NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 SECOND DIVISION Award No. 12614
Docket No. 12546
93-2-92-2-69

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"1. That the Union Pacific Railroad Company violated the controlling agreement and in particular Rule 37 and Ruling No. 19 when the Carrier failed to allow claim as submitted after violating the time limits on the first level of handling of the claim.

2. That the Union Pacific Railroad Company violated the controlling agreement and in particular Rules 22, 37 and Ruling No. 19 when Electrician R. L. Taylor was unjustly withheld on November 20, 1990, and then unjustly suspended from service for a period of ninety (90) days.

3. That accordingly, the Union Pacific Railroad Company be ordered to compensate former Electrician R. L. Taylor as follows:

a. Compensated for all lost time including all overtime at the prime rate of interest.

b. Returned to service with all seniority rights unimpaired.

c. Made whole for all vacation rights.

d. Made whole for all health, welfare and insurance benefits.

e. Made whole for pension benefits, including railroad retirement and unemployment insurance.

f. Made whole for any and all other benefits that he would have earned during the time withheld from service.

g. Any record of this unjust disciplinary action be expunged from his unblemished personal record."

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.

On November 20, 1990, the Claimant was notified to attend a formal Investigation on November 26, 1990, on charges that he was allegedly insubordinate when he failed to report for duty on November 17 and 18, 1990, and that he was absent without authority on November 17, 18 and 19, 1990. Following a postponement, the hearing commenced on December 27, 1990. It was reconvened on January 2, 18, and March 7, 1991, when it was completed. Subsequently, on March 12, 1991, the Claimant was found guilty as charged and assessed discipline of a 90 day suspension.

The Organization claims that the Carrier did not timely respond to its initial appeal; that it failed to provide the Claimant with a fair and impartial hearing and that the Carrier has not shown by substantial evidence that the Claimant was guilty of the charges.

Rule 35 requires the Carrier, within 60 days from the date of the appeal, to notify the party filing the claim in writing of the reasons for disallowing a claim.

On September 3, 1991, the Organization notified the Carrier that it had not received a reply to its appeal and, therefore, the Organization asserts because the Carrier had not responded to the claim, it must be allowed as presented.

In cases, such as this, the party charged with failure to comply with a contractual time limit has the burden of proving compliance, when challenged. In some cases, the Board has required evidence, such as certified or registered mail receipts, to show

that a letter was mailed. In other cases, if it is shown that the parties relied upon the U.S. Postal Service to exchange correspondence, proof of Agreement compliance is shown if the sending party is able to produce the letter it sent. In this case, it is undisputed that the Carrier has for years hand-delivered correspondence to the Organization's local chairman's mailbox located on the shop premises. The Clerk who customarily handles these cases has provided a notarized statement that she typed the letter at issue and that she had hand-delivered that letter to the local chairman's mailbox on May 24, 1991. In light of this, and noting that this practice for mail delivery has existed and has been accepted by the Organization without complaint, we agree with the Carrier on the time limit question. This conclusion also is consistent with previous decisions of this Board and other adjudicating bodies. In reaching this conclusion, the Board also notes the lengthy record, the number of letters exchanged on the property and the length of time it has taken to complete the on-the-property handling. We conclude that this is not the type of case that should be decided solely on a questionable procedural issue. Finally, the Board observes that, if the current mail distribution practice is not acceptable, the parties should agree on a specific procedure which would be acceptable in the future.

With respect to the other procedural and due process contentions, we find no basis to set this matter aside on those grounds. The Board also observes that the volume of correspondence on the property and the lengthy hearing record in this dispute is replete with irrelevancies as well as issues and concerns that add little, if any substance to the key issues. These tend to clutter the record and to obscure the real questions.

With respect to the question at issue, namely whether the Claimant was insubordinate and was he absent with authority, the evidence adduced from the testimony at the hearing held on this matter shows that the Claimant told the Locomotive Maintenance Manager that he intended to be absent on November 17 and 18, 1990. The Claimant did not have vacation time available for the intended absence. After he was refused authority by the first Manager to be absent, he was also refused authority to absence himself by a second Manager. The Claimant basically argues that, pursuant to Rule 22, all that is required of him is notification to his employer of his intended absence. Rule 22 states:

> "In case an employee is unavoidably kept from work he will not be discriminated against. An employee detained from work on account of sickness or for any other good cause, shall notify his foreman as early as possible."

We find that Claimant's construction of the Rule clearly misplaced. The Rule contemplates an involuntary absence, as suggested by the language of the Rule and its inclusion of the word "unavoidable." For examples of an "unavoidable" absence, one could include sickness, car failure, death in the family, an accident on the way to work, etc. In essence, the Claimant argues that all he needs to do to be allowed to not work is notify the Carrier that he will not work. If such an argument prevailed, chaos would result in the work place for obvious reasons. The Claimant was clearly notified that his absence would not be approved. He, therefore, acted at his own risk and the Carrier properly considered his behavior to be insubordination.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of November 1993.