

Award No. 16262

Docket No. MW-17111

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(SUPPLEMENTAL)

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The discipline assessed to Track Equipment Operators Anthony Parillo, Robert K. Barber, Henry Crispino and Alex Van Guilder by letters dated November 24, 1965 was unwarranted and improper and as a consequence thereof.

(2) Track Equipment Operator Anthony Parillo be allowed pay for time lost during period of fourteen (14) days commencing 7:00 A. M., Monday, November 29, 1965 and that his record be cleared of the notification of discipline. (System Case No. 12.66 MW)

(3) Track Equipment Operators Robert K. Barber and Henry Crispino be allowed pay for time lost during the period of seven (7) days commencing 7:00 A. M., Monday, November 29, 1965 and that their records be cleared of the notification of discipline. (System Case Nos. 13.66 MW and 14.66 MW)

(4) Track Equipment Operator Alex Van Guilder's record be cleared of notification of discipline. (System Case No. 15.66 MW)"

OPINION OF BOARD: Claimants were disciplined for claiming 1 hour overtime for servicing Equipment. Claimant Parillo claimed 1 hour overtime on each of 26 days from September 21, 1965 to and including October 26, 1965. Claimant Crispino claimed 1 hour overtime on each of 24 days from September 21, 1965 to and including October 26, 1965. Claimant Barber claimed 1 hour overtime on each of 25 days from September 21 to and including October 26, 1965. Claimant Van Guilder claimed 1 hour overtime on each of 10 days from September 21, to and including October 4, 1965.

A hearing in regard to said disciplinary action was originally scheduled for November 1, 1965 but was continued at the request of the Organization and was held on November 16, 1965.

The Organization raises a procedural defect in that the hearing was not held within 10 days as required by Rule 35(a) of the Agreement.

Rule 35(a) provides in part as follows:

"An employe will not be disciplined or dismissed without a hearing before the proper official, at which hearing he may be accompanied by a representative of his choice. He may, however, be held out of service pending such hearing. The hearing will be held within 10 days and a decision will be rendered within ten (10) days after the hearing. * * *"

The Organization's position is that the hearing must be held within ten (10) days after the Carrier has notice of the occurrence. In support of this conclusion, the Organization cites Award No. 12806, which involved the same parties and the Referee in that Award stated:

"The Rule does not say that the hearing must be held within ten days after the occurrence of the alleged offense. The only reasonable construction of this Rule is that the hearing must be held within ten days after the Carrier has notice of the occurrence. Any other interpretation would impose a penalty upon the Carrier, which could not have been the intent when this Rule was agreed to."

With this conclusion, we concur. The hearing in this case therefore was required to be held within ten days after the Carrier had notice of the occurrence of the alleged offenses.

This, then, resolves the question down to when did the Carrier have notice of the alleged offenses?

The Carrier's contention in this regard is that it did not receive notice of the alleged offenses until Track Supervisor R. L. Bowen became aware of the situation on October 27, 1965. Carrier further argues that Track Supervisor Bowen was the only responsible official or agent of the Carrier that could receive notice of the occurrences inasmuch as he was the one who issued the specific instructions that there was to be no overtime for Claimants in servicing said equipment.

The Organization contends that both Supervisor Bowen and Assistant Extra Gang Foreman P. Sparano both knew that Claimants were working and claiming the 1 hour overtime for servicing said machines on or before October 12, 1965. The Organization cites the testimony of Assistant Extra Gang Foreman Sparano at the hearing in support thereof, and which was as follows:

70. Q. Was there any time in the period from September 21st until you got rid of the equipment in October that you knew what hourly time these men were claiming?

A. Yes Sir.

71. Q. There was a time when you knew what time they were claiming?

A. What happened, I told the boys that job was going to pay eight hours a day. What happened, when we get paid this week, we are getting paid for the past week, our week winds up on a Tuesday night, they withhold one week. As a matter of fact, I asked the boys

and they told me they worked nine hours. I told them something is wrong someplace. I said as far as I am concerned you know that you have to work eight hours a day. If you get nine hours a day, that is news to me.

72. Q. Did you report this to the Supervisor or anyone?

A. At the time the job was done.

73. Q. In other words you didn't know until close to the end of the period that they might be getting the extra hour pay?

A. That's right.

74. Q. And at that time you did not tell the Track Supervisor?

A. I didn't say anything to anybody because as far as I was concerned it was nothing to me it was up to them.

The record discloses that the Claimants worked under the supervision of Assistant Extra Gang Foreman Sparano and Foreman Pellegrino until October 12, 1965, when the Tie Job on the Rutland Branch was completed. The record further shows that Claimants Parillo, Barber and Crispino were transferred thereafter to North Creek under the supervision of Extra Gang Foreman Harrington.

From the testimony above referred to it is the conclusion of this Board that Carrier had notice of the occurrence when Assistant Extra Gang Foreman Sparano became aware of the fact that Claimants were claiming nine hours instead of eight for work performed, and since the record shows that Sparano had knowledge of the overtime claims on or prior to October 12, 1965, Carrier was therefore obligated to hold the hearing no later than 10 days after October 12, 1965. Having failed to do so, (the original hearing was scheduled for November 1, 1965 but continued to November 16, 1965), the Carrier must be charged with violating the agreement.

As was said by Referee Ferguson in Award 6446:

"Express time limitations in grievance procedure have been many times held to be enforceable; primarily because the parties by including them in their agreement intended thereby to expedite the orderly handling of claims. Application of such rules is sometimes harsh but in the interests of efficient, proper procedure they must be applied. We are not granted any discretion to extend such statutes of limitations as the parties have fixed on themselves. We can only apply their own rule. * * *

Therefore, Carrier having violated the Agreement, these claims must be sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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 the Agreement was violated by the Carrier.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of April 1968.