NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24232
Docket Number MW-24298

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Kansas City Southern Railway Company
((Milwaukee-Kansas City Southern Joint Agency)

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

(1) The five (5) days of suspension imposed upon Section Laborer Trent Vogel for alleged 'violation of Rules 11 and 14' was without just and sufficient cause (Carrier's File 013.31-239).

(2) The claim as presented by Vice Chairman R. T. Arnold on July 14, 1980 to General Superintendent B. R. Amiss shall be allowed as presented because said claim was not disallowed by General Superintendent B. R. Amiss in accordance with Rule 14-1(a).

(3) As a consequence of either or both (1) and/or (2) above, Claimant Trent Vogel shall be allowed

'all time lost both regular and overtime
from June 9, 1980 thru June 14, 1980'."

OPINION OF BOARD: This dispute brings into consideration two issues; (1) Rule 14-1(a) which requires that claims not denied within 60 days shall be allowed without such allowance being considered a precedent. Thus, if it is the Board's determination that the procedural requirements of Rule 14-1(a) were indeed violated the claim should be allowed without consideration of the merits. On the other hand, if the Board determines that there was no violation of Rule 14-1(a), then we must proceed to examine the merits of the disciplinary action to determine whether it was for just and sufficient cause, as required by Rule 13.

Rule 14-1(a) places mutual responsibilities on the Organization and Carrier. The Organization must file claims within 60 days. If it fails, the Carrier may disallow such claims on procedural grounds, as failing to meet the time requirements of the rule. Similarly, the rule requires the Carrier to notify the Organization of disallowance of a claim within 60 days, and failing to meet this time requirement, the claim is allowed as presented but shall not constitute a precedent.

In this case we have the unsupported statement of R. T. Arnold, First Vice Chairman, in letter of October 7, 1980 that no reply to his claim had been received within the time limit requirements of the Rule and therefore was due and payable under Rule 13. He apparently inadvertently erred in citing Rule 13 rather than Rule 14-1(a) in support of his contention. He corrected this error in his letter of May 12, 1981, to Mr. Deveney of the Carrier in a further appeal of the claim.

The Board cannot accept Organization contention as an inexorable fact that Carrier clearly failed to comply with the time requirements nor that Carrier's highest appeals officer ignored the default issue. The facts are relatively simple on the default issue. The Organization filed a claim on July 14, 1980. In a follow-up letter of October 7, 1980, Organization stated no reply had been received and concluded the time requirements had been violated thus triggering provisions requiring default payment. In reply, the Carrier wrote on October 21, 1980, stating the claim had been denied by letter of August 15, 1980, and enclosed a copy thereof.

The record shows it to be the practice of both sides to rely on regular mail service in communications on claims. While it is recognized use of registered or certified mail with receipt notification would be more reliable in establishing proof the parties have not chosen this service as a usual practice. In all, some nine communications were exchanged by regular mail on this claim, and in only one was the issue of non-receipt raised. It must also be noted the denial letter of August 15, 1980, was prepared over the signature of Superintendent Amis and on stationary carrying the letter head of the Company. The Organization did not maintain that the letter of August 15, was not prepared or mailed, only that it was not received by Mr. Arnold of the Organization to whom it was addressed.

The use of regular mail service has been in effect as the usual means for submitting and processing claims for a period of many years. Alleged failure by either side to comply with the time requirements of Rule 14-1(a) must be supported by probative evidence, not a mere allegation. In this case the balance of evidence appears to favor the Carrier contention that its denial of the claim was timely.

As stated in Third Division Award No. 10490:

> "it is the opinion of this Board that both parties have a right to rely on the regularity of the mail and since the letter was mailed within the 60 day period Article V, Section 1 (a) was not violated by the Carrier. This is especially true where usual handling of claims is by mail. See Award No. 3541, Second Division where Board held:
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> > 'This presumption being that both parties are telling the truth, we find that carrier gave timely notices of disallowance of claims required by the Time Limit Rule and that the Local Chairman failed to receive them, so neither side is in default of the rule.'
>
> This principle will work both ways. Where the Organization asserts that it has mailed an appeal within the 60 day required period, producing a copy of the letter from its files, the Carrier alleges it did not receive the letter the presumption then would be that the Organization had not violated the 60 day rule."

In the circumstances it appears fair to conclude that if the Carrier letter of August 15, 1980, had not been delivered it would have been returned to the Carrier. The use of regular mail service by the parties assumes mutual faith and integrity just as in all other business relationships. If, as a result of this experience, they conclude that the use of regular mail service is no longer satisfactory for claims handling communications they may conclude to use certified or registered mail with return receipts. This, of course, is their decision to make.

Now, turning to the merits of the claim. In the first place we find the procedural requirements of Rule 13 were satisfied in that a hearing was held to determine the facts, the employe was notified of the hearing and was representated by a representative of his choice. The facts as developed at the hearing show the Claimant, Trent Vogel, employed as a section laborer in the Extra Gang 5 under supervision of Foreman Leo J. Favoroso and Assistant Roadmaster Lawson Hullinger.

Company rules require that employes must not absent themselves from their employment without proper authority. It is not disputed that Claimant was absent from duty on May 10, 1980 without proper authority. It is pointed out by the Organization, however, that Claimant attempted to secure proper authority from Roadmaster Hullinger but was prevented from doing so by alleged demeaning and harrassing remarks. In support of this contention, Organization refers to following testimony by Claimant from the transcript of the hearing:

"Tr. P5:

Q. What reason did you give to Mr. Hullinger when you asked to be excused from work for Sat. May 10, 1980?

A. First of all I didn't ask for a full day, I just asked to be off a half a day, and I never had a chance to give him any reason.

Q. Mr. Vogel do you have any further statement that you wish to make in connection with this investigation?

A. Yes."

"Tr. P.6:

I never had a reason to tell Mr. Hullinger why I was wanting off because he started talking and saying you country boys just don't know how to make enough money, and after he said that I just started to agreeing with him and never told him that I had hurt my foot."

Organization also pointed out that Claimant had two reasons for requesting one day's absence. First, he had an appointment with an eye doctor to correct a condition causing discomfort. Secondly, he injured his foot and was suffering pain.

Mr. Favoroso testified as to knowledge of Claimant's foot injury although he did not see the injury occurrence. Mr. Hullinger testified that Claimant approached him at 10:00 A.M. on Friday, May 9 and requested to be relieved on the next day because he had a trip planned. Mr. Hullinger denied any conversation with Claimant during the afternoon of May 9 and stated he did not find out about Claimant's foot injury until the morning of May 10 when he was told by Foreman Favoroso.

Claimant Vogel testified he approached Mr. Hullinger at 3:00 P.M. on Friday, May 9, after he had injured his foot. He denied he had approached Mr. Hullinger during the morning of that day. Claimant also testified he went to the doctor on Saturday, May 10 at 11:45 and otherwise spent the day at home. He stated the pain in his foot bothered him on that date. This, and his appointment with the eye doctor were the reasons for his absence from work on that date.

Evidence is conflicting as to the conversations between Claimant and Roadmaster Hullinger. We can understand Carrier need for services of employes to take care of emergency track work as was planned for Extra Gang 5 on May 10. However, in view of the testimony it appears doubtful the Roadmaster was sufficiently diligent in determining the reasons for Claimant's request to be absent from work on that date. Had he taken the time and concern over the physical problems of the Claimant, particularly the foot injury which had occurred on the job, he might very well have granted the request for time off. Lecturing the Claimant over the failings of "country boys" hardly seems the proper response of a Supervisory Roadmaster in the circumstances reported.

Third Division Awards 20148 and 23039 dealt with a problem similar to the one presented here and are quoted, in part, below:

Award 20148:

"Surely an employee should be allowed to explain reasons for tardiness and/or absences when charged with specific offenses. To rule otherwise would nullify, in most cases, the very purpose of an investigation. As noted in Award 19589 (Blackwell):

> 'If the person accused can show that he was not responsible for the absences because of reasons beyond his control, such as illness, or other excusable reasons, he should not be subject to discipline.'"

Award 23039:

"While the rule clearly requires an employe to obtain authority prior to being absent, it also obligates his supervisor to be available to receive such requests."

Based on the review of evidence as summarized above it is the Board's opinion that the suspension of Claimant for five days was unreasonable and without just cause and that he should be paid for time lost as claimed.

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: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of March 1983.