

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23943
Docket Number MW-24124

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Duluth, Winnipeg & Pacific Railway Company

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

(1) The sixty (60) day suspension imposed upon Sectionman R. Morrison and the thirty (30) day suspension imposed upon Sectionman R. E. Rice for alleged 'insubordination to Section Foreman E. G. Nyman and Roadmaster Russell Soger' was without just and sufficient cause.

(2) General Manager J. F. Corcoran failed to disallow the claims (appealed to him under date of August 18, 1980) as contractually stipulated within Agreement Rule 21, Sections (a) and (c).

(3) As a consequence of either or both (1) and/or (2) above, each of the claimants'

'record' be cleared of this violation and the monies due be paid.' "

OPINION OF BOARD: This dispute concerns the disciplining of two employes for alleged insubordination in an incident on February 28, 1980. Following an investigative hearing, Claimant Morrison was accorded a sixty day suspension and Claimant Rice thirty days.

As a threshold matter, Petitioner raises a procedural issue, which was part of the Claim submitted to this Board (supra). The Organization argues that the authorized officer of the Carrier failed to timely respond in Step III of Grievance procedure in violation of Rule 21 of the Agreement derived from the 1954 National Agreement, provides as follows:

Rule 21.

"(a) All claims or grievances must be presented in writing by or on behalf of the employes involved, to the Officer of the Carrier 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 Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employes 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 Carrier as to other similar claims or grievances."

"(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 Carrier 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 as a precedent or waiver 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 the claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose."

"(c) The requirements outlined in Clauses (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding Officer, except in cases of appeal from the decision of the highest Officer designated by the Carrier 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 of 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."

The Organization also relies on a letter dated January 21, 1980, which stated:

"Mr. John R. Ritacco
Area Chairman
Brotherhood of MoFW Employees
Rain Tree, Apt. 3A
Mt. Iron, MN 55768

Dear Mr. Ritacco:

For your information, and for all others concerned, I would like to point out the proper procedure for progressing grievances in the Engineering Department:

FIRST STEP: Employes and/or Area Chairman to
 immediate supervisor.

"SECOND STEP: General or Area Chairman to Chief Engineer

THIRD STEP: General Chairman to General Manager

The immediate supervisor referred to in the First Step is either the Roadmaster for track forces or the Assistant Engineer for B&B forces.

Sincerely,

/s/ R. A. Olson

R. A. Olson"

The record indicates that the Claims herein were presented to the Roadmaster on May 1, 1980 and denied by the Roadmaster on May 19, 1980. They were progressed to the Chief Engineer on June 16, 1980 and finally on August 18, 1980 the Step III appeal was made to the General Manager. The Carrier's response at Step III was from R. A. Olson, Labor Relations and Personnel Officer. By letter dated December 17, 1980 the Organization wrote to the General Manager specifying that there had been a default by Carrier in that Mr. Olson had responded to the Step III appeal rather than the General Manager, Carrier's highest appeal officer. The General Manager responded by letter dated January 2, 1981 stating, inter alia, that "As a matter of practice, which you have recognized, Mr. Olson has answered Step III appeals for the General Manager."

Carrier, in support of its position with respect to Mr. Olson's participation in the procedure, presented evidence of an instance in 1978 when Mr. Olson responded in behalf of the General Manager to a claim and also an instance with a final letter dated January 17, 1980 in which the same substitution took place. Petitioner objects to this evidence being considered, since it was not presented during the handling of this dispute on the property. The Board notes that Petitioner's position with respect to the tardiness of the data presented is correct. However, it also must be noted in passing that even if the evidence was timely, two isolated instances (one somewhat ambiguous) do not establish a binding past practice.

The Organization argues that the decision and letters from Mr. Olson, who was not the authorized officer to receive the final appeal, was clearly invalid and a violation of Rule 21. The Organization maintains that the responsibility for disallowing claims appealed to the third step is coexistent with the authority to receive appeals at that step. A series of awards dealing with similar problems are relied on by Petitioner, including Third Division Awards 4529, 11374, 17696, 18002, 22800, 22822, 22783, 22710, 22600 and FLB 1844, Award No. 14.

Carrier insists that its handling of the Claims was proper and that Mr. Olson answered the Claims within the time limits on authority vested in him by the General Manager. It is pointed out that the language of Rule 21 provides only that the Carrier shall notify whoever filed the claim of its disallowance, rather than specifying that a particular officer of Carrier be designated for this purpose.

All the authorities cited by the parties have been reviewed and it is clear that the great weight of authority in closely related circumstances supports the Organization's position. Those awards hold that the officer of the Carrier who had been previously designated as the individual to receive claims or appeals must be the officer who responds to such claims or appeals. For example, this Board in Award 22710 stated:

"We have reviewed the authority submitted by the parties. The great weight of authority supports the position of the Organization that the Carrier committed a procedural error when an official other than the one designated to receive and process the claims responded to the claims."

It must be concluded, therefore, that Carrier erred in permitting Mr. Olson to respond to the Step III appeal rather than the General Manager to whom they had been addressed. Particularly in the light of Mr. Olson's own instructions contained in the letter of January 21, 1980, it is apparent that the Carrier violated the Agreement. Under these circumstances, we cannot reach the merits in this dispute.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By

Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of July 1982.

