

Award No. 8475

Docket No. MW-8960

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MIDLAND VALLEY RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it dismissed Section Foreman H. W. Cole from service without just and sufficient cause and on the basis of unproven charges.

(2) The Carrier further violated the Agreement between the parties hereto, particularly Section 1 of Article V (Supplement No. 16) when it failed and refused to allow the claim as was presented for the reinstatement of Section Foreman H. W. Cole with pay for time lost, in recognition of the Carrier's failure to disallow an appeal of the claim as provided and required by Section 1 of Article V.

(3) The claim for Section Foreman H. W. Cole as was presented to the Chief Engineer be allowed and Carrier be required to reinstate Claimant Cole and pay him for time lost.

OPINION OF BOARD: This claim arises out of the dismissal from Carrier's service of Section Foreman H. W. Cole. It is based upon two separate and distinct grounds and for reasons hereinafter set forth it is necessary for the Board to consider only one of these, i.e., whether or not this Carrier violated the Agreement in failing to comply with the procedural requirements of a supplemental contract designated Supplement 16.

A brief review of what transpired on the property is necessary in order to determine the procedural issue here presented.

After proper notice, an investigation was held on August 31, 1955, and on September 6, 1955, claimant was advised by Carrier that the charge against him had been sustained and that he was being dismissed from service effective that date.

On September 13, 1955, the General Chairman advised Carrier's Chief Engineer that the Organization was "not satisfied with your decision in this case" and requested a conference.

On October 27, 1955, a claim was filed by the General Chairman in a letter to the Chief Engineer who declined it under date of November 15, 1955.

This decision was appealed on December 15, 1955, to the Vice President and General Manager, who refused to accept the appeal on the ground that it was not made within the ten-day time limitation of Rule 6 (b) and (c) of an agreement between the parties effective May 16, 1937.

The Organization asserts now, and so contended on the property, that procedurally this claim comes within the purview of Supplement No. 16, effective November 1, 1954, which amends the aforesaid contract of May 16, 1937, and contains certain new rules agreed to by the party signatories to the National Agreement of August 21, 1954. These new rules were incorporated into the effective contract between these parties on October 26, 1954.

The Carrier rejected the claim on the property on the basis of the time limitation contained in the agreement of May 16, 1937, and contended that these provisions, rather than those of Supplement 16, were applicable. The Organization asserts that this was substantial error and a violation of the agreement—more specifically, of Article V, Sections 1 (a) and 3, reading as follows:

"1. All claims or grievances arising on or after January 1, 1955, shall be handled as follows:

"(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.

* * * * *

"3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient."

It may be noted that the language of the rule in subsection (a) is mandatory in its direction that if the Carrier disallows a claim it "shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance . . ." and "If not so notified, the claim or grievance shall be allowed as presented. . ." (Emphasis supplied.)

It is also worthy of note that Section 3 states, in part: "With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost

shall be sufficient." This requirement was fully met by the Organization when on October 27, 1955, it presented a claim to the Chief Engineer for claimant's reinstatement with pay for time lost.

We find the contention of the Organization that Article V of Supplement 16 is controlling in this case sound and well taken. The rule became effective January 1, 1955, and provided that all claims or grievances arising on or after that date would be handled in a certain manner specified therein. The instant claim arose after the effective date of the aforesaid agreement and clearly comes within its terms.

The Carrier's latest defense presented in a brief to the Referee alleging the Organization violated Article V, Section 1 (b) of Supplement 16, when it failed to notify Carrier of its rejection of the final disallowance of the claim is without merit because of Carrier's initial failure to notify the Organization as required by Section 1 (a). Instead Carrier rejected the claim on the basis of an inapplicable provision of the agreement of May 16, 1937, an error that the Organization was prompt in pointing out in its letter of March 12, 1956, to Carrier's Vice President and General Manager.

Accordingly, we find and hold that Supplement 16 to the Agreement of May 16, 1937, applied as to the procedural requirements governing the processing of the appeal in this case and that when Carrier failed to comply with these requirements it committed substantial error prejudicial to the rights of claimant.

Therefore, Parts (2) and (3) of the claim are sustained without prejudice to Part (1), except that payment for time lost shall be for assigned working hours actually lost while out of service, less any amounts earned in or out of the service, as provided by Rule 6 (e) of the applicable Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1924;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September, 1958.

DISSENT TO AWARD NO. 8475, DOCKET NO. MW-8960

Here, the majority render a sustaining Award on untenable grounds. They say:

"The Carrier's latest defense presented in a brief to the Referee alleging the Organization violated Article V, Section 1 (b) of Supplement 16, when it failed to notify Carrier of its rejection of the final disallowance of the claim is without merit because of Carrier's initial failure to notify the Organization as required by Section 1 (a). Instead Carrier rejected the claim on the basis of an inapplicable provision of the agreement of May 16, 1937, an error that the Organization was prompt in pointing out in its letter of March 12, 1956, to Carrier's Vice President and General Manager."

The record before us showed clear compliance with the provisions of Article V, Section 1 (a) of Supplement 16. This claim was first presented to the officer of Carrier required to receive same, Chief Engineer Lowe, on October 27, 1955. It is conceded in the Record that Chief Engineer Lowe disallowed the claim on November 15, 1955, well within the sixty day time limit stating in writing the reasons for such disallowance. This constituted full and complete compliance with Article V, Section 1 (a) of Supplement 16.

The next step of the meticulous requirements in the line of appeal was Section 1 (b). The majority rejected Carrier's defense that Organization violated Article V, Section 1 (b) of Supplement No. 16 on a false premise that "* * * because of the Carrier's initial failure to notify the Organization as required by Section 1 (a)".

There was no initial failure on the part of the Carrier. As shown, supra, there was a full, complete and timely compliance with the provisions of Section 1 (a) by Chief Engineer Lowe when, as "representative of the Carrier authorized to receive same", denied the claim within the sixty day period, giving his reasons therefor. Further, there is no contention nor allegation in the Record by the Organization of any failure on the part of the Carrier at this, the initial step.

Article V, Section 1 (b) of Supplement 16 reads:

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the 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. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose."

The Organization, on behalf of Claimant, appealed in writing the dispute to Carrier's General Manager on December 15, 1955, well within the sixty day provision of Section 1 (b), but the Record clearly showed that the representative of the Carrier, Chief Engineer Lowe, was **never** notified of the rejection of his decision in this case.

Based on Claimant's failure to comply with these meticulous provisions of Section 1 (b), there was no need to consider the case further and the Award should read: "Claim dismissed."

Next, Carrier's General Manager rejected the claim on December 18, 1955, giving his reason therefor. The term "reject" means "not to grant" which was, of course, a disallowance of the claim. If the reason given for the disallowance turns out to be erroneous, this is immaterial. If such reason is later rejected, it would only mean that the employee had **appealed** the dispute well within the time limits of Section 1 (b), and the dispute would be decided on its merits.

This Award, based on a false premise, is erroneous.

We dissent.

J. E. Kemp

J. F. Mullen

R. M. Butler

W. H. Castle

C. P. Dugan