Award No. 12559
Docket No. TE-11047

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY
(Western District)

STATEMENT OF CLAIM: Claim of the General Committee on the New York Central Railroad, Western District, that:

1. The Carrier violated the terms of the Telegraphers' Agreement, Article 32(e) when it failed to observe the ten day time limits in rendering a decision on the appeal of O. S. Conaghan, who was dismissed from its service because he wrote a letter to the Ohio Public Service Commission.

2. That the Carrier be required to pay O. S. Conaghan $1,153.36 wages he lost between the time he was taken out of service at the close of business Tuesday, November 12, 1957 and the time he was restored to service on Wednesday, February 12, 1958.

OPINION OF BOARD: Article 32 of the Agreement prescribes procedures and time limitations in discipline cases. Paragraph (e) of Article 32, insofar as here pertinent, reads:

"(e) Appeal, if made, from the decision of the employe's immediate superior must be filed with the Superintendent within 10 days following date of receipt of decision by the employe. Decision on the appeal shall be given by the Superintendent within 10 days after the date the appeal is received by him. . . . Time limits mentioned in this paragraph (e) may be extended **by mutual agreement** between the carrier and the General Chairman." (Emphasis ours.)

Claimant was duly charged, on November 1, 1957, with violating Carrier's Rule 722 prohibiting its employes from divulging Carrier's business affairs "except to proper officials". A fair hearing was timely held on November 6, 1957, in the course of which Claimant admitted the violation as charged. And, on November 8, 1957, Claimant's immediate superior, timely, issued his decision dismissing Claimant from service.

Petitioner, timely, on November 12, 1957, appealed the decision to Claimant's Superintendent. In material part, the appeal reads:

"Please consider this as our appeal from the decision of Mr. Pickett in dismissing Mr. Conaghan from service of the Carrier, as we feel full and due consideration must not have been thoroughly given to his excellent service record of the past thirteen years without any notations whatsoever against his record. Also, Mr. Conaghan plainly stated in his testimony he did not intentionally expect to violate any rule of the Carrier. . . .

Will you please give this appeal your fullest consideration, and if a conference is desired, at your convenience, will you please state time and date you so desire."

Claimant's Superintendent failed to render decision on the appeal "within 10 days after the date the appeal [was] received by him." Then, in a letter to the Superintendent under date of November 25, 1957, Petitioner reviewed the proceedings in the case to date; and, concluded therein:

"Due to the fact no reply was made to our appeal within the prescribed time limit of ten days as set forth in our Agreement, it must be considered the appeal is approved and full restoration of seniority and employe privileges shall be granted Mr. Conaghan with no loss in compensation."

There followed further correpondence and conferences between representatives of the parties.

As to the time limitation in Rule 32(e), the Carrier took the position, as it does here, that when Petitioner, in the initial letter of appeal dated November 12, 1957, **supra**, stated "if a conference is desired, at your convenience," this constituted a waiver of the time limitation. Petitioner's position was and is that the prescribed time limitation could only be extended "by mutual agreement" and there was no such agreement; and, further, the Carrier's failure to issue decision on the appeal within the prescribed time limitation wiped out, **in toto**, the discipline charge and proceedings; consequently, the Claimant should be restored to the status and emoluments of his position which he would have continued to enjoy absent the charge.

On December 10, 1957, Carrier refused to reinstate Claimant.

At a conference on January 15, 1958, Petitioner suggested that Claimant be restored to service with all rights and entitlements unimpaired, "with the understanding that the question of pay for time lost be handled as a separate matter as provided in the Railway Labor Act, and without prejudice to the position of either party." Carrier stated its willingness to restore Claimant "without compensation for time lost". This was rejected by Petitioner.

On February 12, 1958, Carrier restored Claimant to service without compensation for time lost. It is Carrier's position that: (1) "all the time lost . . . is to be considered part of the discipline"; and (2) since Rule 32 (e) provides for no penalty for failure to comply with the time limitations prescribed therein, this Board has no power to award Claimant compensation for the time lost.

Let us first dispose of Carrier's "no penalty" arguments. It is an elementary principle of contract law that a party damaged by a violation of a contract has a right to be made whole for any losses which he has suffered as a result of the violation. This sounds in damages; it is not a penalty. Where the contract fails to set forth the manner in which the damages are to be

computed, the amount of the damages, if any, is a question of fact to be proven by a preponderance of evidence of probative value.

In our review of discipline cases, we look to whether: (a) there was due notice and a fair hearing; (b) the decision is supported by substantial evidence; and (c) the discipline administered is reasonable. This case raises the question as to whether a failure to comply with a time limitation, agreed to by the parties, precludes us from considering the three items.

We find that there was no "mutual agreement" to extend the agreed upon and prescribed time limitation; and, Carrier's failure to comply violated the Agreement. Since the Agreement does not specify the damages to be assessed for such a violation, we must consider items (a), (b) and (c) listed in the preceding paragraph.

There is no question that items (a) and (b) were satisfied by Carrier. Claimant, having admitted he was guilty as charged, was subject to discipline. In a rule drawn such as Rule 32 (e), in the light of the facts of the case, we must find the damages, if any, suffered by Claimant because of the violation.

Had the decision on appeal been issued within the prescribed period, the claim would have been expeditiously disposed of on the property and there would have remained, at most, the question as to whether the ultimate discipline administered was fair, just and reasonable. Carrier, because of its violation, must bear the burden for what occurred after the violation. We, therefore, find and hold that: (1) any loss of wages suffered by Claimant subsequent to 10 days after the appeal had been filed with Carrier's Superintendent is not fair, just and reasonable; (2) the discipline imposed shall be reduced to loss of wages during the 10 days the appeal was properly pending; and (3) Claimant shall be made whole for all loss of wages subsequent to the aforesaid 10-day period to the date Carrier restored him to service with all other rights and entitlements unimpaired.

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 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 Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claim sustained to the extent prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1964.

**DISSENT TO AWARD NO. 12559,
DOCKET NO. TE-11047**

Award 12559 is in palpable error in sustaining any portion of the instant claim.

In the first place, the Local Chairman's appeal to the Superintendent was in the form of a request for leniency; it made no request for claimant's restoration to service, and made no monetary demand in his behalf (see Award 10789). The appeal simply requested the Superintendent's "fullest consideration" and that he state a time and date for a conference **at his convenience,** if desired. Obviously, liability of Carrier, if any, by default, cannot exceed the appeal "as presented" and on which it defaults, but in any event this Board lacks jurisdiction over leniency cases.

Furthermore, the Referee should have denied the instant claim in its entirety under his own reasoning herein, viz., "Since the Agreement does not specify the damages to be assessed for such a violation" we must consider whether "(a) there was due notice and a fair hearing; (b) the decision is supported by substantial evidence; and (c) the discipline assessed is reasonable", because of his having found "There is no question that items (a) and (b) were satisfied by Carrier" and his not having found under (c) that the discipline administered was unreasonable.

In addition, there is no requirement on this Board and it is without authority to "find the damages, if any, suffered by Claimant", under a rule like Rule 32 (e) in the instant case, which admittedly provides for no penalty or damages (see Awards 4169 and 9637). This is particularly true when, under Rule 32(f), cited by the Petitioner herein, the sole basis for requiring reinstatement and compensation for time lost is "If the final decision decrees that charges against the employe are not sustained" (see Award 10547). In the instant case, Claimant admitted he was guilty as charged.

For the foregoing reasons, we dissent.

W. H. Castle
D. S. Dugan
P. C. Carter
T. F. Strunck
G. C. White