Award No. 17631
Docket No. TE-15687

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerry L. Goodman, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)
MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Employees Union (formerly The Order of Railroad Telegraphers) on the Missouri Pacific Railroad (Gulf District) that:

1. Carrier improperly removed Agent-Telegrapher P. B. Oliver from service on November 3, 1964 pending investigation in connection with violation of Uniform Code of Operating Rule "G". Investigation conducted November 10, 1964 does not warrant such harsh disciplinary action.

2. Carrier shall reinstate Agent-Telegrapher P. B. Oliver to his position at MK Yard, Houston, Texas, with seniority, vacation and all other rights unimpaired and shall reimburse Mr. Oliver for all wage loss beginning November 3, 1964 and continuing thereafter as long as Mr. Oliver withheld from service.

3. Carrier shall pay six percent per annum on all sums due and withheld as a result of this violative action.

OPINION OF BOARD: On November 3, 1964, Claimant was removed from service pending an investigation of his alleged violation of Carrier's Operating Rule G. which provides:

> "The use of intoxicants or narcotics is prohibited. Possession of intoxicants or narcotics while on duty is prohibited."

The investigation subsequently disclosed that at the time of the incident Claimant was sixty years old, had been in the continuous service of the Carrier for thirty-eight years, had occupied his present position of agent-telegrapher for fifteen years and was assigned a daily meal period from 12:01 to 1:01 P.M.; that on the date of the incident, immediately after his meal period, two Carrier officers entered Claimant's office, smelled alcohol and asked Claimant if he had been drinking; that Claimant admitted and had in fact drank a glass of wine while at home on his meal period; that when the officers observed Claimant he was performing his duties in a proper and routine way and was not intoxicated; that one of the officers thereupon removed Claimant from service as stated above.

On the basis of this evidence Carrier found Claimant guilty as charged and permanently dismissed him from the service which decision Claimant appealed to the highest officer who on April 20, 1965, advised Claimant that he would be returned to service without pay for time lost for the reason that he, the highest officer, believed Claimant had been sufficiently disciplined.

Thus, in essence, the issue before us is whether this penalty of five and one-half months suspension without pay was within the limits of Carrier's discretion in view of the facts and circumstances surrounding the offense.

We believe that in light of the facts set out above the penalty of five and one-half months suspension without pay exceeded the bounds of Carrier's discretion and was therefore arbitrary.

While we make no attempt to define the boundaries of Carrier's discretion in these matters, we do believe that in the instant case a sixty-day suspension would have been quite ample.

Accordingly, we direct that Carrier reinstate Claimant to his former position with seniority, vacation and all other rights unimpaired and reimburse him for all wages lost from January 10, 1965 until the date of his reinstatement.

We further direct that Claimant be paid interest on the amount of all wages lost from January 10, 1965 until the date of his reinstatement at the rate of six percent per annum. Award No. 16632.

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 the Agreement was violated.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1969.

CARRIER MEMBERS' DISSENT TO AWARD 17631, DOCKET

TE-15687 (REFEREE GOODMAN)

The arbitrariness of this award is clearly apparent on its face. The Claimant was admittedly guilty of violating Rule G, the strict observance of which is vital to safe and efficient operations. The violation of Rule G has long been recognized as a dismissal offense — Awards 16280 (Perelson), 15574

(Ives). It is also well established that this Board will not substitute its judgment for that of Carrier on matters of discipline — Awards 16189 (Dugan), 3149 (Carter). In spite of all of this, the award arbitrarily reduces the punishment from five and one-half months suspension to a sixty day suspension.

Even if the decision that Carrier erred in its judgment as to the amount of discipline were correct, there would be no valid basis for allowing the interest claimed. The law on this point has long been considered settled in the awards of this and other adjustment boards as well as in the decisions of the court.

Award 6962 (Rader):

> ". . . B (4) denied for the reason that the agreement makes no provision for interest payments in such cases."

Award 13478 (Kornblum):

> ". . . In all other respects Item (b) of the claim herein is hereby denied, including so much thereof as requests "The claim seeks interest but there is no basis therefor in Awards 6962—Rader, 8088—Lynch, 11172—Coburn)."

Award 15709 (Woody):

> "However, we must not lose sight of the purpose for which this Board was established and the prescribed limits of its jurisdiction. Such jurisdiction is not coextensive with that of a court of law or equity, but confined to the interpretation and application of the collective bargaining agreement under which the claim is conceived. We cannot award claimant that which is not provided for by the express terms of the agreement. Interest pendente lite is not provided for in the Agreement between the parties in the instant case, and, therefore, must be denied."

First Division Award 12989 (Klamon):

> "The payment of eight per cent (8%) interest on each claim from the date it was submitted and made a matter of record until day that settlement of claim is made is not supported by schedule rule or agreement and is in effect a request for a new rule which this Division has no authority to grant. Therefore, the claim for eighty per cent (8%) interest on each claim must be denied."

First Division Awards 13098, 13900 (Boyd):

> "There is no rule that supports the claim for interest."

Second Division Award 2675 (Whiting):

> "The claim seeks interest but there is no basis therefor in the rules and this Board is not a court of general jurisdiction, so such request must be denied."

Second Division Award 5467 (Ives):

> "Petitioner seeks Claimant's reinstatement with seniority rights unimpaired and compensation for all time lost from the date of discharge as well as 6 per cent interest on all such back pay; . . . Under the particular circumstances

of this case and prior awards of this Division concerning compensation payments, we will confine the applicable remedy to reinstatement with seniority rights unimpaired and compensation for net wage loss, if any, from the date of Claimant's dismissal from service."

Fourth Division Award 2368 (Seidenberg):

"The Board finds no validity in the Claimant's request for having 5% interest compounded on the amount of the general wage increase denied him and accordingly that part of the claim is denied."

Award No. 13 of PL Board No. 132 (Harr):

"Part of the Claim asks compensation for 'interest due on monies due the Claimant during this period at the rate of one-half of one percent per month.' We can find no precedent or basis for allowing interest."

Also see recent **Third Division Award 17217** (Dugan).

With the exception of a recent award which is manifestly based on confusion concerning the nature of proceedings and rights of parties before this Board as compared to those before the National Labor Relations Board (which we will discuss below) our awards have been entirely consistent in denying requests for interest in cases comparable to that now before us, and these denials are supported by well established principles of law. On the point that the law of damages governing breach of contract is now generally applied to proven violations of collective bargaining agreements, see **Williston on Contracts** (Revised Edition) § 1361, 1362.

Where there is a bona fide controversy as to whether any amount is payable, as in the instant case, and the case turns upon an unsettled question of interpretation, the rule of damages for unliquidated contract claims is applicable, and it is stated as follows in **American Jurisprudence 2d**, § 185:

". . . **An allowance of interest as damages will be refused, however, as a matter of law where a demand is not only unliquidated, but is also uncertain in fact or because of the unsettled state of the law.**" (Emphasis supplied.)

Corpus Juris Secundum states this same rule. See 25 C.J.S., Damages § 52.

The principle emphasized in the sentence we have underlined has long been applied by the U. S. Supreme Court. In denying interest in a patent case as far back as 1887, the Supreme Court said:

". . . **questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue. Interest should therefore be allowed, as in Illinois Central Railroad v. Turrell,** just cited, only Tilghman v. Proctor, 125 U.S. 136, 161 (1887). (Emphasis supplied.)

In a much more recent case **(Southern Printing v. U. S.,** 222 F2d 431, 435) the U. S. Court of Appeals has stated the rule this way:

". . . A good statement of the rule is found in Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 60 S.Ct. 285, 289, 84 L. Ed. 313, as follows: 'The cases teach that interest is not recovered according to a rigid theory of compensation

for monies withheld, but is given in response to considerations of fairness. It is denied when its extraction would be inequitable.' That no doubt is also the reason upon which the general rule with respect to allowance of interest in unliquidated cases as well as the rule of Kansas is based. **Obviously, it would be unfair and inequitable to exact interest when the amount of an asserted claim is in dispute in good faith and could not be determined until after a judicial inquiry and sifting of all the facts."** (Emphasis added.)

Certainly the rights of the parties in the instant case were uncertain and remain uncertain until this Board properly adjudicates the question presented concerning the interpretation and application of the controlling agreement; hence, any claim for interest should be denied as a matter of law. The above cited awards are all consistent with this clear rule of law.

Obviously, it is within the power of the parties to make specific provision in their contract for the allowance of interest on sums ultimately found due in disputed and unliquidated claims; and where such a rule appears in the agreement, the rule applies and there is no room for applying the general rule of damages. However, as the above cited awards correctly observe, this Board has no power to make such a rule for the parties.

The Employes frequently cite Third Division Award 4665 and Interpretation No. 1 to Award 9578, Serial No. 195. These awards are not inconsistent with what has been previously stated herein and they do not support the proposition that interest can be allowed in the instant case. In Award 4665 the carrier had withheld money from employes' salaries to make up shortages in their accounts. The amounts withheld were absolutely certain and the claims were sustained on the specific finding that "the action of the Carrier in charging the Claimants in the amounts shown was a form of discipline." The case thus has no relevancy whatever to a case wherein there is a genuine dispute as to the effect of the agreement and as to the existence of a liability on the part of the Carrier.

Interpretation No. 1 to Award 9578 is not only consistent with the principles we have discussed above, but it lays down a rule that requires denial of the instant claim for interest. Award 9578 sustained the rights of employes to an automatic allowance of a claim they had presented under a time limit rule that provided for such automatic allowance in the event of Carrier's failure to timely disallow the claim. Under the facts of that case, the claim became fully liquidated upon the automatic allowance thereof. Interpretation No. 1 allowed interest only from the date that carrier defaulted and the claim thereby was automatically allowed.

Thus no interest was allowed from the date of the occurrence which was January 1, 1954, until November 29, 1954, during which period of time the claim was unliquidated.

In **Raabe v. Florida East Coast Ry. Co.**, 259 F.Supp. 351 (M. Dist., Fla., 1966), a federal district judge had before him a case which likewise involved a time limit rule. An employe was removed from the service by a carrier after expiration of the period allowed by a time limit provision in the agreement for taking such action. While the case is thus distinguishable on its facts from an interest claim such as we have before us, the court made the grave mistake of comparing the functions and powers of this Board with those of the NLRB and applying decisions of the courts upholding NLRB action in allowing interest based on violation of "a statutory obligation owed the employee" in a case that involved nothing but a bare agreement right as be-

tween private litigants. While this Board is strictly an adjudicative body whose powers are limited to the interpretation and application of agreements which the parties themselves have entered into, the NLRB is an enforcing agency which, by its General Counsel, prosecutes parties for violation of federal law prohibiting unfair labor practices. The NLRB has no jurisdiction to order an employee restored to service or paid for any time lost unless it is first proved that the employe was taken out of service in violation of federal law prohibiting specifically defined unfair labor practices. Thus, NLRB proceedings relate solely to prosecution for violation of federal law (thus partaking of a criminal nature) and making people whole for violation of statutory rights, whereas the proceedings of this Board relate solely to the interpretation of agreements between private parties (thus partaking of a civil nature). It is elementary that the rules of damages applicable to violations of law are not applicable to breaches of contract where there is a genuine issue concerning the meaning and effect of the contract.

In recent Award 16632, which is cited in this award as authority for allowing interest in the instant case, a referee on the Supplemental Board made the same mistake that the federal judge committed in **Raabe v. Florida East Coast** in that he predicated an allowance of interest solely upon a group of cases each of which was concerned with a "statutory obligation". Since the awards of this Board are concerned solely with collective bargaining agreement rights and the rules of contract law are applicable, the Board should continue, as it has in the past, to apply rules of contract law with respect to interest, and not be misled by cases dealing exclusively with violation of a "statutory right".

There are other awards in which interest has been sustained purely on the basis that the respondent carrier did not deny that interest was payable during handling on the property. These awards are all beside the point, for they rest on the premise that the carrier's failure during handling on the property to raise the issue and deny liability for interest under the controlling agreement in case of a violation constituted an admission of such liability. As we have already noted, it is admittedly within the powers of the parties to a collective agreement to create a right to interest on the amount ultimately claimed for a claim of any kind, even though based on unsettled questions of interpretation such as we have here, but absent such a rule in the agreement, we cannot sustain a claim for interest in such cases because this Board has no power to create a rule for the parties. The Board exceeded its jurisdiction when it allowed interest in this case in the absence of a rule providing therefor.

We respectfully submit that the award is invalid.

/s/ GEORGE L. NAYLOR
George L. Naylor
/s/ R. E. BLACK
R. E. Black
/s/ P. C. CARTER
P. C. Carter
/s/ W. B. JONES
W. B. Jones
/s/ G. C. WHITE
G. C. White

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