

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

Parties to Dispute: (System Federation No. 117 Railway Employees'
(Department A.F.L. - C.I.O. - Carmen
(
(The Western Pacific Railroad Company

Dispute: Claim of Employees:

1. That setup Carman Helper, R. C. Walsh was improperly withheld from service from October 6, 1972 to and including November 15, 1972.
2. That accordingly, Carrier be ordered to make Claimant Walsh whole by compensating him for all time lost; make him whole for all vacation rights; and make him whole for Railroad Retirement and Unemployment benefits, and any other benefits that he would have earned during the time he was held out of service.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

On October 6, 1972 Claimant reported for duty at Carrier's Oroville Repair Track. Soon after reporting, he was called into his supervisor's office and was advised that he was being withheld from service pending investigation. The reason given was that Claimant was absent without proper authority on October 1, 4, and 5, 1972. (October 2 and 3 were rest days.)

From the transcript of hearing it appears that Claimant's supervisor, the Car & Derrick Foreman, discovered sometime between October 1 and 5, 1972 that Claimant was arrested and in jail.

Formal investigation was scheduled for October 31, 1972 to determine the facts and circumstances surrounding Claimant's alleged absence from his regular assignment without proper authority on October 1, 4 and 5. At the request of Claimant, hearing was postponed until November 15, 1972.

On November 30, 1972, prior to any finding of culpability by Carrier, the Local Chairman filed a claim against Carrier alleging, among other things, that Claimant was improperly suspended in violation of Rule 36.

By letter dated December 4, 1972 Carrier rendered its decision based on the hearing. Carrier concluded that Claimant's absence was unauthorized but, by way of "leniency," would restore him to service immediately. However Claimant was not allowed pay for time lost from October 6 to November 16, 1972.

In response to the Organization's claim of November 30, 1972, Carrier's Foreman by letter dated January 12, 1972 (actually 1973) denied the claim as having "no foundation under existing rules."

On February 16, 1973 the claim was presented to Carrier's Chief Mechanical Officer by the General Chairman. After denial, the claim was progressed to Carrier's highest designated officer who denied the claim on its merits, i.e. the testimony established that Claimant was absent without authority, and also that the claim was not handled within the time limits of Article V (a) of the August 21, 1954 National Agreement. */

We consider first the time limit question. Carrier asserts in its submission that:

"In the instant case, following the formal investigation which was held on November 15, 1972, the Carrier's Chief Mechanical Officer addressed a letter to Mr. R. C. Walsh dated December 4, 1972 in which he informed the Claimant that leniency would be extended in this particular instance for his unauthorized absence from duty on October 1, 4 and 5, 1972. However, the Claimant was also informed that he would not be allowed pay for the loss of time between October 6 and November 16, 1972; said time being applied as actual discipline.

Nothing further by way of a claim of payment for the time lost by Mr. Walsh was initiated by the Petitioning Organization until February 16, 1973. Therefore, in accordance with the above-quoted portion of Article V of the August 21, 1954 National Agreement, the

*/ It is interesting to note that the General Chairman's appeal concerns itself only with violation of Rule 36 - improper suspension - and makes no mention of insufficient evidence of being absent without authority; and Carrier's denials make no mention of Rule 36 - contending only that the evidence showed that Claimant was guilty of being absent without proper authority. It is as though two separate claims were being progressed by each of the parties.

instant claim was contractually barred from further progression by virtue of the fact that it was not appealed within the prescribed 60-day period." (Underscoring added)

It is obvious that Carrier has either overlooked or has chosen to ignore the Organization's claim dated November 30, 1972 alleging a violation of Rule 36 as well as the January 12, 1972 (1973) denial of that claim by Carrier's Car & Derrick Foreman. (Organization Exhibits B and D).

Carrier, in its Rebuttal, continues to obfuscate the situation (unintentionally or otherwise) by making no mention of Organization Exhibits B and D above, and by stating:

"It remains an uncontroverted fact that the Chief Mechanical Officer's letter of declination was issued on December 4, 1972. It further remains an uncontroverted fact that the Petitioning Organization did not make any attempt to progress the instant claim prior to February 16, 1974 (sic) at which time a letter of appeal (albeit clearly in excess of the time limits as prescribed by Article V of the National Agreement dated August 21, 1954) was directed to the Chief Mechanical Officer." (Underscoring added).

Referring to the December 4, 1972 correspondence as a "letter of declination" is at complete variance with Carrier's statement in its Ex Parte Submission that, "Nothing *** by way of claim or payment for time lost by Mr. Walsh was initiated by the Petitioning Organization until February 16, 1973."

Clearly, Carrier's reliance on time limit is totally without merit.

We come next to the question of the merits of the claim: Was there any probative showing by Carrier that Claimant was properly suspended prior to hearing as required under Rule 36. The Board has on many occasions held that where a rule defines a case of proper suspension as it does in this Agreement, viz. "the proper case is one where leaving the man in service pending an investigation would endanger the employe or his fellow employes", Carrier has the burden of showing by substantial and probative evidence that suspension prior to a hearing was warranted.

There is no such showing in this dispute.

Consequently, the Board finds that Claimant is entitled, under the rule, to be compensated "for net wage loss, if any, resulting from said suspension." There is no rule provision for the remaining portions of the claim and they will be denied.

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Award No. 6913
Docket No. 6686
2-WP-CM-'75

A W A R D

Claim disposed of per findings herein.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch /es
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of August, 1975.