Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8445
SECOND DIVISION Docket No. 8383
2-UP-MA-'80

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Union Pacific Railroad Company

Dispute: Claim of Employes:

1. That under the terms of the current Agreement Machinist Boyd Gigax (hereinafter referred to as Claimant) was improperly suspended from service on February 15, 1978, and subsequently dismissed on March 20, 1978.

2. That, accordingly, the Carrier be ordered to restore Claimant to service with seniority and service rights unimpaired and with compensation for all wage loss from date of restoration to service.

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 was suspended from service on February 15, 1978, and subsequently dismissed on March 20, 1978, for allegedly being insubordinate and for his failure to comply with instructions issued by his immediate supervisor to wear safety glasses.

Carrier charges Claimant's actions were in violation of Rule B, 700, 702(B), and 4116 from Form 7908 "Rules Governing Duties and Deportment of Employees, Safety Instructions and Use of Radio". Said rules provide:

> "Rule B
> Employes must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation."

"Rule 700
Employes will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

"Rule 702B
Employes must comply with instructions from proper authority."

"Rule 4116
Suitable goggles must be worn when doing eye-dangerous work. Spectacle-type goggles with or without corrective lenses are recommended and must be equipped with side shields. Employes having corrective lenses in personal glasses will use cover-type goggles.

In designated eye protection areas, all employes must wear goggles.

In certain designated operations, such as handling chemicals and some abrasive wheel grinding, a face shield will be used in addition to goggles.

Employes must not face nor face nor watch electric or acetylene welding or cutting operations unless proper goggle protection is used."

In support of its position Carrier contends that Claimant's actions were clearly insubordinate in that he refused to comply with his supervisor's instructions that he wear safety glasses. Carrier further contends that there can be no mitigation in this matter since: (1) Claimant was familiar with the rule which he violated; (2) Claimant as well as all other Shop Craft Employees, was aware of the Mandatory Eye Protection Rule which is the basis of this dispute; and (3) Claimant had been warned and instructed on many occasions to wear safety glasses or face the possibility of disciplinary action.

Additionally, Carrier maintains that Claimant was afforded a fair and impartial hearing in accordance with the parties' collective bargaining agreement.

As its final argument, Carrier charges that the Organization's appeal in this matter is procedurally defective in that the Shop Superintendent's letter of May 31, 1978, which denied Organization's claim at the local level, was not rejected within the prescribed sixty (60) day limit as specified in Rule 35(B) of the parties' current agreement.

Organization contends that Claimant's dismissal was improper for reasons that: (1) no specific order was given to Claimant by his supervisor; and (2) supervisor made no attempt to determine why Claimant was not wearing his safety glasses at the particular moment of their confrontation. On this latter point, Organization argues that Claimant's failure to wear his safety glasses was motivated by fear for his own safety since said glasses "made him feel dizzy", "caused distortion", and "obscured his side vision". Evidence of validity of Claimant's fears, according to Organization, is demonstrated by the fact that only two (2) days following his suspension, Carrier cancelled the disputed safety glasses program thus recognizing that "the glasses posed a greater threat to safety than an aid to safety".

Somewhat related the previously posited argument, Organization further maintains that Carrier has acted in bad faith in this matter in that various managerial representatives, after acknowledging Carrier's error in discharging Claimant, stated to Organization representatives that Claimant would be restored to service with compensation for any wage loss, but this commitment was later repudiated by higher Carrier officers.

Regarding Carrier's contention that Organization failed to comply with the time limits established by Rule 35(B) of the parties' appeal procedure, Organization maintains that such a letter of rejection, dated June 20, 1978, was sent to the appropriate Carrier officer in accordance with its contractual obligation. Organization argues that said letter apparently was lost, and this occurance probably was due to the confusion which was caused when there was a change of chief clerks at Carrier's North Platte office during the same time period in which said letter was sent. In support of this contention Organization offers "affidavits" signed by Claimant and General Chairman attesting that they each received copies of said correspondence within the time frame as required by the Agreement.

After having carefully studied and reviewed the complete record of this instant case, this Board is led to the inescapable conclusion that Carrier's argument concerning Organization's untimely rejection of the Shop Superintendent's May 31, 1978 response to Organization's initial claim, is creditable, and therefore, must be sustained.

Regarding this particular matter, Organization maintains that a rejection letter dated June 20, 1978, drafted by the Local Chairman to Carrier's Shop Superintendent, was mailed in timely fashion in accordance with Rule 35(b). Carrier, however, contends that said rejection letter was never received; although a copy of same was furnished to Carrier by Organization on November 2, 1978. Carrier further maintains that subsequent to Shop Superintendent's transmittal of his May 31, 1978 letter to Local Chairman, no further correspondence was received from Organization until July 26, 1978, when a letter from the General Chairman to Carrier's Chief Mechanical Officer was received.

The critical language of Rule 35(B) reads as follows:

> "If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within

> "60 days from receipt of disallowance, and the representative of the Carrier shall be notified in writing of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, ..." (Emphasis added by Board).

The requirement that the parties comply with the contractual time limits specified in a collectively bargained grievance procedure is sufficiently established and is of such universal acceptance among labor-management practitioners that its validity and applicability need not be further expanded upon by this Board (See: Second Division Awards Nos. 3865, 4297, 5307, 5308, 5385 and 6393). Equally as well established, however, is the principle which directs that a party alleging to have satisfied the requirements of a specific performance clause assumes the evidentiary burden of proving, with sufficient evidence, that such compliance was, in fact, satisfied. This latter principle was clearly expressed in Third Division (Supplemental) Award No. 11505 wherein the Board held as follows:

> "It is a general principle of the law of agency that a letter properly addressed, stamped, and deposited in the United States mail is presumed to have been received by the addressee. But, this is a rebuttable presumption. If the addressee denies receipt of the letter then the addressor has the burden of proving that the letter was in fact received. Petitioner herein has adduced no proof, in the record, to prove de facto receipt of the letter by the Carrier.
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> The perils attendant to entrusting performance of an act to an agent are borne by the principal." (Emphasis in original). (See also: Second Division Awards No. 5308, 7591 and 7955).

In support of its contention that its disputed letter of June 20, 1978 was in fact sent, Organization offers two letters, one from Claimant and one from Organization's General Chairman, eact attesting that they had received copies of said letter sometime during the last week of June 1978. Organization contends further that said letter, though originally mailed to Carrier as Organization maintains, was probably lost, and if so, said loss probably occurred because (the Chief Clerk's position at North Platte was changed during this period and many papers were lost; unfortunately, this letter of June 20, 1978 was among them".

The Board discredits Organization's contention in this regard for several reasons.

First, Organization alleges that Claimant's and General Chairman's respective letters verifying their receipt of the June 20, 1978 letter, were "affidavits". Apparently, Organization uses the word "affidavit" to describe said letters in an effort to underscore the importance which Organization attributes to these documents. This Board has carefully examined copies of said documents, as provided by Organization, and finds that they are not "affidavits" as claimed, but merely letters composed by Claimant and General Chairman respectively alleging that each had received a copy of said letter "... about June 23-24, 1978" or "...during last week of June, 1978".

Secondly, apart from the fact that said letters do not correspond to affidavit form as alleged by Organization, and that said letters are "self-serving" documents in nature; more importantly, it is significant to note that said letters, even if they are valid (and this Board has no reason to conclude otherwise), only prove that Claimant and General Chairman received their respective copies of said letter, not that Carrier had received the original--which is the basic issue before us in this particular consideration. Thus, Organization's offering of proof in this regard is deemed as being insufficient to conclude with any degree of certainty that Carrier did, in fact, receive the June 20, 1978 letter as alleged.

In arriving at the above posited conclusion, this Board has taken favorable judicial notice of Third Division Award No. 22600 wherein Referee Louis Yagoda, when reviewing a similar situation involving the sufficiency of evidence to determine whether a rejection letter was sent and received within the specified contractual time limit, concluded that:

> "In the face of denial of receipt, the burden for proving that the letter was timely sent falls on the sender. That burden is not satisfactorily met by the supplying of only a properly dated purported carbon copy of a letter allegedly timely sent. Certain probative underpinnings are missing, which we believe are not unreasonable to expect from Carrier (sender) for convincing support of the action it contends it took. Was the original of such letter put in an envelope, properly addressed to the proper individual, sealed, stamped and conveyed to a postal connection? When and by whom?
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> We are unable to find the answer to these questions from the combination of silence or unilateral assertion in the record which reaches us.
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> We must therefore conclude that Carrier (sender) has failed to show that it timely met the response requirements put to it by Rule ... and, pursuant to that Rule, sustain Claimants in their contention that said claim was "allowed" by Carrier's default." (Emphasis added by Board).

The third and final consideration upon which this Board has discredited Organization's contention regarding this matter, which now becomes somewhat unnecessary in light of the foregoing analysis, is that Organization's contention that its July 20, 1978 letter along with many others were lost because of personnel changes at Carrier's North Platte office, appears to be nothing more than an unsupported allegation which has no basis whatsoever in the record. Since Organization has offered nothing more than mere allegation on this point, this Board is led to conclude that no such evidence is available and no such situation occurred.

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AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 24th day of September, 1980.