

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20862
Docket Number CL-20928

Irwin M. Lieberman, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Pacific Fruit Express Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7732)
that:

(a) The Pacific Fruit Express Company violated current Clerks' Agreement on July 2, 1973 when it dismissed Mr. Julia Fierro from service contrary to the rules thereof; and,

(b) The Pacific Fruit Express Company shall now be required to reinstate Mr. Julia Feirro and compensate him for eight (8) hours at the pro rata rate of Clerk-Inspector each and every work day commencing August 1, 1973 in addition to payments for Southern Pacific Employees Hospital Association and Travelers Policy GA-23000 for dependents, and for all other contractual benefits he has been deprived of commencing August 1, 1973 and continuing until restored to service with the Pacific Fruit Express Company.

OPINION OF BOARD: This dispute, involving discharge of Claimant, deals with the alleged failure of Claimant to report back from his vacation: failure to protect his assignment. Both parties raise serious procedural questions which must be considered first.

The investigation in this dispute was held on June 25, 1973 and Claimant was dismissed from service by letter dated July 2, 1973. Claimant was not present at the investigation, nor was his representative. The generally agreed upon facts pertaining to this dispute are that Claimant went on vacation on April 11, 1973 which was to end on May 16, 1973. Upon receipt of a telegram from Claimant indicating he was ill, he was granted sick leave until May 20th. On July 18, 1973 Claimant appeared at the office and picked up his checks. Carrier was aware that Claimant had been in Mexico during his vacation.

Petitioner contends that Claimant was deprived of his right to a fair hearing in that he did not receive the notice of hearing and therefore did not participate in the investigation. The pertinent provisions of Rule 38 provide:

"(a) An employe who has been in service more than sixty
(60) days or whose employment application has been formally approved shall not be disciplined or dismissed without investigation, at which investigation he may be represented by the duly accredited representative or another employe of his choice coming within the scope of this agreement.

"He may, however, be held out of service pending such investigation. The investigation shall be held within fifteen (15) days of the date when charged with the offense or held from service. A decision will be rendered to the employe within fifteen (15) days after the completion of investigation.

* * * * *

(c) Not less than five (5) days prior to the investigation the employe shall be given written notice of the precise charge against him and given reasonable opportunity to secure the presence of necessary witnesses. Copy of such notice to the employe will be sent to the Local Chairman. In cases of unsatisfactory service or incompetency all charges to be investigated will be stated. In establishing a current charge at a disciplinary investigation, Company will not use record of any previous infractions.

(d) Two copies of the transcript of the evidence taken at the investigation or on the appeal, together with one copy of the decision rendered the employe, shall be furnished to the representative of the employe within fifteen (15) days after the completion of the investigation.

(e) An employe disciplined or dismissed and desiring to protest such action shall present such protest (which may include written rebuttal of evidence in transcript) in writing, personally or through his representative, to the officer who assessed the discipline within fifteen (15) days from the date of the decision or date transcript is forwarded, whichever is later."

Petitioner also states that Claimant's representative, the Local Chairman, did not receive the copies of the transcript of the investigation or the decision until September 20, 1973.

Carrier asserts that timely appeal of the dismissal was not made locally nor was any claim filed locally at any time, thus barring the dispute from further handling. On August 16, 1973 the Local Chairman wrote to the Plant Manager requesting that the matter be reopened; the Plant Manager declined by letter dated August 28th. Finally on September 26, 1973 the Local Chairman wrote to the Carrier Officer who assessed the discipline and filed a formal appeal to the dismissal.

It is noted that although there is no evidence that Claimant received the Notice of the Investigation, there is no denial that said notice was received by his representative. It is also clear that Claimant did receive the Notice of Dismissal upon his return from Mexico at an unnamed date.

The record of this dispute is quite clear in that Claimant did know of his discharge no later than July 18th. In spite of this, no claim or appeal was filed until more than two months later. The provisions of Rule 38 (e) are quite unequivocal: the appeal must be filed within 15 days and with the officer who assessed the discipline. Regardless of other possible questions with respect to the procedure and even assuming that effective receipt of the notice of discipline was July 18th, the appeal was not timely filed and may not be considered. Carrier raised its objections to the untimely filing of the appeal consistently in the course of the handling on the property and there is no evidence of any expressed or implied waiver. This Board has held in a number of prior disputes that similarly defective appeals warrant dismissal: Awards 19147, 19663, 20035, 19070 and 20063 among others. For the reasons indicated we may not consider the merits of this dispute; it must be dismissed.

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 Employee involved in this dispute are respectively Carrier and Employee 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 dispute is barred.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1975.