Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7731
SECOND DIVISION Docket No. 7628
2-SPT-MA-'78

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Southern Pacific Transportation Company

Dispute: Claim of Employes:

1. That under the current Agreement Machinist H. G. Lucht (hereinafter referred to as Claimant) was improperly suspended from service from August 1, 1976, through, and including, October 31, 1976.

2. That, accordingly, the Carrier be ordered to compensate Claimant for all wage loss resulting from said suspension.

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.

This is a dispute challenging Carrier's assessment of a 90 day disciplinary suspension against Claimant for engaging in an altercation with a fellow employe while on duty and on company property.

Before discussion the merits of the case, there is a jurisdictional issue which must be considered. The organization contends that the record contains no submission by the Carrier. However, Carrier did file a rebuttal to the Organization's submission which is in the record. According to the record, the following facts explain the absence of a submission from Carrier. On November 1, 1977, Carrier was notified of the Organization's intention to file the submission. Thereafter a corrected notice was received from this Division establishing the date of December 12, 1977 as the due date for Carrier's submission. By letter dated December 12, 1977 Carrier requested its first extension of 30 days. Carrier says it did not receive a response to this request. Division records indicate this letter was received December 15, 1977. On December 16th, the Division wrote Carrier and said that since it had not filed its ex parte submission on or before

the due date (December 12), it was granting Carrier 15 days, or until January 3, 1978, to file its case with the understanding that no further extensions would be granted. Carrier records indicate that this letter was not received until December 28, 1977, and, on January 4, 1978, Carrier, still believing that it had been granted the first 30 days extension, wrote requesting another extension. Records indicate that the Division never responded to this letter, but, instead, by letter of January 18, 1978, forwarded a copy of the Organization's submission to the Carrier and advised it that it could file a rebuttal statement, which, it did. In the face of this, the Organization asks that the claim be sustained as presented since Carrier did not set forth its facts in submission form.

Carrier responds with reference to no less than seven (7) previous cases where requested extensions of time were requested on the dates the documents were due, and such requests were granted without question. It also refers to a June 18, 1975 letter from the National Railway Labor Conference which, in effect, articulates the same thing.

Our review and research of the Second Division's procedures on such matters discloses that until September 23, 1977, the Division often granted numerous extensions on individual cases. On September 27, by action of the Division, the Executive Secretary was granted authority to give only four (4) extensions on submissions and rebuttals. Then, in the minutes of the Division's January 6, 1978 meeting the following statement appears regarding time limits for filing material:

> "Time Limits: Motion duly carried that resolution that any correspondence having time limits being sent to the Second Division, the postmark will govern whether late or not, except mail that is hand carried, then the Second Division date stamp will govern, be adopted."

Summarily, it appears that prior to the time such resolutions were adopted, the rule of thumb guided the parties in such matters. We note with great interest the findings in the case of Chicago, Rock Island and Pacific Company vs. Wells, U. S. Court of Appeals, Seventh Circuit, No. 73-1685, decided July 9, 1974:

> "Based upon our examination of the record as a whole, we find and hold that the findings of fact made by the district court are amply supported by the evidence and are not clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure. In fact, most of the evidence was either undisputed or stipulated.
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> It appears that when the written request for a third automatic extension was delivered to the Division in an envelope which bore the timely postage meter date of January 29, 1968, and the

"one-day late postmark of January 30, 1968, the Executive Secretary referred the plaintiff's request to the Division for instructions on February 2, 1968. The Division considered the matter on February 6, 1968, declined the plaintiff's request, and instructed the Executive Secretary to inform plaintiff that its request was declined because of "a late postmark." The next day plaintiff wrote a letter of protest but to no avail.

The Division had no rule at that time adopting a United States postmark as the criterion for determining the timeliness of a request or tender. It was not until June 5, 1970, nearly two and one-half years after defaulting plaintiff, that such a rule or policy was adopted. Such new rule or policy was not made public and the evidence was that plaintiff had no knowledge of it. To find plaintiff in default without giving it an opportunity to establish that the mailing was timely, or if not, whether there were sufficient extenuating circumstances to warrant granting the extension, is at best harsh action and at worst inexcusable.

It further appears from the record that on a number of occasions in 1966 extensions were granted or filings were accepted when the requests made were clearly late. On other occasions reply submissions were accepted when received late in envelopes bearing illegible postmarks. Another late request was granted when stamped with a timely postage meter date. Other parties were permitted to obtain extensions by telephone, a practice not generally known and one that was not made known to plaintiff at that time. In short, the practice of the Division indicates that the extension would probably have been granted if the envelope had borne only the postage meter date and not the added postmark dated one day later; if the telephone practice had been made known to plaintiff; or if the postmark on the envelope had been smeared or otherwise made illegible. Indeed, the Division is hard put to justify this illogical pattern. It certainly is not in keeping with its proclaimed policy of liberality. By contrast, it was shown in some cases extensions had been granted as many as 8, 11, 19, 21 and even 40 times.

Even more indicative of the unfairness of this review by the Division is the lack of prejudice that would have resulted if it had granted the extension, or at least have permitted plaintiff an opportunity to make its showing. Plaintiff was defaulted on February 6, 1968. The Division did not consider the claim of Wells until October 3, 1968. Because of intervening circumstances, the Division could not consider proceeding further until April 23, 1970. This litigation was not originally

"filed until January 8, 1971. It is clear that there can be no claim that the Division's default of plaintiff was necessary to efficiently expedite the case.

We have no difficulty in finally concluding that there is more than adequate factual support to uphold the district court's determination that in this proceeding plaintiff was denied due process of law under the Fifth Amendment."

As was noted above, the Court of Appeals upheld the District Court's determination that failing to accept Carrier's submission, under circumstances closely parallel to those in the instant case, denied Carrier due process.

Based on the judicial findings of this case, we likewise reach the same conclusion here. However, in light of the clarifications made by the Second Division on its procedures, and our presumption that all affected parties have been notified of these changes and clarifications, we must point out that the Rock Island case cannot forever be cited as a precedent should such a dispute arise again.

Conversely, turning to the case's merits, we find that claimant and a fellow employe engaged in an unpermitted altercation for which they were both at fault.

However, the evidence strongly shows that while claimant contributed in part to this scuffle, it was the other employe who continued to badger the claimant to the extent of even pulling claimant's hair. It was at this point that claimant, trying to protect himself, pushed the aggressor aside and admonished him to leave him alone.

Rather than accepting the above blandishments, the other employe continued his aggressive behavior, which resulted in both persons falling on the floor fighting.

This is behavior which cannot be countenanced in our critical industry and we warn claimant that it must not be repeated again. Because he appeared to be reacting in self defense and was ostensibly more the object of the attack rather than the initiator, we believe that the discipline assessed was too severe. We will reduce it to a thirty (30) days suspension and order that claimant be compensated for the balance of the time lost in accordance with Agreement Rule 38.

A W A R D

Claim sustained in accordance with the findings.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 1st day of November, 1978.