

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20129
Docket Number CL-20165

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline & Steamship Clerks,
(Freight Handlers, Express & Station Employees
(
(Missouri Pacific Railroad

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7296)
that:

1. The Carrier violated and continues to violate the Clerks' Agreement when beginning on or about May 10, 1968, it removed the work of checking all trailers parked on the grounds at Settegast, maintaining seal records and checking piggyback ramps during the day, from the employees covered by the Clerks' Agreement at Houston, Texas, and assigned it to persons not covered thereby.

2. That the Carrier restore the work that was formerly performed by employees at Houston, Texas, under the Scope of the Clerks' Agreement from which it was removed.

3. The Carrier shall be required to compensate J. W. Mercado for eight (8) hours at pro rata rate each work day beginning November 13, 1971, and continuing each day thereafter until violation is corrected.

NOTE: Claim is to include any successor and/or successors to Mr. Mercado which, of course, can be determined by a joint check of Carrier's payroll records.

OPINION OF BOARD: This is a Scope dispute which the Carrier contends is not properly before the Board because the dispute has been previously adjudicated. The Petitioner concedes that, except for a change in the beginning dates of compensation claimed to be due the Claimant, this dispute is the same as the dispute involved in this Board's prior Award 18806 (Devine). In that Award the claim was dismissed on the following grounds:

".....in the handling on the property the parties were ~~un~~able to agree on how the work was handled prior to May 10, 1968, the date mentioned in the claim, or how it has been handled since that date. Each party has submitted statements which it contends supports its position, but were unable on the property to resolve the conflicts in the statements and evidence. The conflict continues throughout the docket. In fact, the evidence is so conflicting that it defies resolution of the issues presented on the merits. On the record as it exists, we have no alternatives but to dismiss the claim. See Awards 17500, 17211, 17197, 16036."

The Petitioner's argument that the claim is properly before the Board is predicated on the fact that Award 18806, being a dismissal Award,

did not deny the claim on the merits. This fact, it is argued, in conjunction with the fact that the claim involves an alleged continuing violation, which has been timely filed and properly progressed on the property, permits the claim in its present form to be considered on the merits by this Board.

The logic of Petitioner's argument is obvious, for it is true that a dismissal in a court action would leave open for consideration all matters, including part or all of the merits, not precluded by such dismissal. However, the issue here is not one of first impression. The possibility of adapting court procedures to this forum has been considered and foreclosed by numerous Board Awards, which recognize that this Board is created by the Railway Labor Act and that its jurisdiction is limited to the express provisions of that Act. In Award 9397 (Rose) this Board held that we could not consider a claim which had been re-submitted to the Board following the dismissal of the claim in an Award which stated: "Claim dismissed without prejudice." The following portion of Award 9397 is pertinent here:

"Carrier contends that this prior award constitutes a 'final' disposition of the claim and that the words 'without prejudice' do not permit resubmission of the same claim. Petitioner maintains that these words and the nature of Award 6051 authorize resubmission of the claim.

In a court action, the Referee would regard a judgement of dismissal without prejudice as leaving open for consideration matters which were not to be prejudiced by such judgment. We are governed by the Railway Labor Act's provision that the Board's 'awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award.' Section 3, First (m).

In view of this provision of the Act, a bare statement that a claim is dismissed without prejudice may leave some uncertainty as to the finality of such an award. See Second Division Interpretation No. 1 to Award 1740. Cf.

Awards 8220, 8107, 8106. However, in the Interpretation cited, the Second Division stated that by the use of the words 'without prejudice' it was not intended to permit resubmission of the identical claim. This Referee cannot say what was intended by the use of those words in the award in Award 6051 made with another Referee sitting with the Board.

The question posed by the contentions of the parties is not one of first impression in this Division. The Third Division has repeatedly regarded an award dismissing a claim without prejudice as a final disposition and refused to consider the same

"claim on resubmission in another docket. Awards 9377, 9376, 9255, 9254, 9026, 8760, 8752, 8419. Nothing in the record before us suggests any reason for disregarding these precedents."

For rulings identical to Award 9397 see Awards 10516 (Miller), 9452 and 9453 (Grady), and 9376 (Stone). We note that all of these Awards involved alleged continuing violations.

The foregoing authorities make it abundantly clear that the use of the term "without prejudice" in a dismissal Award does not keep a claim viable for consideration of the merits upon re-submission of the claim to this Board. Apparently, some specific intent to give the claim further consideration would have to be indicated along with the term "without prejudice". In the instant dispute, however, the claim was merely dismissed; Award 18806 did not contain the term "without prejudice". It follows a fortiori that the claim in the instant dispute is barred from a consideration by the Board. Consequently, on the whole record, and in accord with the foregoing Awards, we shall dismiss the claim.

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 Employee involved in this dispute are respectively Carrier and Employee 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

The Claim is dismissed for lack of jurisdiction.

A W A R D

The claim is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

AW. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1974.