NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23920
THIRD DIVISION Docket Number CL-23229

George E. Larney, Referee

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

STATEMENT OF CLAIM: Claim of the Committee of the Brotherhood (GL-8991)

(a) The Pacific Fruit Express Company violated Rule 23 of the Clerks' Agreement when it failed to notify Mr. H. R. Sloan within 60 days from the date he filed his claim that such claim was disallowed.

(b) The Pacific Fruit Express Company shall now be required to allow Mr. H. R. Sloan eight (8) hours compensation per day at the current Clerk Repairman hourly rate beginning April 16, 1978, and continuing thereafter until allowed to work the position from which displaced effective that date; and, in addition, he shall be paid the sum of ten thousand dollars ($10,000.00) severance allowance as requested in the original claim.

OPINION OF BOARD: Effective April 16, 1978, Mr. R. R. Gorman vacated the position of District Agent at New Orleans and displaced employe R. R. Chrishold who in turn displaced the Claimant, Mr. H. R. Sloan holding the position of Clerk Repairman. Subsequently, Claimant, in a letter dated June 2, 1978, directed to Mr. T. D. Walsh, Carrier's Manager of Personnel and its highest designated officer to receive claims on appeal, related his objections relative to his displacement and set forth the remedy which hereinabove appears in the Statement of Claim's Section of this Award. The record evidence reflects that Claimant provided copies of this June 2, 1978 letter to appropriate representatives of the Organization. As a result, General Chairman J. H. Groskopf by letter dated June 7, 1978, apprised the Claimant that any claims or grievances had to be submitted in accordance with the applicable provisions of the Railway Labor Act, advising that if his claim was to be given any consideration he needed to first submit the claim to the Carrier officer designated to receive claims at the initial level of handling. Groskopf informed Claimant this Carrier Officer was the District Agent at New Orleans. Groskopf further apprised Claimant he was obligated to timely file his grievance in accordance with the time limit provisions of Rule 23 of the controlling Agreement bearing effective date of June 1, 1965 as revised and reprinted June 1, 1973.

Claimant, having personal knowledge there was no incumbent filling the District Agent's position at New Orleans as the last person to hold the position was employe R. R. Gorman who started the chain of displacements which resulted in his being displaced, and allegedly acting on advice related to him by General Chairman John R. Jenkins, filed his claim with J. E. Roberson, the General Agent at Houston. The record evidence indicates that Roberson as General Agent in Houston was the Carrier's designated officer at the intermediate level to receive claims on appeal. Claimant filed the subject grievance with

Roberson in a letter dated June 9, 1978 and received in Roberson's office on June 13, 1978. Thereafter, Claimant heard nothing from Roberson until he received a letter from him dated September 1, 1978, in which Roberson formally rejected the claim.

In the meantime, Claimant received a letter from Walsh dated June 13, 1978, in which Walsh acknowledged receipt of Claimant's June 2nd letter on June 7, 1978. Walsh apprised Claimant the files relative to the details of the displacements complained of were not available in San Francisco but that he had written requesting them. The gist of this letter was that Walsh would have to wait on these files and other documentation before addressing the alleged impropriety of the displacements. Moreover, Walsh indicated to Claimant that whether or not his displacement was proper, it nonetheless was totally unrelated to the then recently negotiated Agreement covering the split-off of the Pacific Fruit Express Company. Walsh indicated to Claimant that when the requested documentation became available and a determination made as to whether or not the Controlling Agreement had been observed, he would be advised further as appropriate. The Carrier alleges that between the dates Walsh received Claimant's letter on the 7th of June and June 13th when he wrote the Claimant, Walsh had a telephone conversation with a representative of the Organization, not identified in the record, in which he apprised the representative that Claimant should handle the grievance through proper and usual channels.

Prior to his receipt of Roberson's denial letter dated September 1, 1978, Claimant in a letter to General Chairman Jenkins dated August 28, 1978, apprised Jenkins he had yet to be advised by Carrier as to the status of his claim. In response, Jenkins, in a letter to Roberson dated September 1, 1978, apprised Roberson the subject claim had not been acted on by him as representative of the Carrier and therefore requested the claim now be honored as presented in accordance with the pertinent part of Rule 23(c)1, which reads as follows:

> "1. ... 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 employe 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."

Apparently, Jenkins at the time of writing this letter was unaware Roberson had, on the very same date of September 1, 1978, issued a formal denial rejecting the subject claim. Thus, in another letter to Roberson dated September 11, 1978, Jenkins refuted Roberson's basis for denial arguing that since Gorman had vacated the position of District Agent at New Orleans there was no one to receive the subject claim at the local level heretofore specified by Carrier as the designated officer to handle initial claims. Jenkins noted further that it was not until July 20, 1978, nearly forty (40) days following the filing of this subject claim that Carrier had established its new designa-

tion of Agent Clerk at New Orleans as the officer to receive initial claims and grievances filed at the local level and formally made this known to the Organization. Jenkins argued that under these circumstances, the subject claim had properly been filed with him (Roberson) as General Agent in Houston. Furthermore, Jenkins took issue with Roberson relative to the Claim's meritoriousness, arguing that it was the Organization's position the claim did have merit as Claimant's displacement arose as a result of a violation of Rule 9(E) of the Controlling Agreement. Jenkins then reiterated the Organization's request to have the claim paid as presented based on the fact Carrier had untimely denied the claim.

Roberson responded to Jenkins by letter dated September 26, 1978, in which he insisted that Claimant had been advised by Carrier and Organization spokesmen alike that he should file the claim locally with the Carrier's designated officer at the local level, to wit, the District Agent at New Orleans. In not having followed this advice, Roberson asserted, Claimant wrongly filed the subject claim with him at the intermediate appeal level, thereby presenting the claim improperly. Roberson then went on to reaffirm his denial of the claim both on procedural and substantive grounds. The claim was next appealed to Walsh, who in turn denied the claim on the same basis as did Roberson and as a result is now on appeal before the Board.

The Organization's position is simple and straightforward, wherein it argues, Carrier failed to deny the subject claim on a timely basis and therefore is contractually obligated to pay the claim as presented in accordance with Rule 23(c)1 of the Controlling Agreement cited hereinabove. In support of its position, the Organization cites decisions of the National Disputes Committee, empowered to rule on violations of Article V of the August 21, 1954 Agreement, wherein it asserts the various decisions issued by the Committee, but particularly NDC Decision 16, uphold the contractual obligation on Carriers to timely deny claims and where they do not, the claims are payable as presented. As further support of its position, the Organization cites a myriad of Third Division Awards, sixteen (16) in total, but seizes on several as being particularly on point with the instant case. Most relevant is Award 21900, wherein the Board held the following:

> "It may very well be that the Employes were dilatory in their assertions and that they addressed them to the wrong official. Similarly, we concur with the Carrier's assertion that Employes could submit obviously frivolous claims. But, we are inclined to determine that the Carrier can protect itself from such circumstances by the simple expedient of responding to the claim and setting forth its defenses therein. Were we to rule to the contrary we would allow the Carrier to make the determination as to what is or is not a claim which is worthy of presentation here, and in essence, we would permit the Carrier to usurp the function of this Board. In order to protect against such a result, we are inclined to reaffirm this Board's determinations in Awards 16564, 19422 and 20900, among others."

In Award 16564, the Board held the following:

> "Rule 21 of the confronting Agreement, which is a reproduction of Section V, 1(a) of the National Agreement of August 21, 1954, contractually obligates a Carrier to disallow a 'claim or grievance' within 60 days of its filing, giving its reasons for disallowance in writing, under pain of allowance 'as presented' if those procedural requirements are not complied with. There are no exceptions. A Carrier may not disregard a filed claim because it, in the Carrier's opinion, is: (1) without merit; (2) is not supported by the Rules Agreement; or (3) is not a dispute within the contemplation of the Railway Labor Act. Carrier's obligation to deny any claim filed within 60 days of filing, giving its reasons for disallowance in writing, is, by application of Rule 21, absolute. Since, Carrier failed in this contractual obligation we are compelled, by Rule 21, to sustain the instant claim as presented."

The Carrier defends its position on several grounds, but the thrust of its major argument is that, by Claimant's not filing the subject claim with the properly designated Carrier officer at the initial level of handling and thereafter Claimant's failure to rectify his mistake to so file properly even when counseled by it and Organization representatives to do so, such action itself constitutes a violation of Article 23(c)1 of the Controlling Agreement. In support of its position, Carrier cites that portion of Article 23(c)1 which reads as follows:

> "All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

Carrier argues vigorously that at the time Claimant issued his claim, the designated officer to receive same was the District Agent at New Orleans and not the General Agent at Houston. Carrier argues the subject claim is therefore contractually barred from being considered by the Board because of Claimant's insistence on ignoring the proper procedures of filing the claim despite being instructed to file same with the District Agent at New Orleans. Such action by Claimant, contends Carrier, constitutes a procedural flaw fatal to the Organization's position. Furthermore, Carrier argues that in addition to the contractual violation committed by Claimant, filing of the subject claim in the manner it was filed is contrary to Section 3, First (i) of the Railway Labor Act, as amended which requires that as a condition precedent to an appeal before this Board, the dispute must be handled on the property, "in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes." Carrier charges, Claimant failed to handle the dispute in the usual manner when he chose to flout all advice and simply ignored the requirement of having to file the claim first with the District Agent at New Orleans. Carrier notes for the record, the subject claim has yet to be filed at this initial level.

In further support of its position, Carrier cites several Third Division Awards, but most particularly relies on Award 20977 wherein the Board held the following:

> "Moreover, assuming arguendo that the time slips constituted proper claims, the further objection is raised that such claims were not presented to the Carrier Officer designated for such purpose and as specifically provided in Supplement D, subdivision 1(a) of the Agreement. The record conclusively establishes that the claims ... were filed with the Freight Agent and not with the Terminal Trainmaster. This did not constitute proper filing."

In these circumstances, we have held in innumerable prior Awards that such improper filing is jurisdictionally defective. Thus, in Award 15334 (House) we said:

> "There can be no dispute that by application of Article V, 1(a) a claim, as the instant one, is barred if the same had not been presented in writing to the proper officer of the Carrier and such objection is timely raised during the handling on the property.
>
> Upon the record before us we find no evidence that Petitioner presented claim initially to the proper officer of Carrier and in the absence of such proof the claim is barred. We are compelled to dismiss the claim."

Also in Award 20035, the Board held:

> "The claim was not first presented to the officer designated to receive claims in the time allowed, was it appealed as prescribed in Rule 61-1(a), (b) and (c). (Award 15183). (Also First Division Award 21123).
>
> Accordingly, and without reaching any other issue, we must find that the claim here asserted is barred because of Claimant's failure to present it to the officer of the Carrier authorized to receive same; and that it must, therefore, be dismissed."

Carrier argued vigorously claim in first instance, was not properly filed and therefore it had no obligation to respond. The Organization on the other hand specifies there is only one issue before the Board, to wit, the procedural question as to whether or not Carrier is contractually bound to honor the claim as filed because of an alleged untimely response in denying the claim. We believe this to be a most troublesome case because of the unusual and to some extent peculiar prevailing circumstances. We acknowledge, as does the Organization, that Claimant misfiled the claim initially when he directed his grievance to Walsh. Thereafter, the record is sufficiently unclear as to what measures Carrier actually did take to notify both the Claimant and Organization as to how the claim should be handled at a time when the District

Agent's position at New Orleans was vacated and Carrier had not yet designated the Agent Clerk as its officer to receive initial claims at the local level. If such advice was in fact transmitted by the Carrier, we are at a loss to determine why this was not formally communicated to the Claimant and/or Organization in writing. We are equally at a loss as to how Carrier would expect the Organization to file a claim beginning at the local level, when the Organization was fully aware the position of District Agent had been vacated and thus knew there was no one there at New Orleans to handle the claim.

The record evidence on the other hand indicates the Organization endeavored to discover the identity of the proper Carrier official to whom the subject claims should first be directed and was motivated to do so because it knew the incumbent District Agent was no longer in that position and Carrier had yet to specify a replacement as its designated officer to handle initial claims. Under these circumstances, the Organization was stymied in its effort to comply with either its contractual obligations as spelled out in Rule 23(c)1 or its statutory obligations under Section 3, First (i), to progress the dispute in the "usual manner" on the property. This "usual manner" was substantially altered when the District Agent's position at New Orleans was vacated and when during an approximate interim period of forty (40) days, the Carrier failed to formally redesignate one of its officers at that location to handle initial claims as they arose.

Based on the foregoing observations it is our judgment Carrier had the burden to make clear and in writing to both the Claimant and Organization as to where the claim should be filed in the absence of an incumbent District Agent, at New Orleans. It appears obvious to us, that in Carrier's failing to so do, confusion reigned on both the Claimant's part and the Organization's part as to where the initial filing should be made. As a direct result of not putting such advice in writing, the Organization apparently seems to have been mislead into believing it should refile the claim with the General Agent in Houston.

For his part, the General Agent in Houston, knowing too there was no designated officer residing at the time in New Orleans to handle claims at the initial level, had an obligation, irrespective of his judgment the claim should not have been filed with him, to put in writing the claim had been misfiled, thereby informing Claimant and the Organization of this fact. If for no other reason, the General Agent should have taken such action to protect the Carrier. By the time the General Agent did respond, it was, as the Organization so alleges, in excess of the sixty (60) days set forth in Rule 23(c)1 of the Controlling Agreement.

We find Carrier erred in not issuing a timely denial. In reaffirming what we said in Award 21900, we hold the claim as presented, irrespective of its regrettable flaws as stated, must now be contracually honored by the Carrier.

Carrier is directed to pay all liabilities stated in the claim. Relative to this order we note Carrier's liability for eight (8) hours compensation per day at the then prevailing current hourly rate for Clerk Repairman ended as of September 1, 1978, when Carrier issued its denial of the claim. We also wish to note that in sustaining the claim, such Award is not meant to serve as having any precedential force in cases which have arisen subsequent to this case and prior to this Award or in cases arising post this Award.

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of June 1982.

Serial No. 312

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 23920

DOCKET NO. CL-23229

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Pacific Fruit Express Company

Upon application of the Carrier involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following determination is accordingly issued as set forth hereinbelow:

In our review of Carrier's application for an interpretation we judge said application to represent, in whole, an attempt to reopen and reargue the merits of the dispute. Further, it is our judgment that Carrier is additionally requesting a review of the correctness of the Award by questioning the basis for same and seeking a determination that it has already complied with the Award on the grounds of having met what it believes to constitute the proper definition of "allowing the claim as presented".

We note emphatically the well-established and well-settled principle that the purpose of an interpretation is to explain and clarify the Award as originally made, but not, under any circumstances, to make a new Award. We find that the Award as originally issued and the attendant reasoning underlying the Award is clear and unambiguous.

We further find that it is not within our jurisdiction to consider Carrier's position that it has already complied with the Award. Clearly, in not paying to the Claimant the $10,000 sum set forth in the Award, the Carrier has not met compliance.

Finally, we reiterate and remind the Carrier that the original Award held that it violated the Agreement.

Referee George E. Larney, who sat with the Division as the Neutral member when Award No. 23920 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of April 1983.