

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19974  
Docket Number CL-19893

Benjamin Rubenstein, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
(Norfolk and Western Railway Company  
( (Involving employees on lines formerly operated by  
( the Wabash Railroad Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7198) that:

1. Carrier violated the provisions of the Schedule for Clerks, effective May 1, 1953, when on December 8, 1971, it arbitrarily capriciously and unjustly assessed a five (5) day penalty against Clerk C. Perkins, in violation of the provisions of Rule 28, Paragraphs (a) and (m), of the Schedule for Clerks.

2. Claimant shall now be paid for time lost with interest computed at the rate of one percent compounded monthly.

OPINION OF BOARD: The facts, as they appear from the record, are:

On November 15, 1971, Claimant was notified of a charge against him of violation of certain Carrier regulations, and to appear at a hearing scheduled for November 19, 1971, at 11:30 A.M. The claimant and his representative appeared at the time scheduled, but the hearing did not start until 2:20 P.M. Five minutes later (at 2:25 P.M.) the hearing was adjourned by the hearing officer to November 29, 1971, over the expressed objection of the claimant and his representative. On November 29, 1971 the representative of the claimant objected to the continuation of the hearing on the ground that it violated Rule 28, sections (a) and (m) of the existing agreement between the parties.

The pertinent sections of Rule 28, are:

"(a) An employee who has been in service sixty (60) days or more shall not be disciplined without investigation at which investigation he may be represented by one or more duly accredited representatives... The investigation will be held within seven (7) days of the date when charged with the offense or held from service. A decision will be rendered within seven (7) days after the completion of the investigation".

\* \* \* \* \*

"(b) The time limits provided in this Rule may be extended by mutual agreement".

The claimant requests that the penalty assessed as a result of the adjourned hearing be set aside, and that he be paid for all time lost, plus interest of one percent monthly compounded on a monthly basis.

The Carrier objects to the claim, contending that the Rule cited by the claimant is merely "directory" and not "mandatory". In support of its contention, the Carrier cites two Court decisions (200 Federal Reporter, 2nd Series 160; and 210 Federal Reporter, 2nd Series 812), and several awards of this Board.

A careful reading of the cited cases shows a distinction between the facts and issues in those cases and the ones in the instant matter.

In 200 Federal Reporter 160, the hearings were, on numerous occasions adjourned on request of the claimant who was, at that time, under indictment for a criminal offense. After the hearings were finally concluded, the Hearing Officer advised claimant, on several occasions, about the need for a delay in rendering the decision. At no time did the claimant or his representative object to the delays. The Court, at page 164, analyzing the positions of the parties, said:

"Defendant, . . . , insists that the 15 day limit is a procedural feature of the grievance machinery and may be waived. . . and since the undisputed evidence shows that the action of the hearing officer was not objected to, it was acquiesced in and waived". (emphasis supplied)

\* \* \* \* \*

"In this state of the record, plaintiff's course of conduct, as a matter of law, clearly constituted a waiver of the time provisions".

There is no such contention on the part of the Carrier in the instant case. On the contrary, the record clearly shows that the claimant vigorously opposed the postponement and delay. Furthermore, the case above cited does not indicate whether the provision at issue there contained the contents or similar wording of section (m), in the instant dispute. Section (m) is more than merely a "directory" provision, to be violated at will.

The case of Atlantic Coast Line RR Co. vs. Brotherhood of Railway and SS Clerks, 210 Federal Reporter, 2nd Series 812, is also distinguishable. 1) That case involved a proceeding commenced in 1946, under the agreement then in existence. Since then, on May 1, 1953, the agreement was amended. It is not evident from the record of the case whether section (m) was part of the 1946 agreement. 2) The issues were different, they centered on distinguishing the terms "suspension" from that of "dismissal".

The Board is of the opinion that even though Rule 28(a) does not specifically provide that a violation of that paragraph vitiates the disciplinary proceedings, section (m) does that, by specifically providing that the time limit "may be extended by mutual agreement". Absent such an agreement, and especially in face of definite opposition thereto, the party extending the time limitations unilaterally is guilty of violation of the agreement.

We, therefore, hold that the Carrier violated the provisions of Rule 28, and sustain the Claim.

Interest in paragraph 2 of the claim should be denied. Neither the record nor the arguments contain any data in support of the interest demand in paragraph 2.

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

Carrier violated the provisions of Rule 28 as per above Opinion.

A W A R D

Claim is sustained. Interest is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. W. Paulos  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.