

CORRECTED

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 26749
Docket No. MS-27582
88-3-87-3-20

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Jerry H. Clarke
(
(Atchison, Topeka & Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of Jerry J. Clark (#159) that:

(a) Carrier violated the rules of the current Clerks' Agreement at Los Angeles, California commencing August 13, 1985 when it failed to properly respond to a grievance submitted that date, and

(b) Carrier shall now accept grievance as presented, and,

(c) Claimant Jerry J. Clark shall now be compensated \$1,202.04 plus \$100.17 each day after August 13, 1985 that Claimant is wrongfully denied payment of this claim, and

(d) Claimant Jerry J. Clark shall be paid interest payable at the prevailing prime rate and pay other such damages and awards as may be determined by this Honorable Board."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On or about January 6, 1987, the Third Division of the National Railroad Adjustment Board was served with numerous Notices of Intent to file Claims on behalf of employees of the Carrier who were employed in the craft represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (referred to herein as BRAC). The Claims were filed by John P. Lemkau as Representative of the individual Claimants.

In each Claim, BRAC was notified by the Board that the Claim had been filed and that it had the right to file a submission, if it so desired, as a Third Party In Interest. In each dispute, BRAC did respond. It took the position that the disputes were not properly before the Board because the Claims were not handled on the property by the individual Claimant or the Claimants' duly authorized bargaining Representative, i.e., BRAC. The Carrier has joined with BRAC in requesting that the dispute be dismissed for the same reason.

In addition, the Carrier argues that if the Board does assert jurisdiction, the Claims should be denied on the merits. We shall discuss each issue seriatim.

Initially, the jurisdictional requirement that dispute be handled in accordance with the provisions of the applicable Collective Bargaining Agreement and the customary practices of the parties is spelled out clearly in Section 153, First (1) of the Railway Labor Act which, in pertinent part, provides:

"(1) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions...shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes;..." (Emphasis added)

In addition, Section 2, Second of the Act provides:

"Second. All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (Emphasis added)

The Board has consistently held that failure to hold a conference on the property deprives the Board of jurisdiction to hear the dispute. Third Division Awards: 25712, 25298, 25345, 25429, 25801, 25252, 23466.

Rule 47 of the Agreement between the Carrier and BRAC sets forth the Rules with respect to who can handle employee claims on the property. Thus, Rule 47-A provides that "All claims or grievances must be presented in writing by or on behalf of the employee involved" and that the Carrier, if it declines the Claim or Grievance must "notify whoever filed the Claim or grievance (the employee or his representative) in writing of the reasons for such disallowance." (Emphasis added.) While Rule 47-A does not define the term representative, Rule 47-C does. Thus, Rule 47-C provides:

"Rule 47-C. Rule 47 recognizes the right of representative of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employees they represent."

The Agreement clearly limits the parties who can handle Claims or Grievances on the property of the Carrier to the individual Claimant or BRAC. This Board has repeatedly recognized the right of parties to a Collective Bargaining Agreement to limit the representative rights of employees in the handling of their Claims or Grievances. See, for example, First Division Awards: 25853, 6381, 1821; Second Division Awards: 8727, 7300, 6381; Third Division Awards: 21626, 21237. Furthermore, both the Carrier and BRAC assert that at no time in the history of representing clerical employees of the Carrier has anyone other than BRAC or the employee involved handled Claims or Grievances on the property of the Carrier. The Claimant has not disputed such assertions of material fact.

A review of the Claims filed by Mr. Lemkau, a former Carrier employee, on or about January 6, 1987, shows that at critical junctions of the handling of these disputes on the property, the Claims were not handled by the individual Claimant or BRAC. Thus, in this particular Claim, the evidence shows that the Claimant filed his initial Claim with Carrier on August 13, 1985. Under Rule 47-A of the Agreement, the Claimant clearly had the right to file a Claim on his own behalf. The Carrier declined the Claim on August 16, 1985. The Claimant responded on September 9, 1985, stating that he was going to progress his Claim by appealing to a higher officer of the Carrier, which he did in a letter to the Carrier's Assistant to Vice President, Labor Relations, dated September 9, 1985. The record reflects further correspondence between the Claimant and Carrier officials dated September 30, 1985, March 3, 1986, April 11, 1986, and April 28, 1986.

Thereafter, on November 24, 1986, the Claimant sent a notarized statement to the Carrier notifying the Carrier:

"...that Joel F. Handler, John P. Lemkau and Gary J. Guidicessi may represent me in conferencing any and all claims and/or grievances I have pending before the Atchison, Topeka and Santa Fe Railway Company and further do expressly authorize Mr. Handler, Mr. Lemkau and Mr. Guidicessi to fully settle, compromise and/or otherwise resolve all such claims or grievances on my behalf."

It is undisputed that none of the individuals listed in the Claimant's notarized statement has any connection with BRAC as an authorized representative.

Finally, on April 24, 1987, BRAC wrote to the Carrier stating that it objected to the Carrier dealing with anyone other than the individual or BRAC in handling the Claimant's Claim on the property.

While the record does indicate that Claimant's Claim was discussed in a conference between the Carrier and some of the individuals named in the Claimant's notarized statement, the record likewise shows that no conference was held between the Carrier and the Claimant or the Representative designated to represent him under Rule 47 of the Agreement. Accordingly, no conference was held on the property as required by the Railway Labor Act and, in accordance with a legion of Board Awards, some of which were cited supra, the Board must dismiss the Claim on jurisdictional grounds.

Beyond the jurisdictional defect that requires our dismissal of the Claim, we have examined the merits of the Claim and find that the Claim is not supportable on such basis as well. The initial Claim, dated August 13, 1985, alleged that the Carrier violated various provisions of the Agreement between the Carrier and BRAC dealing with the abolishment of clerical positions. Beginning with its appeal letter of March 3, 1986, however, the Claimant abandoned any argument with respect to the merits of his Claim, relying instead solely on the position that the Carrier had not timely responded to the appeal letter dated September 9, 1985, which according to the Claimant alleged "the improper bulletining of Position No. 6255 to Santa Fe." The Carrier, in its letter to the Claimant dated April 11, 1986, responded that it had never received an appeal from the Claimant with respect to Position No. 6255; that it had received an appeal from the Claimant dated September 9, 1985, dealing with the abolishment of Position No. 6143; and that the Carrier had responded to the appeal dealing with Position No. 6143 in its letter to the Claimant dated September 30, 1985. The correspondence between the parties clearly supports the Carrier's version of the facts. Thus, the file reflects that the Claimant filed a Claim on August 13, 1985, which was declined by the Carrier on August 16, 1985. On September 9, 1985, the Claimant wrote a letter to the Carrier's Superintendent informing him that the Claimant intended to appeal the Carrier's declination of his Claim dated August 13, 1985. On the same date, the Claimant sent an appeal letter to the Carrier's Assistant to Vice President, Labor Relations, which reads:

"Enclosed for your consideration are all papers, regarding a grievance filed August 13, 1985 and rejected by [the Superintendent]. This is to appeal his rejection to you."

The "papers" attached to the Claimant's letter included the initial Claim filed by the Claimant on August 13, 1985, which alleged the improper abolishment of Position No. 6143. There is no evidence in the record that the Carrier received a second Claim from the Claimant with an alleged improper abolishment of Position No. 6255. This Board has long held that the burden of proof is upon the sending party to prove that the document was received. Third Division Award 25417, citing 17 additional Awards.

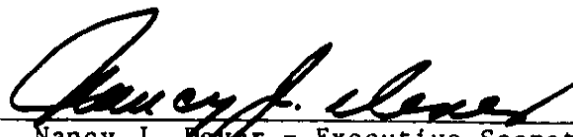
For all the foregoing reasons, not only must the Claim be dismissed for jurisdictional reasons, it likewise has no support on the merits.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois this 5th day of January 1988.