NATIONAL RAIIROAD ADJUSTMENT BOARD

Award Number 23883

THIRD DIVISION Docket Number MW-23381

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

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

(1) The five (5) day suspension imposed upon Assistant Foreman M. Diaz, Laborer C. E. Meeks and Welder Helper D. G. Bree was without just and sufficient cause and wholly disproportionate to such a charge (System File C#2/D-2242-1).

(2) The claim as presented by General Chairman Mobry on January 10, 1979 to Assistant Division Manager E. E. Howard shall be allowed as presented because said claim was not disallowed by Assistant Division Manager E. E. Howard in accordance with Rule 47(a).

(3) As a consequence of either or both (1) and/or (2) abwe

'employees Bree, Meeks and Diaz should be made whole for the five deys suspension resulting from the Carrier's action.'"

OPINIONOFBOARD: The Claimant was suspended from service for five (5) days because of an alleged Safety Rule violation; which suspension was upheld on appeal. Ultimately a claim "... for unjust discipline" was processed end Rule 47 requires a disallowance, in writing, within sixty (60) days.

The 60 day mandate, referred to above, was not met; however the Carrier insists that the claim itself, in addition to being vague, was not submitted in a timely manner. Be that as it may, as we read the Rule it was incumbent upon the Carrier to raise that defense, just as it would any other defense, within the contractually required time period and it may not merely ignore the Rule and then raise its own timeliness question in this fashion.

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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of May, 1982.

CARRIER MEMBERS' DISSENT
TO
AWARD 23883 (DOCKET 23381)
(Joseph A. Sickles)

The Majority was clearly in error when they decided Award 23883 based upon a procedural defense raised by the Organization. The Majority sustained the claim because the Carrier did not deny the claim within the sixty (60) days time limit of Rule 47. This award declared, the Carrier could not rely upon the Organization's own initial and fatal defect of not timely filing the claim, as a defense to defeat the claim. Such reasoning is M egregious error and must not go unchallenged.

In this Award the Organization failed to timely file its claim, that is, within the sixty (60) days time limit. The Carrier raised this procedural defense and argued there was no need to respond to the Organization's defective claim. The Majority decided the mandates of Rule 47 need not apply equally to both the Carrier and the Organization. Thereby violating a well-established principle of the Board that the Employees must initially present a timely and proper claim before the burden of the time limit provisions of Rule 47 would apply to the Carrier. (See Awards 9684, 15631).

The Majority incorrectly stated that Rule 47 required a disallowance of the claim (denial) by the Carrier within sixty (60) days. The Carrier had no obligation to respond to the Organization's procedurally defective claim.

In Award 10603 the Board stated:

> "If the Organization's claim was not filed within the time limit provided in Article V of the August 21, 1954 Agreement, then it does not matter whether the Carrier's declination was within the time limits.

> "In Award 9684 (Elkouri) we held that since the claim was not properly filed in the first instance we did not need to consider whether the Carrier dls-allowed the claim within 60 days from the date it was filed. We must, therefore, consider whether the claim was filed in time."

The Majority should have followed the reasoning in Award 10603, and dismissed the claim without ever reaching the issue of the Carrier's alleged procedural error. As no valid claim existed Ab Init.10 because of the defective nature of the Organization's claim, the Carrier had no need to assert any affirmative defense of its own. The Board in Award 16164 (Miller), quoted with approval from Award 10532 as follows:

> "The claim in this case was first presented on March 5, 1955, which was in excess of 60 days after January 1, 1955. There is no dispute in regard to the! late filing of the claim. The Claimant contends that the Carrier failed to raise the question that the claim was not filed within the 60 days on the property and by so doing waived this defense...
>
> This is a case under an Agreement that requires the filing of the claim within the specific time. There was no claim hers because it was not filed within the time required, and there being no claim, it was not necessary to deny same within the 60 day period."

In Award 15631 the Carrier did not give a reason for the declination of the Organization's claim es required by the Agreement. However, the Board concluded that the Carrier's procedural error was irrelevant as the Organization's claim was improper and defective from the outset.

> "We further state that since no valid claim existed ab initio, the fact that the Carrier failed to give a reason for declining the Claim is of no consequence. Since the claim was invalid in the beginning, we have no right to consider Carrier's later procedural error, nor do we have a right to consider the merits of the case. We will dismiss the claim."

The Majority, in the instant award, should have applied the lucid logic quoted above and likewise dismissed the claim.

The previously cited awards are only representative of the plethora of awards which follow the long standing rule, which was so flippantly regarded by the Majority in this Award.

Therefore we dissent.

D. M. Harkow

W. F. Euker

J. E. Mason

J. R. O'Connell

P. V. Varga