

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY.
(The New York Central R. R. Co., Lessee)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Carrier violated the rules of the current Clerks' Agreement when it failed to—(1) . . . hold formal investigation within ten (10) days from the date the employe was charged with the offense. (2) . . . when it failed to render a decision within seven (7) days after the completion of investigation, as required by Rule 33 of the rules and working conditions agreement.

(b) That Mr. William Owens, the employe involved, be compensated for wage loss, \$13.19 per day, from September 24, 1954 to November 26, 1954.

OPINION OF BOARD: Claimant Owens was charged with insubordination and was held out of service beginning September 24, 1954. A formal investigation was held on October 6. On November 24, Claimant received advice (by letter dated November 23) that he has been assessed a sixty-day suspension permitting his return to work on November 26. Rule 33 provides in pertinent part:

"The investigation shall be held within seven (7) days of the date when charged with the offense or held from service. A decision will be rendered within seven (7) days after the completion of investigation."

The contention that the Carrier violated the Agreement by failing to hold the investigation within the contractually prescribed time limit is without merit. The original hearing date of September 29 was postponed at the request of the Local Chairman involved due to his inability to be present. The Claimant joined in this request.

Petitioner also asserts the Carrier's failure to render a decision within seven days following completion of the investigation warrants sustaining the claim. Carrier responds the protest on this point is without merit because the Claimant voluntarily, and with the knowledge of another Local Chair-

man, waived the application of Rule 33. This asserted waiver is contained in a letter prepared by Agent Scott which Claimant signed. The letter reads:

"I, William Owens, am requesting that my formal hearing set for 10 A. M., September 29, 1954, be postponed until the week of October 4th, 1954, account my being unable to secure desired representation.

"In making such request I am releasing the company from any responsibility for failure to comply with Rule 33 of agreement between the New York Central Railroad and the Brotherhood of Railway Clerks."

The Carrier's interpretation of this letter takes out of context the reference to "releasing the company from any responsibility for failure to comply with Rule 33". The release applied to the requirement that the investigation be held within seven days of the date when charged or held out of service. It was not intended to waive compliance with the Rule in general. The Rule also provides for an appeal procedure available to employees dissatisfied with the initial decision. It could not reasonably be argued that the above letter was intended to waive the Claimant's right of appeal. The Carrier does not go to this logical conclusion of its argument but we find no greater merit in the more limited contention that the written release applied to the time limit for rendering a decision after the investigation is completed.

The Rule obligates the Carrier to render its decision within the seven-day period since the term "will" is here used in the sense of "shall". (Note the interchangeable usage of these terms elsewhere in the Rule.) The Carrier's failure to reach a timely decision renders said decision without effect in the same sense as an untimely appeal at later stages in the grievance procedure. We are unable to agree with Management that at best this was a harmless error. This Board is not authorized to revise agreements by holding that clear mandates thereof may be ignored at the convenience of either party. The claim must be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of November, 1957.