Award No. 6053
Docket No. 5916
2-WT-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Don J. Harr when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 106, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Car Repairman, J. A. Miller, was unjustly dealt with when he was assessed with a ten (10) day suspension commencing June 6, 1969 and which was subsequently and arbitrarily changed to a reprimand on June 17, 1969.

2. That Carrier violated the terms of the 60-day time limit rule contained in the agreement of August 21, 1954 when it failed to disallow J. A. Miller's appeal within 60 days.

3. That accordingly, J. A. Miller, is entitled to have his appeal dated May 19, 1969 allowed as presented and that his service record be cleared of any discipline subsequent to his hearing of April 22, 1969.

EMPLOYES' STATEMENT OF FACTS: J. A. Miller, hereinafter referred to as the claimant is employed as a car repairman with the Washington Terminal Company, hereinafter referred to as the carrier. On April 18, 1969 carrier's master mechanic, Mr. McCabe, served notice to claimant that he was notified to appear at Room 220, Union Station, at 9:00 A. M., Tuesday, April 22, 1969 for a hearing, at which time he would be charged with:

"Failing to perform your assigned work by not attaching plant air to draft of five cars in track 7, Station, which permitted uncontrolled movement of these cars for approximately two and one-half car lengths at 2:40 P. M., April 8, 1969."

The hearing was held on schedule. On May 15, 1969 carrier's master mechanic notified claimant that he had been found guilty as charged and that he was suspended for a period of ten (10) days commencing Friday, June 6, 1969. Claimant's case was appealed and handled in accordance with the col-

submits, that the appeal challenged both the merits of the case and the severity of the discipline assessed. On this basis, the carrier's decision of June 17, 1969, addressed itself to both matters. The claim as to the merits was denied.

As to the severity of the discipline, the determination of whether excessive or unnecessary discipline was assessed under all the circumstances, including the claimant's record, and whether, if so, some modification of the discipline was warranted, was the proper function of the appeal officer. This function has historically been recognized as proper on review — regardless of what, exactly, a particular organization representative might or might not argue on an individual's behalf. It is submitted that, under the time limit rule, the reviewing officer's authority is not limited by what the organization's general chairman may, for good or ill, put forward on behalf of the claimant. It's the reviewing officer's responsibility to act in the broader interest of the company, the individual employe, and of all other employes. Mitigation of discipline is a common and necessary function for an appeal officer regardless of whether specificallly asked for by an organization.

In First Division Award 17402, T. v. Ga. RR., Referee Wyckoff, claim denied, it was said ". . . the authority to dismiss by necessary implication carries with it the authority to assess lesser penalties." Certainly, it cannot be denied that the authority of a subordinate official to assess dismissal or other punishment by necessary implication presupposes authority on the part of the appeal officer to modify such discipline. The national time limit rules do not divest the carrier appeal officers of that authority.

Finally, to recap and conclude: Assume only for the sake of argument that in the appeal on the property of the present case, the organization general chairman somehow confined the carrier's response only to one of either setting aside the discipline assessed or to confirming the discipline. If this were the case, the carrier's decision in reducing the discipline to a reprimand — regardless of whether considered an effort to "compromise" the claim—can reasonably be considered only as a rejection of the black-or-white appeal-demand, which the organization relies on here. The organization general chairman did not get what he wanted. If the carrier made by this any kind of a "compromise" offer to him, he didn't accept it. His rejection killed the offer. In any event, the exact claim the organization put forward was disallowed. The reason for the disallowance was stated. The time limit rule was complied with. If the general chairman did not want to accept the disallowance, he could and should have appealed the case to the Second Division on the merits, on the severity of the discipline, or both.

The time-limit-default argument the petitioner has here put forward is a specious one. It should be rejected. Like in **Second Division Award 3884**, the situation here did not call for a categorical denial of the organization's claim because that position was implicit in the carrier's decision.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant was employed by the Carrier as a Car Repairman. On April 18, 1969, the Carrier's Master Mechanic notified Claimant to appear for a hearing on April 22, 1969 charging him with:

> "Failing to perform your assigned work by not attaching plant air to draft of five cars in Track 7, Station, which permitted uncontrolled movement of these cars for approximately two and one-half car lengths at 2:40 P. M., April 8, 1969."

The hearing was held as scheduled. Claimant was found guilty and assessed a 10 working day suspension to begin June 6, 1969.

By letter dated May 19, 1969, the Organization's General Chairman appealed the discipline to Carrier's Manager. This letter reads in part:

> "In view of all of the above, it is obvious that J. A. Millller is not guilty of the charge, therefore, I request that you grant me a conference on this appeal, or, compensate J. A. Miller for all time lost as the result of the suspension."

By letter dated June 17, 1969, Carrier's Manager stated:

> "However, because it is impossible to discount the possibility that contributory negligence on the part of others might have been a factor in connection with this mishap (though this was not established at the hearing) and because Mr. Miller has a reasonably good record — though not unblemished — insofar as on-the-job diligent performance of duty is concerned, we feel that the assessment of 10 days against him should be reduced, and that a reprimand be substituted therefor."

The Organization contends that the handling by the Carrier did not meet the requirement of Article V of the August 21, 1954 Agreement. Article V(a) reads:

> "(a) 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. 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."

The facts in the case before the Board are similar to those involved in Second Division NRAB Award 5512 (Ives). Award 5512 states:

"Claimant's letter of January 13, 1966 constitutes a bonafide claim for reinstatement without loss of pay and with seniority as well as all other rights unimpaired. Carrier's reply to Claimant's letter was not responsive to either final disposition of his case following the investigation or disposition of the claim contained in said letter. Furthermore, there was no settlement agreement entered into by the parties during the conference on March 23, 1966 as the proposed compromise was subject to Claimant's approval. Consequently the original claim was neither settled nor withdrawn, and the time limitations found in Article V(a) of the effective Agreement are applicable. The pertinent language in Article V(a) is clear and unequivocal in the event of failure to notify a Claimant that a particular claim or grievance is denied. Award 3312. Accordingly, we have no alternative but to sustain the instant claim."

As in Award 5512 we find that Carrier's reply was not responsive and we will sustain the claim.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November, 1970.

DISSENT OF CARRIER MEMBERS TO AWARD 6053

This is an erroneous Award. Certainly the National rule is violated if **no reason** for declination is given or where **no decision** is rendered, or for **failure to meet the time requirements.** None of these violations occurred here. Accordingly, the Division erred in its findings that the Carrier violated the Agreement.

The majority states that the facts in this case are similar to those involved in Award No. 5512. A perusal of Award No. 5512 will indicate very clearly that the facts in that case are not analogous to those involved in this case.

It was pointed out that the facts in this case are similar to those involved in Award No. 3884 and copy was furnished the neutral. The Carrier definitely complied with Article V of the August 21, 1954 Agreement in its reply of June 17, 1969 to the organization, as the reasons were contained therein for the action of the Carrier.

The majority has misinterpreted the meaning of Article V and for that reason we dissent.

H. F. M. Braidwood
W. R. Harris
P. R. Humphreys
J. R. Mathieu
H. S. Tansley

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