NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21542
THIRD DIVISION Docket Number CL-21167

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7795) that:

Wage Adjustment (Retroactivity Pay) scheduled for payment February 16, 1971.

OPINION OF BOARD: This dispute relates to baggage and mail handling employes at Carrier's 30th Street Station in Philadelphia. The increasing diversion of U.S. mails away from rail transportation made these employes surplus. However, the 1968 merger agreement between the former New York Central and Pennsylvania railroads afforded them protected status in that the Carrier was obligated to continue them on current payrolls. In effect, this obligation carried beyond the normal retirement age to an indefinite future time so long as the employe was physically and mentally qualified to do the work of his craft. There was no compulsory retirement agreement in existence. The only alternative available to Carrier under the agreement was to proffer to each employe the separation allowance applicable under the protective merger agreement. Accordingly, the employes, under certain conditions, were free to accept or decline the offer. In pursuit of this alternative, the Carrier contacted the surplus baggage and mail handlers at the 30th Street Station in an effort to persuade them to resign in return for the separation allowance. Over one hundred employes, including these fifty-seven claimants, accepted the separation allowance during the period April to October 1970.

The fifty-seven employes here were not of retirement age and were not entitled to the full annuity benefits; however, each of them made application to the Railroad Retirement Board and each was awarded a reduced annuity on an early retirement basis.

In February, 1971, the National Agreement covering these parties provided for retroactive wage payments to employes and former employes except those who voluntarily left the service of the Company other than to retire. The essential substantive question raised here is whether these former employes left the service of the Carrier to retire or did they leave service to obtain the proffered separation allowance?

This case involves a procedural question which must be considered before the substantive issue can be reached. That issue involves consideration of Rule 7-B-1(a) which provides:

> "(a) - Claims for compensation alleged to be due, may be made only by an employe or by the 'duly accredited representative' as that term is defined in this Agreement, on his behalf, and must be presented in writing, to the employe's immediate Supervisor within 90 calendar days from the date the employe received his pay check for the pay period involved, except...."

The Employes' position is that the Carrier waived the procedural requirement insofar as the authorized carrier representative, the Superintendent-Labor Relations, received, accepted and handled these claims without objection. The assertion follows that thus Carrier waived the requirement that claims must be filed with the immediate supervisor. We have examined the record established on the property and we are persuaded that this matter did not originate in accordance with the requirements of Rule 7-B-1(a). It began with a letter dated March 1, 1971, Division Chairman Salvatore wrote to W. L. Davidson, Carrier's Superintendent-Labor Relations and, in effect, made an inquiry concerning Carrier's position, stating in part:

> "We have endeavored our utmost to acquire some information as to why employes who have accepted severance pay during the interim period of 1970, were not included in this list of eligible employes.
>
> As of date of this letter, we have received no official information as to whether the Carrier intends to include these severed employes in the status of being eligible to receive this wage adjustment, or whether they intend to exclude them."

For its part, the Carrier's Superintendent-Labor Relations Davidson answered on November 11, 1971 in terms of the 1971 Mediation Agreement denying eligibility. On December 6, 1971, the Division Chairman answered, rejecting this position, and stated they were prepared to enter into a joint submission on the matter (a procedure permitted under the agreement). Accordingly, a joint submission was made, dated May 3, 1973, that stated the respective positions of the parties on the substantive issues but did not make reference to the procedural question. Thereafter, while still on the property, the Carrier's appeals officer's letter to the General Chairman, dated October 23, 1973, stated:

"Before considering the merits of the claim now being asserted on behalf of the 57 named employes, we would point out that claims on their behalf were never submitted to their 'immediate supervisor' nor were such claims made within the time limits as prescribed in Rule 7-B-1(a) and are invalid."

In its submission to this Board, the Carrier advances the argument that Section 3, First (i) of the Railway Labor Act requires that disputes "shall be handled in the usual manner" and, briefly, failing that, deprives this Board of jurisdiction. This approach, if followed, leads to the conclusion that a jurisdictional matter may not be waived, thereby undercutting the Employes' contention that a waiver of this procedural requirement had occurred here. We have reviewed the Awards cited and they go both ways on the question whether a violation of a procedural rule is jurisdictional and may not be waived. Those that seem to assert it as a jurisdictional matter include: Third Division Award 15075 (No Referee); Awards 20976 and 20977 (Norris); Awards 19785 and 20165 (Sickles); Awards 19728, 20974 and 20752 (Lieberman); Second Division Award 1404 (Chappell); First Division Award 6798 (Simmons). Those following the view that procedural requirements may be waived include: Third Division Awards 11752 (Hall); 12845 and 12846 (Ables); 14693 (Ives); 15798 (House).

We do not believe it is necessary to resolve this question under the facts of this case. The issue to be considered first is whether or not there was a waiver here. If there was no waiver, it follows that the failure to comply with the rule will bar consideration of these claims.

On the matter of "waiver," almost all the Awards cited to this Board by the Employes involved situations where the procedural question had not been raised while the matter was still in progress on the property. See Award 11752 (Hall); Awards 12845 and 12846 (Ables); Award 14693 (Ives). In the latter Award, this Board stated:

"This objection was not raised by Carrier on the property and no reference was made to it until submission of this dispute to the Board ... Thus, Carrier will be deemed to have waived objection to consideration of the merits of the dispute."

In the case under consideration, the Carrier made its objection at a late stage but still at a time when the matter was still on the property. On this basis we cannot say the Carrier waived its right to object to this procedural question under the aforementioned Awards. Clearly, it would have

been preferable if the question had been raised at an earlier stage in the adjustment process. It was not; nevertheless, we do not believe we are permitted to depart from well-established principles of this Board and the agreement of the parties in order to achieve what may appear to be an equitable result. In Award 11044 (Dolnick) it was found the Carrier had waived the alleged procedural issue even though it appears that objection was raised on the property. This is the only Award cited that supports the Employes' contention that a waiver could occur even though the objection was raised on the property. We do not believe it should be followed here. We are inclined to follow a later award by the same referee, Award 14608, which relied upon Decision 5 of the National Disputes Committee, dated March 17, 1965 where it was stated:

> "If the issue of non-compliance with the requirements of Article V is 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, it is held to have been raised during handling on the property."

It follows that the matter of non compliance with Rule 7-B-1 was raised on the property and it was not, therefore, waived. Based upon the record, we conclude the claims asserted here were never submitted to their "immediate Supervisor" and they are barred.

We express no view concerning the merits of this issue.

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

That the Claims are barred.

A W A R D

The claims are dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: C. W. Paulse
Executive Secretary

Dated at Chicago, Illinois, this 19th day of May 1977.