

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20423
Docket Number CL-20524

Irwin M. Lieberman, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees

PARTIES TO DISPUTE: (

(The Atchison, Topeka and Santa Fe Railway Company
(- Coast Lines -

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7446)
that:

(a) Carrier violated the Agreement between the Parties when on or about October 14, 1970, as a result of a formal investigation it improperly dismissed Mr. Leroy Flemons from its service without timely furnishing his representative a copy of the notice of discipline assessed and a copy of the transcript of the evidence taken at the investigation; and,

(b) Carrier shall now reinstate Mr. Leroy Flemons to its service with seniority rights and all other rights unimpaired; and,

(c) Carrier shall now compensate Mr. Flemons for a days pay each day held out of service beginning September 26, 1970, forward.

OPINION OF BOARD: Claimant was dismissed from service in this dispute, after an admittedly proper investigation, charged with violating certain rules of Carrier which related to a robbery in his office. Claimant was hired by Carrier on April 13, 1970 and the incident in question took place on September 20, 1970. The formal investigation took place on September 29, 1970, in the course of which Claimant admitted his guilt. Claimant was notified by letter dated October 14, 1970, enclosing a copy of the transcript of the investigation, that he was found guilty and was removed from service. On October 30, 1970 the District Chairman of the Organization notified Carrier by letter that the Organization had not been given a copy of the October 14th letter or a copy of the transcript of the investigation, and for this reason set forth the Claim herein. On November 16, 1970 Carrier informed the Organization of the contents of the October 14th letter and attached a copy of the transcript.

The pertinent Rules in the dispute are as follows:

"ARTICLE V Section 3 - An employee disciplined as a result of a formal investigation will be informed thereof in writing with copy to his representative, within twenty (20) days after completion of the investigation unless a longer time limit is mutually agreed upon. A copy of the transcript of the evidence taken at the investigation will be furnished to the employee and a copy to one of his representatives."

"Section 5-a. If the final decision decrees that charges against the employe are not sustained, the record shall be cleared of the charge; if suspended or dismissed the employe will be returned to former position and paid for all wages lost, less amounts earned in any other employment. Any employe displaced thereby, while not entitled to any other benefits implied in the preceding sentence, may either (1) return to his former position or (2) take his place on the extra list."

There is no doubt whatever that Carrier failed to abide by the provisions of Article V Section 3 of the Agreement by its tardiness in furnishing the required information to the Organization. Carrier's plea that the omission was an inadvertant clerical error and merely a technical oversight is not persuasive. There is also no doubt that Claimant received a fair hearing, was properly found guilty, and received appropriate discipline commensurate with his offenses; this is not denied by Petitioner.

The sole issue before us is whether the proper remedy for Carrier's dereliction is to set aside the discipline imposed on Claimant, as contended by Petitioner. The Claim stipulates that Claimant was improperly dismissed only because of Carrier's failure to furnish the information to Claimant's representative in timely fashion.

Petitioner argues that time limit rules are placed in the Agreement for a purpose and must be adhered to by both parties. Carrier argues that Claimant's rights were in no way prejudiced by the tardiness in sending copies to his representative and the language of Section 5-a of Article V precludes allowance of the Claim unless the charges are not sustained.

At the outset we must point out that the disciplinary process in this industry does not follow the careful technical procedures required in criminal trials; on the other hand the rights of employes to due process and equity in the investigative process must be scrupulously preserved. The Board's function, in reviewing the disciplinary activity on the property, is of course restricted. In this case such review is limited to determining whether or not the Carrier's failure to furnish timely information in any fashion impaired Claimant's rights to a fair hearing and subsequent handling of the discipline. We find no evidence presented by Petitioner to indicate the impact of Carrier's error and we can find no effect on any rights accruing to Claimant. It is clear that the purpose of Section 3 of Article V was to enable Claimant to perfect his appeal in normal fashion and in this case he was not hampered. In Award 4781 we said:

"The purpose of the rule (requiring notice) patently was not to provide a technical loophole for escape from deserved discipline, but to enable the employee to prepare his defense."

In Award 11775, in a very similar factual situation, we held that Claimant was not prejudiced by Carrier's inadvertent failure to send a copy of the disciplinary decision to the General Chairman. We said:

"We hold to the general view that procedural requirements of the agreement are to be complied with but we are unable to agree that Carrier's failure in this regard, under these circumstances, was a fatal error which justifies setting aside the discipline ultimately imposed."

Claimant's undenied guilt is significant in our consideration. The Claim herein does not allege a violation of the Agreement in Carrier's error per se, but rather through the improper dismissal of Claimant. Under these circumstances it would be entirely improper for this Board to reinstate Claimant with substantial back pay in accordance with Article V Section 5-a; such justice could be considered arbitrary and capricious (Award 10547). It would be impossible to hold that the charges against Claimant have not been sustained and there is no contractual remedy provided for violations of Section 3 unless there was some negative affect on Claimant's rights to due process. The Claim must be denied.

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 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

C. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.

LABOR MEMBER'S DISSENT TO AWARD 20423
(Docket CL-20524)
(Referee Lieberman)

Award 20423 is another award of the Third Division that applies conflicting standards in its treatment of procedural issues developed in the handling of grievances under the parties' Agreement and the Railway Labor Act. Unfortunately, it is individual claimants who suffer in this application of a conflict, because if they are guilty of failure to comply with the literal requirements of an Agreement, their cases are summarily dismissed; while, on the other hand, if the Carrier is guilty, it argues that its fault was not prejudicial, claimant's rights were not violated by this fault, etc. The Award correctly stated:

"There is no doubt whatever that Carrier failed to abide by the provisions of Article V Section 3 of the Agreement by its tardiness in furnishing the required information to the Organization. Carrier's plea that the omission was an inadvertent clerical error and merely a technical oversight is not persuasive."

This should have ended the matter; and the claim, by any standard, should have been sustained. Instead, the majority ignores a positive requirement of a negotiated Agreement and deals with the merits of the discipline, even though such issues were not legally before them. The Award states:

"Claimant's undenied guilt is significant in our consideration."

Examination of the Record of the correspondence exchanged between the parties when this claim was handled on the property discloses

only one remark concerning Claimant Flemons' guilt or lack of guilt, and this comment was merely a passing remark. The record discloses that the Carrier's procedural violation, and only the procedural violation, was joined by the parties.

Nonetheless, claimant's guilt was denied. The last remarks made at the investigation were made by claimant's representative. He stated:

"Mr. Ruan: Nothing was proven to any extent as to his guilt, as far as the robbery was concerned, and I do believe that he was promoted too soon, not knowing all the rules and regulations that he should have known to be out on his own as an Operator. As far as discipline, I think he should be talked to about the rules and what they mean and I think he will make a good Operator when he knows his responsibilities. That's all." (Emphasis added)

In the instant case, if Claimant Flemons and his representatives had not followed in lockstep each and every procedural requirement of the rule, I am sure that the claim would have been summarily dismissed, no matter how meritorious the case may have been. It is unfortunate that different standards exist. Attention is directed to Award 20079 (Referee Lieberman), wherein claim was dismissed on the grounds:

"That Rule provides for appeal within nine calendar days from the date of the decision to the highest officer of the REA Express designated to handle such appeals; this Claimant failed to do."

The same result obtained in Award 20078 (Referee Lieberman):

"Rule 43 provides for the submission of all claims to the officer of the Carrier authorized to receive them and a step by step procedure thereafter; this process was not followed by Claimant."

Also, attention is directed to Award 20076 (Referee Lieberman), which held:

"The Record indicates that this claim was not processed on the property in accordance with the procedures outlined in Rule 43 of the Agreement. That rule provides, inter alia, that all claims must be presented to the officer of the Carrier authorized to receive them within sixty days of the event complained of and then must be progressed on the property in specific steps."

In order to avoid creation of a double standard, Referee Lieberman would have been well advised to give careful consideration to Award 8714 (Referee Weston), which was before him when he considered the instant Docket. In that award, the Board wisely stated:

"We would very much prefer not to base a finding on a procedural technicality. Nevertheless, as we had prior occasion to point out in a similar situation (see Award 8564), each of the parties is responsible for the inclusion of this language in the Agreement and what we may think of its wisdom, relative importance or soundness is not at all material. It is our function to interpret the Agreement as it now stands and not to rewrite it in accordance with our own theories of labor-management relations. We are not disposed to strain interpretations in order to escape the technicalities of a plain meaning. Nor is it proper or desirable to resort to fictions and distortions to spell out a waiver, where none exists, in an effort to award a decision based on procedural defects rather than on the merits. (Emphasis added)

"Here the Agreement is clear and unambiguous with respect to the immediate point in issue and it is entirely certain that the Carrier has not complied with a requirement expressly made by the Agreement essential to the imposition of discipline. In Award 8564, where a Carrier made a similar procedural objection, we sustained the claim. We are not persuaded that a contrary principle should be applied here. Carrier's dismissal decision is not valid since it was not made in accordance with the terms of the Agreement.

"While we are in sympathy with some of the language and views expressed in Awards 4781, 2945 and 1497, we are impressed with the manifest inconsistency of emphasizing in one case the necessity of limiting all consideration to the plain language of the agreement involved without considering the equities and then in another case insisting that principles of equity require the agreement to be ignored. As heretofore noted, our understanding of this Board's procedures and authority is that, in deciding the cases that come before us, we are limited to a consideration of the agreement and record involved. . . ."

In this case, the majority should have followed Award 8714. Having failed to do so, the decision in Award 20423 is palpably in error and requires dissent.


J. C. Fletcher
10-3-74