NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22180
THIRD DIVISION Docket Number MSX-20805

Louis Norris, Referee

PARTIES TO DISPUTE: (Clarence Brown
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(REA Express, Inc.

STATEMENT OF CLAIM: This is to serve notice as required by the rules of the National Railroad Adjustment Board of my intention to file an ex parte submission on July 3, 1974 covering an unadjusted dispute between my client, Clarence Brown, and the Railway Express Agency involving the question of wrongful discharge from the Railway Express Agency.

OPINION OF BOARD: Claimant was employed by Carrier on July 6, 1965 and remained in service until December 22, 1968, when he was furloughed. On December 16, 1969, Carrier sent Claimant a telegram recalling him to service as of December 23, 1969. Claimant failed to report on said date. On December 23, 1969, Carrier sent Claimant a second telegram advising him that he was being dismissed from service due to failure to report for work, in accordance with Rule 3 (o) of the Agreement between the parties. Both telegrams were sent to Claimant at his residence address then on file with Carrier.

Claim was initiated on behalf of Claimant on January 29, 1970, by letter of the Local Chairman, alleging that both telegrams had not been received by Claimant "because it had been addressed ... to his former residence." The claim letter requested that Claimant be "returned to service and compensated for time lost." Thereafter, appeals were made on the property up to and including the highest appeal officer. The claim and all appeals were declined by Carrier, the final declination being dated July 10, 1970.

On August 15, 1973, Claimant's attorney appealed to Special Board of Adjustment No. 752, and, upon being advised by Carrier that such Board was then in inactive status, he submitted the dispute to this Board on June 3, 1974.

At the outset, Carrier raises objection to the propriety of this appeal on the ground that it is time barred under the provisions of the Railway Labor Act. It is conceded that no specific time limit is set forth in the Act. However, one of its stated purposes is the prompt and orderly settlement of all disputes. A period of 37 months elapsed between the final rejection of Claimant's appeal on the property (July 10, 1970) and his appeal to the Special Board (August 17, 1973). Carrier urges that this period of 37 months is an unreasonable length of time to perfect an appeal, and is not in compliance with the Railway Labor Act stricture on "prompt" settlement of disputes.

Carrier cites, among others, two prior Awards of this Board which are pertinent to this dispute. In Award No. 8162 (Bailer) we stated:

> "It is argued that consideration of this claim on its merits is barred by virtue of Petitioner's unreasonable delay. We agree with this contention under the confronting facts. One of the stated purposes of the Railway Labor Act is '(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.' In Award 4941 we stated:
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> > '... While it is true that a time limit in which an appeal must be taken to this Board from an adverse determination by a Carrier is not stated in the Act, or in the agreement before us, it is contemplated that disputes arising under it shall be handled expeditiously. The parties are entitled to a reasonable time to appeal in the light of all the circumstances.'
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> "In the present instance we think the Petitioner allowed an unreasonable period to elapse before appealing its claim to the Board. With 26 months having passed since denial by Carrier's highest appropriate officer and 19 months after the termination of further discussions initiated by the Organization, we think Management was entitled to conclude the Employees had accepted its adverse decision. There are no extenuating circumstances involved. The appeal must be dismissed."

In Award No. 6229 (McMahon) we affirmed this principle, as follows:

> ". . . . This action by the General Chairman in filing and notifying the Carrier, approximately two years after denial, of their intention to appeal to this Board, is in our opinion an unreasonable time in which to take such further action, and certainly is not in compliance with the Railway Labor Act. See 2,

"'General Purposes' as set in (4) and (5) of said section. There is nothing contained in the Act nor in the current Agreement which puts a time limit on the filing of an appeal to this Board from any denial of a claim by the Carrier, but such appeal must be prompt and orderly. Certainly the parties are entitled to a reasonable period of time in which to perfect an appeal to this Board, but a period of approximately two years in which the Organization elected to further assert its rights to this Board is unreasonable, and not within the purview of the provisions of the Railway Labor Act, and said claim should be denied. We are in accord with Award 4941, Carter Referee."

We are not persuaded by Claimant's contention, as stated in his attorney's submission, that he was "misled" or that "he was not notified of the rejection of the said claim." The facts speak to the contrary, for on June 19, 1970 Claimant filed a complaint of discrimination with the New York State Division of Human Rights "after failing to receive his union to represent him." This in spite of the fact that the Organization was engaged at that very time in the processing of its appeal to the Carrier. For it was not until one month later, on July 10, 1970, that the final appeal on the property was rejected. He knew then and prior thereto that his appeal was being rejected by Carrier, as witness his filing of the complaint of discrimination on June 19, 1970, and the statement therein contained as to "terminating me from employment."

In view of the above cited precedents, therefore, and the foregoing facts and circumstances, we are compelled to the conclusion that Petitioner's inordinate delay of 37 months in filing his appeal to the Special Board of Adjustment was in violation of the spirit and stated purpose of the Railway Labor Act. His claim is therefore time barred and must be dismissed.

Ordinarily, the foregoing would terminate our Opinion at this point. However, various issues are raised in Petitioner's submission which merit comment.

1) The Claim of No Investigation.

Claimant's attorney makes the following statement in his initial submission. "Initially, it is conceded that there is a provision in the Union contract which empowers respondent to terminate the employment of any employee who fails to respond to a call ordering him to return to work after a lay-off." The specific provision of the Agreement here applicable is Rule 3 (o) which reads as follows:

"(o) When a bulletined new position, or vacancy, is not filled by an employe in service senior to a furloughed employe who has protected his seniority as provided in this rule, the senior qualified furloughed employe will be assigned and called to fill the position. Furloughed employes failing to return to service within seven (7) calendar days after being notified (by mail or telegram sent to the last address given) or give satisfactory reason for not doing so will be considered out of service."

Nevertheless, it is urged that Claimant was entitled to an "Investigation" under Rule 11. We cannot agree. Rule 11 is entitled "Discipline, Grievances and Witnesses" and is specifically designed to cover discipline cases based on offenses. Claimant was not disciplined under Rule 11 and consequently there was no requirement that an investigation be held. He was terminated under Rule 3(o), which is clear and unambiguous and does not require an investigation prior to termination. Petitioner's contention in this respect is therefore without merit and is disallowed.

2) The issue of the telegrams and claim of "wrongful discharge."

Four dates in the record are significant here:

a) December 22, 1968 - The date on which Claimant was furloughed.

b) October 21, 1969 - The date on which he moved to a new address.

c) December 16, 1969 - The date of the first telegram.

d) December 23, 1969 - The date of the second telegram.

Rule 3(o) provides specifically that a furloughed employee who fails "to return to service within seven calendar days after being notified (by mail or telegram sent to the last address given) or give satisfactory reason for not doing so will be considered out of service." (underlining supplied). The record shows that Claimant was so notified by telegram sent to the last address given. He failed to respond and was ruled out of service.

Claimant attempts to show "satisfactory reason" for not responding by claiming that he notified the Brotherhood as to change of address. This, however, does not constitute notice to respondent Carrier. He states further that "on November 25, 1969, he notified respondent by a written notice of the said change of address" but he fails to state specifically whom he notified, nor does he submit a copy of such "written" notification, which Carrier denies ever having received. Additionally, the letter of the Local Chairman, dated January 29, 1970, contains the statement that Claimant "on or about

November 15, 1969 corrected his address in Room 4, Pennsylvania Express Terminal." This is a purely self-serving statement without any supporting proof in the record and is not consistent with other statements of Claimant referred to above.

Claimant moved on October 21, 1969 from his address on record with Carrier. He was a furloughed employee; notice of recall to service could come at any time. His responsibility, therefore, was a simple one - to notify Carrier promptly of his change of address. This he failed to do at any time prior to date of the first or second telegram. The record indicates no evidence to the contrary. The vague unsupported assertions cited above are not convincing, nor do they constitute proper proof of "satisfactory reason" for not responding.

The Carrier fulfilled its obligation under Rule 3(o) by sending its telegram to Claimant "to the last address given." The fault for its nonreceipt must rest upon Claimant. The claim, therefore, that he was wrongfully discharged is without merit.

Accordingly, we find that this claim must be dismissed. Firstly, because it is time barred, and secondly, because the evidence on the merits clearly preponderates in favor of Carrier.

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 not violated.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1978.