

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26392
Docket Number SG-26726

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(The Chesapeake and Ohio Railway Company
(Pere Marquette District)

STATEMENT OF CLAIM: "Claims on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Chesapeake and Ohio Railway Company (Pere Marquette):

On behalf of Signal Maintainer working independently J. S. Jones:

Case No. 1

(a) Carrier violated the parties' Schedule Agreement, as amended, particularly Discipline Rule 701, when on September 4, 1984 it assessed Mr. Jones' personal record with a reprimand for his allegedly being absent on Friday, February 3, 1984.

(b) Carrier should now be required to remove the reprimand, including any reference thereto, from Mr. Jones' personal records. General Chairman file: 84-4-PM. Carrier file: SG-738.

Case No. 2

(a) Carrier violated the parties' Schedule Agreement, as amended, particularly Discipline Rule 701, when on September 4, 1984 it assessed Mr. Jones' personal record with an actual suspension of ten (10) working days to be served from September 5, 1984 through September 18, 1984 for his allegedly being absent on February 22, 23 and 24, 1984.

(b) Carrier should now be required to compensate John S. Jones for all time lost and clear his personal record of all reference thereto. General Chairman file: 84-4-PM-1. Carrier file: SG-739.

Case No. 3

(a) Carrier violated the parties' Schedule Agreement, as amended, particularly Discipline Rule 701, when on September 4, 1984 Mr. Jones was dismissed for allegedly falsifying his timesheet for April 10, 1984.

(b) Carrier should now be required to reinstate John S. Jones with all rights and benefits unimpaired and compensate him for all time lost. General Chairman file: 84-13-PM. Carrier file: SG-740."

OPINION OF BOARD: Claimant was employed as a Signal Maintainer at Dearborn, Michigan and held a seniority date of June 6, 1977.

By letter dated February 13, 1984, Carrier's Manager-Engineering J. R. Rymer notified Claimant to attend a Hearing on February 28, 1984, concerning Claimant's alleged absence without permission on February 3, 1984. By letter dated March 2, 1984, Rymer charged Claimant with being absent without permission on February 22, 23 and 24, 1984. Hearing in that matter was set for March 7, 1984. By letter dated April 19, 1984, Claimant was charged with falsifying his time sheet on April 10, 1984, and Hearing was set for May 1, 1984.

The Hearings were postponed several times by mutual consent and were eventually held on August 21, 1984, after the last notice dated June 22, 1984. Claimant did not attend the Hearings. The Transcripts of the Hearings show that Claimant was absent without permission on the dates charged. Further, the record shows that Claimant stated on his time sheet that he was present on April 10, 1984, for a full eight hours when he was not present for that amount of time.

By letters dated September 4, 1984, the Carrier issued Claimant a reprimand for being absent without permission on February 3, 1984; a ten day suspension for being absent without permission on February 22, 23 and 24, 1984, and a dismissal for falsifying his time sheet on April 10, 1984. In light of the dismissal, the Carrier advised Claimant that he would not be required to serve the ten day suspension.

By letters dated September 12, 1984, the Organization appealed and requested a rehearing under Rule 701(e) and further requested that the three disciplinary matters involved in this case be consolidated. By letters dated September 17, 1984, the Carrier's Division Manager W. B. Vander Veer declined the requests for rehearing on the basis that he felt the discipline issued was correct and proper.

By letter dated October 15, 1984, the Carrier's Senior Manager Labor Relations W. C. Comiskey wrote the Organization stating that the Carrier was agreeable to a rehearing if desired by the Organization. By letter dated November 7, 1984, the Organization reaffirmed a conversation held on October 9, 1984, wherein the Organization declined the offer for a rehearing on the grounds that the time limit for holding the rehearing as requested by the Organization on September 12, 1984, had previously expired under the provisions of Rule 701(e).

The Organization argues that the discipline should be rescinded and Claimant returned to service and made whole because the Hearings were not held by the Carrier within 15 days as required by Rule 701(c) and because the Carrier failed to timely hold a rehearing as required by Rule 701(e). In its Rebuttal, the Organization points out that the dispute was progressed primarily on the procedural issues concerning Rules 701(c) and (e).

Rule 701 states in relevant part:

"(c) Hearing shall be held no sooner than ten (10) and no later than fifteen (15) days of the date charged.

* * *

(e) Appeal from a decision may be made to each succeeding higher officer, up to and including the highest officer designated by the Carrier to whom appeals may be made. Such appeals must be filed, in writing, within twenty (20) days from date of each decision, and a copy furnished to the official appealed from. Rehearing, if desired by either party, will be held within twenty (20) days of appeal, and decisions on appeals, whether rehearing is or is not held, will be rendered within sixty (60) days.

* * *

(j) The time limits provided in this Rule may be extended by mutual agreement, which shall be in writing."

With respect to the Organization's contention that the Carrier violated Rule 701(c) by not holding the initial Hearings within 15 days, we find that argument lacking in merit. The record is clear that the postponements were by mutual agreement which is specifically permissible under the Rules. See Rule 701(j). By agreeing to postpone the Hearings in this case, the Organization is barred from raising the issue of timeliness under Rule 701(c).

With respect to Carrier's failure to hold a rehearing within the 20 day limit found in Rule 701(e), we find that the Organization's position is well taken in that a violation of that Rule has been committed. Rule 701(e) requires that a rehearing, if desired "will be held within twenty (20) days of appeal" The Organization appealed and requested a rehearing on September 12, 1984. In accord with the terms of Rule 701(e), a rehearing should have been held by October 2, 1984. The Carrier did not agree to hold the rehearing until after the time limit for holding the rehearing expired. Therefore a violation of the Rule has been shown. Whether or not the rehearing would have been superfluous as argued by the Carrier is irrelevant. The right to that Hearing is guaranteed by Rule 701(e). See Third Division Award 19064.

However, we disagree with the Organization that under the circumstances of this case that Claimant should be returned to service and made whole as a result of the procedural violation. As noted, the record demonstrates that by letter dated November 7, 1984, the Organization confirmed that on October 9, 1984, the Carrier, through E. Norton, orally offered to the Organization's General Chairman a rehearing as requested by the Organization, which offer was declined on that date. The Carrier renewed the offer in writing by letter dated October 15, 1984, and the Organization again declined the offer by the letter dated November 7, 1984. Therefore, in light of the offer for a rehearing and the rejection of the same, we believe that the relief in this matter should be limited compensation for time lost during the period that the Carrier delayed in agreeing to hold the rehearing (October 2 through October 9, 1984). The record contains no evidence that Claimant was prejudiced by the delay in granting the rehearing. We recognize that in Third Division Award 19064 the Claim was sustained in its entirety when the Hearing at issue therein was not provided. However, in that case there was no offer by the Carrier, as here, to hold the Hearing.

We further recognize that numerous Awards have strictly and appropriately held the parties to time limits of their Agreements and the failure to adhere to those contractual time limits has resulted in either a sustaining or denying Award. See e.g., Third Division Awards 22748, 19725, 11757, 8501; Second Division Award 8089; Fourth Division Award 3539. A party's disregard of its contractual mandates has been considered at that party's peril. Third Division Award 20238. However, under the unique circumstances of this case, we do not believe those Awards strictly enforcing the time limits are applicable in light of the fact that aside from the Carrier's offer to grant a rehearing and the Organization's refusal, in this case the Organization could have had a rehearing at the next highest appeal level - an opportunity that it did not seek. See Rule 20(e). Indeed, had the Organization sought such a rehearing, the argument it makes herein may well have been rendered entirely moot. Thus, under all of the circumstances presented in this case, we are of the opinion that the Rule 701(e) violation is in the nature of a technical violation which does not require a full sustaining Award. See e.g., Third Division Award 20238, *supra*; Second Division Award 7505.

Under the circumstances presented, we must reject the Carrier's argument that no remedy can be imposed since no penalty provision is found in Rule 701 for this kind of Rule violation. Such a holding in this case would permit the Carrier (and under the appropriate circumstances, the Organization) to violate the time provisions of the Rule at will. By awarding a remedy in this case we are not, as the Carrier argues, writing a provision into the parties' Agreement. We are merely formulating a remedy to fit the contractual violation.

In the Organization's initial Submission, reference is made to a contention that Claimant did not receive a fair Hearing on the charges. We find nothing in the record to support that argument. Review of the record before us reveals that the Claim must fail with respect to the merits. The charges were sustained.

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 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

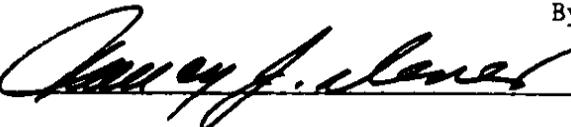
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1987.