

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21696  
Docket Number CL-21163

Walter C. Wallace, Referee

(Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees

PARTIES TO DISPUTE:

(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,  
(GL-7778) that:

1. Carrier violated the Agreement between the parties when on June 19, 1974, they arbitrarily and capriciously assessed Clerk B. R. Knight sixty (60) days actual suspension.

2. Carrier's action was unjust, unreasonable and an abuse of Carrier's discretion. The discipline was assessed with complete disregard of the working agreement.

3. Carrier shall now reimburse B. R. Knight for all time lost, with all rights and privileges unimpaired, including time spent attending the hearings.

OPINION OF BOARD: The Claimant held the position of second trick operator at Manhattan Tower, Toledo, Ohio. On May 23, 1974 two letters were directed to him by the Assistant Trainmaster. Both letters were sent by certified mail, return receipt requested, to the last known address of Claimant which was a Post Office box: P. O. Box 4273, Toledo, Ohio. The letters notified Claimant he was charged with delay of Penn Central Train DF-7 on May 8, 1974 and the delay of the N.W. Train AJ-12 on May 11, 1974. Thereafter on May 28, 1974 Carrier directed new letters to Claimant in the same way via certified mail to the same address. The May 28 letters informed him the hearings scheduled originally for May 28 and May 29 were respectively postponed until scheduled hours on the morning and afternoon of June 4, 1974. The first hearing was held on schedule and the second hearing was recessed because of the lateness of the hour and reconvened on June 11, 1974.

On June 12, 1974 the Claimant was assessed ten (10) days' actual suspension for the delay of the Penn Central Train. On June 19, 1974 Claimant was assessed twenty (20) days' actual suspension for the delay of

the N.W. Train. (These activated an earlier suspension deferred in connection with a separate disciplinary matter.)

Rule 27 is invoked here which provides in pertinent part:

"The investigation and hearing will be held within ten calendar days from date charged with the offense or held out of service, and a decision will be rendered within ten calendar days after completion of the investigation and hearing."

The Employee's position is that the investigation was unilaterally postponed in both cases to a date beyond the ten-day limit and as a consequence Claimant's record should be cleared and he should be paid for time lost. The Carrier's argument is that efforts were made to contact Claimant after the May 23rd letters were sent and he could not be reached by telephone or otherwise. Claimant was not on duty between the dates of May 23 and May 28, 1974 and there was no opportunity to deliver the notice to him personally at his work place. The only mailing address the Carrier had for Claimant was the Post Office box and Carrier did not receive a return receipt for the May 23 letters. Upon checking at the Post Office on May 24 and May 27 Carrier determined that Claimant had not picked up his mail including the May 23 letters. As a consequence Carrier concluded Claimant had not received the notice sent out and the May 28 letters were sent which postponed these hearings.

Claimant, in his testimony, admitted he had prior knowledge of the hearing originally scheduled for May 28, 1974 at 2:00 p.m. It appears that another Tower Operator had called him at home and gave him information about the hearing. Despite this notice Claimant did not make contact with the Carrier until he received the letters postponing the hearings on June 3, 1977.

The submissions to this Board indicate the only issue presented for determination is whether or not the time limitations under Rule 27 have been violated. We believe this claim should be denied.

The Carrier went beyond what could be considered its responsibilities here in seeking to ensure that Claimant had notice of these hearings. It has been held that the Carrier cannot be made an insurer of the receipt of this type notice. Where bona fide efforts are

made to deliver the notice but the failure of delivery is due to Claimant's conduct, then it must be concluded the rule requirements have been met. Award 13757 (Coburn). The Employee had the responsibility not to avoid service of the notice. Award 15007 (Wolf). Here the Claimant admits he had actual notice of the hearing from a fellow employee and that the scheduled hearing was common knowledge. Under these circumstances the burden was on him to justify his actions by offering a reasonable explanation for his conduct. Award 15575 (Ives). None was forthcoming and we must conclude that he was avoiding service of the notices. Award 17691 (McGovern).

We have given careful consideration to those Awards cited here that hold to the view that time limitations must be enforced, regardless of harshness, because no discretion exists to apply them except in accordance with the terms fixed by the parties. Awards 16262 (Dugan); 11757 (Dorsey); 18352 (Dorsey); 6446 (Ferguson); 16632 (Heskett); 19851 (Rubinstein); 19796 (Sickles). These awards did not involve circumstances where the Carrier made reasonable efforts to comply with the notice requirements only to have the Claimant frustrate those efforts by his own conduct. On this basis we do not consider them controlling here. The claim must be denied.

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

The contract was not violated.

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Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: A. W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1977.

