NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24731
THIRD DIVISION Docket Number MW-25160

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The dismissal of Welder Helper G. L. Ogden for alleged violation of 'Rules M810 and 801' was without just and sufficient cause.

(2) The hearing held on April 20, 1982 was not held as required under Article 14(b).

(3) For the reasons set forth in either or both (1) and (2) above, the claimant shall be allowed the benefits prescribed in Article 14(f) of the Agreement (System File MW-82-118)."

OPINION OF BOARD: Claimant was employed as a welder helper, Welding Gang No. 8, headquartered at Rosenburg, Texas, and worked under the supervision of General Foreman P. Flores and Welder S. F. Warzecha. On March 19, 1982, claimant was notified of his dismissal from service by Carrier's Regional Maintenance of Way Manager for reporting about three hours late for his assignment and not returning to work on time following his lunch break on March 17, 1982. On March 19, 1982, the claimant addressed a letter to the Regional Maintenance of Way Manager requesting a hearing, in accordance with the provisions of the Agreement. On March 25, 1982, claimant was advised by the Regional Maintenance of Way Manager:

> "Pursuant to your request dated March 19, 1982, hearing is granted and will be held at 9:00 AM, April 6, 1982, in Room 907, S.P. Building, 913 Franklin Avenue, Houston, Texas."

On March 31, 1982, claimant was advised by the Regional Maintenance of Way Manager:

> "Due to other commitments, your hearing has been postponed and will now be held at 9:00 AM, April 13, 1982 in Room 907, S.P. Building, 913 Franklin Avenue, Houston, Texas."

On April 7, 1982, claimant was further advised:

> "Due to other commitments, your hearing has again been postponed and will now be held at 9:00 AM, April 20, 1983, in Room 907, S.P. Building, 913 Franklin Avenue, Houston, Texas."

Article 14(b) of the applicable Agreement provides:

> "(b) An employee disciplined or who feels unjustly treated shall, upon making a written request to the officer of the Carrier authorized to receive same, within fifteen (15) days from the date of advice, be given a fair and impartial hearing by an authorized carrier officer.

The hearing will be held within fifteen (15) calendar days thereafter, unless for good cause, additional time is requested by the Carrier, the employee, or employee's representative."

At the beginning of the hearing conducted on April 20, 1983, claimant's union representative objected to the timeliness of the hearing:

"We object to the holding of this hearing as this hearing has been postponed two times since the original date of April 6, 1982 without the consent of the Brotherhood. It is our position that this hearing is out of the time limit as prescribed by but not limited to Article 14 of the current agreement. It is further position that Mr. Ogden now be returned to his former position with pay for time lost, seniority vacation and all other rights due him unimpaired."

The hearing officer responded to the claimant's representative:

"... your statement has been recorded, and your request is respectfully denied."

Following the hearing conducted on April 20, 1982. claimant was notified that his dismissal was sustained.

Before we can possibly reach the merits of the dispute, we must pass upon the timeliness of the hearing issue, which, we note from the record was raised by the Organization at each appeal level on the property, but not responded to by any appeals officer. In appeal to Carrier's highest designated officer of appeals, the Organization contended:

"It is our position that the time limits under Article 14 of the current agreement was violated due to the fact that hearing was set for April 6, 1982, and then postponed two times by the Carrier without the consent or approval of the organization or the accused, and Mr. Ogden did not receive a fair and impartial hearing due to this fact. Also, in letter to Mr. Ogden dated March 25, 1982, and again on March 31, 1982 no reason other than a vague 'due to other commitments' was given to postpone his hearing."

The Organization continues its contention concerning Article 14(b) before the Board. In fact, this issue is spelled out in part (2) of the Statement of Claim. The Carrier has not responded to the contention of the Organization before the Board concerning Article 14(b).

This is not the first case of the kind before the Board involving the postponement of an investigation unilaterally when the rule provided for postponement at the "request" of either party. In Third Division Award No. 23082 we passed upon a very similar dispute involving the same Organization and another Carrier. In Award No. 23082 we endorsed and quoted extensively from Award No. 41 of Public Law Board No. 1844, in which it was held:

"The instant claim mounts no serious challenge to the sufficiency of the evidence nor the appropriateness of the penalty imposed. Indeed, were those the only issues we would deny the claim. But the claim comes to us on the procedural jurisdictional complaint

that Carrier violated Rule 19(a) which reads in pertinent part as follows:

'The investigation will be postponed for good and sufficient reasons on request of either party.'

The crux of this claim, as presented and pursued on the property, is that Carrier did not 'request' but rather just unilaterally presumed to postpone the hearing originally scheduled for September 2, 1977. On the property Carrier defended against that complaint by asserting that there were 'good and sufficient reasons' for postponement, and also by pointing out that the Organization requested and was granted several postponements by Carrier before the hearing actually was held. At our hearing Carrier asserted for the first time that then Vice Chairman Jorde was 'told' about the necessity of a postponement prior to August 30, 1977. The Organization articulated its objections regarding that postponement on the record at the hearing and pursued this objection diligently on the property. At no time prior to our Board hearing did Carrier raise this latter defense. It comes too late now to be legitimately raised and considered.

There is no doubt on this record concerning the 'good and sufficient reasons' why Carrier wanted a postponement. The only question is whether Carrier complied with the clear contractual requirements that it 'request' such postponement from the other party to that agreement. To 'tell' is not the same as to 'request'. We must assume that the parties to the Agreement knew the meaning of the words which they used. Irrespective of the bona fides or the justification for a postponement, Carrier violated Rule 19(a) when instead of requesting a postponement it unilaterally granted itself a postponement and merely informed the Organization of that fait accompli. It should be noted that each party is required to grant the other a postponement under Rule 19(a) when requested to do so for good and sufficient reasons. If Carrier had requested that particular postponement and the Organization had refused, we would have a different case. But Carrier's fatal error herein was in failing altogether to make the request and in acting unilaterally.

Nor in the final analysis is it really relevant that Carrier subsequently granted several requests from the Organization for postponements. Such considerations go to questions of equity and comity; whereas, we are called upon here to interpret clear and unambiguous contract language. Perhaps the result does not seem 'fair' or a layman might deem that the 'guilty party' has been permitted to escape through a technical 'loophole'. However, we do not sit to dispense our own particular brand of justice. Rather, we are requested to interpret the contract before us and where it is clear we have no alternative but to enforce it as it is written. See Award 3-11757."

See also Third Division Award No. 22258 and Fourth Division Award No. 1767.

In Third Division Award No. 23082, we went on to state:

"This Board is always reluctant. to decide claims on technicalities. but we have no choice but to apply the Agreement as written. We cannot ignore the clear language thereof. We find that the Carrier violated the Agreement in postponing the investigation in the manner that it did."

The same conclusion is warranted in our present case. Without passing upon the merits of the dispute, the claim will be sustained, with pay for time lost by claimant being computed in accordance with Article 14(f) of the Agreement.

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;

The 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 Adjsutment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March, 1984.