Award No. 11757
Docket No. MW-9556

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it failed to hold a hearing within the time limit prescribed in Rule 25(a) in connection with charges placed against claimant R. G. Whitehouse and, as a consequent thereof

(2) Claimant R. G. Whitehouse's record now be cleared and he be paid for all monetary loss suffered, account of the violation referred to in part one (1) of this claim.

OPINION OF BOARD: This is a case of first impression. It is concerned with the interpretation and application of a precisely formulated time limit rule with regard to the holding of hearings in discipline cases. The Awards cited by the parties in support of their respective positions do not construe a like rule. They are, instead, interpretation and application of agreements which do not obligate the parties to comply with specified agreed upon time limitations. Therefore, the cited Awards are inapposite in that they only enunciate general principles applicable in the absence of a specific time limitation rule.

The Rule to be Construed

The rule which we have been petitioned to interpret and apply reads:

"DISCIPLINE

Rule 25.

(a) **Employes shall not be disciplined or dismissed until after a fair and impartial hearing.** Notice of such hearings, stating the known circumstances involved, shall be given to the employe in writing within ten (10) days of the date that knowledge of the alleged offense has been received by the Division Engineer.

"(b) Hearing shall be held within ten (10) days from the date of the notice to the employe of the alleged offense by an officer of the carrier **unless additional time is requested BY THE EMPLOYE OR HIS REPRESENTATIVE.**

* * * * *

(d) If hearing is not held within the specified or agreed time limit, no action will be taken by the carrier on the charge.

* * * * *

(i) **If charges against the employe are not sustained, they shall be stricken from the records.** If by reason of such unsustained charges the employe has been removed from the position held, reinstatement shall be made and **payment allowed for the assigned working hours actually lost at the rate of pay of the position formerly held** less amount earned by him either in or out of the service.

* * * * *"

The Facts

The facts are not in dispute.

Claimant was held out of service on August 19, 1955 pending formal investigation on a charge of allegedly refusing to follow instructions of his foreman. The merit of the charge is not before us.

Under date of August 24, 1955 Carrier notified Claimant, within the time limit prescribed in Rule 25 (a), **supra**, that the hearing, provided for in the Rule, would be held on August 29, 1955 at 11:00 A. M.

When Claimant, pursuant to the notice, appeared for the hearing on August 29 he was informed that Carrier was postponing the hearing because of the absence of the Division Engineer caused by a derailment. Claimant was not informed as to the length of the postponement; he stood silent.

Under date of September 2 the Carrier notified Claimant that the hearing would be held on September 6, which date, admittedly, was more than "ten (10) days from the date of the notice [from Carrier] to the employe [Claimant] of the alleged offense" (See Rule 25(b) **supra**). Claimant made no response to the Carrier's September 2 notice; and he did not appear at the hearing on September 6 on the advice of his representative. Carrier proceeded with the hearing ex parte.

Claimant was restored to service on September 23, 1955. What occasioned the restoration is immaterial. The date is material only in that it terminates the period for which Petitioner prays that Claimant be made whole in accordance with the formula set forth in Rule 25(i).

Contentions of Parties

The issues in this case are framed by the contentions of the parties.

Petitioner contends that Rule 25(a), (b), (d) and (i) is unambiguous and unequivocally obligated Carrier to hold the hearing within ten days — the only exceptions being those prescribed in the Rule; namely, (1) "unless additional time is requested by the employe or his representative" (Rule 25(b)); or, (2) the time is extended by agreement of the parties (Rule 25(d)). Therefore, the unilateral postponement of the hearing by the Carrier to a date more than ten days after the notice of August 24, in the absence of a request by "the employe or his representative" and without agreement between the parties, enjoined the Carrier from taking any action on the charge against Claimant (Rule 25(d)); and, consequently, Carrier is contractually obligated to make Claimant whole as prescribed in Rule 25(i).

Carrier contends that: (1) since neither Claimant or his representative voiced objection to the indefinite postponement of the hearing by the Carrier this constitutes a waiver of the time limitations; (2) in that Claimant has not shown he was prejudiced by the hearing being postponed for more than ten days he has no just cause for complaint; (3) Claimant's failure to appear at the hearing on September 6 shows lack of good faith and failure to exhaust hearing procedures; (4) Rule 25(b) cannot be construed as limiting the Carrier's prerogative "to procure a continuance;" (5) the test is whether under the hearing was held within a reasonable time, otherwise substance would be sacrificed to form; and (6) if the Claimant or his representative felt that the postponement of the hearing to September 6 was a violation of the Agreement he or it should have put the Carrier on notice.

Resolution of the Issues

If the meaning of an agreement is plain the acts of the parties cannot prove a construction contrary to the plain meaning. The parties are each conclusively presumed to know their obligations and rights under the contract — there is no duty on either party, in the absence of an expressed obligation, to counsel the other and failure to do so cannot be held to constitute a waiver. It is a principle of fundamental justice that if a party to a contract is himself the cause of the failure of performance of a condition upon which his own liability depends, he cannot evade the liabilities attendant to the failure.

The common or normal meaning of language is given to words of a contract unless the circumstances show that in a particular case a special meaning should be attached.

Rule 25(a), (b), (d) and (i) employ simple, clear and unambiguous words the meanings of which are plain. The Rule permits of only two exceptions to extension of the time limits set forth therein: (1) upon request of the employe or his representative (Rule 25(b)); and, (2) by agreement of the parties (Rule 25(d)). The Carrier does not defend by pleading compliance with either exception. Instead it argues mores and legal and equitable principles applicable to timely performance of contract or statutory obligations where the time for performance has not been agreed upon or mandated. These arguments have no place here.

It is a principle of contract construction that where an exception(s) to a contract provision is set forth in the document no other exceptions can be implied. Therefore, Carrier's argument that it was "reasonable" under the circumstances to conduct the hearing at a date beyond that agreed upon in the contract is without merit.

The Carrier's contention that it retained the prerogative to set the hearing at any "reasonable" time it chose is also without merit. If this was so then the time limitations set in Rule 25 would have no meaning — they would be surplusage having no force or effect.

When time limitations, for the performance of an act, are embodied in an agreement, with precision, the parties are contractually obligated to comply with them. Whether the limitations are found in practice to be harsh, not equitable, or unreasonable is no concern of this Board. The remedy for such ills is negotiations between the parties. Our function is by statute confined to interpretation of the contract. We cannot by decision alter, vary, add to or subtract from the agreement of the parties. We have no power to dispense our sense of what we might consider just and equitable under the circumstances — the terms of the contract are absolute.

For the foregoing reasons we find that under the facts of this case Carrier was contractually bound to hold the hearing within ten days from August 24, 1955. Its failure to do so denied Claimant "a fair and impartial hearing" in violation of Rule 25(a) and (b). Also, we find that Carrier by its failure to comply with Rule 25(a) and (b) was enjoined by Rule 25(d), from taking any action on the charge against Claimant; and, Claimant has the contractual right to be made whole by application of the formula prescribed in Rule 25(i). We will sustain the claim.

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 Employes involved in this dispute are respectively Carrier and Employes 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: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 1st day of October 1963.