

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

Parties to Dispute: { International Association of Machinists and  
{ Aerospace Workers  
{  
{ Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated the controlling Agreement, particularly Rule 32, when they unjustly dismissed Machinist C. C. Jones from service on March 30, 1977 for allegedly leaving his assignment at approximately 8:00 p.m., February 13, 1977, without proper authority and being absent from his assignment since that date without proper authority.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Machinist C. C. Jones at the pro rata rate of pay for each work day beginning March 30, 1977 until he is reinstated to service. In addition, he shall receive all benefits accruing to any other employee in active service, including vacation rights and seniority unimpaired.
3. Claim is also made for Machinist C. C. Jones's actual loss of payment of insurance on his dependents and hospital benefits for himself, and that he be made whole for pension benefits, including Railroad Retirement and Unemployment Insurance.
4. In addition to the money claimed herein, the Carrier shall pay Machinist C. C. Jones an additional sum of 6% per annum compounded annually on the anniversary date of said claim in addition to any other wages earned elsewhere in order that he be made whole.

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, C. C. Jones, a Machinist at Carrier's Wheel Shop located in North Little Rock, Arkansas, was dismissed from service on March 30, 1977, following an investigation held on March 11, 1977, in which Claimant was adjudged guilty as charged of leaving his assignment prior to the end of his tour of duty on Sunday, February 13, 1977 and for being absent thereafter both without proper authority.

At the investigatory hearing, Claimant testified he left his assignment early on the evening of February 13, 1977, without personally securing permission from any Carrier officer on account of becoming frightened of "strange noises in a big empty building". The following two (2) days, February 14 and 15, 1977, were Claimant's rest days and on his next regularly scheduled work day, February 16, 1977, Claimant's wife reported to Carrier by telephone that Claimant would not be reporting for work as he had sustained an injury to his hand in the interim period since leaving work on February 13, 1977.

Carrier contends that in both incidents, that is leaving work on February 13, 1977 and having his wife report him off on February 16, 1977, Claimant failed to follow established procedures of securing proper authority and thereby failed to protect his assignment.

The Organization contends Claimant was not afforded a fair and impartial hearing citing several technical grounds in support of its position. In addition, the Organization advances the position that Carrier violated Rule 31(a) of the Controlling Agreement effective June 1, 1960, when it failed to issue a declination of the claim within the sixty (60) day period following the filing of the claim. Rule 31(a) reads as follows:

"All claims or grievances must be presented in writing by or on behalf of the employee 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."

Carrier acknowledges that it failed to issue a declination of the claim within the contractual sixty (60) day period, citing unusual circumstances, specifically, the death of the Carrier official responsible for handling the claim at that stage on the property.

The Board notes that subsequent to the Claimant's dismissal from service, Carrier reinstated Claimant on August 24, 1978, Carrier stating that it did so in view of Second Division Awards 7401 and 7597, both reinstating Claimants with nearly identical claims as that involved in the instant case. Carrier further offered that Claimant C. C. Jones had more seniority than the Claimants involved in Awards 7401 and 7597 and that the other Claimants had both been subject to a longer loss of service than Claimant C. C. Jones.

In view of Claimant's reinstatement subsequent to the initiation of the original claim, the Board has determined that the question before it now is whether Carrier acted within its contractual rights in suspending Claimant from service during the nearly seventeen (17) month period between March 30, 1977, the date of Claimant's dismissal and August 24, 1978, the date of Claimant's reinstatement.

After a thorough examination of this question and the record, we have concluded that the procedural issue raised by the Organization regarding Carrier's failure to comply with the contractual sixty (60) day period within which it had to issue a declination of the original claim, prevents us from considering the merits of the modified claim now before us. In so concluding, we have decided to remand the claim back to the parties so as to afford them the opportunity to resolve this issue themselves. We do this for basically two reasons. First, in accordance with well established principle, this Board cannot substitute its judgment for that of the parties, here concerning past practice and other factors involved. And second, we note that under the Railway Labor Act, the parties themselves, with detailed, explicit and experienced knowledge of such practices and other conditions bearing upon this matter directly between themselves and having to do directly with their contractual relationship, have a duty to exert every reasonable effort to settle such disputes directly.

To assist the parties in their deliberations, we note the following points for consideration:

1. Claimant's previous attendance record is far from exemplary.
2. The untimely death of the General Manager, while certainly an act of God and most regrettable, cannot in and of itself, excuse the Carrier from exercising its contractual responsibilities as agreed to under the Controlling Agreement.
3. With regard to point 2 above, the Board agrees there has been a breach of contract but must agree with the position of the Organization that Carrier must accept the full financial responsibility for this breach. Specifically with regard to this point, the Board brings to the attention of the parties, Second Division Award 8089 which is strikingly similar to the facts of the instant case. In relevant part Award 8089 reads as follows:

"Article V (a) is a provision drawn by the parties, at arms-length, which commits both to the terms therein. Its purpose is clearly to provide order and structure to the submission and execution of grievances. It is a 'meeting of the minds' as to such mutual obligations and either implies or asserts the consequences of either's failure to meet such obligations. If (or better yet, except where) such a provision is subject to dissimilar interpretation (i.e. vague or ambiguous), it should be executed as written. The Carrier asserts that procedural imperitives occupy a lower order of importance than those involving merits. In essence, the Carrier contends that although it failed to meet the time limits in responding to the appeal from its initial denial, such fault on its part should be waived or liability limited, if the merits of its actions are considered supportable. Such rationale, if a proper interpretation of Article V (a) is enforced, must be applicable to both parties, since the provision was obviously drawn with mutual obligations in mind. Applying it thusly, if the Organization fails to initiate or process a grievance within prescribed time limits, it would not be precluded from doing so at a later date, but the Carrier's liability -- should the grievance be found to have merit, would not

"extend to the period during which the Organization failed to properly file or process the grievance. This would appear to be the counterpart to the Carrier's argument herein as it would be applied to the Organization. We are unaware of such interpretation of Article V (a) or of its implementation.

We are not unaware that the Carrier has cited several Awards which limits liability to the period between the end of the 60-day period available for such response and the point in time in which the Carrier did so respond (Award 6326, 2466, 3777 and 6370 -- Second Division, and Award 15691 Third Division.) It is noteworthy, that, in this case, the Carrier responded only when the Organization alerted it to its obligation to do so. Applying the rationale of the aforementioned Awards to the instant case, presumably if the Organization had delayed such notice for six months more or six more years, this liability would have continued to accrue. We are unable to reconcile the decisions of prior Boards to the apparent difference in application of this provision depending upon where the responsibility to act lies. Had the parties intended a different obligation to issue to the Carrier than to the Organization under Article V (a), we would expect the provision to make this clear. The term 'If (the Organization or Claimant is) not so notified, the Claim or grievance shall be allowed as presented...' is neither vague nor ambiguous. Neither can we reach a conclusion that procedural matters have some lower order of status than do merit ones; to the contrary, myriad prior Awards have made manifest that merits issues are not 'reachable' if the case is not proper for consideration due to a failure to meet (procedural) time limits under the Agreement. We are no less obliged to reach the same conclusion here. However, we are moved to make some general observations in this regard: this Board is not unaware of the distinctively poor record of attendance accumulated by the Claimant herein. We are equally unimpressed by the Organization's argument that the Carrier 'was aware' of the Claimant's medical difficulties; it is generally recognized that an employee is obliged to meet the obligation of his job and failure to do so creates the prospect for termination -- for whatever reason.

As to the liability, if any, for back wages, we take note that the Organization erred in its submission of the grievance initially, citing inapplicable rules as the basis for its action. (We also note that the Carrier asserted the Organization's initial claim to be vague and ambiguous in its reference to 'all benefits and wages he would have received...;' we find no basis for this position.) With the observations of this Board so stated, we remand to the parties the responsibility to assess the propriety of back pay, if any, that should accompany this Award. This Board will retain jurisdiction over this case but it charges the parties to seek a satisfactory resolution, considering any and all past practices and other conditions bearing upon this matter. If not resolved in 90 days from receipt, the matter is to be returned to this Board for final resolution."

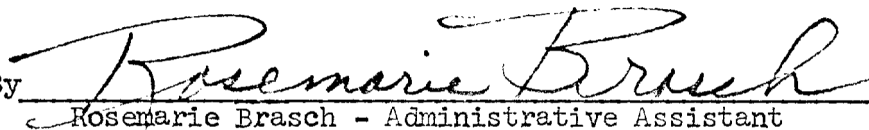
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Claim remanded back to the parties who are charged with seeking a satisfactory resolution of the issue by considering any and all past practices and other conditions bearing upon this matter. The parties shall have ninety (90) days from receipt of this Award within which to resolve this matter, otherwise upon a failure to do so, the matter will revert back to the Board for final determination.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 20th day of February, 1980.