Award No. 18352
Docket No. SG-18567

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

PENN CENTRAL TRANSPORTATION COMPANY
(Northeastern Region, Springfield Division)

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Boston and Albany Railroad (New York Central Railroad Co., Lessee):

(a) Carrier violated the current Signalmen's Agreement, as amended, when it failed to comply with the time limit provisions of Rule 36 in connection with the twenty (20) day actual suspension assessed Signal Maintainer E. P. Bennett June 21, to July 19, 1968 inclusive, for an alleged violation of carrier rules on June 20, 1968.

(b) Carrier violated the time limit provisions of Article V of the August 21, 1954 Agreement when it failed to properly respond to the General Chairman's appeal of October 5, 1968.

(c) Carrier now be required to dismiss the charges against Mr. Bennett, pay him for time lost, and clear his record of this discipline.

OPINION OF BOARD: The issue presented is interpretation and application of time limitations agreed to by the parties and memorialized in Rule 36 — Discipline and Grievances.

At the outset we deem it prudent to collect and show, as premise of our adjudication, the source and limitations of the Board's jurisdiction:

1. The Board's jurisdiction is by statute confined to the interpretation and application of the Agreement in being. Section 3, First (i) et seq of the Railway Labor Act (RLA);

2. The Board is without jurisdiction to add to, subtract from, or otherwise vary the terms of the Agreement. It has no jurisdiction to set aside the expressed terms of the Agreement and substitute its sense of justice — fairness or hardship — in the place and stead of what the parties have agreed to. See Award No. 6446. The award must find its essence in the Agreement. Steelworkers v. Enterprise Wheel and Car Corp., 363 U. S. 593 at p. 597;

3. The Agreement "covers the whole employment relationship. It calls into being a new common law — the common law" of the particular property. TCEU v. Union Pacific R. Co., 385 U. S. 157. The Agreement is a codification of the supreme law of the property governing wages, hours and conditions of employment in the relationship between Carrier and the employes in the collective bargaining unit. While provisions of an Agreement expressing intent of the parties in general terms may be construed as viable to effectuate the intent of the parties such latitude does not attach to fixed provisions as, for example, wages, hours of employment and time limitations;

4. Parties, legally qualified, are free to enter into Agreements (contracts) which are legally enforcible unless they require an unlawful act or are contrary to public policy;

5. A party to a legally enforcible Agreement may be freed from compliance with its terms only with consent, expressed in agreement, of the other party; or, by overriding law;

6. In discipline cases the Board sits as an appellate forum to determine whether in the proceedings on the property: (a) the employe was afforded due process; (b) substantial evidence was adduced to support the Carrier's finding of the employe's guilt as charged in whole or in part; and, (c) the assessed discipline was reasonable and neither arbitrary nor capricious;

7. The phrase "due process of law" in the Constitution is a conceptualism. The authorities agree that it has never been defined. In adjudication it is interpreted and applied by constitutional and statutory courts of law in the factual circumstances of a case. The guarantees of the Fifth and Sixth Amendments vests only in criminal proceedings and prosecutions; and, the Fourteenth Amendment, Section 1, inhibits the powers of the States. A Federal statutory quasi-judicial body, such as this Board, adjudicating civil matters, has no occasion to be concerned with the applicability or enforcement of the constitutional rights which are the substance of those Amendments;

8. The phrase "due process" as employed by this Board pertains to procedures with which the parties have agreed to comply in their dealings. The principles of contract law and the law of evidence — particularized relative to collective bargaining agreements and admissibility, materiality, relevancy and weight of evidence in quasi-judicial proceedings — provide the framework of adjudication.

The reasons for the parties agreeing to time limitations in discipline proceedings are a matter of general knowledge in the industry. Consequently, no purpose would be served by detailing them herein. The intent of the parties in this dispute is self-evident by a reading of the following provisions of the Agreement in which we have supplied the emphasis:

"RULE 36.

DISCIPLINE AND GRIEVANCES

(a) An employe who has been in the service more than 30 days shall not be disciplined or dismissed without a fair and impartial hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this section. At least 48 hours prior to the hearing, such employe shall be apprised of the precise nature of the occurrence or irregularities to be investigated and be given a reasonable opportunity to secure the presence of necessary witnesses to testify in his behalf. He or his representatives shall have the right to cross-examine witnesses who are used in support of the charges.

Such investigation shall be held within 10 days of the date when charged with the offense. A decision shall be rendered within 10 days after the completion of investigation.

(b) An employe dissatisfied with a decision shall have a fair and impartial hearing before the next higher officer provided written request is made to such officer and a copy furnished to the officer whose decision is appealed, within 10 days of the date of the advice of the decision. Hearing shall be granted within 10 days thereafter and a decision rendered within 10 days of the completion of the hearing.

(c) If further appeal is taken it shall be filed within 20 days of the date of the decision appealed from. On such appeals hearings shall be given and decision rendered as promptly as practicable.

(d) The right of appeal by employes or duly accredited representative of Brotherhood of Railroad Signalmen of America in regular order of succession and in the manner prescribed up to and inclusive of the highest official designated by the railroad to whom appeals may be made, is hereby established.

* * * * *

(g) If a charge against the employe is not sustained it shall be stricken from the record. . . .

* * * * *

(i) No case involving alleged violations of this Agreement shall be considered after the expiration of 60 days from day such alleged violation occurred."

While the record raises some questions concerning compliance with Rule 36 (a) we can resolve the case by confining the issue of compliance to Petitioner's allegation that Carrier violated Rule 36 (b) and the prayer of the Claim that the discipline assessed and imposed be set aside. The following chronological list of events is sufficient to show the facts which gave rise to the dispute:

June 20, 1968: Date of the occurrence involved in the charge;

June 24, 1968: Charge and Notice of Hearing served on Claimant;

July 9, 1968: Hearing held;

July 19, 1968: Carrier issued its finding of Claimant's guilt as charged and imposed discipline of 20 days suspension from service;

July 19, 1968: Claimant perfected his appeal to the District Signal Engineer in the manner mandated in Rule 36 (b);

July 26, 1968: By letter to Petitioner District Signal Engineer set hearing on the appeal for August 6, 1968 — more than 10 days after it received the appeal request. For reasons not here material the hearing on the appeal was held subsequent to August 6. Petitioner timely filed motion to dismiss the charge and make whole Claimant on the grounds that Carrier, by its failure to to afford Claimant hearing on the appeal within 10 days of the filing of the appeal, violated Rule 36 (b).

Carrier's defenses are: (1) the time limits are directory; not mandatory — Petitioner, to prevail, must show that he was prejudiced by the delay; (2) Nothing in Rule 36 (b) says that the appeal hearing must be **held** within 10 days, only that it must be "**granted**" in that time. The Rule only requires that Carrier **grant** a hearing, i.e., agree to hold one and set a date, which it did within 10 days; and, (3) the Rule does not prescribe a penalty for violation. If the Board finds a violation and sets aside the discipline imposed by Carrier it would in effect penalize Carrier and exercise a power not within the Board's jurisdiction.

Words in a contract must be given the meaning of their ordinary everyday usage in the absence of a showing that the parties intended otherwise. No such showing is found in this record. The word "grant" generally means "to give." A legal anology is the conveyance of title to realty. A grant of title occurs only at the time of execution of a deed. In the sense of Rule 36, as a whole, we find that paragraph (b) provides that the hearing on appeal shall be held within 10 days of the date when "written request" is made. Compare with Rule 36 (c) in which the parties disclose their recognition of the distinction between a fixed time limitation within which a hearing must be held and one to be held "as promptly as practicable."

Carrier's defense that Rule 36 (b) is directory and not mandatory — in support of which it cites numerous awards of this Board — finds no essence in the Agreement. Were we to honor it we would: (1) exceed our jurisdiction by adding a condition to the Agreement; and, (2) ascribe ineffectuality to the Rule. Had an employe failed to file written request for appeal within 10 days — which is also a time limitation prescription within Rule 36 (b) — we would, for the same reason, reject a petitioner's argument that the Rule was directory and not mandatory and that the Carrier, to prevail, would be required to show that it was prejudiced by a late filing. We have consistently held that an employe who has failed to initiate action within the time limitations fixed in an agreement is barred from initiating an action at a later date. Satisfaction of identified action within fixed agreed upon time limitations is mandatory as to each of the parties. Time limitations set by contractual agreement have the same force and effect as those found in statutes and court rules — a party failing to comply by nonfeasances finds himself hoisted by his own petard.

Carrier's defense that the Board would be exceeding its jurisdiction if it were to set aside the discipline which it had imposed is novel. It having failed

to handle the dispute in the usual manner on the property the discipline proceedings became void ab initio. In sustaining the Claim we are merely restoring Claimant to the status quo he would have enjoyed absent the aborted discipline proceedings. For certainly, in so doing, we do not penalize Carrier.

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 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 31st day of December 1970.

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