Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9354
Docket No. 8929
2-CMStP&P-CM-'83

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Dispute: Claim of Employes:

1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the terms of the controlling Agreement when Carman H. Bates was removed from service on February 18, 1979 pending a hearing on February 20, 1979 and dismissed from service on March 14, 1979.

2. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company violated the terms of the August 21, 1954 Agreement, Article V, Carriers Proposal No. 7, when A. D. M. - Mechanical D. A. Radabaugh did not properly respond to Local Chairman Laacks' letter of claim dated April 11, 1979, and which letter was received by the Carrier on April 12, 1979, until Mr. Radabaugh responded with a letter dated June 11, 1979, postmarked June 14, 1979 and received by the Local Chairman on June 15, 1979 and which letter was due on or before June 10, 1979 and four days beyond the 60 day time limit.

3. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to restore Carman Henry Bates to service with seniority rights unimpaired.

4. That the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company be ordered to make Carman Henry Bates whole for all rights and benefits that are a condition of employment such as, but not limited to, seniority, vacation, holidays, medical, dental, surgical, and all group life insurance benefits from date he was removed from service until he is restored to service.

5. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to compensate Carman Henry Bates for all lost time from February 18, 1979 until he is restored to service.

6. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to reimburse Carman Henry Bates for all losses sustained account loss of coverage under health, medical, dental, surgical, welfare and all group life insurance benefits during such time as he is held out of service.

7. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company be ordered to award Carman Henry Bates interest at the 6% rate per annum for any payment he may receive as a result of this claim.

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 H. Bates, with service date of December 11, 1978, was dismissed from the Carrier's employ effective March 14, 1979. At the time of his termination, Claimant was a Carman Carpenter, promoted, working in the Carrier's Milwaukee Diesel House.

Prior to his termination, Claimant had been taken out of service by letter dated February 18, 1979, pending a hearing that was conducted on February 28, 1979, and continued on March 2, 1979, at the request of the Organization, on charges that Claimant failed to protect his assignment on specified dates and absented himself from his assigned area on February 18, 1979 when he was found sleeping in the Carpenter Shack.

After Claimant's termination effective March 14, 1979, a claim was filed by letter dated April 11, 1979. That claim, requesting Claimant's reinstatement will full back pay, etc., was received by the Carrier on April 12, 1979 as verified by certified mail postal receipt.

There was no notification of disallowance of the claim until Mr. Radabaugh responded by letter dated June 11, 1979, which was not postmarked until June 14, 1979, and was not received by the Local Chairman until June 15, 1979.

By letter dated July 5, 1979 which was received by the Carrier the next day, the Local Chairman advised the Assistant Division Manager Mechanical that the latter's response to the letter claim was untimely in that it did not comply with the 60-day requirement set forth in the August 21, 1954 Agreement, Article V. On that basis, request was made that the Carrier pay the claim as presented.

The August 21, 1954, controlling Agreement between the parties reads in pertinent part:

> "1. All claims or grievances arising on or after January 1, 1955 shall be handled 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, 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."

However, by letter dated February 13, 1980 from the Assistant Vice President - Labor Relations to Claimant, it was stated:

"The matter concerning your dismissal effective March 14, 1979, has been carefully reviewed and considered by this office and we have now reached a decision that the time you have already lost as a result of the disciplinary assessment should suffice, thus, we are offering you another opportunity to continue your employment with the company with your seniority rights unimpaired but without pay for any time lost.

You should, therefore, arrange to report to Mr. H. U. Urbanski, Plant Manager, at Milwaukee Diesel House on or before February 25, 1980."

Claimant did not respond to the offer, but the General Chairman repeated his request that payment be made as initially presented in the claim on behalf of Claimant in a letter to Mr. Merritt on February 17, 1980. To this letter, Merritt responded by letter dated March 6, 1980, in which he stated, in part:

"Reference is also made to my letter to Mr. Henry Bates under date of February 13, 1980, advising him that he was being reinstated and that he should report to Mr. H. U. Urbanski, Plant Manager at the Milwaukee Diesel House, on or before February 25, 1980. I have been advised that Mr. Bates did not report as instructed, and it is my position, therefore, that any time which you are claiming on his behalf subsequent to February 25, 1980, is improper."

It is the position of the Carrier that the discipline initially imposed on Claimant should not be disturbed by this Board. Further, while admitting that Mr. Radabaugh's disallowance of the claim was beyond the 60-day time limit period prescribed in Section 1(a) of Article V of the controlling Agreement, the Carrier contends that any sustaining award is appropriate only to the extent of sustaining the claim for the time lost in excess of the 60-day time period. In calculating that time, the Carrier asserts that the time should be measured from the date on which Mr. Radabaugh actually received the claim (April 13, 1979) to the date the disallowance of the claim was postmarked (June 14, 1979), a total of 62 days. Thus, it is argued that the belated denial of the claim entitles Claimant to no more than two days for time lost pursuant to his claim under Section 1(a) of Article V.

The Carrier also contends that beyond June 14, 1979, the instant claim should be reviewed objectively by the Board to determine whether the Carrier proved the charges against Claimant and, if so, whether the penalty was commensurate with the offenses committed, taking into consideration the Claimant's short time in service (approximately 3 months) and the fact that Carrier did offer reinstatement and did instruct Claimant to report to work on or before February 25,1980, which Claimant failed to do.

In partial support of its position, the Carrier has directed the attention of this Board to Decision No. 16 of the National Disputes Committee that was established in May, 1963 by various non-operating unions and Carrier members to resolve certain disputes that were submitted to the Third Division. In NDC Decision No. 16 it was alleged that commencing July 17, 1959 the Carrier (Denver and Rio Grande Western Railroad Company) had abolished the position of a clerk and thereafter assigned work coming under the scope of the Clerk's Agreement to be performed by other crafts. A claim for the Clerk involved was filed on October 5, 1959, asking for a day's pay commencing 60 days prior to filing of the claim and continuing until the work was returned to the scope of the Clerks' Agreement and performed by clerical employes thereunder. The claim was not received by the Carrier until October 15, 1959.

Without explanation the National Disputes Committee ruled that the Carrier's liability for payment of the claim arising out of the Railroad's failure to comply with the 60-day requirement of Article V of the August 21, 1954 Agreement ended when the Carrier's denial letter dated December 29, 1959 was received by the local chairman on December 30, 1959. The claim for compensation for each day commencing 60 days prior to receipt of the claim by the Carrier was allowed and continued through December 30, 1959 when the Carrier's denial was received by the local chairman. The docket was then returned to the Third Division, N.R.A.B., for disposition of the claim on its merits for dates subsequent to December 30, 1959.

The Carrier submits that in light of NDC Decision 16 its default regarding the 60-day limitation in Article V was cured by a proper denial letter postmarked June 14, 1979. The Carrier believes that the claim should be denied from June 15, 1979 to the date Claimant was offered reinstatement and instructed to report for work, but failed to do so. Further, the Carrier asserts that aside from the fact that it finds the instant claim totally lacks merit, Item 4 of

the Employes' Statement of Claim is not only vague and indefinite from the standpoint that it is totally lacking in specificity, but it is a claim unsupported by the schedule rules of agreements. It is pointed out that under the provisions of Rule 34(h) of the parties' Agreement, the remedy provided is reinstatement with seniority rights unimpaired and payment for all time lost, resulting from a suspension or dismissal action, less any amounts earned in other employment. No provision is made for reimbursement of health and welfare benefits and, consequently, are not proper matters for consideration by the Board.

Rule 34(h) reads as follows:

> "(h) If it is found that an employe has been unjustly suspended or dismissed from the service such employe shall be reinstated with his seniority rights unimpaired and paid for all time lost resulting from such suspension or dismissal, less any amount earned in other employment."

The Carrier further submits that Item 5 of the Employes' Statement of Claim constitutes a penalty not sanctioned by schedule rules and/or agreements between the disputing parties. Consequently, it is Carrier's position that a demand from the Organization for the Board to award Claimant "interest at the 6% rate per annum for any compensation awarded" is unreasonable, unwarranted, improper, invalid and should be barred.

Even if this Board were disposed to follow rulings of the National Disputes Committee, it would not find NDC Decision 16 applicable to the instant dispute. The NDC case involved an alleged continuing violation, unlike the case sub judice.

As noted in Award 3298, Second Division (Ferguson) the language of Article V, Section 1(a), appears deceptively simple of application, but difficulty arises when it is attempted to put that language into operation in a claim for an alleged violation continuing in the future. The technical rule violation presents a dilemma, which the framers of the language did not anticipate except as they provided in Article V, Section 3, of the August 21, 1954 Agreement pertaining to continuing violations. Consequently, there is logic in the "cut off" rule of NDC Decision No. 16 to avoid the unintended result that untimely denial of a continuing claim requires that the substantive nature of such claim be granted for the unlimited future. However, that logic has no place in a dismissal action.

Article V, 1 plainly provides mutual obligations on the parties to act in a timely manner in processing claims or grievances. Under that language, this Board was held in disputes between the instant parties that it is without jurisdiction to inquire into the merits of a dispute where a claim has not been filed within 60 days from the date of the occurrence on which the claim is based. Similarly, this Board must hold that it is without jurisdiction to inquire into the merits of the instant dispute between the parties where the Carrier has failed to make notification that the claim was disallowed within the required 60-day period. The claim must be allowed.

The language of Article V, 1(a) is that the claim must be allowed "as presented". Here, the claim as presented included forms of relief that have quite generally been denied on one or more grounds as outside the scope of proper relief. If the literal language is to be applied, the improper relief must be ordered. Such request suggests that the language should not be applied literally because it would not reach the intention of the parties in adopting that language. Just as it would be improper to award relief based on a claim presenting erroneously excessive amounts of time, so it appears to this Board that it would be outside the contemplation of the contracting parties to order relief that has been improper even though such relief is contained in a claim as presented. Consequently, the ordered relief here must be limited to reinstatement of Claimant to his former position with compensation for all wages lost, less outside wages earned, and with seniority unimpaired.

There is a further limitation on the award in this case that is imperative. There is an almost inflexible proposition that an aggrieved employe may not recover a remedy from a wrongdoer for losses that could have been avoided. This doctrine of avoidable consequences, often called a "duty to mitigate", is employed in every manner of contract, requiring reasonable effort to reduce or mitigate losses.

In the instant case, the Carrier offered reinstatement of Claimant to employment at the Milwaukee Diesel House, where Claimant had formerly worked, on or before February 25, 1980. Claimant could not reject that offer and idly sit by allowing additional losses to accumulate. In failing to accept the reinstatement offer, which in no way required Claimant to abandon his claim for relief for wrongful dismissal prior to the date of his reinstatement, Claimant has failed to make a reasonable effort to mitigate damages. He may not recover for such avoidable harm.

A W A R D

The claim is sustained consistent with the foregoing determinations. The Carrier is ordered to reinstate Claimant and to pay him for all lost wages from the date of his dismissal on March 14, 1979 through February 25, 1980, less earnings realized by Claimant during that same period of time, and with seniority unimpaired.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of January, 1983.