

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

Parties to Dispute: (Danny R. Krela
(Northwestern Pacific Railroad Company

Dispute: Claim of Employees:

Petitioner Danny R. Krela was discharged from his employment as a carman helper for the carrier Northwestern Pacific Railroad Co. (hereinafter "NWP"), a subsidiary of the Southern Pacific Transport Co., by letter dated May 25, 1978, for alleged violation of Rules B, 802, and 810 of NWP's Rules and Regulations. Following the exhaustion of his appeal rights through the applicable collective bargaining agreement, petitioner Krela appeals that discharge action to this Board, and he seeks reinstatement to his former position with such benefits, seniority, and rehire rights as he held at the time of dismissal and would have accrued during the time subsequent had he not been dismissed. In support of this appeal petitioner Krela asserts the matters set forth below.

First, petitioner Krela has met the jurisdictional requirements for bringing this appeal, including exhausting his remedies before the carrier by making every intermediate appeal within the applicable time limits. In particular, although petitioner Krela's dismissal hearing was held on May 23, 1978 and a letter of dismissal issued on May 25, 1978, said letter was not delivered to petitioner and he did not receive actual notice of the dismissal until November 24, 1978.

Second, petitioner Krela was denied the fair hearing on his dismissal to which he was entitled under Rule 39 of the applicable collective bargaining agreement. In particular, he attempted but was not permitted to exercise his right to be represented at said hearing.

Third, petitioner Krela should not have been discharged since 1) his absence from duty was for legitimate medical reasons which he reported to NWP; 2) the proper procedures, i.e. a fair hearing per Rule 39 of the applicable collective bargaining agreement, were not employed to discharge petitioner, and his defense on the merits was prejudiced by this violation of his rights; and 3) even if petitioner Krela did violate a company rule, his actions were not injurious to NWP and did not warrant discharge.

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.

Claimant, Danny R. Krela initially entered service of the Carrier on date of August 6, 1974. On date of April 12, 1977, Claimant was transferred to the position of Carman Helper. At the time of the events leading to Claimant's discharge, specifically in and around May of 1978, Claimant was assigned as a Carman Helper at Carrier's Fields Landing facility with scheduled hours of service between 7:00 AM and 3:00 PM.

Claimant's discharge stemmed from charges made by Carrier that he had absented himself from work without proper authority between the dates of May 1 through May 10, 1978, in violation of Rule 810 of the Controlling Agreement, bearing effective date of April 16, 1942 (reprinted April 19, 1957, including revisions), and unilaterally altering his scheduled vacations in violation of provisions of Rule B and Rule 802 of the Controlling Agreement.

Carrier scheduled a hearing to be held on May 16, 1978, in connection with the above stated charges and notified Claimant of same by letter dated May 10, 1978, and sent to him at an address in Eureka, California. Upon Claimant's request, the hearing was postponed by one week to afford him additional time to secure representation. Claimant presented himself at the hearing on May 23, 1978, but without any representation. Claimant apparently expressed his desire not to proceed without being represented but the Carrier moved forward any way.

On date of May 25, 1978, Carrier based on the evidence adduced at the May 23, 1978, hearing made a determination Claimant was guilty as charged and accordingly issued Claimant a notice of dismissal. Carrier asserts it attempted delivery of said notice along with the hearing transcript numerous times between the dates of May 25 and June 16, 1978, at the address Claimant stated at the hearing was his present address in McKinleyville, California. Efforts at delivery included personal delivery attempts, as well as, a certified return receipt letter which was returned by postal authorities after a third notice went unclaimed. All delivery attempts during the aforementioned period were ultimately unsuccessful.

Sometime following the hearing, Claimant retained the services of legal counsel at the Redwood Legal Assistance Organization to act as representative on his behalf. Claimant's counsel acting on his behalf moved to contest the discharge action without the involvement of Union assistance upon counsel's first becoming aware of the dismissal which counsel asserts was November 24, 1978. Counsel, according to the record initiated appeal of Claimant's dismissal on January 5, 1979. Thereafter Counsel on behalf of Claimant proceeded with the appeal procedures, albeit improperly according to Carrier, up to and including the highest officer designated by the Carrier to receive such claims. Carrier's highest officer responded by denying Claimant's request for a second hearing based on the fact Claimant had failed to specify violations of either rule, practice, or precedent on the property. Claimant responded to this denial by submitting the subject matter in controversy to

the National Railroad Adjustment Board thus bypassing the contractual procedure of rejecting Carrier's last denial and requesting Carrier for a conference to attempt to resolve the dispute.

Now comes Carrier before this Board petitioning us to dismiss the instant issue on the grounds Claimant's appeal was not perfected within the time limits prescribed by the parties' Controlling Agreement, specifically as set forth in Rule 38(b) which reads in pertinent part as follows:

"A claim or grievance may be presented in writing by the duly authorized committee to the master mechanic (to shop superintendent in general shops), provided said written claim or grievance is presented within sixty (60) days from date of occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty (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. Any claim or grievance not presented within sixty (60) days of the occurrence on which based will be deemed to have been abandoned."

Carrier notes its District Superintendent H. B. Fowler rendered the decision to dismiss Claimant from service on date of May 25, 1978. Carrier further notes that it was not until October 23, 1978, a period of 152 days after May 25, 1978, that Claimant's counsel entered into the first communication with it concerning Claimant's situation. Furthermore, Carrier asserts, 74 additional days elapsed before counsel on behalf of Claimant initiated appeal of its decision to dismiss Claimant. Specifically this appeal was made on January 5, 1979, and Carrier claims that these elapsed time periods are far in excess of the sixty (6) days allowed under Rule 38(b) cited above.

In addition to the instant claim failing to meet the contractually provided time limitations, Carrier alleges two other procedural defects which would bar the National Railroad Adjustment Board from considering the merits of the instant dispute. These two defects are as follows:

1. Claim was not handled in the normal manner on the property in accordance with the Railway Labor Act, Section 3, First (i). Carrier asserts the normal manner of handling grievances on the property as historically done is specified in Sections (b), (c), (d) and (e) of the Controlling Agreement which is by the duly authorized committee or a representative of the craft in which employed; and
2. The appeal procedure was not pursued properly in that Claimant did not reject the denial given by the highest officer designated by the

Carrier nor request a conference, but rather submitted the claim to the Board which constitutes, Carrier alleges a violation of Circular No. 1, of the National Railroad Adjustment Board.

It is well established principle that this Board must dispose of any procedural matters it deems critical prior to moving toward consideration of the merits of a dispute. Here in the instant case we have pondered the procedural issues raised by Carrier and find them to be meritorious. We believe any one of the three procedural defects alone, and on their own, would bar us from consideration of the merits. But if we had to align these procedural defects in rank order of relative importance we would deem the violation of the contractually provided time limits as the number one bar. Based on all the foregoing discussion we find we must dismiss the instant Claim.

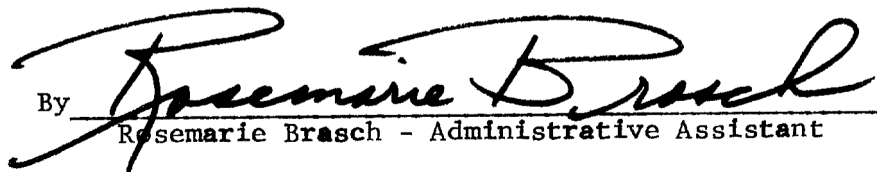
A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 17th day of March, 1982.