion, the claim lacks "substance." Awards 9760, 10138, 10500, 11174, 12233, 12472, 12473, 12474, 14759, 16564, 19361.

In answer to Carrier's third argument, we must be governed by National Disputes Committee Decision No. 16, which held:

"The National Disputes Committee rules that receipt of the carrier's denial letter dated December 29, 1959 stopped the carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement."

Carrier's final argument is that the merits of the claim were abandoned. The Record of correspondence clearly establishes that the November 5, 1969 appeal letter was confined to the time limits issue. This is the appeal that was answered on December 26, 1969, wherein the Carrier indicated that it was apparent that the matter was being appealed only on the time limits issue. On January 20, 1970, the Organization took exception to this and raised the issue of the merits. This attempt to revitalize the claim on its merits appears to be untimely - it should have been done within sixty days of the initial denial of October 26, 1969. From the Record, we hold that the Organization abandoned pursuit of the claim on its merits.

This leaves us with one last matter - the belated denial of the Organizations' January 9, 1970 appeal. The Organization contends that this constituted another Rule 43 violation and that the claim should be paid up to March 29, 1970. If the merits of the claim were timely before the Carrier Officer to whom appeal was made, this argument might have substance. As indicated above, however, they were not. The only claim that was timely before the General Manager was that which was presented in the Organization's January 9, 1970 letter, to wit:

"Since these claims were not declined within the time limits, then they are due and payable until the date the declination was finally received by the Division Chairman on October 26, 1969."

The abandonment of the meritable issue on appeal precludes payment for dates subsequent to October 26, 1969. The belated denial by the General Manager only emphasizes that the claim presented to him is payable under the time limits rule.

Accordingly, we will dismiss Part 1. of the claim, we will sustain Part 2. of the claim, and we will sustain parts 3. (a) and 3. (b) of the claim for the period April 29, 1969 to and including October 26, 1969.

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 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 Agreement was violated to the extent indicated in the Opinion.

A W A R D

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

E. G. Kellum  
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1972.