

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravitz when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Boston and Maine Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10221) that:

1. Carrier acted in an arbitrary, capricious, unjust and uncalled for manner and violated the Agreement between the parties when on December 22, 1986 it dismissed Freight Claim Investigator, Thomas E. Firth, III, from service of the Carrier.

2. Carrier shall now be required to reinstate Freight Claim Investigator, Thomas E. Firth, III, to service of the Carrier, clear his record of any and all unfavorable entries and compensate him for one (1) day's pay commencing Monday, December 22, 1986, and each and every day thereafter until he is restored to service of the Carrier."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was discharged on December 22, 1986, for verbal abuse of two fellow employees to whom he had referred several times as "scabs" while in a crowded bank lobby. His dismissal was appealed on December 30, 1986, and denied on April 27, 1987, 118 days thereafter.

The Organization contends that the dismissal must be overturned, regardless of the merits of the charges, for procedural violation of Rule 44-TIME LIMITS, which provides:

- "(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.
- (b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances...
- (c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine (9) months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board..."

The procedural issue, and its implications, arise out of the delay between December 30, 1987, and April 27, 1987. The Carrier's answer was due on February 28, 1987.

In an attempt to possibly explain that delay, Carrier has submitted its memo dated April 3, 1987, summarizing a discussion of March 26, 1987, between the General Chairman and the Senior Director of Labor Relations, and prepared by the Senior Director of Labor Relations. In his memo he states that the General Chairman waived the 60 day time limit. The Organization contends that this memo was not made part of the case on the property and cannot be considered in accordance with the principles consistently followed by the Board:

- "1. This Board being an appellate tribunal, may only properly consider the issues that were considered by the parties to the dispute in the handling on the property. New issues and new defenses may not properly be raised for the first time before this Board.
2. In disputes involving discipline the parties to such disputes and the Board are each and all restricted to the evidence introduced at the hearing or investigation, and the record may not properly be added to after the hearing or investigation closes." (Third Division Award 25807)

However, evidence of an alleged time limit waiver need not be part of the hearing record. It may arise after the investigation closes, but before the Organization files its notice of intent to appeal to the Board. Carrier's memo memorializes a conversation which allegedly took place on March 26, 1987, well before the Organization filed its notice of intent on January 21, 1988.

Therefore, in evaluating Carrier's memo, we cannot say it must be excluded per se; it must be judged by the same standard applied to any evidence arguably relevant to the issue of timeliness.

It is on this basis that the Board must reject Carrier's memo of April 3, 1987. Standing alone it is not substantial competent evidence to prove waiver. First, it is hearsay; second it is unsubstantiated; and, finally, the third paragraph of the memo indicates that the General Chairman may, 10 days earlier, have made a statement contrary to the waiver the Senior Director of Labor Relations attributes to him on that day and again on April 2nd.

There is also, in paragraph 3, a particularly confusing reference to Section 44 (b), given that the only exception to time limits in 44 (c) is specifically for Organization appeals from the decision of the highest Officer of the Carrier. This paragraph also refers to correspondence which appears nowhere in the Submission. While evidence of waiver may be technically admissible under the circumstances as described, the memo in question can be given no weight and therefore cannot be used to show waiver.

The Board is left with the inescapable conclusion that the Carrier is in violation of Rule 44 (a) and must deal with the Organization's contention that such violation requires the Board to overturn the dismissal without reaching the merits.

A number of cases submitted and considered hold that procedural violations in disciplinary cases do not automatically entitle Claimants to be restored to service:

"It is well established that a late denial is effective to toll the Carrier's liability for a procedural violation as of the date of that denial. From the date of the late denial, disputes are thereafter considered on their merits." (Third Division Award 26239.
Citations omitted.)

The rationale for these decisions arises out of Decision No. 16 of the National Disputes Committee rendered on March 17, 1965, interpreting Article V of the August 21, 1954 Agreement. That Article reads, in part:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances." (Cited in Third Division Award 24269)

The case concerned a failure to deny a non-disciplinary Claim within 60 days of appeal. The Committee awarded compensation to the Claimant up to the date the denial was actually received, but tolled the time for denial on the merits. That is, "receipt of the Carrier's denial letter dated December 29, 1959, stopped the Carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement." The case was remanded for a determination on the merits as to Carrier liability after December 30, 1959.

In its DECISION the Committee stated that its Award of compensation up to the December 29th reply date:

"...shall not be considered as a precedent or waiver of the contentions of the carrier as to this claim for dates subsequent to December 30, 1959 or as to other similar claims or grievances." (Emphasis added. NDC Dec. No. 16, Third Division Docket CL-12336.)

Except for the insertion of the phrase "as to this claim for dates subsequent to December 30, 1959 or", the language of its Decision is identical to the language of Article V.

The Board has reviewed a line of Awards adopting Decision No. 16 as dispositive of the issue before us.

"Many awards have been rendered by this Division involving late 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 late denial is effective to toll Carrier's liability for the procedural violation as of that date. From the date of late denial, disputes are considered on their merits if the merits are properly before the Board." (Third Division Award 24298. In accord: Third Division Awards 25473 and 24269.)

In Fourth Division Award 4600, dated April 21, 1988, where the Rule (17 (c)) made no reference as to what would occur if the denial by an officer of the Carrier was untimely, Decision No. 16 was also applied as precedent:

"There is another line of Awards, however, which does address to the type of time-limits' question found in this case and the appropriate remedy for such violation... (Citations omitted.) The Board has reviewed these Awards but will cite only Second Division Award 10754 and Third Division Award 24298 as representative of the National Railroad Adjustment Boards' precedential conclusions on proper remedy for a violation of the type here at bar."

This Award makes a distinction between violations of time-limits "relating to requesting a hearing and on Carrier's obligations to render post-hearing decisions in a timely manner," and "missing time-limits on appeal of a decision after it has been rendered subsequent to an Investigation." It applies Decision No. 16 to the latter without discussing the reason for the distinction between its holding and Awards holding to the contrary on the former.

The Labor Member's Dissent to Award 4600 denies that Decisions 15 or 16 were intended to apply to disciplinary cases, and states, in part:

"Decisions No. 15 and 16 both involved rule violations, neither of which were discipline cases. Awards 10754 and 24298 took in part that rationale and then decided it applied equally in discipline matters when in fact the National Disputes Committee never decided that such an interpretation should apply in discipline cases. If, however, those Awards had paid closer attention to the concluding remarks of Decision No. 15, they probably would have arrived at a different conclusion. That last paragraph states the following:

'In this connection the National Disputes Committee points out that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the state of handling in which such failure becomes apparent. If the carrier has defaulted, the claim should be allowed at that level as presented;...'"

Cases presented by the Organization involve time limits pertaining to all phases of the investigation and appeal process. Third Division Award 23553 concerned Carrier's failure to render a decision within 7 days from an employee's request for a hearing. The Board stated:

"Every Division of this Board has attempted, through its decisions, to be meticulously accurate and consistent in applying time-limits as written in the Schedule Agreement. The parties in this industry are fully aware of the Board's position on adherence to time-limits ...we see no reason to deviate from a policy of strict adherence to time-limits here. This case will be sustained on the time-limit issue. The merits of the case need not be reached."

Third Division Award 21996 concerned the failure to render a decision within 30 days from completion of the investigation. The Board here also refused to reach the merits citing with approval the following:

"We have consistently held that an employee who has failed to initiate action within the time limitations fixed in an agreement is barred from initiating an action at a latter 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." (Third Division Award 18352.)

"...time limit provisions are to be applied as written by the parties and (that) any deviation from this principle would amount to re-writing the parties' Agreement which no third party is empowered to do." (Third Division Award 21675.)

In Third Division Award 19666 the Board sustained the Claim without reaching the merits where no conference arrangement was made within 15 days after being requested. In Third Division Award 20519, where the Carrier failed to meet the time limit for timely denial of the Claim in a disciplinary matter, the Claim was similarly upheld without reaching the merits.

In Fourth Division Award 4368 the Rule read:

"Officers receiving such appeal will render a decision thereon within thirty (30) days of date appeal is received."

The Board rejected the rationale of Decision No. 16, holding that the awards cited in support of the result reached in that case "do not involve discipline. Rather, they represent this Board's holdings in cases involving a 'belated denial of a continuing claim...'"

The Board further held:

"Rule 17 imposes mutual obligations. The Carrier did not meet those imposed upon it. We remind the parties that Carriers consistently deny employee claims when they fail to comply with contractual time limits."

stating that its decision was in accordance with "a long line of precedent which far outweighs cases cited by the Carrier." (Citing Fourth Division Award 4211.)

In Third Division Award 21755, Decision No. 16 was rejected where Carrier's highest officer failed to answer a disciplinary appeal within sixty days as required in Article V of the August 21, 1954 Agreement, which was being interpreted in that case also. The Board's rationale is simply that a contract should be interpreted as written and that the clear and unambiguous language requires the granting of the claim without reaching the merits.

The cases cited on behalf of the Carrier do not express a clear rationale as to why a tolling of Carriers' liability should occur only in appeals from decisions of the Carriers where a disciplinary decision has been grieved. Decision No. 16 contains no such rationale. Its weight derives from the composition and purpose of the Committee rendering it. The decision clearly runs counter to the last paragraph of Decision No. 15, cited above.

On the other hand, cases cited by the Organization contain clear rationales and demonstrate the equity involved in requiring equal adherence to all time-limits as well as the consistency inherent in following the clear language of the contract.

The language of Rule 44 (a) in the present case is identical to Article V in Decision No. 16. However, in that case the Claimant was on leave during the entire period involved in his Claim. There was a jurisdictional issue and apparently a question as to whether Claimant should have exercised his seniority and worked or whether he was justified in taking leave and making the claim. Under these circumstances, the Committee's ruling suggests a view of the issue on the merits as one involving a continuing grievance. This interpretation of its insertion of the phrase "as to this claim for dates subsequent to December 30, 1959" into the language of the Rule, seems more logical than an intent to distinguish between time-limits in different phases of the disciplinary process.

This interpretation of Rule 44 (a) is more consistent with that portion of the last paragraph of Decision No. 15, quoted in the Dissent to Fourth Division Award 4600. A contrary finding would result in the principle of default for violation of time-limits being applied against all time-limit violations by a Organization and against all procedural violations by a Carrier except for violation of the time-limit for disallowance of a Claim.

The weight of the cases is clearly with the proposition that time-limit requirements should be evenly applied. In addition, time-limits represent policy decisions incorporated into agreements for reasons determined by the parties. The Board must respect such decisions.

This Claim will be sustained on the time-limit issue. The merits need not be reached. Claimant will be restored to service and made whole for earnings lost in accordance with the Agreement and subject to normal rules of set-off.

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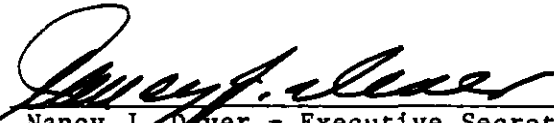
Award No. 27842
Docket No. CL-28267
89-3-88-3-40

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1989.