

The Second Division consisted of the regular members and in addition Referee James F. Searce when award was rendered.

Parties to Dispute: { System Federation No. 16, Railway Employees'
 { Department, A. F. of L. - C. I. O.
 { (Carmen)
 { Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when Push Car Repairman George E. Rose was unjustly dismissed from service on October 19, 1976, as a result of investigation held on October 13, 1976, at Bellevue, Ohio.
2. That the Norfolk and Western Railway Company violated Article V (a) of the August 21, 1954 National Agreement during the processing of the claim on the property.
3. That the Norfolk and Western Railway Company be ordered to reinstate Push Car Repairman George E. Rose to service, compensate him for all benefits and wages he would have received had he not been unjustly dismissed.

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.

The Claimant was terminated due to failure to protect his position when, on October 1, 4 and 5 of 1976 he was absent without notifying the Carrier prior to or during such absences. According to the Claimant, no such contact was made because he was "unable to do so". The Claimant's prior record was also considered in making the decision to terminate him, according to the Carrier.

A grievance was timely filed by the Organization by date of November 30, 1976; the Carrier denied the initial claim on January 27, 1977 -- also timely. The Organization's appeal to the Carrier's denial came timely, 32 days later, by letter dated February 28, 1977; subsequent correspondence

by the Carrier makes clear that the aforementioned appeal was received a few days thereafter. In June of 1977, the Organization brought to the Carrier's attention that no response had been received to its February 25, 1977 appeal; by date of June 17, 1977 the Carrier submitted its denial of the Organization's February 28 appeal. Thus, such response came some 109 days after the appeal was issued. The Organization cites Article V (a) of the Agreement in contending that the Carrier is in error:

"(a) 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 employee 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 Organization demands that he be returned to duty and be made whole.

As to the merits, the Organization contends that the Carrier was well aware that the Claimant had a continuing medical condition, which adversely affected his work status. According to the Carrier, the Claimant's absence rate -- 68% in 1974, 57% in 1975 and 75% for the first ten months of 1976 was indicative of his non-availability for duty. The period of absence in October of 1976, according to the Carrier, constituted a final unacceptable action on the Claimant's part.

The Carrier contends that the Claimant's poor attendance record alone suffices to affirm its termination action, and that procedural or technical errors cannot be used to offset such a dismal and unacceptable record. It points to the actions of the "National Disputes Committee" -- a body formed in 1963 to provide decisions, on a variety of persistent problems involving interpretation of Agreements between carriers and those non-operating crafts represented under the Third Division of the Adjustment Board. One such "Decision" (#16) of this deliberative body held that a Carrier's liability for payment -- where the Carrier involved had failed (as here) to respond within the proper time period, was limited to that period between when a Carrier's response was required and when it was received. The Organization points out that it was not signatory to such an Agreement and is not bound by "Decision #16". The Carrier also cites various awards which it contends to support the concept that, even given a procedural error of timeliness, where the record supports termination such action is affirmed with the only liability accruing to the Carrier to be that extending to the period of delinquency of response. (In this instance this would entail liability for the period beyond that available for responding -- 60 days or until

April 30, 1977, to the point at which the Carrier did not respond -- June 17, 1977.) The Carrier cites the principle that discipline should not be disturbed unless it can be shown that such action was arbitrary and capricious.

Conversely, the Organization asserts the language of Article V (a) is clear as to its meaning and is without vagueness or ambiguity. It also points out that this provision covers those instances where the Organization fails to file or process a grievance timely; under such circumstances, there is no recovery possible from a failure to do so.

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 imperatives 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.

We shall order the Carrier to return the Claimant to service, based exclusively upon our findings that: the obligation under Article V (a) rests equally upon both parties; the Carrier violated the procedural aspects of this provision; and, such violation stands on its own. This decision in no way can be construed to suggest approval of the case on its merits.

The claimant's return to duty shall be predicated upon his ability to successfully meet the physical standards of employees now in service and upon his recognition that his failure to meet reasonable attendance requirements in the future will be the basis for subsequent and probably permanent removal from service.

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.

A W A R D

Claim upheld as set out in the Findings.

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 27th day of September, 1979.