NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20900
THIRD DIVISION Docket Number MW-20844

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Inc.

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

The claim presented by Local Chairman J. H. White on June 2, 1973 that

"... Mr. McInturf should be placed back in service and compensated for lost time wages."

should and shall be allowed as thereby presented because of Superintendent Heimsjo's failure to disallow the claim in conformity with the procedural requirements of Rule 42A. (System File S-S-102C/MW-32(a)3 9/24/73)

OPINION OF BOARD: Claimant was employed as a sectionman commencing April 2, 1973. His application for employment was disapproved by Carrier and his services terminated as of the "close of work" on May 31, 1973. On June 2, 1973 the Organization filed claim alleging violation of Rule 3(A) and Rule 40, and demanded that Claimant "be placed back in service and compensated for lost time wages." Carrier failed to respond to said claim. Accordingly, on August 29, 1973, Organization filed further claim as follows:

"August 29, 1973
Spokane, Washington

Mr. J. G. Heimsjo, Supt.
Burlington Northern, Inc.
W. 221 First Avenue
Spokane, Washington 99204

Dear Sir:

On June 2, 1973, I filed a claim with you on behalf of Mr. C. D. McInturf, Employee No. 044318.

As I have not received a reply regarding this claim, you have violated Rule #42.

So therefor according to Rule #42, I feel Mr. McInturf should be placed back in service, and again I feel should be compensated for lost time wages.

Sincerely,

/s/ J. H. White

J. H. White, Local Chairman
Lodge 104
9510 E. Seventh Avenue
Spokane, Washington 92206

cc: Ray Richardson
Duane Tulberg
C.C. McInturf
J. H. White"

Rule 40 of the controlling Agreement, and specifically the first sentence of subdivision "A", provides that "An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held." Obviously, this rule does not come into play unless an employe has been "in service sixty (60) days or more". This in turn involves construction of Rule 3(A), which provides as follows:

> "A. An applicant for employment will be required to fill out and execute the Company's application forms and pass required physical and visual examinations, and his employment shall be considered temporary until application is approved. If application is not disapproved within sixty (60) calendar days from commencement of service, the application will be considered as having been approved unless it is found that false information has been given. In the event applicant gives false information, the Company will have the right to disapprove such application after the sixty (60) calendar day probationary period has expired."

Petitioner contends that Claimant actually completed 60 days of service and thus could not be dismissed without an investigation. Carrier, on the other hand, asserts that Claimant was a probationary employe and that it complied with Rule 3(A) by disapproving his application "within sixty (60) calendar days from commencement of service." Accordingly, Carrier maintains Claimant, having no status as an employe, did not come within the protective provisions of Rule 40.

We point out, however, that irrespective of the merits of the latter contentions, the appeal to this Board rests solely on the procedural issue presented in the Statement of Claim -- that the claim of June 2, 1973, "shall be allowed as thereby presented" because of Carrier's "failure to disallow the claim in conformity with the procedural requirements of Rule 42(A)."

Rule 42(A) provides as follows:

"A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."

The record evidence indicates that the letter claim of June 2, 1973 was not in fact replied to within the 60 days period specified in Rule 42(A), and that it was not until August 30, 1973 (some 89 days later) that Carrier responded by "rejecting" the Organization's letter claim of August 29, 1973.

Carrier is consistent in its position, however, that since Claimant had no employe status, Rule 42(A), also, did not apply to him.

Procedurally, Carrier, citing precedent, contends that "rules" and "issues" are now asserted by Petitioner which were not raised on the property and that these, being new matters, are not properly before the Board at this level of the Appellate process.

This principle is well established and has been adhered to consistently by this Board. However, in reviewing the correspondence on the property we find it quite clear that issues were raised in respect to Rules 3(A), 8(A), 40 and 42(A). Moreover, it should be emphasized that the Statement of Claim is specifically limited to Rule 42(A). Accordingly, since we shall limit ourselves to consideration of these issues, and no others, we do not sustain Carrier's objection on the issue of "new matter" as bearing upon the merits of the claim.

The gravamen of this dispute rests on the specific language of the involved Rules, and these, unfortunately, are not identical. Thus:

(1) Rule 3(A) requires that the employment application must be disapproved "within sixty (60) calendar days from commencement of service."

(2) Rule 40(A) provides that "An employe in service sixty (60) days or more will not be . . . dismissed" until after investigation.

(3) Rule 42(A) states that claims must be disallowed by Carrier "within sixty (60) days from the date same is filed . . .". (Emphasis added in each case).

On Rule 3(A) there is sharp issue between the parties as to the meaning of the words "within . . . commencement of service". Carrier argues that the "first day" should not be counted and that "calendar days" refer to "24 hour days". Petitioner contends on this issue that the beginning of the "first day" represents the "commencement" of service and that, in fact, Claimant had completed 60 days of service prior to dismissal. With similar reasoning, Petitioner urges further that Claimant was actually "in service" for 60 days and thus came within the coverage of Rule 40(A).

Carrier cites many prior Awards as precedent, most of which do not involve interpretation of any rule similar to Rule 42(A) here involved. Some are not germane, being based on dissimilar factual situations. For example, Award 3152 related to definition of "reasonable time," 3520 concerned seniority rights on reemployment, 13301 dealt with "furloughs" on less than five days notice, 14274 and 4391 related to false information on the application as extending Carrier's time to dismiss, and 8536 related solely to whether "oral notice" was adequate.

Additionally, Awards 15026, 19117, 19674 and 19968, some of which did involve language similar to Rule 42(A), dealt with situations in which there was no question but that the application had been disapproved well within the specified time limitation. This is not the situation here, for the instant dismissal occurred precisely on the 60th day, after the "close of work".

Awards 19177 and 3545 (2nd Div.) deal with the legal principle of excluding the first day in measuring time, but the language of the rules in those cases differs from the language of the rules here involved. The latter relate to the words "after" the applicant begins work or "from date". Emphasis is placed on the precise meaning of these specific words, the Referee concluding that "This language shows that the parties intended the period to exclude the first day of employment" See Award 19177, supra. Rule 3(A) and Rule 40(A), with which we are involved, respectively contain the phrases "within . . . commencement of service" and "in service sixty (60) days or more". Such language is not involved in the Awards cited above.

Standard Dictionary references define "within" as being "inside the limits of, not beyond". And "after" is defined as "subsequent to in time or order". It would appear, therefore, that differences in interpretation hinge on the narrow issue of how these words are used in the confronting Rules.

We have gone into this matter at some length, and have analysed in depth the pertinent Rules and cited precedents, to demonstrate that serious dispute existed as between Carrier and Organization on precise interpretation

of the stated Rules and their applicability specifically to this Claimant and the confronting facts. The correspondence between the parties on the property evidences that these matters were pointedly placed in issue.

Carrier urges, in connection with the foregoing Rules, that the Agreement must be interpreted as written, and that its provisions and Rules must be read together to determine the intent of the parties in context.

We agree, but that is not the issue before us. It should have been, but it is not. The simple issue before us is compliance by Carrier with Rule 42(A). A valid claim had been presented by Organization letter of June 2, 1973. Carrier's obligation was clear; i.e., to disallow the claim "within sixty (60) days from the date same is filed" by appropriate notice to Organization. Carrier failed to do so and the consequence of such failure is clearly stated in the Rule: "If not so notified, the claim or grievance shall be allowed as presented . . ."

See Awards 9931 (Bailer), 15788 (McGovern), 10138 (Daly), 11174 (Dolnick), 12473 (Kane), 16564 (Dorsey), and 19946 (Blackwell), among many others.

We acknowledge and agree with Carrier's position and supporting Awards on the principle that specific rules take precedence over general rules. We apply this principle to the instant dispute, for there appears to be no question that Rule 42(A) is precise and specific, and mandatory upon the negotiating principals to the Agreement.

Nor do we feel that Carrier can evade the issue by contending that since Claimant "had no employe status" he was not covered by Rule 40 or by Rule 42(A). In essence this position begs the question. For, the precise thrust of the claim relates to Claimant's status as an employe. Certainly, Carrier could not unilaterally demolish the claim by virtue of the discharge; the discharge itself having been specifically placed in issue by the claim.

Additionally, we have held repeatedly that even where the claim is deemed "fanciful" or "without merit", Carrier is required to reject within the time limit set forth in the Rule.

"This requirement is mandatory, not a matter of choice or dependent upon the type or quality of the claim." See Awards 10138 (Daly), 12473 (Kane), 14759 (Ritter), 19422 (Edgett), 6383 (2nd Division - Lieberman) and 6627 (2nd Division - O'Brien).

In Award 19422, supra, we stated:

". . . we have firmly established that a Carrier is not permitted to prejudge the merits of a claim and fail to answer because, in its opinion, the claim lacks 'substance'. Awards 9760, 10138, 10500, 11174, 12233, 12472, 12473, 12474, 14759, 16564, 19361."

Finally, "Carrier's obligation to deny any claim filed within 60 days of filing, giving its reasons for disallowance in writing, is . . . absolute. Since Carrier failed in this contractual obligation we are compelled . . . to sustain the instant claim as presented." See Awards 16564 (Dorsey) and 19361 (Devine), among many others.

Accordingly, based on the foregoing findings and controlling authority, we sustain the claim as presented.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paules
Executive Secretary

Dated at Chicago, Illinois, this 12th day of December 1975.