NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20374
Docket Number CL-20109

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7281) that:

1. Carrier violated the Clerks' Agreement when, beginning April 29, 1969 it required and/or permitted Yardmasters (who are not covered by the Clerks' Agreement) at Memphis, Tennessee, to make physical yard check of cars in the various Yards, for switching purposes and records in violation of Rules 1, 2, 3, 5, 21, 25, 45 and related rules of the Clerks' Agreement (Carrier's file 205-4254)

2. Carrier shall now be required to compensate claimants as listed below, until violation is corrected and the work involved is returned to the scope and operation of the Clerks' Agreement:

(a) Yard Clerk A. E. Burcham, eight hours' pay at punitive rate, seven days per week, beginning April 29, 1969 and continuing each day thereafter until violation is corrected.

(b) Yard Clerk J. W. Dacus, eight hours' pay at punitive rate, seven days per week, beginning April 29, 1969 and continuing each day until violation is corrected.

(c) Yard Clerk Nello Greganti, eight hours' pay at punitive rate, seven days per week, beginning April 29, 1969 and continuing each day thereafter until violation is corrected.

OPINION OF BOARD: In this case the Organization claims that the agreement was violated when the Carrier instructed Yardmasters to perform the work of Yard Clerks.

The Organization contended that for over forty eight years the yard clerical force performed yard checking and related work. It is conceded by the Organization that effective January 7, 1969, the Carrier inaugurated a new system known as the Terminal Car Control

System (TCC) but it is contended that Yard Clerks continued to perform the Yard checking work. Although the Carrier appointed four additional Yardmaster positions, not covered by the Clerks' Agreement, Petitioner claims that they did not perform the yard clerical work until April 29, 1969. It is contended that on April 29, 1969, the Yard Masters started to do the yard clerical work on a piece meal basis - a little at a time on each shift. The Organization's position is that the matter came to a head on May 7, 1969 and on May 14, 1969 when the employes discovered that beginning April 29, 1969, Yard Masters were performing Yard clerical work that they never performed before, see Organization's Submission, p.5,6.

The Carrier's main defense is that the identical claim, except for the named claimants, had been presented and had been dismissed; that the dismissal precluded consideration of this claim. This was stated in the handling on the property by the Carrier's Director of Labor Relations, Employes' Exhibit 15.

The Carrier referred to a claim filed by the Organization on June 2, 1969 which was processed by this Division as Docket CL-19358 and resulted in Award 19422. The claim in the present case was presented to the Carrier by letter from the Division Chairman dated May 26, 1969, Employes' Exhibit 8. In a letter dated September 8, 1970, the General Chairman wrote to the Director of Labor Relations requesting that the time limits for the claims in this case be extended in the hope that the claim initiated June 2, 1969 would be resolved. In the letter, Employes' Exhibit 18, the statement was made, "We have claims identical to these separate instances filed on a continuing basis--, beginning April 29, 1969, because of Yardmasters performing the identical work of physically checking the Yards at Memphis, in violation of the rules of the Clerks' Agreement." By letter dated October 23, 1970, the Director of Labor Relations answered by stating, "--we are agreeable to your request that the above listed cases be held in abeyance for a period of 90 days subsequent to disposition of the dispute involving claims of W. A. Rasbach and H. D. Patrick,--." Employes' Exhibit 19. W. A. Rasbach and H. D. Patrick are the claimants named in Award 19422.

Examination of the claim stated in Award 19422 and the claim stated in this case discloses that except for the names of the claimants, the claims are identical as to the facts upon which the claims were made.

In Award 19422, the Petitioner raised a time limit question. The OPINION OF BOARD discussed the failure of the Carrier to make a timely answer to the claim and concluded that the claim must be allowed as presented pursuant to Rule 43, (a) of the Agreement, up to the date

the claim was denied. In the discussion, the Board also passed on the Carrier's contention that the claim could not be considered on the merits because the claim had been abandoned in the course of handling on the property. It was held that this contention was correct; that the record disclosed that the Organization had, in fact, "abandoned pursuit of the claim on its merits." Accordingly, that part of the claim in Award 19422 which is identical to the claim in this case, dealing with the merits, was dismissed.

The Organization now contends that such dismissal was on technical grounds and is not binding in this case.

We have reviewed prior Awards on this subject as follows: In Fourth Division Award 793, the Organization sought the restoration of the position of Yardmaster. A prior claim seeking the same relief had been dismissed in a prior Award because the claim had not been progressed within the time limits. The Organization had contended that the violation was a continuing one and thereby a new claim for the same relief was appropriate. The Board stated in its opinion that: "Except for the date from which reparation is claimed, the claim--does not vary in substance from the claim presented--. Changing the date from which reparation is claimed does not change the date 'of the occurrence out of which such' grievance arose, or extend the periods in which the appeal may be made.--The occurrence out of which this claim arose was the abolishment of the position. That question was before the Division--and the appeal was dismissed. As such, it was a final determination of that claim."

In Fourth Division Award 993, a Yardmaster who had been demoted to a switchman was subsequently discharged for events which had occurred prior to the demotion. The Fourth Division passed upon the demotion, ruling that it was not improper but declined to pass upon the discharge on the merits while in the position of switchman because jurisdiction of the switchman position was exclusively that of the First Division under the Act. Claim was then processed for reinstatement as Yardmaster. The issue was the effect of a dismissal for lack of jurisdiction. In upholding the final and binding effect of the dismissal on technical grounds, as applied to the discharge, the Board stated: "The Carrier on its part argues res adjudicata.--, we believe that the instant claim contains the elements required to support the argument, i.e. the same parties, base their present demand for the same relief, on the same facts, and the same contractual rights as were raised--."

In Fourth Division Award 967 claim was made to restore a Yard Master's position. This Board found that the same claim had been presented and dismissed for failure to appeal within the time limits. Also, that the same claim had been presented and dismissed without considering the merits in Award 793 for the reasons stated in our discussion of that Award, above. The Organization insisted that it was entitled to a decision on the merits. The Board repeated the reasoning set forth in Award 793 and relied thereon.

In Fourth Division Award 990, an individual employe who occupied a dual position claimed relief after his Organization had acted for him in a prior case before a different Division of the Railroad Adjustment Board. The Board stated: "The thing sued for, the party suing, the party being sued, the facts presented, the rights claimed, and the defenses made were all decided--. All the same factors are again presented here and we are of the opinion that the thing has been judged, which is the literal meaning of res adjudicata."

In Second Division Award 1740, the Board dismissed a claim without prejudice because the appeal to the Board was not timely. The Organization then requested an interpretation of the meaning of the decision, "dismissed without prejudice", by asking if these words meant that they could file the identical claim for disposition on the merits if it were handled in accordance with the Agreement and the Act. The answer was "NO", on the ground that: "The dismissal of the appeal had the effect of affirming the carrier's denial of the claim made on the property."

In Second Division Award 4034 a claim was made that work had improperly been assigned to the wrong craft. It was found that the claim was a resubmission of a claim previously dismissed by the Division on the technicality that it was without jurisdiction to consider the merits for want of third party notice. The Board reviewed and agreed with the interpretation in Award 1740, discussed above. The Award also cited precedent to the same effect in Third Division Awards. The Railway Labor Act was quoted: "--for under Section 3 First (m)--" the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award." It was concluded that: "--under Section 3 First (m) of the Railway Labor Act, the award of dismissal, whether right or wrong, is a final disposition of the claim, and that if same claim is refiled the Boards only authority is to dismiss it."

Prior Awards presented by the Organization for our consideration were carefully reviewed but were concerned with the merits of the claims in those cases.

The semantics of same, similar or identical does not alter the conclusion that the claim is a composite of claims arising from alleged facts which are alike and which, the Organization contends, exist in each location as to each named claimant.

For the reasons stated above and following the established precedent as reviewed above, we shall not consider the merits herein.

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

This claim is barred.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulk
Executive Secretary

Dated at Chicago, Illinois, this 6th day of September 1974.

LABOR MEMBER'S DISSENT TO AWARD 20374,
DOCKET CL-20109 (Referee Bergman)

Once again, I find it necessary to repeat the remarks I made in the Labor Member's Dissent to Award 20216, in which Referee Bergman also participated. That Dissent opened with the statement:

> "It has often been stated that an Award is no better than the reasoning behind it. If that reasoning is totally lacking in substance by failing to accept the true facts relating to authorities relied upon, or if it misapplies such authority to support a preconceived erroneous notion, then the Award will fall heir to criticism and overturn."

To demonstrate the preconceived and erroneous notions exhibited by Referee Bergman in his improper, if not illegal, dismissal Award 20374 (Docket CL-20109), one need only examine his review of prior decisions of three of the Divisions of this Board. As authority for his improper dismissal Award, Referee Bergman cites Fourth Division Awards 793, 993, 967 and 880 and Second Division Awards 1740 and 4034. In no less than 700 words in six paragraphs, he relies on authorities that do not even remotely touch upon the language of the controlling Agreement--Article 5 of the August 21, 1954 National Non-Ops Agreement (Rule 43 of the parties' Agreement). With respect to the four Fourth Division Awards cited, all involved Yardmasters. Among other things, Yardmasters are not parties to the August 21, 1954 Agreement. The claim in Second Division Award 1740 occurred in April and May, 1952, well before the adoption of the terms and provisions of the August 21, 1954 Agreement. Second Division Award 4034 involved, among other things, a third-party issue, which matter is now controlled by the decision of the United States Supreme Court in TCEU v. UP, 385 U. S. 187 (1966).

Thus, the six authorities relied upon are at best suspect. Nonetheless, for 700 words we are supposed to believe that they are authorities. Now, contrast this with the mere 24-word treatment Referee Bergman gave to the Organization's authorities:

> "Prior Awards presented by the Organization for our consideration were carefully reviewed but were concerned with the merits of the claims in those cases."

Reasonable individuals immediately develop suspicion when confronted with such "fair and impartial consideration of argument and authorities," especially when a Referee dismisses this authority in 24 words with language which indicates that he missed the thrust of the Awards.

The claim involved in Award 20374 was not the same claim that was handled by this Division in Award 19422. The claim involved in Award 19422 arose at Leewood Yard in Memphis, Tennessee. The claim before us in the instant Award arose at the Georgia Street Yard. There were different claimants involved in the disputes, and the claims covered different periods during the day. Admittedly, similar arguments were presented in both cases, i.e., the Carrier violated the Clerks' Scope Rule when it permitted Yardmasters to perform Clerks' work.

The claim in Award 19422 was dismissed by this Board because the Referee was persuaded that the Organization had not timely appealed that claim as required by Rule 43-1(b) of the Agreement. This dismissal, however, cannot, by the very language of Rule 43-1(b), extend itself to other, similar claims or grievances. The first two sentences of Rule 43-1(b) provide:

> "(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative

of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances." (Emphasis added)

This language of the Rule is not, as Referee Bergman would have it, "the semantics of same, similar or identical." The language is clear and precise and is susceptible to only one interpretation and conclusion. The failure to timely appeal a claim does not bar consideration of other, similar claims or grievances. It is asinine for a Referee now--20 years after the August 21, 1954 Agreement was adopted--to write:

> "The semantics of same, similar or identical does not alter the conclusion that the claim is a composite of claims arising from alleged facts which are alike and which, the Organization contends, exist in each location as to each named claimant."

Award 20374 is palpably in error and completely without value, and the Award itself demonstrates this conclusively. Moreover, one finds it difficult to conclude that Award 20374 resulted from an honest mistake.

J. C. Fletcher
9-19-74

CARRIER MEMBERS' ANSWER TO DISSENT OF LABOR MEMBER
TO
AWARD 20374 (REFEREE BERGMAN)

Regardless of the comments of the dissenter, Award 20374 is sound.

In Award 19422, involving the same parties the Statement of Claim of the Organization was:

> "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."

In the dispute covered by Award No. 20374 the Statement of Claim of the Organization was:

> "Carrier violated the Clerks' Agreement when, beginning April 29, 1969 it required and/or permitted Yardmasters (who are not covered by the Clerks' Agreement) at Memphis, Tennessee, to make physical yard check of cars in the various Yards, for switching purposes and records in violation of Rules 1, 2, 3, 5, 21, 25, 45 and related rules of the Clerks' Agreement (Carrier's file 205-4254)."

Thus both claims alleged violations of the same rules by the same persons outside the Agreement (Yardmasters) making ground check of cars at the same location (Memphis) beginning the same date (April 29, 1969). Only the named claimants in the remedial portion of the claims were different.

Award 19422 was a final determination of the claim, and Award 20374 correctly dismissed the identical claim. The dissent does not detract from the Award.

P. C. Carter

W. M. Braidwood

W. B. Jones

D. T. Naylor

G. M. Yoachum