Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13005
Docket No. 11982
96-2-90-2-86

The Second Division consisted of the regular members and in addition Referee Robert O. Harris when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
(
(Illinois Central Railroad

STATEMENT OF CLAIM:

"That the Illinois Central Railroad violated the current and controlling Agreement between the International Association of Machinists and the Illinois Central Railroad dated April 1, 1935, as revised and amended, when it harshly and unjustly disciplined (removed from service on December 12, 1990) Machinist Carl Hazelwood.

That the Illinois Central Railroad reinstate Machinist Carl Hazelwood to service, make him whole for any and all losses incurred as result of the investigation conducted on February 21, 1990, and clear his service record of all reference to the incident..."

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 jursidiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On September 15, 1993, in Second Division Award 12580 this Board denied Claimant's grievance. That decision was appealed by the Organization to the United States District Court for the Northern District of Illinois, Eastern Division and on January 20, 1995, Judge James B. Zagel issued a Memorandum Opinion and Order vacating the Award of this Board as being in excess of the Arbitrator's authority under the Agreement and remanding the matter to the Board "for further proceedings consistent with the opinion of this Court delivered in open court on 22 December 1994." Because this Board is required to follow the mandate of the Court, its opinion will be quoted in its entirety, as follows:

"This is a dispute between a union and a railroad over an arbitration award issued by the National Railroad Adjustment Board. The union seeks to overturn the award.

In the course of my remarks I may be referring to the board or to the arbitrator. By that reference I mean exactly the same thing. This was one of those cases in which a panel of the board was deadlocked and a neutral arbitrator was appointed and the opinion of the arbitrator was in effect the opinion of the board.

Carl Hazelwood, a union member, was fired for being intoxicated on the job and the union grieved his discharge. Under the collective bargaining agreement the railroad had 60 days to answer the grievance, or more precisely to notify the grievant in writing of the reasons for the disallowance. The contract said 'if not so notified, the claim or grievance shall be allowed as presented.'

The railroad failed to meet the deadline. Six days or so after the deadline passed, the union noted the absence of response and requested reinstatement. A few days later, four days I believe, the railroad rejected the grievance. The matter went to arbitration where the union pressed its claim on procedural grounds, which was the failure to respond in 60 days, and on the merits. There are no disputed facts at this level and both sides seek summary judgment.

The union says the arbitrator failed to comply with the requirements of the Railway Labor Act and did not confine itself to the matters within its jurisdiction. Essentially the arbitrator refused to accept what I referred to as the default theory of the union, saying that it elevated form over substance since the purpose of the contract was to ensure adequate notice to each side of their respective positions, and a notice ten days or so late did not prejudice the grievant. At most the arbitrator thought Hazelwood might be entitled to ten days' worth of damages or ten days' worth of pay.

In so concluding, the union says, the arbitrator breached the Railway Labor Act.

Simply stated, the question is whether the arbitrator could properly read the contract to provide a remedy other than the default judgment that the union sought. If he could, then all is well. If he could not do so within the applicable canons of interpretation, then he has rewritten the contract, and this is forbidden.

The applicable precedents in this circuit are few: Wilson v. CNW, 728 F.2d 963, a Seventh Circuit opinion; and two district court opinions, Miller v. CNW, 647 F. Supp. 1431, and Riley v. National Passenger Railroad Corporation, 814 F. Supp. 40.

In the two Chicago Northwestern cases, the contract said, 'If investigation is not held or decision rendered within the time limit specified herein, the charges against the employee shall be considered as having been dismissed.'

In this case the contract says, 'If the claimant is not so notified, the claim or grievance shall be allowed as presented.'

The railroad's argument is that its clause is amenable to the board's interpretation because the phrase 'within 60 days' does not appear after the phrase 'if not so notified. This it is said is a point of distinction between its clause and the CNW's clause which did specifically refer to the time period.

The railroad says that this is a sharp contrast between the CNW clause and the clause in this case. I don't think it's a very sharp contrast at all. It seems clear to me that the word 'so' in the phrase 'if not so notified' incorporates the time period which appears in the preceding sentence. The clause here states in full, '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.'

But clarity to me is not the crucial issue; the issue, the crucial one is whether the arbitrator's reading is rationally inferable, which brings me to the arbitrator's reading.

The truth is the arbitrator read the contract as I read the contract. He thought that the 60-day limit had to be read into the clause, but he thought that the allowance of the grievance was not mandatory. Some other remedy he found would satisfy the contract, and he believed so not because of any language in the contract, but because the result would exalt form over substance.

In the arbitral precedents cited to me a few arbitrators seem to have done similar things, but in situations that are in some cases distinguishable. Others have enforced the clause as written.

It is easy to see why the arbitrator ruled as he did. There was considerable evidence of intoxication in an employee whose duties do impact to some extent on rail safety and there was no prejudice in the ordinary sense to Hazelwood from a slight delay. On the other hand, of course, the railroad's failure to meet a 60-day time limit in this sort of case is not to be easily excused either.

Is there a way to read the arbitrator's decision as a reading of the contested clause that disagrees with the union's reading? The answer seems clearly to me to be no. If the 60-day limit were not applicable, there would be no need to address questions of form and substance or disadvantage or prejudice, yet the arbitrator did so.

On this view this board's decision -- well, let me restate that. On one view I suppose this board's decision could be construed as a reading of the contract in light of the purpose of the clause, which appears to be the arbitrator's theory. To answer the question as to whether this is a permissible view I look to the Seventh Circuit law.

In Wilson v. CNW the Seventh Circuit held that a board acts beyond its authority when it attempts, 'to alter the existing agreement by ignoring the provisions mandating the dismissal charges when the railroad fails to comply with the specified time limits.'

That sounds like this case, but perhaps there is something in the context of the Wilson award that makes it different. One of them involved a waiver or standing theory. The employee quit and thus, according to the arbitrator, lost the protection of the agreement. But this seems to me to be the same sort of case as we have here. The board read the clause in light of its purposes which did not seem to matter when an employee abandons his job to another.

In the two other award cases in Wilson again purpose was read into the contract. Two employees accused of theft were not given timely hearings under a time limit that was shorter than that allowed for less serious offenses. In effect the contract literally read would give more favorable treatment to employees charged with more serious offenses than it would for those charged with less serious offenses. So the board refused to so read the contract and, preferring substance over form, decided that all employees should be treated equally and all should be heard under the same time limit.

As in this case, the employee did get some benefit for the failure to hold a hearing in a shorter period. The benefit was payment for the delay. There is in fact in my view no real distinction between the case before me and the binding precedent of Wilson. Where the contract specifies a remedy, then that is the remedy.

In this regard one could compare Judge Aspen's opinion with Riley with Judge Shadur's opinion in Miller.

Accordingly, I agree essentially with the view of the union in this matter.

This leaves, however, one last question which the carrier raises, and that is the question of reinstatement. Illinois Central says reinstatement is against public policy. It is true that reinstatement even when mandated by contract can be refused when it is against public policy, and it is not unfair to state that it is against public policy to have those charged with rail safety working while intoxicated.

This case, however, does not present very strong facts to mandate what must be a very narrow public policy exception to the enforcement of contract. The fact is in this case Hazelwood reported to work, but was not in fact working. It was his failure to work, his remaining in the locker room, that precipitated the investigation of his status, and that seems to be significant to me under the leading opinion dealing with this public policy exception in the Seventh Circuit, which is Chrysler Motors v. International Union, 959 F.2d 785, a Seventh Circuit opinion from 1992.

I base my view on this on the summary of cases as stated by the Seventh Circuit in footnote 3 of that opinion.

> For these reasons I grant the union's motion for summary judgment and order the union to prepare a draft order of judgment within seven days. The railroad will have seven days thereafter to object as to form and as to the calculations of the monetary element of such a judgment.
>
> The minute order will read that for the reasons stated in open court motion for summary judgement is granted."

Subsequent to the decision in open court the Carrier requested an amendment of the findings made by the Judge. On February 8, 1995, a ruling was made on this motion as follows:

> "The Railroad seeks to have me amend my findings and produces transcripts that might well justify a change. Nevertheless, the material now cited to me was not cited in or attached to the summary judgment papers. The material come to be (sic) me too late and I decline to amend my findings."

Before this Board the Carrier contends:

> "[T]his dispute must be dismissed because it is improperly before this Board. In their letter of intent to submit this dispute to this Board, dated June 1, 1990, the Machinists' Statement of Claim is defective on its face. It contains the wrong date (December 12, 1990 rather than December 15, 1989), fails to name the intoxicated machinist and requests the reinstatement of a different machinist (J.S. Grady rather than Carl Hazelwood)."

The Carrier further contends that the time limit argument is not properly before this Board because that argument was not included in the statement of claim filed before this Board. It further contends that the time limit argument does not warrant reinstatement of the Claimant and that reinstatement should be refused to an employee who admitted a violation of Rule G.

The Organization contends that the Board should follow the direction of the reviewing Court and sustain the claim.

Any arbitration tribunal operating under the Railway Labor Act should be aware that Courts do not lightly review such decisions. The arbitral tribunal, like a lower Court, must pay deference to the reviewing authority. If a party to a dispute does not like the decision of a reviewing Court, the remedy is to appeal that decision, not to come back to the arbitral tribunal and attempt to attack the reviewing Court's decision. This Board is bound by Judge Zagel's decision and will follow it.

The original decision by this Board relied on a series of cases which hold that where there is a Rule violation, such as Rule G in the railroad industry, which involves the use of substances which affect the ability of an employee to perform his or her work, the arbitral tribunal must look to the merits of the problem rather than procedural defects in the case. Judge Zagel was well aware of these decisions and discussed them, concluding that this was not the type of case where that Rule should be followed.

If there is no public policy impediment to following the time dictates of the Agreement between the parties, it is clear that the Carrier failed to respond to the claim in a timely fashion. The Carrier's present contentions that it did not know who the Claimant was and that the wrong date was on the claim clearly did not mislead it as to the actual Claimant or the merits of the claim. The Carrier failed to respond to the claim in accordance with the Agreement and, accordingly, the claim must be sustained on remand from the United States District Court. Claimant will be returned to service with full backpay after complying with the applicable Carrier Rules regarding return to service. If Claimant fails a back-to-work physical, he shall receive pay for the period from the date the claim was filed until he fails the physical.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 10th day of July 1996.