

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. That the Chicago & North Western Transportation Company violated the current Agreement effective December 1, 1985, specifically Rule 28(a) when Carrier Officer failed to timely deny the claim of Electrician Terry L. Palmer within sixty (60) days and failed to allow the claim as presented.

2. That the Chicago & North Western Transportation Company violated the current Agreement dated December 1, 1985, specifically Rule #26(a), (c), and (h), when they dismissed from service Electrician Terry L. Palmer, May 26, 1989.

3. That accordingly the C&NWT return Mr. Palmer to service of the Carrier and make him whole for all wages and benefits lost on account of this unnecessary and excessive discipline.

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 employes 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.

The Claimant an Electrician in service with the Carrier at its Clinton, Iowa system shops was dismissed from service as a result of an Investigation held on May 15, 1989 by Discipline Notice #1 dated May 26, 1989. The Claimant was dismissed for refusal to take a Drug Test.

The Organization argued that the Carrier was in violation of Rule 28 of the schedule Agreement which states that the Carrier must notify the Organization within 60 days of the date a Claim is filed as to the reasons for a disallowance. Rule 28 goes on to state "If not so notified, the Claim or grievance shall be allowed as presented,..." The Claim in this matter was filed on July 3, 1989 and was not denied by the Carrier until November 7, 1989, well past the 60-day time limit. The Carrier stated that Decision 16 of the National Disputes Committee allows for a tolling of the time limits to the date of the late denial. It is the Organization's position that this argument was a new argument and was not handled on the property, therefore, a violation of Circular #1. Therefore, Rule 28 applies in this case. The Board has no right to modify or change the Agreement. In any event, the IBEW is not a party to the National Dispute Committee. The Organization noted that if the Organization had defaulted, its Claim would have been denied on a procedural basis even though it might be meritorious. Therefore, the Board has no alternative but to sustain the Claim. There are not exceptions to Rule 28 and, therefore, the Organization asked that its Claim be sustained in full.

The Carrier argued that the Carrier had proper and reasonable grounds for demanding that the Claimant submit to an alcohol and drug screen in that the Claimant's physical appearance gave the Carrier reason to believe that the Claimant had an hallucinatory experience and also his physical appearance was such that the Carrier had reasonable suspicion the Claimant was in violation of Rule G. The Claimant was asked and agreed to take an alcohol sensor test, the results of which were negative. The Claimant was then asked to take a urine test at which point he refused. The Carrier then found the Claimant to be insubordinate in that he refused a direct order to submit to a drug test because of reasonable suspicion. The Carrier stated its charges have been proven and the appropriate discipline was assessed under the circumstances of the case.

The Carrier also stated that the handling of this Case on the property was appropriate even though its denial was beyond the 60-day period required in Rule 28. It has been clearly established by Decision 16 of the National Disputes Committee that back pay would toll from the time of the dismissal to the late declination, and from that point forward the merits of the case would be established. In addition, the Claimant did receive a fair and impartial Hearing. The Carrier's Supervisors acted appropriately in this case. The Claimant was clearly insubordinate, and the appropriate discipline was assessed. Therefore, the Carrier asked that the Claim be denied in full.

Upon complete review of the evidence, the Board finds that the Carrier's declination of the July 3, 1989 Claim was clearly beyond the 60-day time period for such declination as required under Rule 28 of the schedule Agreement. The Board finds that the argument of the applicability of the National Disputes Committee Decision 16 was properly raised during the handling of this Claim. The question then before the Board is, does this National Disputes Committee rule apply to the parties in this case? The Board notes that this Organization has not been a member of the National Disputes Committee and, therefore, can find no basis to apply that committee's rule

to this case. The 60-day time limit and Rule 28 place a burden on both parties. The language of Rule 28 is exceptionally clear and does not allow this Board any latitude. In any event, the Carrier offered no defense at all for its late declination. Therefore, in accordance with the specific provision of Rule 28 which was quoted above, the Board finds that it has no choice but to sustain the Claim as presented. The Board will order the Carrier to offer to reinstate the Claimant within 60 days of the receipt of this Award subject to the Claimant's successfully passing a back-to-work physical. The Board will not address the merits of this case in accordance with Rule 28.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of June 1992.

CARRIER MEMBERS' DISSENT
TO
AWARD 12346, DOCKET 12011
(Referee McAlpin)

Dissent to this Award is required because it has failed to consider the valid precedent that had been placed before it.

National Disputes Committee Decision No. 16, issued in 1965, applied and interpreted the standard time limit provisions contained in the August 21, 1954 National Agreement. The identical time limit provisions, adopted verbatim, are found in most, if not all of the various Organizations' collectively bargained agreements including those of the Shop Crafts on this Carrier including the IBEW. It is also a goal of arbitral precedent that, unless otherwise modified, the same language stemming from the same source should be given the same interpretation.

In this matter, the Majority has properly concluded that the application of the National Disputes Committee Decision No. 16 was advanced by the Carrier during the handling of this matter on the property.

It is also a fact of record that the Organization never objected or otherwise rebutted the Carrier's argument that NDCD No. 16 was applicable to this case. Having concluded that the Decision was properly raised on the property and not rebutted, that Decision is thereafter ignored by the Majority.

Of the four Second Division and the five Third Division Awards cited to the Referee in this regard by the Organization, not one addressed the applicability of NDCD No. 16 that was properly raised in this case. In fact, Award 3312 relied upon by the Organization

was issued six years prior to NDCD No. 16 and certainly could not address the applicability of NDCD No. 16 to the decision rendered in that docket.

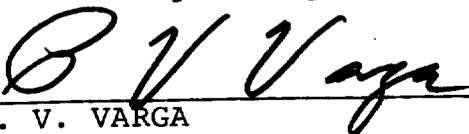
In the Carrier's defense, the Majority was provided Second Division Awards 10754, 11621 and 11730 among others. Award 10754 referred to prior Second Division Awards 4853, 6370 and the Interpretation to 6326. All of these decisions recognized that NDCD No. 16 had been properly raised on the property and acknowledged its contractual impact by incorporating its disposition into the Majority's disposition of the matter before it. Further, the Majority was provided with copies of PLB 2779, Award 95 and PLB 1459, Award 144 involving this Carrier and the UTU, an organization like the IBEW, "...not a member of the National Disputes Committee," in which the determination of NDCD No. 16 was followed.

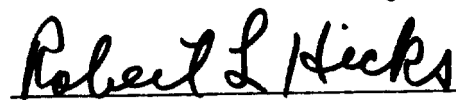
Finally, in Second Division Award 12151, involving the same carrier and a different Shop Craft organization, this Board found:

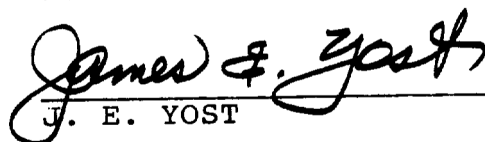
"Conversely, we will sustain the Claim vis a vis Carman W. Sheredy but only up to April 4, 1989. This is consistent with National Disputes Committee Decision No. 16, Third Division No. 28182 and Award No. 5 of Public Law Board No. 1844. Carrier's April 4, 1989 denial, although late, was effective to toll Carrier's liability for the procedural violation as of that date. Its failure to include his name in its December 27, 1988 denial letter was technically a procedural violation. Liability shall extend from December 7, 1988 through April 4, 1989 and only for days when Mr. Sheredy relieved either Mr. F. Martinez or Mr. G. Kelm."

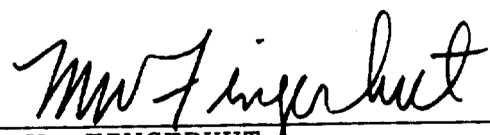
Obviously, having correctly concluded that the National Disputes Committee Decision No. 16 was "properly raised," it was grossly in error for this Majority to refuse to apply that Decision to this case in accordance with established precedent.

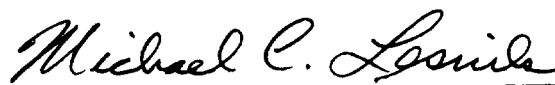
We Vigorously Dissent.


P. V. VARGA


R. L. HICKS


J. E. YOST


M. W. FINGERHUT


M. C. LESNIK

