

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23845
Docket Number CL-22514

William M. Edgett, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Southeastern Demurrage and Storage Bureau

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8548) that:

(a) The Bureau violated the Rules Agreement, particularly Rules 5, 6, 9 and 13 by arbitrarily and capriciously advertising for bid (in bulletin No. 2460) the position held by claimant.

(b) Claimant J. R. Fleming, Jr., should be paid at his respective regular basic rate of pay at the straight time rate, in addition to what he has already been compensated for each of the days that the bulletin (No. 2460) advertised claimant's position.

OPINION OF BOARD: Carrier failed to deny the claim within the time limits during its handling on the property. The Employes twice, on the property, demanded that the claim be paid because Carrier had failed to deny the claim within the time limits. Thus that issue had been handled in the usual manner on the property. 1

When the claim was submitted to this Board the Statement of Claim did not demand payment based on the time limit violation. Carrier asserts that the Employes' failure to state the time limit issue in the Statement of Claim and requires the Board to dismiss it for failure to comply with Circular No. 1 of this Board. 2

The Board has jurisdiction to hear and decide the case. The Statement of Claim, as submitted, placed the claim on the Board's Docket and complied with Circular No. 1. The time limit issue is not a new issue. It was handled on the property in the usual manner. Demand for payment was twice made during handling there. The question on which the Employes desire an award was presented to the Board in the Statement of Claim, as required. The Rule under which they assert that the claim is payable (in addition to the claim on the merits) is the Time Limit Rule. Demand for payment under that Rule was made on the property and five days pay should have been allowed under the parties' Rule and National Disputes Committee Decision No. 15 when the Employes pointed out Carrier's untimely handling on the property. 3

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.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April 1982.



LABOR MEMBER'S ANSWER
to
CARRIER MEMBERS' DISSENT
to
AWARD 23845, DOCKET CL-22514
(Referee Edgett)

For openers it should be noted that the eight (8) page "Dissent" is longer than Carrier's written submission and rebuttal brief. The entire submission of the Southeastern Demurrage and Storage Bureau, with the inclusion of certain "boiler plate" language and repeating the Statement of Claim, is only three and one-half (3½) pages. The rebuttal brief is shorter — two pages.

Next, it must be noted that at no time did the Carrier argue that it had properly and timely denied the appeal of the original claim within the sixty (60) day time limit established by Article V of the August 21, 1954 National Agreement. On two separate occasions, in the on the property handling, Carrier was notified that it had blown the time limits and on each occasion payment was requested on the basis of Article V and Rule 24. Each time that the Carrier was notified that the claim was payable under the time limits rule the Carrier chose to ignore the issue, as they chose to do so in their brief Ex Parte Submission to this Board. Perhaps they felt that if the problem was ignored the time limit issue would be swallowed into a black hole never to be heard of again. In the real world though, this does not happen.

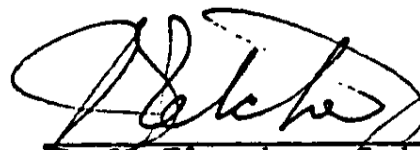
National Disputes Committee Decision No. 15 lays down the law with respect to a breach of time limits:

"In this connection the National Disputes Committee points out that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the stage of handling in which such failure becomes apparent. If the carrier has defaulted, the claim should be allowed at that level as presented; and if the employee representatives have defaulted, the claim should be withdrawn."

In the instant case the Carrier defaulted and instead of allowing the claim at the level of default it ignored the default.

The decision to allow the claim as presented is proper and attempts to have the claim dismissed on pseudo technical grounds are an affront to the grievance process. Challenges, such as those laid down in the "Dissent" seem juvenile and not worthy of comment.

Award 23845 is a sound and proper decision.



J. C. Fletcher, Labor Member

Date: 5-12-84



CARRIER MEMBERS' DISSENT
TO
AWARD 23845, DOCKET CL-22514
(REFEREE EDGETT)

The facts culminating in the Neutral's decision in this case are so bizarre, they almost defy narration. The Neutral sustained a claim involving an issue or "particular question" which was never set forth in the "Statement of Claim", after hearing a detailed jurisdictional argument that it was impermissible to consider the issue under the N.R.A.B.'s Circular 1. The case was considered by the Division with the Neutral on March 25, 1980. After considering the case for over two years, the Neutral decided the Carrier violated the Time Limit rule and should be penalized. The Award was adopted on April 28, 1982.

The Carrier challenged the Board's jurisdiction to decide the Time Limit question because it was not set forth in the Employee's "Statement of Claim". The Carrier strenuously objected to the injection of this issue under the Employee's position because it was not in compliance with Circular 1 of the N.R.A.B. dealing with the specific requirements for the proper presentation of a dispute. Circular 1 contains the following explicit requirement under "Statement of Claim":

"Under this caption the petitioner or petitioners must clearly state the particular question upon which an award is desired."
(Emphasis Supplied)

The Statement of Claim in this case reads as follows:

"Claim of the System Committee of the Brotherhood (GL-8548)
that:

"(a) The Bureau violated the Rules Agreement, particularly Rules 5, 6, 9 and 13 by arbitrarily and capriciously advertising for bid (in bulletin No. 2460) the position held by claimant.

"(b) Claimant J. R. Fleming, Jr., should be paid at his respective regular basic rate of pay at the straight time rate, in addition to what he has already been compensated for each of the days that the bulletin (No. 2460) advertised claimant's position."

There is absolutely no reference to Rule 24 or the Time Limit issue to be found in the Statement of Claim. This was the same statement of claim which was filed with the Board in the "Notice of Intent", which under Board rules was furnished to Carrier, notifying them to file their submission in this dispute. It should come as no surprise, therefore, that Carrier did not even mention the Time Limit question in its submission, since they had no knowledge that Petitioner was disregarding the Board's Circular 1, and presenting an issue for decision which could only be found under their Position. In short, the Carrier fully expected the Organization to discuss the "particular question" that was framed for discussion under "Statement of Claim" in their "Notice of Intent", and that was the issue which Carrier developed in its Submission.

The Neutral now asserts:

"The question on which the Employees desire an award was presented to the Board in the Statement of Claim, as required. The Rule under which they assert that the claim is payable (in addition to the claim on the merits) is the Time Limit Rule."

We challenge the Neutral or the Majority, as we did during discussion, to show us where Rule 24 or the Time Limit issue was referred to in the "Statement of Claim". If that was "the particular question upon which an award is desired" [Circular 1] then it should readily appear but it does not.

It should also be noted that the Organization not only failed to raise the Time Limit issue in the "Notice of Intent" or the "Statement of

Claim" in their Submission but they presented the following issue in their "Statement of Facts":

"The particular rules of our agreement that are applicable to this claim are Rules 5, 6, 9 and 13, in part reading as follows:" (Emphasis Supplied)

Again we find no reference to Rule 24.

In the course of discussion of this case some two years ago, the Neutral's attention was directed by the Organization to several Awards including his own Award 20410, in support of the contention that claims have been sustained under the Time Limit Rules even though such rules were not set forth in the Statement of Claim. Upon examination, it was found that no argument was presented on this point in that case and the Neutral was so advised. If it need be said at this late date, a case does not stand as a precedent for a principle that was not discussed or resolved.

On the other hand, the Neutral was fully advised there were numerous Awards of the Third Division which have categorically rejected attempts by either side to discuss questions or issues not set out in the statement of claim, including Time Limit issues. The fact that such issues may have been discussed on the property at one level or another is irrelevant to the point whether they are in compliance with Circular 1. If Circular 1 can be treated with contempt and ignored by this Neutral for what he conceives to be a good reason, then each Neutral will have the same privilege for reasons which the Organization may not consider palatable and Circular 1 then becomes a nullity.

Award 6954 (Coffey) (April 12, 1955):

"In preparing all submissions, which relate to the moving cause of controversy, Petitioner should have looked carefully to the Board's Rules of Procedure (Circular No. 1, last reprinted November 1, 1948) before splitting claims. In connection therewith and for 'statement of claim' all parties are on notice, that:

'Under this caption the petitioner or petitioners must clearly state the particular question, upon which an award is desired.'

"Pursuant to the foregoing it has become the accepted practice to regard the substantive part of claim as the pleading on which issue must be joined, and other parts of the claim as being the proposed remedy. No amendment to part one, the substantive pleading, is ever permissible and the Board cannot go beyond that part of the claim, as stated, in deciding the issue framed thereby.

"In connection with their submissions, it is expected of all parties that they will clearly and briefly set forth all relevant, argumentative facts and the Agreement or rules involved, under their statement of position. It is to this part of the submission that the Board looks for the theory of the case, and failure on the part of one or both parties to adhere strictly to procedural requirements has contributed much to the unacceptability, by the parties to the dispute, of Board awards.

"The moving party always has the right to rely upon an alleged violation of one or more rules and to cite purported violative action in more than one respect in connection with one and the same dispute, but it cannot vacillate or make other than a frontal attack. It can better accomplish by direction than indirection whatever may be its object.

"In the instant dockets, Petitioner could have had an expression from the Board whether new positions had been created and/or whether the rates fixed by the Carrier are in accord with Article 7, but such controversy was not put in issue by the claim and developed pursuant to issue properly joined thereon in accordance with Board procedure.

"If intended to put in issue here the question whether any reduction is permissible when positions are reclassified, Petitioner could clearly have framed that issue by its statement of claim and position, so as to have brought about an

"interpretation of Article 2(a), and then by holding fast thereto could have obtained that result, but it shirked its duty in both instances."

(Emphasis Supplied)

Award 10537 (Sheridan):

"From the outset, we are confronted with a jurisdictional question, the foregoing claim does not mention the fact that the subject work is being performed by persons other than those who come within the Agreement between the Carrier and Organization.

"We are extremely reluctant to impose stringent provisions for the processing of claims but we must face reality in recognizing past precedents in the nature of decisions of this Board which hold that if the claim is substantially amended, it cannot be considered by this Board. This is in violation of Railway Labor Act and the awards of this Board prohibit it. See Awards 4346, 5077, 6692 and 10193.

"In the instant case, the Organization elected to pursue its theory of Agreement violations as set forth in its original Statement of Claim, and in reliance thereon, the Carrier moved to defend or rebut this claim, the Carrier is not burdened to look at matters other than those contained in the original Statement of Claim in order to prepare a defense if it has one.

"In the instant case, the Statement of Claim fails to mention that the work in question is being performed by or has been transferred to persons other than those subject to the Agreement between the Carrier and the Organization.

"The evidence shows that the claim submitted here is not the one that was handled by the Carrier, there has been a failure to comply with Section 3 First (i) of the Railroad Labor Act as amended." (Emphasis Supplied)

Award 10904 (Ray):

"While this position was taken by the Organization in the handling of the claim on the property it is not encompassed within the Statement of Claims as submitted to this Board and under the accepted practice of the Board cannot be considered. The sole question presented by the claim is whether through restoration of force Claimant was restored to service. Whether

Carrier Members' Dissent to
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"Carrier should have recalled Claimant to fill some temporary vacancy and the effect of such recall is not before the Board under the present claim."

(Emphasis Supplied)

Award 15523 (Kenan):

"The Employees also contend that Bulletin No. 628 does not conform to the bulletin requirements established by Rule 9 and that it and all actions taken under it must, therefore, be rescinded. Without question, Bulletin No. 628 does not follow the form established by Rule 9. However, this attack on the bulletin is not properly before this Board. The Employees' statement of claim attacks the bulletin only for imposing the welding requirements on applicants for the Carpenter 2nd Class position. The Board is limited to the issues raised in the statement of claim. See Award Nos. 6954 (Coffey), 10904 (Ray) and 11006 (Boyd)."

(Emphasis Supplied)

Award 16955 (Brown):

"In the handling on the property Petitioner claimed a violation of Regulation 3-C-1 of the basic Agreement, and requested removal of the asterisk designation from the Sharpsville Agency, and also made request for an increase in pay of \$75.00 per month for the Agent at Sharpsville under the provisions of Regulation 8-A-1 (b) of the basic Agreement. There two matters were not encompassed within the Statement of Claim as submitted to this Board. In accord with prior awards, these matters may not be considered. See Awards 6954, 8426, 10904, 15523"

(Emphasis Supplied)

Award 17512 (Dugan):

"Under the Railway Labor Act, and our rules of procedure the only question properly before us is that presented in the formal statement of claim." (Emphasis Supplied)

Award 17525 (Dugan):

"This Board has recently held in Award No. 17512, that the only question properly before this Board is that presented in the formal statement of claim."

(Emphasis Supplied)

Award 18239 (Dolnick):

"The Board has no power to go beyond the issues in the Statement of Claim. And that is confined to the question whether the Carrier had the right to direct the Claimant to make restitution. A restitution in the amount stolen is not an excessive penalty. And this is properly so because the most Carrier can now recover from the Claimant is \$150.00. Such a penalty for the violation of explicit instructions is neither arbitrary, capricious nor unreasonable." (Emphasis Supplied)

Award 19306 (Devine):

"It is well settled that the only dispute properly referable to the Board is the claim appealed to Carrier's highest appeals officer and that the Board is not empowered to go beyond the issues presented in the formal statement of claim. Awards 17512, 18239, 15523. (Emphasis Supplied)

Award 19507 (O'Brien):

"While Petitioner argued before the Board that 'it was necessary to remove the rail braces from the gauge plates, and the roller spring hanger from the stock rails,' the Statement of Claim is limited to the work of installing these switch heaters, hence there is no issue before us concerning rail braces or roller hangers." (Emphasis Supplied)

Award 19790 (Brent):

"Finally, this Board has no power to go beyond the issues raised in the original statement of claim." (Emphasis Supplied)

Award 21543 (Wallace):

"The Claim is premised upon violations of Rules 101, 307 and 309 of the agreement. Carrier denies these violations. The matter was progressed on the property in the usual way except that the Organization alleged that Carrier's answer to its appeal had not been received within the 60 day time limit rule and therefore payment of the claim should be made under the contract. No other evidence or comment was made concerning the time limit rule on the property.

"The Organization cites a number of awards sustaining claims under the time limit rules such as Rule 701. The Carrier, in turn, answers this procedural claim on various grounds. We need consider only that the claimant failed to make this a part of his formal statement of claim. We have reviewed all the awards cited by the Carrier and the Organization and each included the issue of time limits in its formal statement of claim with one exception, Award 20763 (Lieberman). In that case the time limit question was raised on the property and was fully discussed in the opinion, but no mention was made that the issue was not raised in the formal statement of claim. Accordingly, we do not consider that this award represents authority contrary to the general view reflected in the awards, that the time limits issue must be included in the formal claim. That was not done here and we find it is decisive on this issue. See Awards 17512 (Dugan) and 11006 (Boyd)."
(Emphasis Supplied)

We submit there was no issue properly before this Tribunal dealing with Rule 24 of the parties collective bargaining Agreement, consequently we were not empowered to consider that question. The Petitioner had the privilege to frame the claim in any manner they desired. Their "Notice of Intent", "Statement of Claim", "Statement of Facts" and their Rebuttal indicate what they expected the Board to decide, and the Board exceeded its jurisdiction when it considered matters outside the question properly presented. For the reasons set forth above, we dissent.


W. F. Euker


D. M. Lefkow


J. E. Mason


J. R. O'Connell


P. V. Varga

