PUBLIC LAW BOARD No. 689
(Procedural)

HOUSTON BELT AND TERMINAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

ROY R. RAY, Referee

ISSUE

The sole issue before this Procedural Board is whether the claim of R. L. McKeehan (identified as Case 19 in Attachment A to the Memorandum of Agreement between the parties dated January 26, 1971 establishing a Public Law Board) is a proper case for submission to the Public Law Board.

FACTS

The Company granted Yardman R. L. McKeehan a leave of absence for military service on November 22, 1966. He was discharged from Service on October 18, 1967 and attempted to exercise his seniority rights to bump into Job 316 as foreman on October 25, 1967. The Company refused to permit him to return to work on the ground that he had received a military service connected injury to his ankle and was found by the Company doctor not to be physically qualified. The Union filed a claim (No. 3075) on McKeehan's behalf with Superintendent Reese on October 30, 1967 asking pay for October 25 and all days subsequent thereto and including fringe benefits. In his letter of Claim the General Chairman asserted that McKeehan had not received the injury in military service but in fact had the defect while

still working for the Company prior to the military service. The claim was declined by the Superintendent on November 22, 1967. By letter of November 28, 1967 General Chairman Cotton refused to accept the Superintendent's decision, reiterating that McKeehan did not get the injury in military service and was not required by the Rules to take a physical examination. Thereafter the United States Department of Labor entered the picture and conducted an investigation to determine whether the Company had violated McKeehan's reemployment rights under the Selective Service Act. On April 3, 1968 General Chairman Cotton and Superintendent Reese had a conference concerning the status of McKeehan's claim. Reese wrote Cotton on April 19, 1968 as follows: "Since the matter has been turned over to the United States Department of Labor which handles the reemployment rights of returning veterans the claim should be held in abeyance covering the ruling by the United States Department of Labor and when this ruling is received we will act accordingly." Thereafter the Department of Labor, acting through the United States Attorney filed a civil suit on McKeehan's behalf in the United States District Court in Houston, charging the Company with violation of McKeehan's reemployment rights under the Selective Service Act. The case was tried in the latter part of 1969 and on December 16, 1969 Judge John Singleton ruled that the Company had violated McKeehan's rights and ordered it to return him to work immediately. The judge took under advisement the matter of compensation to which McKeehan was entitled.

On May 8, 1970 General Chairman Cotton wrote M. G. Jackson, Superintendent, referring to Judge Singleton's decision of December 1969 and requested that the Company pay McKeehan for his lost earnings in the amount of $20,820.68. Jackson replied on May 13th stating "the matter of McKeehan is now pending before the Justice Department and we are awaiting their reply." Cotton wrote again on June 10th insisting that the Company pay McKeehan for all time lost, and asking him to set a conference date. Jackson replied on June 17th saying that the matter was still before the Federal Court. Cotton wrote back on June 18th stating that the Federal Judge had not ruled on the money issue and insisting that the Company pay McKeehan for all time lost without deductions for outside earnings. He asserted that if the Federal Judge should rule contrary to the Agreement of the parties on the money issue he would exceed his authority by changing the Agreement. On June 19th Cotton wrote to Personnel Manager Minahan appealing from the ruling in Jackson's letter of the 17th. Minahan replied on July 2, 1970 saying the matter was still pending in the Federal District Court and the Company was awaiting the ruling. Cotton and Minahan had a conference on the McKeehan claim on July 30, 1970. On August 7th Minahan wrote that the matter was still pending before the Federal Court. On August 14th Cotton wrote to Minahan that since the Company still refused to pay McKeehan for time lost it was the Union's position that the dispute should be submitted to a Public Law Board as provided by the Railway

Labor Act. By letter of September 11 Minahan refused to submit the dispute to a P L Board. In this letter he said that the Union was trying to relitigate the identical issue which had been ruled on by the Federal Court. By letter of October 19 Cotton advised Minahan that the Union would exercise its rights to request a Public Law Board. In this letter he said that the Federal Court had passed on the factual question of whether McKeehan received a service connected injury, which could not have been resolved by a Special Board of Adjustment. The Union took the position that the matter of compensation was for a P L Board.

On November 10, 1970 Judge Singleton rendered a final judgment in the civil suit ordering the Company to pay McKeehan the sum of $9331.68 plus interest from October 20, 1967. This amount was arrived at as follows: The Court determined that McKeehan would have earned $20,820.68 had he been reemployed on October 20, 1967; and that he had actually earned $11,489.00 in other employment during the time involved. The difference between the two figures was $9331.68. The interest at 6% was $1726.36. The Company then paid McKeehan a total of $11,058.04.

On January 11, 1971 Cotton wrote Minahan contending that McKeehan was entitled to the lost earnings of $20,820.68 without deduction for outside earnings and that the Union was amending the claim to cover the outside earnings ($11,489.00) which had been deducted by the Court and requested that the matter be submitted to a P L Board. On January 14th

Minihan replied refusing to submit the issue to a P L Board.

POSITIONS OF THE PARTIES

Company: The Company's argument that this is not a proper case for a Public Law Board is three-fold : (1) The Union failed to observe the one year time limitation of Article 43 after receiving Reese's letter of April 19, 1968 until May 8, 1970 when it sought to revive the claim. (2) By filing the civil suit under the Selective Service Act for a violation of his reemployment rights McKeehan elected to pursue his claim in the Federal Court and is bound by the judgment of the Court and is not entitled to relitigate the money claim through the Grievance Procedure. (3) The Union's altered claim for additional money not allowed by the Court is in violation of the policy of the First Division against the piecemeal submission of disputes.

Union : The Union denies any violation of the Time Limits provisions of the Agreement. It points to Reese's letter of April 19, 1968 in which he said that the claim was being held in abeyance pending the ruling of the Department of Labor; and says that this was not a denial of the claim. The Union also asserts that the Company never at any time prior to September 11, 1970 raised the question of time limits or suggested that the claim was barred.

The Union contends that the decision of the Federal Court does not bar the Union from pursuing through the Grievance Procedure the claim

for the money the Court did not allow under the Contract. It says that the Selective Service Act is separate and apart from the Contract between the parties which comes under the provisions of the Railway Labor Act and the Union is not barred from processing McKeehan's claim for what the Contract says he should be paid.

OPINION

It is the judgment of this Board that the Company is not entitled to assert the time limit rule. The Union had aggressively processed the claim up to April 19, 1968 at which time Superintendent Reese stated that the matter was to be held in abeyance pending decision of the Department of Labor. This was not a denial of the claim and the one year limitation of Article 43 did not begin to run. Thereafter the Labor Department had a civil suit filed on McKeehan's behalf by the Justice Department. The Union was entitled to rely upon the Company's statement that the matter was in abeyance and that it did not have to take further action. After the Judge had ordered McKeehan reinstated and before he had made any ruling concerning compensation the Union sought to process the claim for money. The answer of the Company each time was that the matter was still pending in the Court. At no time prior to June 17, 1970 did the Company purport to deny the claim. Furthermore, it never raised any objection based on time limits until its letter of September 11, 1970. Under those circumstances it cannot be said that the claim is barred by failure to process it within the proper time limits.

The Company's primary contention is that by having elected to pursue his rights by a civil suit in Federal Court McKeehan is bound by the judgment of that Court and is barred from now processing his claim through the Grievance Procedure. In other words it invokes the doctrine of estoppel. It is true that McKeehan elected to pursue his rights under the Selective Service Act and that he authorized and processed the suit through the Federal District Attorney, appealed the judgment and later withdrew the appeal and accepted payment of the amount decreed by the Court. But there is nothing to indicate that the Court based its decision in any part on the Contract provisions. For example Article 24 states that an employee who has been wrongfully withheld from service is entitled to be paid for all time lost. The Union asserts that many decisions of the National Railway Adjustment Board and other Boards hold that under such a provision outside earnings are not deductible in the absence of past practice to that effect on the particular property.

In the judgment of the Board the Company's estoppel argument presents more than a mere procedural question. It is a defense asserted by the Company to McKeehan's claim under the Contract. In order to determine whether the judgment in the Selective Service Act suit is properly a bar to McKeehan's claim under the Contract it will be necessary to consider the Contract provisions and their interpretation. The Union is entitled to have this question resolved by a Public Law Board, and we direct that the

McKeehan claim be placed on the calendar of Public Law Board No. 689. We make no judgment as to whether the doctrine of estoppel should apply in this case.

Roy R. Ray

ROY R. RAY, Chairman

A. J. Cotton, Union Member

A. J. Cotton

T. Minahan, Carrier Member

T. Minahan

Dissent