

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25130
Docket Number MS-25227

M. David Vaughn, Referee

(Brenda L. Williams
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation

STATEMENT OF CLAIM:

"Claim of Lead Service Attendant Brenda L. Williams that she be restored to service and compensated for all losses with seniority and other fringe benefits unimpaired - based on the wrongful termination of Ms. Williams by the National Railroad Passenger Corporation on December 23, 1981 in violation of substantive due process, constitutional and statutory rights, including Discipline Rule T of the Interim Agreement dated November 3, 1973 between the carrier and the organization.

A review of the transcript of the purported investigative hearings dated December 14, 15, 1981, together with administrative appeal pleadings, support the fact that the charges of Interim Rule T violations were unfounded and the penalty imposed was unduly harsh, discriminatory, unwarranted and malicious. The carrier at no point in time evidenced proof of alleged dishonesty - as none existed."

OPINION OF BOARD: Claimant Brenda L. Williams was employed by the Carrier as a Lead Service Attendant. Following a routine investigation by Carrier's Loss Prevention Agents, the Carrier ordered an investigatory hearing. Following that hearing, the Carrier dismissed Claimant for violation of stated Rules of Conduct and Amtrak Security Policies.

Following Claimant's dismissal, the Organization progressed a claim under the Agreement. By letter dated February 18, 1982, Attorney Harvey L. Taylor advised the Carrier that his office represented Claimant in all matters relating to the appeal of her dismissal. Claimant's Organization continued to pursue the appeal through the contractual procedure. On June 4, 1982, the Carrier's Director of Labor Relations, the highest designated Appeals Officer under the provisions of the applicable Agreement between the parties, denied the Organization's appeal. Claimant was notified of the denial.

Under Rule 19 of the Agreement,

"Any appeal from the decision of the Director of Labor Relations must be made to a proper tribunal, as established under the provisions of the Railway Labor Act, within nine months of the date of such decision."

On September 3, 1982, the Carrier's highest designated official denied the Organization's appeal from his rejection of the claim, following a request by the Organization for reconsideration and further discussion. However, that response to the Organization's request clearly followed the Director's unequivocal rejection of the claim and neither constituted the start of the time period for appeal, nor did it toll the running of the appeal period.

Under the applicable Agreement, Claimant had nine months from June 4, 1982 (that is, until on or about March 4, 1983) within which to assert her individual claim with the National Railroad Adjustment Board, which is, under the Statute, her only appropriate avenue of administrative review. 45 U.S.C. 153 First (i).

On September 29, 1982, Claimant's private Attorney sent the Carrier a letter purporting to appeal the Carrier's denial of the claim to the pertinent Public Law Board. It is, of course, the case that individual Claimants have no standing to progress a case to a Public Law Board. That prerogative rests exclusively with the Carrier and the Organization. 45 U.S.C. 153 Second. From the record there is no indication that an appropriate Public Law Board was even in existence at the time the Attorney sent his letter. By letter of October 19, 1982 the Carrier informed Claimant's private Attorney that it could not accept his appeal. The Board concludes that, under the circumstances, the September 29th letter could not and did not constitute a valid appeal.

Claimant's private Attorney asserts that he thereafter mailed a notice of appeal to the NRAB by letter dated February 17, 1983. The Board did not receive it. The letter was not mailed in such a manner as to provide any verification that it was deposited with or sent by the Post Office or that it was received by the NRAB.

Claimant's private Attorney states that he contacted the NRAB by telephone in the "late spring" of 1983 and, upon learning that his prior appeal had not been received, sent by letter of June 14, 1983 a copy of his February 17, 1983 letter. Insofar as the record shows, receipt of the June 14, 1983 letter and enclosure marked the first time the NRAB had received Claimant's appeal. By letter dated July 22, 1983, Claimant's Attorney filed a notice of intent to file an appeal and submission which included for the first time a formal Statement of Claim. The June 14th letter was untimely by about three and one-half months. Indeed, the nine-month filing period had already expired at the time the Attorney made his "late spring" telephone call to the NRAB.

Claimant's Attorney had, on May 13, 1982, filed suit against the Carrier and the Organization. The suit was dismissed for Claimant's failure to exhaust her administrative remedies. The suit did not stay the period of time within which Claimant was required to file with the NRAB. Union Pacific Railroad Co. v. Sheehan, 489 US 89, 99 LRRM 3327 (SCT, 1978).

In its submission, the Carrier has challenged under Rule 19 of the applicable Agreement the jurisdiction of the NRAB based on the untimeliness of Claimant's submission. It is clear that the NRAB accepts filings, including appeals, by first-class mail. However, it is also clear from a review of NRAB precedent that a filing for purposes of satisfying the Board's procedures is not deemed to have been made until it is received, that the burden of proving receipt is on the sender, and that the risk of using a method of filing which provides no proof of receipt rests also with the sender:

"Notification connotes communication of knowledge to another...The method of communication in the instant case was left to the discretion of the party bearing the responsibility of notification and [that sending party, in the case quoted, the Carrier] apparently elected to use the regular first class Mail service rendered by the Post Office...Had the [sending party] elected to use certified or registered mail service offered by the Post Office..., probative evidence of delivery would be available to support [the sender's] assertion.

[Recipients, in the quoted case, employees] cannot be held responsible for the handling of [sender's] mail by the Post Office...It was the responsibility of the [sender] to be certain that the letter...was properly delivered to the [recipient's representative]." Award 14354.

Award 14354 was quoted with approval and its rule adopted in Third Division Award Number 20763. See also Awards 10742, 16000, 17227, 17291, and 17999 cited therein, and many others. Thus, in contrast to the procedural rules of some other adjudicatory bodies, the NRAB makes filing complete only on receipt and places the burden of non-receipt on the sender.

Here, the record is devoid of proof that Claimant made any filing with the NRAB, within the meaning of its procedures, prior to June 14, 1983. Under the applicable Agreement, any filing made subsequent to March 3, 1983 was untimely. Since the burden of demonstrating timely receipt was on Claimant and was not met, the Board concludes that the appeal was untimely.

In circumstances in which the appeal was untimely, and where it has been challenged by one of the parties on that basis, as is the case here, the Board's precedents are clear that the Board lacks jurisdiction and cannot reach the merits of the case. The appropriate disposition of such a claim is dismissal. See, e.g., Third Division Awards 21347, 21727, 21868, 21983, 22075, 22133, 22449 and 23095. Award 21868 stated the Board's rule clearly:

"...Claimant failed to progress this claim to this Board within the nine month requirements of [the applicable Rule].

Under the circumstances there is no alternative but to dismiss the claim."

The Board's precedent derives from Section 153, First (i) of the Railway Labor Act, which limits access to the NRAB to those disputes which are processed in the "usual manner", that is, in accordance with the applicable Agreement. As NRAB precedents make clear, the Board has strictly applied its time limits for filing appeals; and the Board's procedures must be respected. Thus, since the appeal to the NRAB is deemed to have been filed more than nine months after June 4, 1982, the dispute is untimely and the case must be dismissed.

The Board has, however, also reviewed the record of the claim on its merits. The Board would conclude, based on the factual record, that the action of the Carrier is supported by substantial evidence and should not be overturned as excessive or an abuse of discretion.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

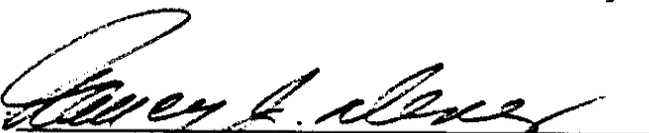
That the claim be dismissed because the dispute was untimely filed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1984.

