Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31140
Docket No. MW-31690
95-3-93-3-616

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Truck Operator T.L. Atwood for alleged violation of General Rules A, B, D, G, I, J and L and Safety Rules 604, 607, 608, 621, 4150, 4152, 4156, 4159 and 4160, in connection with the operation of Vehicle 65372 while allegedly being under the influence of alcohol or drugs, being involved in an accident and subsequent arrest on July 21, 1992, was without just and sufficient cause, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File D-174/920632).

(2) The Agreement was further violated when the Carrier failed to give written reasons for the denial of the claim as required by Rule 49(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2), above, the Claimant shall be reinstated to the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning July 23, 1992."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

Claimant was timely charged with:

1 - Using a company vehicle without proper authorization
2 - Causing $2,000 damages to the company vehicle
3 - Operating the company vehicle while under the influence of alcohol and drugs
4 - Arrested and charged with a D.U.I.
5 - Arrested and charged with resisting arrest and
6 - Being absent from work without proper authority

On September 28, 1992, he was dismissed from the service of the Carrier.

The Organization has vigorously pursued this claim contending Carrier failed to establish Claimant's culpability for the charges preferred and that Carrier committed procedural errors in its handling of the dispute on the property to wit:

1 - Claimant was dismissed without a hearing because he was withheld from service pending the Investigation
2 - Carrier accepted other than first hand information to be entered into the Investigation and
3 - Carrier failed to timely deny the claim with reasons.

Regarding Item 3, first, it is noted this alleged procedural error was for the first and only time argued in the Employees letter of appeal dated November 24, 1992, and thus, only in two paragraphs on page 5 of its claim.

In the subsequent handling of this dispute three conferences were held with further arguments being raised and various documents changing hands yet never at any time is there any indication that this procedural argument was ever again raised. On the other hand, the procedural issue was raised on the property. There is no requirement or obligation to consistently and repeatedly raise the same argument; that is, not until it has been responded to. Carrier never responded to this particular argument until it wrote its submission, then vigorously pursued the matter before the Board. This is too late. It should have been addressed while the matter was still on the property.

It is fully understood that the dispute herewith is a discipline case but any appeal of the discipline assessed must be treated as a claim and processed as provided in Rule 49 of the Agreement.

Rule 48 - DISCIPLINE AND GRIEVANCES, Section (e) - Reads, in pertinent part, as follows:

> "***If the decision rendered is considered unsatisfactory, claim may be filed by the employee or a duly accredited representative of the Brotherhood of Maintenance of Way Employees with the officer of the Carrier authorized to receive same within sixty (60) calendar days from the date the decision is rendered and thereafter may be progressed under the provisions of Rule 49 of this Agreement.***"

The appealed discipline starts out with:

> "We submit to you *** a claim in behalf of ***"

Also, in the discipline appeal was a reference to several rules of contract alleged to have been violated by the Carrier, together with a requested remedy.

It has labeled itself a claim, it reads like a claim and pursuant to the aforequoted portion of 48(e) it has to be treated as a claim.

Since the claim for reinstatement was timely and properly filed, the responsibility for a timely and proper response became the obligation of the Carrier.

Rule 49(a) - 1 reads as follows:

> "***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***" (underscoring added)

The response by the Carrier to the claim presented in the first instance reads as follows:

> "***After carefully considering your request, I am unable to give favorable consideration to reinstate Mr. Atwood at this time***"

The above does not meet the requirement of the Rule 49(a) 1. No reason for disallowance is stated.

Based solely upon the procedural error, without consideration of the merits or any other procedural arguments, the claim, as presented, is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.

Carrier Members' Dissent
to
Award No. 31140, Docket No. MW-31690

(Referee Hicks)

We dissent. The Board in this case has chosen to ignore an overwhelming body of evidence which established Claimant had committed numerous serious rules violations and which fully supports the discipline imposed. Instead, the Board has given a hypertechnical reading to the controlling agreement to reinstate a short term employee despite a complete absence of any irregularities in the handling of this matter or any prejudice to the Claimant. The result is palpably erroneous and fails to follow precedent and the established practice of the parties.

The Board's decision is particularly inexplicable considering the Claimant's dangerous and reckless conduct. It is undisputed that Claimant's actions resulted in an accident causing over $2000 damages to the company vehicle entrusted to him. Although Claimant attempted to blame the accident on prescription medicine, he had not been authorized to drive or perform any work while taking such medication. More importantly, Claimant admitted that he had used the company vehicle to purchase and transport alcohol, a clear rule violation and an unauthorized use of the vehicle. He further admitted to drinking three and a half cans of the beer only four hours before the accident. Claimant was obviously in violation of Rule G.

Further, as a result of his accident, Claimant was arrested and charged with driving while intoxicated. Claimant eventually plead guilty to a charge of "Reckless Driving" and was ordered and attended counseling. Incredibly, however, the Board has ordered reinstatement of this employee who had only one year and one month of service at the time of the incident. In doing so, the Board ignores the facts and Claimant's own admissions based on a strained and erroneous interpretation of Rule 49 of the controlling agreement.

There was no violation of the agreement. The initial denial was issued within the time limits of the agreement and advised that, in the circumstances, the Carrier could not give favorable consideration to the request for reinstatement. This was sufficient. In fact, this type of language has continuously been used and reviewed without objection by this Board for many years. The reasons, as set forth in the facts above, were painfully obvious to any impartial observer. Claimant had placed himself, company property, and the general public in serious peril by his irresponsible actions.

It is well-established on the Carrier's property that meticulous denial of every point raised in a claim is not required under Rule 49 so long as the claimant could reasonably be able to conclude the reason for the denial of a claim. See, Third Division Award 27666. Moreover, it has long been held that procedural error does not warrant overturning discipline where the claimant is not

unduly prejudiced. As aptly stated in Third Division Award 8711: "Nevertheless, in the setting of the facts before us, shortcomings do not constitute reversible error, for the claimant was not unduly prejudiced by them...and there is no material way in which claimant's case was injured by these defects." See also, Third Division Awards 27740, 26184, 26600. Here, Claimant suffered absolutely no prejudice whatsoever by the language of the initial claim denial. In fact, there has never been any claim of prejudice, either on the property or before this Board. Given Claimant's own admissions, the reasons were more than clear. The Board itself acknowledged that this entire line of argument was merely a "throwaway" which was never pursued but in passing on the property. The decision to give credence to it now completely defies logic.

In summary, the decision here is a quintessential example of the improper and pointless elevation of form over substance. The misguided result is particularly egregious in this instance given the short tenure of the Claimant and the dangerous nature of the Claimant's conduct. It is fortuitous that no one was hurt or killed. In any event, this Award is simply wrong and should not be cited as precedent. We vigorously dissent.

M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P. V. Varga

SERIAL NO. 366

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 31140

DOCKET NO. MW-31690

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (Union Pacific Railroad Company

The Organization has requested an Interpretation with respect to the Award in this matter. The issue raised is the amount of compensation due Claimant.

Carrier has taken the position that since the claim was sustained (ignoring the fact that it was sustained solely because of their procedural error) and since this was a discipline case, they could stand behind the language of Rule 48(h) of the Discipline Rule which reads:

> "If the charge(s) against the employe is not sustained, the record of the employe shall be cleared and if suspended or dismissed, the employe will be returned to former position and compensated for net wage loss, if any, which they may have been incurred by the employe."

and deduct only from the straight time hours lost all earnings Claimant may have had while in the dismissed status.

The Organization has objected to the deduction of outside earnings arguing only that while employed, Claimant had part-time work away from the industry, thus Carrier could not consider those earnings. It is also noted that when the Carrier sought evidence of Claimant's outside earnings, they were furnished to the Carrier.

Regarding the propriety of including overtime Claimant may have lost, the Organization insists this should be included and the Carrier objects to the inclusion.

Following the guidelines of Circular No. 1 to reach a solution in this Interpretation, a review of the on-property handling subsequent to the award is necessary, as well as a review of the contract language and the claim that was not properly rejected.

The claim is contained in the Organization's letter of October 1, 1992. It reads, in pertinent part, as follows:

> "...we now ask that Mr. *** be paid for all time unjustly withheld from service starting July 23, 1992...."

The language of the Rule that this Board found Carrier to have violated reads, in pertinent part, as follows:

> "...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 employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented...." (Emphasis added)

The language quoted supra is not new. It has been a part of this industry since the August 21, 1954 National Agreement agreed to by most Class I Carriers and non-operating Unions. Article V of that Agreement contains the identical language to that quoted supra.

The Carrier also argues that the phrase "shall be sustained as presented" cannot be taken literally, i.e., that if the Organization's claim was for a pink Cadillac and the Carrier did not timely and properly reject such a request, they could be obligated to buy a pink Cadillac.

To reiterate, the language "shall be allowed as presented" has been in this industry for 42 plus years. Of the awards furnished by either party in support of their various arguments, not one award was furnished that ruled in such a manner. In fact, in over 32 years in this industry, this neutral has never read such findings producing results as absurd as the Carrier foresees.

When the parties negotiated the Discipline Rule, they agreed that all discipline claims would be handled pursuant to the Time Limit On Claims Rule. Both sides were fully cognizant of what they negotiated. The Organization knew if it did not timely present the claim to the Carrier officer designated to handle same within sixty days of the date of occurrence, or if they did not appeal an unsatisfactory rejection timely and advise the first Carrier officer his decision was rejected, the claim would be dismissed, despite the merits thereof.

The Carrier, on the other hand, has the obligation to timely reject the claim, with reason, and if they don't, then they must suffer the consequences of their error and live with the language of the Rule reading "shall be allowed as presented."

All but one of the awards furnished by either party to bolster their respective positions involve whether other earnings of the Claimant during the period of the claim are deductible. All of these awards, except one, involve claims determined on their merits. Only one involves a claim sustained because of Carrier's error in not issuing a timely rejection. That is Case No. 2 of Public Law Board No. 5531, involving this Carrier and the Electrical Workers. The decision was:

> "...In light of its time limit violation...Carrier should be required to pay Claimant from the date of his suspension from the service at the straight time rate. This payment shall be minus any earnings Claimant received from outside employment...."

A review of the on-property handling to determine the parties interpretation of the claim "for all time unjustly withheld from service," reveals that the Organization objected to deducting outside earnings because Claimant held a part-time job while employed. Apparently, the Organization had no objection to the deduction if it would be for jobs secured subsequent to his termination. There is no indication on the part of the Claimant that he worked more or less hours following his termination than he did prior thereto, thus that argument is not persuasive. Carrier can, under these circumstances, deduct Claimant's outside earnings, but only those earnings he had subsequent to his termination up to his reinstatement.

The Organization argues further that all overtime earned by the employee who replaced Claimant during his period of termination should be included. The Carrier,

naturally, objects. The claim, to reiterate, is a request "for all time unjustly withheld from service." It is not that clear as to whether that phraseology was intended to include a request for overtime as well as straight time. Speculation as to the scope of such a phrase is not really an option for this Board. Without specifics, "for all time unjustly withheld from service" conveys a request for all straight time and not overtime.

The repayment of unemployment benefits received by Claimant from the Railroad Retirement Board while out of service, although a routine deduction, is a matter beyond the scope of this Board's authority as is all the other incidents involving Claimant and the Carrier that occurred subsequent to Claimant's reemployment.

Referee Robert L. Hicks who sat with the Division as a neutral member when Award 31140 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois this 4th day of March 1997.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
INTERPRETATION NO. 1 (SERIAL NO. 366)
TO
AWARD 31140, DOCKET MW-31690
(Referee Hicks)

The Majority was correct when it found that the Carrier had violated the Agreement and therefore a concurrence is appropriate. However, the Majority erred in its determination of the remedy requested and a dissent is required.

The Majority held that:

> "*** The claim, to reiterate, is a request 'for all time unjustly withheld from service.' It is not that clear as to whether that phraseology was intended to include a request for overtime as well as straight time. Speculation as to the scope of such a phrase is not really an option for this Board. Without specifics, 'for all time unjustly withheld from service' conveys a request for all straight time and not overtime."

The problem with the Majority's findings here is that there exists only two types of pay in this Agreement. One is pay at the straight time rate and the other is pay at the overtime rate. Hence, when the Organization requested pay for "all time unjustly withheld from service", a long and laborious search for the meaning thereof was unnecessary. The word "all" commanded the request for compensation. If the Majority was "not clear as to whether" "all" encompassed straight time and overtime payments, it should have referred to the dictionary for guidance. Webster's New Collegiate Dictionary defines "all" as:

> "1. The whole of; -- referring to amount, quantity, extent, duration, quality, or degree, as, *all* the wheat; specif., as much as, or the greatest, possible; as, in *all* kindness. 2. The whole number or sum of. ***" (Emphasis in original)

A review of the above-cited definition reveals that inasmuch as the Majority had only two possible interpretations to consider, i.e., whether "all time" included straight time and overtime or whether "all time" included just straight time, reference to the dictionary would have cured that dilemma. We agree with the Majority that it is not within the Board's purview to speculate. However, we must point out that it certainly is not within the Board's purview to bastardize the English language by limiting "all" to include only a portion and not the whole. I therefore dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member