NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20226
THIRD DIVISION Docket Number CL-20420

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(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-7401) that:

(1) Carrier violated the provisions of the Freight Handlers Agreement, particularly Rule 17, also, Article 5, Section 1 (a) of the August 21, 1954 National Agreement, when following investigation held September 22, 1972, it arbitrarily and without justification, dismissed Storehelper M. L. Hammer, from service, and subsequently failed to notify Claimant's representative (who appealed the decision) that their initial decision to dismiss Claimant was upheld.

(2) Carrier shall now return Claimant to his former position as Storehelper with all rights and privileges unimpaired.

(3) Carrier shall pay Claimant eight (8) hours pay at the pro rata rate of his former position for Thursday, September 28, 1972, and for each subsequent work day thereafter, until he is properly returned to service.

(4) In addition to the money amounts claimed herein, the Carrier shall pay an additional amount at 8% per annum compounded annually on the anniversary date of claim.

OPINION OF BOARD: It is the claim of the System Committee of the Brotherhood that: "(1) Carrier violated the provisions of the Freight Handlers Agreement, particularly Rule 17, also, Article 5, Section 1(a) of the August 21, 1954 National Agreement, when following investigation held September 22, 1972, it arbitrarily and without justification, dismissed Storehelper M. L. Hammer, from service, and subsequently failed to notify Claimant's representative (who appealed the decision) that their initial decision to dismiss Claimant was upheld."

Resolution of this dispute requires us to recite details of record which clarify the question raised here. On October 23, 1972, a hearing on appeal was held under Rule 17 of Agreement, providing:

> (b) An employee dissatisfied with the decision shall have a fair and impartial hearing before the next proper officer, provided written request is made to such officer and a copy furnished to the agent or officer whose decision is appealed, within seven (7) days of the date of the advice of the decision. Hearing shall be granted within seven (7) days thereafter and a decision rendered within seven (7) days of the completion of hearing. (underscoring added)

On November 15, 1972, the Regional General Chairman wrote the Director of Labor Relations of the Carrier that "to date, Superintendent Material Cooper has failed to notify Local Chairman Easterling of what decision if any, has been rendered as required by Rule 17(b) of the Schedule for Freight Handlers." On December 7, 1972, the Director Labor Relations wrote: "The hearing was concluded on October 23, 1972. Mr. W. W. Osborne, Manager Material, advised Mr. Hammer with a copy of Local Chairman Easterling by letter dated October 26, 1972 that the Carrier's decision was unchanged." On January 24, 1973, the Carrier again wrote the Regional General Chairman that "Manager Material W. W. Osborne advised Mr. Hammer, with a copy to his representative under date October 26, 1972, that the Carrier's decision with regard to dismissal of Mr. Hammer would be unchanged." The Carrier, in its Statement of Facts (Carrier Exhibit E), declares that "Manager Material W. W. Osborne advised Storehelper Hammer as follows:

> October 26, 1972
> File: 176.11
>
> REGISTERED U.S. MAIL-
> RETURN RECEIPT REQUESTED
>
> Mr. M. L. Hammer
> 158 South Main Street
> Decatur, Illinois 62523
>
> Dear Sir:
>
> A review of the re-hearing of investigation, held on October 23, 1972, has been made. There was no additional information or evidence introduced that would merit change in decision rendered on the original investigation held on September 22, 1972.

Therefore, the decision remains the same that you are dismissed from service of the Norfolk and Western Railway Company.

Yours very truly,

W. W. Osborne
Manager Material".

In its Position, the Carrier states that "The copy of Mr. Osborne's letter directed to the local chairman was delivered personally to him (the local chairman) on October 26, 1972."

In its Rebuttal, however, the Brotherhood states:

".....the Carrier states that a blind carbon copy of Mr. Osborn's letter of October 26, 1972, upholding the dismissal was forwarded to ..... Local Chairman Easterling. The latter has no record of ever receiving a copy of this letter. Further, when Regional General Chairman Jurgens in his letter of November 5, 1972, (Employes Exhibit No. 10) protested the fact that the Carrier had failed to notify Local Chairman Easterling of their decision following the hearing on appeal, he was answered merely with a statement that:

'Mr. W. W. Osborne, Manager Material, advised Mr. Hammer with a copy of Local Chairman Easterling by letter dated October 26, 1972, that the Carrier's decision was unchanged.' (Employes Exhibit No. 12, 5th paragraph) (Underscoring added)

At no time did the Carrier offer to show that letter. As a matter of fact, the first opportunity the Organization had to see this letter was when it showed up in the Carrier's Submission as their Exhibit E. Therefore, the Carrier violated the provisions of Rule 17 (b) ....."

It is clear from this detailed recitation from the record that the question presented in this case is a question of fact: whether as a matter of fact the Carrier failed to notify Local Chairman Easterling of its decision within seven days of the completion of the hearing of October 23, 1972. The question is not how notification was made, whether by Mr. Osborne or by Mr. Cooper, but whether notification of the decision was made at all within the required seven days.

Clearly, the Osborne letter of October 26, 1972, Carrier's Exhibit E, and the Carrier's statements concerning delivery of this letter, would resolve the issue of fact in favor of the Carrier. The Carrier's burden of proof would be met fully. The Board, however, cannot take this letter into account without violating the firmly established requirements pertaining to the handling of grievances on the property. We cannot admit into the record the letter of October 26, 1972, Carrier's Exhibit E, when, as a matter of fact, the first opportunity the Organization had to see this highly material letter was "when it showed up in the Carrier's Submission as their Exhibit E." The Board must, therefore, make the determination, based on the proper record of this case, that the Carrier did not comply with Rule 17(b) requiring a "decision rendered within seven (7) days of the completion of hearing."

In view of this conclusion, the Board does not find it necessary to pass upon the merits of the case or to pass upon the applicability of the more general provisions of Article 5, Section 1(a) of the August 21, 1954 National Agreement.

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 to the extent indicated in the Opinion.

A W A R D

Claimant shall be reinstated to his former position as Storehelper with all rights and privileges unimpaired, but without any compensation for loss of time while out of service.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1974.

CARRIER MEMBERS' DISSENT TO AWARD 20226, DOCKET CL-20420

(Referee Lazar)

This Award is manifestly arbitrary and void because the issue which is said to be controlling in the Award is not the issue that was framed on the property; furthermore, the finding on which the Award is expressly based is contrary to the undenied facts of record and is not even responsive to the issue stated in the Award.

After quoting generously from the record, the Referee who fashioned this Award gives us the following erroneous statement of the issue:

> "It is clear from this detailed recitation from the record that the question presented in this case is a question of fact: whether as a matter of fact the Carrier failed to notify Local Chairman Easterling of its decision within seven days of the completion of the hearing of October 23, 1972. The question is not how notification was made, whether by Mr. Osborne or by Mr. Cooper, but whether notification of the decision was made at all within the required seven days." **

The undenied facts of record establish that this statement of the issue is arbitrary, and these undenied facts were clearly brought to the attention of the Referee by that portion of the memorandum submitted to him by the Carrier Members which reads:

> "Carrier tells us that in handling on the property the actual receipt of a disallowance of the claim after the appeal hearing was not questioned, and that the real issue raised by Petitioner on the property was simply that the said notice did not satisfy the requirements of Rule 17 because it did not come from the officer who conducted the appeal hearing, but rather came from the manager of the department.
>
> "That the issue raised by Petitioner on the property was as represented by Carrier is clearly borne out by the correspondence in evidence. The Regional General Chairman's letter (P. 45) appealing the claim to the highest officer had this to say on this particular issue of notice:
>
> > '. . . However, to date, Superintendent Material Cooper has failed to notify Local Chairman Easterling of what decision if any, has been rendered as required by Rule 17 (b) of the Schedule for Freight Handlers.'
>
> "The highest officer's reply (P. 47) indicates that the entire matter had been discussed in conference and his denial of this aspect of the claim reads:

** All underlining herein added by Carrier Members.

'. . . Mr. W. W. Osborne, Manager Material, advised Mr. Hammer with a copy of Local Chairman Easterling by letter dated October 26, 1972 that the Carrier's decision was unchanged.

'. . . I do not agree with your contention that Rule 17, Paragraph (b), Schedule for Freight Handlers was violated when Mr. W. W. Osborne, who reviewed all the facts involved in this case, advised Mr. Hammer and the local chairman of the Carrier's decision.'

"We must accept the foregoing statement of the highest officer as a completely accurate statement of the facts recited therein, including the position taken by the Petitioner on the issue under discussion, because the General Chairman responded to that letter without in any way challenging the correctness of the facts recited. . .

"There was no contradiction of Carrier's statement that the Local Chairman did in fact receive a copy of Mr. Osborne's decision disallowing the claim and upholding Claimant's dismissal from the service, and since Petitioner did not deny that fact on the property, it is precluded from denying it before the Board. . ."

The Referee's attention was directed to a multitude of awards of this Board and decisions of the Federal courts recognizing that under Section 3 First (i) of the Railway Labor Act and the rules of this Board the only issues that may be considered by the Board are those framed in the handling on the property, and the Petitioner has the burden of proving through reproduction of data in its initial submission that all issues brought to the Board have been previously handled in the usual manner on the property. It is not legally possible for Petitioner to change or enlarge the issue framed on the property through the medium of arguments presented before this Board. Therefore, on the record before us the Referee was legally precluded from assuming the issue in this case to be a question of whether Carrier "failed to notify the Local Chairman . . . at all" rather than whether notification should have been by Mr. Cooper instead of Mr. Osborne. The arbitrary assumption that the controlling issue was whether notification to the Local Chairman "was made at all" renders the Award a nullity. Furthermore, by the facts that went undenied on the property the Referee was precluded from lawfully finding that Carrier did not give any notice to the Local Chairman, and it was unnecessary for Carrier to adduce any evidence on that point.

In addition, the Award is arbitrary on its face for the reason that the finding on which the claim is sustained is not even responsive to the issue that is said to be controlling. Manifestly, notification of the Local Chairman is something entirely different from the actual rendering of the decision itself; and since it was undenied on the property that the decision was rendered and claimant himself given timely notice thereof, failure to also notify the Local Chairman would have

been non-prejudicial; yet, after the Referee so meticulously defined the issue as being one of alleged failure of Carrier to notify the Local Chairman of the decision at all, he sustained the claim on the basis of a finding that does not relate to the alleged non-receipt of notice by the Local Chairman. The arbitrary finding or "determination" on which the sustaining Award is expressly based reads:

> ". . . The Board must, therefore, make the determination, based on the proper record of this case, that the Carrier did not comply with Rule 17(b) requiring a 'decision rendered within seven (7) days of the completion of hearing.'"

In addition to the fact that the rendering of the decision itself is not the issue which the Referee so carefully framed, and is not the issue framed on the property, the facts which were undenied on the property establish that both the decision and the notice thereof were timely rendered by Manager Osborne.

We dissent.

D L Naylor

H J M Braidwood

K. B. Jones

D M Yourtee

P. C. Carter gm

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT
TO AWARD 20226 (CL-20420)
(Referee Lazar)

Carrier Members' Dissent to Award 20226 is nothing more than the continuation and reiteration of the Carrier Member's arguments and assertions presented in the panel discussion held in this dispute.

The Dissent contains five (5) references to "undenied facts," "facts that went undenied" and "facts which were undenied." We submit that "facts" are just that - facts. "Allegations" can be denied, "assertions" can be denied, but "facts" cannot be denied.

This brings us to one "fact" revealed in the Record, i.e., Carrier's Exhibit "E," which is allegedly a letter dated October 26, 1972 which Carrier asserts was sent Certified Mail. There was nothing presented as admissible evidence by Carrier to prove such a letter was sent, either to the Claimant or to his Representative. That is a fact.

For an issue which (as the Carrier Members say) was not "framed" on the property, there certainly was a lot of Record material available. The issue "framed" was properly decided by the Referee, and the Dissent does not detract therefrom.

J. C. FLETCHER
Labor Member

6-21-74