

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24298
Docket Number MW-24613

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
Union Pacific Railroad Company

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

(1) The claim* as presented by the General Chairman on September 25, 1980 to Division Engineer J. M. Sundberg shall be allowed as presented because said claim was not disallowed by Division Engineer J. M. Sundberg in accordance with Rule 49(a) 1 (System File 5-18-11-14-55/013-210-B/W).

*The letter of claim will be reproduced within our initial submission."

OPINION OF BOARD: The claim before the Board involves two claimants, C. M. Wid and K. A. Bittermen. The record shows that the claim in behalf of C. M. Wid has been settled in full by the parties; therefore, that portion of the claim is moot and must be dismissed.

The record shows that on September 19, 1980, C. M. Wid and K. A. Bittermen were notified by letters from the General Track Foreman, with copies to the General Chairman, Local Chairman, and others, as follows:

"On September 17, 1980 at approximately 12:01 a.m. at the North Platte Yards you have admitted to causing damage in the amount of \$1548.23 to M/W Vehicle 191546371, and to destroying Stumac Rail Drill RD-341 in the amount of \$1691.00.

This will serve as written notice of your verbal suspension from service at 11:00 a.m. on September 18, 1980. Therefore in accordance with Rule 48 (1) of the Agreement between the Union Pacific Railroad Company and the Brotherhood of Maintenance of Way Employees effective January 1, 1973 you are removed from service effective 11:00 a.m. on September 18, 1980."

On September 25, 1980, the General Chairman wrote to the Division Engineer :

"This has reference to letters written by Nebraska Division General Track Foreman Mr. G. C. Moreau, dated Sept. 19, 1980, to Mr. K. A. Bitterman and Mr. C. M. Wid, removing them from service for unspecified rule violations on Sept. 18, 1980.

The Carrier **has** violated the currant Agreement between the union Pacific Railroad **Company** and the Brotherhood of Maintenance of Way **Employees** effective January 1, 1973, revised October 1, 1978, Rule 48, when **it removed them from** service prior to a **hearing**, and did not apprise the individuals involved of the precise nature of the charges against them.

The Carrier's letter is deficient, and these employees should now be reinstated with pay for all time lost as a result of that violation."

In the meantime, on September 23, 1980, the General Track Foreman had written to Wid and **Bitterman**, with copies to the **General** Chairman and others who had received copies of his letters of September 19, 1980, to disregard his letters of September 19, and be governed by the letter of September 23, 1980, wherein he informed Wid and **Bitterman** of their dismissal **from** service pursuant to Rule 48(1) of the **Agreement**, and advised them of the rules they **allegedly violated** on September 17, 1980.

On October 1, 1980, the General Chairman wrote the Division Engineer requesting **a hearing for the Claimants, without waiving the position set forth** in his letter of September 25, 1980. Hearing was scheduled for October 17, 1980, and **conducted** on that date. On October 29, 1980, the hearing officer wrote the Claimants that the dismissal action was upheld based on the evidence produced at the hearing.

On December 30, 1980, the Assistant Chairman wrote the Division Engineer, **appealing the decision of** the hearing officer dated October 29, 1980. The Carrier contends this appeal was not **timely** under Rule 48(e) of the **Agreement, which** provides for appeal **within sixty calendar** days following the date the decision is rendered.

Also on December 30, 1980, the General Chairman wrote to the Division Engineer, citing his claim letter of September 25, 1980, and **asserting 96** days had elapsed **with no response** to his claim of September 25, 1980. The **General Chairman** alleged a violation of Rule 49, the time limit rule, and requested that "Claimants **Bitterman** and **Wid** be ret-d to work **immediately with pay for time** lost".

On January 28, 1981, the Division Engineer wrote the Assistant Chairman **emphasizing that his claim of** December 30, 1980, was untimely. Also on January 28, 1981, the Division Engineer wrote the **General** Chairman:

"Referring to your latter of December 30 concerning your claim letter of September 25 relative to discipline cases of Mr. K. A. Bitt-n and Mr. C. M. Wid.

Your letter of September 25 makes reference to Mr. Moreau's letter of September 18 as being deficient with regard to the stipulation of Rule 48. Previous to your letter of

September 25, Mr. Moreau rescinded his original letter of September 18 and wrote a corrected letter of September 23, which was previous to your letter of September 25. Your claims were based on the September 18 letter and inasmuch as this letter was corrected previous to your letter of September 25, your claims of asserted violations have no basis.

Because of the above, Ruk 49 was not violated and the claims will not be paid."

Claim was subsequently appealed on the property on the basis of the of the General Chairman's letter of September 25, 1980, and the Division Engineer's denial of January 28, 1981. The claim as appealed was denied by the Carrier, and the claim before this Board is on the same basis - an alleged violation of Rule 49, the time limit rule, by the Carrier.

Upon careful consideration, the Board finds that Ruk 49(a)1 was violated by the Carrier, as the claim of September 25, 1980, was not denied until January 28, 1981. Even though the Carrier considered the claim as invalid and without basis in view of the General Pack Foreman's letter of September 23, 1980, it was obligated under Ruk 49(a)1 to render a decision on the claim within sixty days. The question then presents itself as to the proper remedy for such violation.

As we indicated in the beginning, the claim in behalf of C. M. Wid is moot and will be dismissed. Therefore, the only claim before us is in behalf of K. A. Bitterman.

Many -ds have been rendered by this Division involving the denial of claims by Carriers, especially since Decision No. 16 of the National Disputes Committee. See also Decision No. 15 of the same Disputes Committee. Decision No. 16 of the National Disputes Committee, and awards following the issuance of that Decision, have generally held that a denial is effective to toll Carrier's liability for the procedural violation as of that date. From the date of the denial, disputes are considered on their merits if the merits are properly before the Board.

We find that the proper measure of damages for carrier's violation of Rule 49(a)1 in the dispute before us, is compensation for claimant K. A. Bitterman at his straight time rate from September 18, 1980, through and including January 28, 1981. See Award No. 5 of Public Law Board No. 1844, as well as Third Division Awards No. 19842 and 21289 dealing with investigations not timely held, also Atlantic Coast Line RR v. BRAC, 120 F. 2d 812 (1954).

As to the merits of the dispute, considering the offenses Claimant Bitterman was clearly guilty of, we will not -d that he be reinstated to service or compensated beyond January 28, 1981.

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 violated to the extent shown in Opinion.

A W A R D

Claim in behalf of K. A. Bitterman sustained in accordance with the Opinion.

Claim in behalf of C.M. Wid is dismissed.

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 14th day of April 1983.

