

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13692

Docket No. 13608

02-2-01-2-11

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Sheet Metal Workers' International Association

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

- “1. The Carrier violated the provisions of the Current and Controlling Agreement, in particular Rule No. 37 dated January 1, 1993, additionally, Rule No. 35 of the Current and Controlling Agreement dated January 1, 1993, 60 day time limits.
2. That the Carrier failed to prove the charges placed against Sheet Metal Worker M.W. Townsend at an investigation held on August 29, 2000, which resulted in his dismissal dated September 28, 2000.
3. That accordingly, the Carrier be required to make the Claimant whole for all compensation for time lost and that he be made whole for all benefits, such as, but not limited to, vacations, holidays, seniority, medical and dental benefits and any other fringe benefits he may have been deprived of due to the Carrier's improper dismissal. In addition, that Sheet Metal Worker Townsend be paid all monies afforded to him in conjunction with his TPA earnings for the time 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 were given due notice of hearing thereon.

By letter dated July 28, 2000, the Claimant was advised to report for formal Investigation regarding an incident on that same date in which the Claimant was allegedly insubordinate and argumentative when instructed by his Supervisor, T. Baldrige, to put water in a locomotive. The Investigation was ultimately held on August 29, 2000, after which time the Claimant was notified that he was dismissed from service.

The Organization advances both procedural and substantive arguments in support of its contention that the Claimant's dismissal was improper. First, the Organization contends that the Claimant was denied a fair and impartial Investigation when the Carrier denied a request made by the Organization prior to the Investigation for a list of witnesses who were going to testify on behalf of the Carrier. The Board has carefully examined Rule 37, cited by the Organization, and finds that no such requirement is specified. Rule 37 provides for a "fair hearing" and states that, at a reasonable time prior to the Hearing, the employee and his duly authorized representative "will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses." The Carrier complied with those contractual requirements in this case. If the Board were to adopt the Organization's position, we would be expanding the discipline and investigative process beyond what the parties themselves have negotiated in their Agreement. Such action is beyond the scope of the Board's authority.

Second, the Organization argues that the Hearing Officer who conducted the Investigation also rendered the discipline, thereby depriving the Claimant of a fair Hearing. The issue of multiplicity of Rules in the discipline process by Carrier Officers has been raised on numerous occasions. The view of the Board is perhaps most aptly expressed in Third Division Award 26239 as follows:

"While duality of roles is neither condoned nor encouraged, the key is to determine whether demonstrable prejudice to the employe exists by virtue of multiple roles of the Officer."

Based on a careful examination of the record, the Board finds that no demonstrable prejudice has been shown. The Claimant's rights were not adversely affected. On the contrary, the Hearing Officer heard the testimony and observed the witnesses and was in the best position to resolve the factual issues that were presented in the instant case. Thus, the fact that the determination of guilt and the assessment of a penalty were both rendered by the Officer who conducted the Hearing did not deprive the Claimant of a fair Hearing. Also, see Second Division Awards 8537, 5360, 8147, 8272, 7196.

The Organization next contends that there was insufficient evidence to conclude that the Claimant was guilty of the charges. In the Organization's view, the Carrier cannot meet its burden of proof when its only witness, the Claimant's Supervisor, presented testimony that was directly contradicted by the Claimant.

The posture of this matter is not unusual. The case turns on the directly contradictory testimony of Supervisor Baldrige and the Claimant. The Board has consistently held that such one-on-one credibility determinations are the province of the Hearing Officer who hears the testimony and evaluates the veracity and reliability of the witnesses' statements. Second Division Award 12804; Third Division Awards 21290, 24388, 28177. In the absence of any showing of bias, predetermination or arbitrariness on the part of the Hearing Officer, the Board finds no basis in our review capacity for disturbing the rejection of the Claimant's version of the incident.

Finally, the Organization contends that the Carrier violated Rule 35 of the Agreement when it failed to respond to the claim within the required 60-day period. In this regard, the record reveals that the claim was filed on October 27, 2000. On January 5, 2001, the Organization contacted the Carrier, stating that there had been no response to the claim and requesting that it be allowed as presented.

Review of the subsequent correspondence of the parties raises considerable doubt that the claim declination notice was sent by the Carrier within the required time limits. In addition to the Organization's insistence that a timely answer was never received, it further appears that the two individuals who were copied on the claim declination did not receive the letter either. In the absence of any affirmative showing that the letter was sent, such as a receipt of certified mail, we find insufficient evidence to support the inference that the Carrier's declination was mailed or received.

It does not necessarily follow, however, that this procedural infirmity entitles the Claimant to be restored to service. The long settled Rule is that the late denial of a claim tolls the Carrier's liability for the procedural violation as of that date. From the date of the late denial, the dispute is considered on the merits if the merits are properly before the Board. Second Division Awards 10754, 11187, 12384, 12580, Third Division Awards 26239, 35604, 35473, 24298, 24269. Accordingly, the measure of damages for the Carrier's violation of Rule 35 is compensation to the Claimant at his straight time rate from the date of his dismissal until January 18, 2001, when the Carrier properly issued its declination of the claim.

As to the merits of the dispute, and notwithstanding the Organization's assertion to the contrary, there is substantial evidence that the Claimant exhibited insubordinate and argumentative behavior as charged. The pattern of misconduct proven on this record was a serious dereliction of duty and warrants the conclusion that the Carrier did not abuse its discretion when it dismissed the Claimant from service. His claim for reinstatement is therefore denied, and no compensation will be awarded beyond January 18, 2001.

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 28th day of June, 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 13692, DOCKET NO. 13608
(Referee Kenis)

The Neutral Member has clearly made a mistake in this case and therefore a dissent is required. In one breath the Board states they did not have the authority to expand or rewrite the agreement and then proceeds to do exactly that when they disregarded the rule governing time limits and proceeded to write its own interpretation. The pertinent rule at issue here is Rule 35 which reads in part, as follows:

Rule 35. ...Should any claim or grievance be disallowed, the carrier shall, within sixty (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....

"Shall be allowed as presented" means exactly what it states, the Claimant should have been allowed to return to work due to the carrier's fatal violation of the agreement regarding time limits.

It is the Organizations' position that the Neutral Member of the Board completely ignored the unambiguous language of Rule 35, which is quoted, in part, above and changed the meaning and intent of said rule, which this Board does not have the power to do.

The Sheet Metal Workers' International Association is not governed by any other agreement, determination, Memorandum, Special Board, etc. that would allow a decision

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as was rendered in this case. Rule 35 of the Agreement between the Union Pacific Railroad and the Employees represented by the Sheet Metal Workers' International Association is controlling and should have been strictly adhered to.

The interest of the Claimant may have been better served if the following Awards would have been reviewed before the decision was rendered: Second Division Awards 11927, 7652, 8089, 8243, 9354, 10157, 10880, 13005, Awards 4 and 25 of Public Law Board 3166, Award No. 133 of Public Law Board 4544 and finally Award NO. 6 of Public Law Board NO. 6400.

Therefore, I hereby register my vigorous dissent to the award as being palpably erroneous.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard S. Bauman".

Richard S. Bauman
Labor Member