Award Number 17313
Docket Number CL-17883

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert C. McCandless, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILAWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL 6469) that:

1. Carrier's action in dismissing G. J. Berndt, F. J. Aronson, I. C. Yell, J. Standfield and J. Breingan from service without prior notice or warning of the discontinuance of a practice which has been in effect for years was arbitrary, unreasonable, unjustified and in abuse of Carrier's discretion.

2. Carrier shall be required to clear the record of the charges against the five employes named in Item 1; reinstate each of those five employes with all rights unimpaired; and compensate each of those employes for all monetary loss suffered, including overtime, if any, to which his seniority would have entitled him.

OPINION OF BOARD: Claimants here, five in number, were mail and baggage sorters in Carrier's Minneapolis terminal. They had been employed by Carrier from twenty years in the case of Claimant Berndt down to almost nine years in the case of Claimant Aronson. On March 30, 1967, Carrier sent individual letters to the Claimants charging them with failure to protect their assignment, leaving said assignment without proper authority, falsifying their time cards, claiming payment for time not worked, and drinking intoxicating beverages during working hours. Several dates were specified for each charge against each Claimant.

As to the merits of the case, the Employes admit—and Carrier does not dispute—that for years the exact quitting time for Claimants' shifts had been more observed in the breach. Until March 8, 1967, after the departure of the last train, the depot was closed to the public, no work was left in the Mail and Baggage Department, and so the Claimants were allowed to go home. On March 8, 1967, a time clock was installed and Claimants were required to punch out. Claimants, again without objection from Carrier or its Agent or Foreman, started a practice of going across the street after the last train had left, having something to eat and drink, returning to punch out individually as had become to be required. Employes contend without warning, the five Claimants were charged and dismissed for what

had become acceptable practice, and that such dismissal was arbitrary, capricious, and an abuse of Carrier's discretion.

As to the merits, we agree. Carrier could have, at the time of negotiations, asked to shorten this shift or otherwise rearrange it so that termination of the shift would more nearly coincide with closing of the depot and the ending of their work. Carrier could have tried to enlarge the responsibilities and duties to such an extent that Claimants would not have had to have remained idle on the premises. Or Carrier could have made a record of warning Claimants through their agent or foreman that the rules had changed—that they now were required to remain on the premises and punch out at the end of the shift. Nowhere does the record disclose any such actions or warnings by Carrier and we find that on the merits Carrier acted arbitrarily and capriciously in charging Claimants as they did and then summarily dismissing them for actions they had so long condoned.

As to the procedural aspects, Carrier asserts that the instant claim should be dismissed and denied because Employes failed to take their appeal properly and within the sixty days provided for in ARTICLE V of the Agreement. The pertinent sections of ARTICLE V read as follows:

> "1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:
>
> (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. 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.
>
> (b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stange of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose."

Although cited in the briefs of both Carrier and Employe, Section (a) of ARTICLE V quoted above is not on point as to whether Employes made timely and proper appeal. Section (a) merely stipulates the manner by which claims and grievances can be presented by Employes and the time in which Carrier has to produce his written disallowance.

Section (b) pertains to appeals from such disallowance, and this then is the controlling section. In summary, this section states that an appeal to

"the representative of the Carrier" (Emphasis ours) must be taken within sixty days from "receipt of the notice" disallowance.

Carrier contends that notice of intent to appeal was not received by the proper Carrier officer until sixty-two days after the disallowance. The disallowance was April 14. Appeal was taken to the "proper officer" on June 15. The elapsed time is sixty-two days as claimed. However, this Board finds there were sufficient intervening steps of appeal taken by Employes to keep Claimants appeal viable. On April 17 hearings on appeal were requested of Superintendent McKegney. These hearings were granted and held on April 24 and 26. On April 27 the Superintendent declined reinstatement. Further correspondence exchanged hands on May 2 and May 9. A request was made and a further hearing on appeal was granted and held on May 26 by the Carrier's Vice President of Labor Relations. It was not until receipt of the Vice President's letter of disallowance of June 7 that appeal was then taken to the Mail and Baggage Agent, the "proper official" on June 15. Carrier claims that Employes were notified back in 1966 who their "proper officials" were for appeals purposes. Carrier claims that Employes were notified that the Mail and Baggage Agent was such an official for claims arising under his jurisdiction. Accepting all this as true, the only problem is that while Employes were requesting hearings on appeal of other Carrier officials, Carrier was not only not refusing to accept such requests, Carrier was also granting and hearing the appeals. Carrier can not now advance the position that Employes stood silent two days too long to be allowed their appeal. The Record is too clear to the contrary, and so this Board finds that procedurally Claimants substantially complied with the Agreement.

AWARD 16014 was relied upon by Carrier, and we find the facts were sufficiently different that this instant decision in no way disturbs the findings there.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1969.

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