

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21297
Docket Number MW-21295

James C. McBrearty, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Denver and Rio Grande Western Railroad Company

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

(1) The dismissal of B&B Foreman J. A. Otteson effective June 29, 1974 was without just and sufficient cause and on the basis of unproven and disproven charges (System File D-10-22/MW-7-74).

(2) The claim* presented by former General Chairman Fraser on July 5, 1974 to the Carrier officer authorized to receive claims (Division Engineer) should be allowed because said claim was not disallowed by Division Engineer A. C. Black in accordance with the provisions of Agreement Rule 29.

(*) The claim, as presented, reads:

"....payment for all time that Mr. Otteson loses until he is reinstated with all seniority and benefits unimpaired."

(3) For either or both of the reasons set forth in (1) and (2) above, the claim as quoted in (2) above be sustained.

OPINION OF BOARD: Claimant was employed by Carrier for over 24 years, and for two (2) and one-half years prior to his dismissal effective June 29, 1974, he had been employed as a B&B foreman.

On June 10, 1974, Claimant and his crew were working in Tunnel No. 1, Mile Post 23.5 on Subdivision 1, Colorado Division, near Plain, Colorado. Claimant and his crew had been using tunnel forms and pouring 20 feet of concrete to form a portal outside the east end of the tunnel. On said date, this crew started to move the forms 200 feet to the west end of the tunnel where they were going to pour 30 feet of concrete. The forms had been moved approximately 47 feet inside the tunnel from the east portal, when it was determined that the forms would have to be left in the tunnel overnight. Because the forms at that point would not clear passing trains, Claimant had the forms moved back to where they would clear passing trains, and then had said forms secured and fastened (i.e., setting the jacks and spreading the forms on top for proper clearance, and bracing the bottom of the forms to the end of the ties). Before leaving, Claimant ran the tunnel clearance car, with the feelers on, through the tunnel to determine if proper and sufficient clearance had been established where the forms had been secured for overnight storage. A speed limit of ten miles per hour through the tunnel had also

been placed by Claimant. After such clearance had been established to exist, two (2) west-bound trains and an east-bound light engine passed through the tunnel without incident. After those passed, Claimant rechecked the forms and found everything to be satisfactory.

At about 8:20 P.M. on June 10, 1974, Train 254610, Extra 3016 East, with 40 loads and 22 empties, struck the forms in Tunnel No. 1, resulting in damage to the tunnel forms, and to cars TTX 801962 (VERTA PAK), SP 178210 (BOX) and RI 92940 (FLAT CAR). The VERTA PAK car had a rather large hole in the door on the north side, as well as damage to the east end of the car, and also to the roof. The RI flat car sustained damage to the hand brake and brake wheel, while the box car on the south side had a ladder torn upward and outward.

The tunnel forms were lying on the east end of the tunnel; they had become separated into two (2) pieces; one (1) on each side of the portal with the interior portion of the forms facing toward the track. At approximately the separation line on the north side, there was a tear along the edge of the form, and also some damage to the interior strut or beam. One of the roof jacks was stripped at the threads, while the other had broken the bolts that were fastened into the clevice.

Investigation was held on June 20, 1974, and under date of June 29, 1974, Carrier notified Claimant that he was being dismissed from the service of Carrier "for your responsibility" in connection with "Train 254610, Extra 3016 East, striking tunnel forms in Tunnel No. 1, Mile Post 23.5, at about 8:20 P.M., Monday, June 10, 1974."

On July 5, 1974, the General Chairman wrote to the Division Engineer requesting reinstatement of Claimant and pay for time lost.

Under date of July 16, 1974, the Division Superintendent wrote to the General Chairman advising that his claim for reinstatement with pay for time lost was declined.

On August 26, 1974, the Division Engineer wrote to the General Chairman advising that Carrier was agreeable to reinstating Claimant effective September 1, 1974, as a Carpenter only, with no pay for time out of service.

The General Chairman wrote to the Division Superintendent on September 6, 1974, advising that the Division Engineer had not declined the claim within 60 days, and the Division Superintendent's declination under date of July 16, 1974, was out of line as the claim had ~~not~~ been appealed to him.

On September 19, 1974, the Division Superintendent again denied this claim in a letter to the General Chairman pointing out that the dismissal letter had been signed by the Division Superintendent, and that his denial of the July 5, 1974 letter had therefore not been out of line.

Under date of September 23, 1974, the General Chairman wrote to Carrier's Director of Personnel taking exception to Superintendent's denial of the claim under letter of September 19.

On October 7, 1974, Claimant was notified by Carrier that he was reinstated to the position of B&B Foreman on a leniency basis without pay for time lost. Both Claimant and his General Chairman notified Carrier that Claimant would accept reinstatement, but would insist on pay for time lost. Claimant returned to work on October 21, 1974.

The Rules of the Agreement applicable to this case are as follows:

RULE 28 - DISCIPLINE

Hearings - (a). An employee who has been in the service more than sixty (60) calendar days shall not be disciplined or dismissed without being given a fair and impartial investigation, except as provided in Rule 7 of this agreement. He may, however, on proper authority be held out of service pending such investigation.

When an investigation is necessary it will be held as soon as possible, ordinarily within ten (10) calendar days but not to exceed thirty (30) calendar days from date of report. The accused employee shall be advised of the charges against him and shall have reasonable time to secure the presence of a representative of his choice and necessary witnesses.

A decision will be rendered within ten (10) calendar days from the date of the investigation. If not rendered within the ten (10) day period the employee, if held out of service, will be paid a minimum day's pay for each day thereafter until a decision is rendered.

Representatives - (b). The right of an employee to be represented at the investigation by another employee covered by this agreement or by accredited representatives of the Brotherhood, but not otherwise is recognized. The right to interrogate witnesses shall be limited to only one representative. The right of appeal is limited to the claimant employee or an accredited representative of the Brotherhood.

Furnished Transcript - (c). All decisions of the Company officers in cases of investigation or appeals for discipline or dismissal will be made in writing. A copy of transcript of investigation will be furnished any employee against whom discipline is assessed and his representative.

Unsustained Charges - (d). If the decision shall be in the employee's favor the employee shall be returned to service and compensated for wage loss, if any, suffered.

Waiver (e). Nothing contained in this rule shall require the holding of the investigation where the violation is of such nature as to not warrant the suspension or discharge of the employee, provided such employee shall agree in writing to waive the investigation and accept lesser discipline and, provided further, that the execution of such waiver will not result in an over accumulation of demerits.

Requested Hearing - (f). An employee who feels he has been unjustly handled or mistreated shall be privileged to request a hearing which will be granted and conducted in accordance with the provisions of this rule. Such request shall be made by the employee or his representative and directed to the superintendent in writing and information pertinent to the reason for the request shall be furnished at that time. Such request must be made within ten (10) calendar days from the date of the occurrence on which the hearing is sought.

Time Claims - (g). Time claims arising out of the application of this rule shall be initiated within thirty (30) calendar days from the date of the written decision and handled thereafter in accordance with Rule 29.

RULE 29 - CLAIMS AND GRIEVANCES

Presented - (a). All claims or grievances must be presented in writing by or on behalf of the employee 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) calendar days from the date same is filed notify whoever filed the claim or grievance (the employee 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.

Appeal - (b). If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Company shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision the matter shall be considered closed, but this

shall not be considered a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may by agreement at any stage of the handling of a claim or grievance on the property extend the sixty-day period for either a decision or appeal up to and including the highest officer of the Company designated for that purpose.

Subsequent Appeals - (c). The requirements outlined in subsections (a) and (b) pertaining to appeal by the employee and decision by the Company shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Company to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within nine (9) months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board, or a system, group or regional Board of Adjustment that has been agreed to by the parties hereto as provided in Section 3, Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) months' period herein referred to.

Continuing Violations - (d). A claim may be filed at any time for an alleged continuing violation of any agreement, and all rights of the claimant or claimants involved thereby shall under this rule be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

Rights of Representatives - (e). This rule recognizes the right of representatives of the Organization, party hereto, to file and prosecute claims and grievances for and on behalf of the employees covered by this agreement.

Rights of Employees - (f). This agreement is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances, provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Company.

Does not Apply to Leniency - (g). This rule shall not apply to requests for leniency.

The first question which this Board must answer in the instant case, is whether there was a procedural violation involved, in that Division Engineer Black, to whom the claim was initially presented on July 5, 1974, did not deny the claim.

Reviewing the foregoing background of this case, it will be noticed that although the claim was initially filed with the Division Engineer, A. C. Black, the claim was denied on July 16, 1974, by the Division Superintendent, A. H. Nance.

Claimant argues that since the Carrier designated the Division Engineer as the Officer of the Company with whom claims should be filed (Carrier's letter of January 14, 1974), then it is the responsibility of the Division Engineer to respond to the claim.

Carrier on the other hand argues that Rule 29 (a) provides only that "the Company" shall notify whoever filed the claim or grievance. There is no language specifying that the Officer of the Carrier with whom the claim is filed must be the one to reply.

Moreover, Carrier argues in the instant case that the Division Engineer was in no position to over-rule the decision of the Division Superintendent (a superior officer), who had notified Claimant originally of his dismissal.

Previous Awards of this Board have held that the Officer of Carrier designated by Carrier to receive claims or grievances must be the one to reply to same.

Award 18002:

We agree with the Organization that Carrier violated Section 1(a) of Article V of the August 21, 1954 National Agreement, governing the parties to this dispute, when it permitted its Roadmaster, R. C. Mingus, to decline the claim, rather than having its Assistant Division Engineer of Track, A.W. Wilson, who was authorized by Carrier to receive claims on its behalf, deny the claim.

Award 17696:

We agree with the Organization that Carrier violated Section 1(a) of Article V of the August 21, 1954 Agreement when it permitted Roadmaster Mingus to decline the claim rather than Assistant Division Engineer of Track, A. W. Wilson, to whom the claim was presented. Therefore, we will sustain the claim.

Award 4529:

We think the rule requires that a decision actually has to be made by the officer of the Carrier on whom that responsibility has been placed, which in this case was Manager Keene, within the time as therein specified, that Rule 22 requires that he give his reasons for so doing if the claim is disallowed, and that the employee and his representative be notified thereof in writing within the time as required by Rule 44(c). Having failed to comply with Rule 44(c) the claims, by the express provision thereof, must be allowed. Nor does the provision of the rule contemplate, when it is applicable, that the merits of the claim shall be considered. Consequently, we shall not do so.

When the Organization filed its claim it did so as required by the January 14, 1974 letter. In so doing it had a right to assume that the claim would be responded to by the Division Engineer. Then, if there was a denial, it would have had a right to reformulate its claim for appeal to the Division Superintendent. If there was a denial by the Division Superintendent, the claim could then be submitted by the Organization to the Director of Personnel, the highest officer of the Company designated for that purpose.

While specific levels of appeals are not spelled out in Rule 29, it will be noted that Rule 29 (b) refers to extending "the sixty-day period for either a decision or appeal up to and including the highest officer of the Company designated for that purpose." (Emphasis added by Board).

Also, Rule 29 (c) entitled, "Subsequent Appeals" refers to "appeals taken to each succeeding officer." Some levels of appeal are certainly implied in such language.

Moreover, the Railway Labor Act in Section 3 (i) states that:

.... disputes growing out of grievances shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes.... (Emphasis added by Board)

Turning now to Carrier's argument that the Division Engineer has no authority to over-rule a decision of the Division Superintendent, how was it then that in light of the Superintendent's denial of the claim on July 16, 1974, the Division Engineer could send the letter dated August 26, 1974, offering to reinstate Claimant as a Carpenter? Where did this authority suddenly come from?

The Board can reach no other conclusion than if the Division Engineer could make an offer of reinstatement as a Carpenter to Claimant after a denial by the Division Superintendent, then the Division Engineer had the

authority, and was indeed required, to answer the claim initially presented to him on July 5, 1974.

Finally, the Board notes in Carrier's Submission that the Board's attention is called to Decision 16 of the National Disputes Committee as well as seven (7) Awards applying such. However, the Board in reviewing these cases finds that the Carrier had failed to render a timely denial in all of them, and the only issue was the Carrier's liability on back pay where there was a continuing claim. These cases show that where Carrier did not properly deny a claim, but an appeal officer did give written notice of denial after the appropriate time limit, then the Carrier's financial or back pay obligation is limited to the date when Claimant received Carrier's denial.

Therefore, in the instant case, the Board must limit the Carrier's liability to the period of June 29, 1974 through September 20, 1974.

Our review of the entire record and the awards brought to our attention by the parties satisfy us that the claim must be sustained as modified, although it has not been considered on its merits.

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

That the Agreement was violated.

A W A R D

Claim sustained as indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1976.