

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Burlington Northern Railroad Company (formerly The
(Colorado and Southern Railway Company)

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

(1) The ten (10) days of suspension imposed upon Grinder Operator G. Martinez for alleged failure to obtain authority prior to his absence from duty on June 28, 1984, was in violation of the Agreement (System File C-9-84-/DMWD 850215).

(2) Division Superintendent E. M. Martin failed to disallow the claim (appealed to him under date of September 13, 1984) as contractually stipulated within subsections A and C of Rule 42.

(3) As a consequence of either or both (1) and/or (2) above, the claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On July 3, 1984, the Claimant was advised to attend an Investigation to determine facts with respect to his alleged absence without authority on June 28, 1984, while working as a grinder operator at the Carrier's Pueblo rail welding plant. The Investigation was held and on July 27, 1984, the Claimant was advised that he had been found guilty as charged and he was assessed a ten (10) day suspension from service, with a letter of discipline placed in his file.

This discipline was appealed by the General Chairman to the Division Superintendent on September 7, 1984. On October 5, 1984, the appeal was denied by the Chief Engineer, Maintenance. The former is located in Denver, Colorado where the appeal was directed. The latter is located in Overland Park, Kansas. On November 19, 1984, the General Chairman wrote to the Regional Vice President-General Manager of the Carrier's Denver Region with request that the Claim be forfeited because the Division Superintendent had not, as of that date, "responded to the claim" filed on September 7, 1984, and was thus in violation of the 60 day time-limit Rule. In this correspondence the General Chairman states the following which is cited here in pertinent part:

"In letter dated October 5, 1984, Mr. J. R. Masters, Chief Engineer Maintenance, from Overland Park, Kansas, answered this claim. We do not know who Mr. Masters is, however, we do know that he is not an officer of the company involved in the claim handling procedure. That procedure was outlined in letter from Mr. C. L. Melberg, dated October 21, 1982, file MW-10(a), to this office whereby he states that with respect to discipline cases, initial claims should be presented to Division Superintendent. We complied with these instructions and submitted this claim to Division Superintendent Martin. By Agreement Rule 42 the responsibility of allowing or disallowing this claim is incumbent upon the Division Superintendent."

Rule 42(a) reads in pertinent part:

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

The Board has had a number of occasions to deal with the interpretation of the language of this provision of Rule 42 (See most recently Third Division Award 27852; and Third Division Awards 26328, 27590 as well as older Third Division Awards 20790, 22710, 23091, 25091 inter alia). Award 27590 is particularly pertinent because it surveyed prior Awards and this survey

need not be repeated here. There has been inconsistency in precedent dealing with the proper intent of the phrase, found in Rule 42(a), which states that "...the company shall, within sixty (60) days from the date same is filed..." notify the party filing the Claim the reasons for its disallowance. Sometimes the inconsistency in arbitral conclusions about this issue is more apparent than real because the Board has denied or sustained claims dealing with this Rule for different reasons, as both Award 27590 and more recently Third Division Award 27852 has underlined.

In the instant case, the Organization argued early on property that a procedure was outlined in 1982 by the Carrier for handling discipline claims and that such claims should be presented to the Division Superintendent. The pertinent part of that letter by the Carrier's Director of Labor Relations to the General Chairman states the following:

"With respect to discipline cases, initial claims should be presented to Division Superintendent J. C. Pohl at Denver. An intermediate appeal will then be to the Regional Vice President - General Manager, Mr. W. L. Arntzen, Room 2000, Executive Towers, 1405 Curtis Street, Denver, COLORADO 80202 (holding of conferences and other handling as may be appropriate may be delegated to the Assistant Vice President.).

Final appeals on discipline matters should be made to the highest officer of the Carrier, Mr. C. L. Melberg."

After this was first brought to the Carrier's attention, it simply ignored this issue in subsequent handling of this case on property. The procedure clearly states that those to handle discipline Claims and appeals are the Division Superintendent, the Regional Vice President-General Manager and the highest office of the Carrier (Director of Labor Relations), and "conferences and other handling as may be appropriate may be delegated to" the Assistant Vice President. Nowhere does this order of procedure state that the Chief Engineer - Maintenance should be involved. If the Carrier wished this officer to be involved, it would have been a simple matter to have named him since the Organization at no time, in the record, disputed these procedural steps laid out by the Carrier. The Organization's argument is that once the procedures were laid out, the Carrier was bound by them.

Rule 42(a) does not designate which Officer is to receive claims and appeals and which is to respond. According to accepted norms of contract construction, the Board must conclude that this provision uses general language. As a question of arbitral principle, however, the intent of general language is best found by searching for written or otherwise past practice between the parties. In view of evidence of record found in the 1982 Letter by the Carrier to the Organization, it would be an unreasonable construction of the language of Rule 42(a) for the Board to conclude that any other officer than those named in that letter intervene in the claim and appeal process dealing with discipline issues. Indeed, such conclusion would undermine the reason itself

for this communication by the Carrier to the Organization and relegate it to the unexplainable. The Carrier was in violation of the intent of Rule 42(a), given the evidence of record, and the Claim must be sustained. The record before the Board in this case does not require decision on more general principles found in arbitral precedent dealing with whether the officer to whom the claim and/or appeal is directed is required to respond and so on. The fact is that in the instant case none of the officers outlined in the written procedures responded within the required time-limits to the Claim, and this Award addresses only that more narrow issue.

The Carrier argues in its submission that the 1982 letter to the Organization refers to a seniority district other than the Pueblo rail welding plant which is a seniority district of its own and is therefore not applicable to the instant dispute. The Board has studied the record closely with respect to this technical point and since it is a de novo argument which is not part of the exchange on property it cannot be used, in accordance with Circular No. 1 and abundant arbitral precedent, in the Board's deliberations in the instant case (See Third Division Awards 24509, 24663, 26357 inter alia).

In view of the Board's conclusion on this procedural objection by the Organization it need not address other procedural issues raised by either party and/or the merits of the case itself.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1989.