

Award No. 6326

Docket No. 6086

2-A&S-CM-'72

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Don J. Harr when award was rendered.

**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 154, RAILWAY EMPLOYEES'  
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**THE ALTON & SOUTHERN RAILWAY COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:**

1. That Carman Myrle Thurston was improperly suspended on September 12, 1969 and subsequently improperly discharged.

2. That the Carrier violated the procedural provisions of Article V, of the National Agreement dated August 21, 1954 when it failed to give written decision on claim filed in behalf of Carman Myrle Thurston by acting Local Chairman Bob Beswick in his letter of October 2, 1969.

3. That accordingly, the Carrier be ordered to restore Carman Thurston to service with seniority and other rights unimpaired and paid for all straight time lost, including payment for Health and Welfare benefits and other benefits that are a condition of employment.

**EMPLOYEES' STATEMENT OF FACTS:** Carman Myrle Thurston, hereinafter referred to as the Claimant, has been employed as such by the Alton and Southern Railway Company, hereinafter referred to as the Carrier, for 19 years.

At approximately 6:30 A. M. on September 12, 1969, the Claimant was approached by Patrolman Yoetke and questioned concerning a small bag of copper scraps which the Claimant had picked up between the tracks in the train yard, which had fallen from cars in transit. The Claimant was taken to the Superintendent for further questioning and subsequently suspended pending an investigation.

Claimant was notified of investigation to be held September 17, 1969.

Investigation was held on September 17, 1969.

After the investigation was held he was notified on September 19, 1969 that he was discharged from service.

A dispute arose by reason of the 60 days' actual suspension assessed the Claimant on June 22, 1967, which was progressed to your Board and assigned Docket No. 5729. In denying the request that the Carrier be ordered to compensate Carman Thurston for 344 hours' time lost while suspended, your Board in Award No. 5984, dated September 14, 1970, stated:

"In discipline cases our function is that of an appellate forum. We review the record made on the property to determine whether: (1) the employe(s) involved were afforded due process; (2) Carrier's findings as to guilt are supported by a preponderance of material and relevant evidence of probative value; and (3) discipline assessed was reasonable.

From our review of the record in this case we find: (1) Claimants were afforded due process; (2) Carrier's findings of guilt as charged are supported by a preponderance of material and relevant evidence of probative value; and (3) the discipline assessed was reasonable. We, therefore, are compelled to deny the claim.

For these reasons the request for the reinstatement of the Claimant should be denied.

In the event, however, your Board should be persuaded that the Claimant should be restored to Carrier's service with pay for time lost, the Carrier should be given credit for any earnings from all sources which the Claimant has earned or could in the exercise of due diligence have earned during the period subsequent to his dismissal from Carrier's service on September 19, 1969, as provided by Rule 19 (e) and (f) quoted on page 12.

**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.

The Employes contend that the Carrier failed to comply with the procedural requirements of Article V (a) of the August 21, 1954 Agreement which reads as follows:

"(a) All claims or grievances must be presented in writing by or on behalf of the employe 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 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."

The claim was presented to the Carrier's General Foreman on October 2, 1969. On December 7, 1969, the Organization requested that the claim be allowed under the Time Limit Rule, stating that the claim had not been denied within sixty days.

The General Foreman presented the Employee's Vice-Chairman a letter on January 22, 1970 dated December 24, 1969 stating that the claim had been denied by letter of October 30, 1969.

The Board finds that it should follow the decisions in previous awards of this Division and other Divisions of the N.R.A.B. Third Division N.R.A.B. Award 10173 (Bailer) states:

"Article V. Section 1 places correlative obligations upon the parties with respect to the progression of claims. Once a claim is properly filed, the Carrier has the responsibility for making a timely denial thereof, if it is to be denied. The Organization bears the obligation of making a timely appeal from the denial if it desires further progression of the claim. When either party is charged with failure to discharge the responsibility placed upon it by the Agreement in this regard, that party has the burden of proving it properly met its responsibility. The Carrier cannot be expected to prove it failed to receive a claim or an appeal. Likewise, the Organization cannot fairly be charged with the obligation to establish that it did not receive a claim denial.

In the instant case the Carrier has not presented proof that a denial letter was mailed on or about December 30, 1955 or at any other time within the prescribed time limit. \* \* \*

\* \* \* \* \*

Since the Carrier has not shown in this record that timely notice of appeal denial was given the Organization by mail or otherwise, the language of Article V, Section 1 (a)—which is made applicable by the following sub-paragraph (c)—plainly requires the claim to be "allowed as presented." The governing language of the rule precludes giving any consideration to the merits of this claim under the confronting circumstances. We therefore make no comment concerning whether the substantive aspect of this dispute is meritorious."

Second Division N.R.A.B. Award 4851 (Hall) states:

"Carrier selected the method by which the denial of the claim of August 27, 1963, was to be delivered. The employee cannot be held responsible for the handling of Company Mail by Company Messengers. It was the responsibility of the Carrier to see that the letter of denial was properly delivered to the Local Chairman. All of the Rules of the Agreement must be made effective though the result may appear to be somewhat harsh at times."

See also Third Division N.R.A.B. Awards 10742 (Miller), 11211 (Miller), 11893 (O'Gallagher), and 16000 (Heskett).

The claim will be sustained for all straight time lost and the Claimant shall be restored to service with seniority and other rights unimpaired.

AWARD

Claim sustained as set out in findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: E. A. Killeen  
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1972.