

The Third Division consisted of the regular members and in addition Referee Mary H. Kearney when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
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(Maine Central Railroad Company/Portland Terminal
(Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10172) that:

1. Carrier violated the Agreement between the parties when on March 17, 1986 it dismissed Clerk Bruce M. Toner from service of the Carrier.

2. Carrier shall be required to reinstated Clerk Bruce M. Toner with all rights and privileges unimpaired and compensate him for all time lost as a result of such violative action.

3. Carrier shall further be required to compensate Clerk Bruce M. Toner interest at the rate of 18% per annum compounded on the anniversary date of this claim for all monies due it Item 2, supra."

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.

By letter dated March 17, 1986, the Carrier dismissed Claimant, a Clerk, from service for an incident which occurred on March 12, 1986, wherein Claimant was arrested for obstructing a railroad crossing with his truck as a train approached. The Organization and Claimant requested a Hearing on March 22, 1986. A Hearing was scheduled for April 10, 1986, but was postponed. During this time period the BMW was involved in a strike action against the Carrier. The Hearing was ultimately convened on August 5, 1986. Based on the Findings at the Investigation the Carrier upheld Claimant's discharge.

The Organization contends that the Carrier violated Rule 36 when it failed to timely grant a Hearing on the charges against him and that this error by the Carrier is sufficient to overturn any discipline imposed upon Claimant.

Rule 36(b) provides in part:

"...a fair and impartial hearing on the precise charge or charges shall be held within ten (10) days of date hearing is requested..."

Rule 36(e) states:

"The time limits provided in this rule may be extended by mutual agreement."

Construing the evidence in the record most favorably to the Carrier it is apparent that the General Storekeeper, the appropriate Carrier Officer, did not receive the request for a Hearing until sixteen days after it had been sent and that the delay was caused at least in part by the work stoppage. On April 7, 1986, the date he received the request, the General Storekeeper attempted to immediately schedule a Hearing concerning the charges against Claimant. He sent notices to Claimant and the Organization Representatives informing them that a Hearing was to convene at 10:00 A.M. on April 10, 1986. The record shows that none of these parties received the notice in time to allow them to attend the Hearing. The Carrier then did not hold a Hearing on the charges against him until August 5, 1986.

In defense of the delay the Carrier maintains first that the Organization "tacitly" agreed to postpone the Hearing. The record, however, fails to affirmatively show that the Carrier and Organization so agreed. Instead a letter of appeal, dated August 26, 1986, from the General Chairman to the Carrier's Director of Human Resources, indicates that the Organization had on several occasions requested a Hearing. This assertion was unchallenged in subsequent correspondence from the Carrier. Accordingly, the Board has no basis in the record to conclude that the decision to postpone the Hearing was mutual.

Secondly, the Carrier states that it delayed the formal Investigation because it presumed that Claimant as a Union member would not cross the picket line to attend a Hearing. The cases cited by the Carrier in support of this position demonstrates that the Board has previously recognized the existence in the industry of the presumption that Union members will not usually cross a picket line. (Third Division Award 20427. See also, Second Division Award 4494.)

The question before us is whether the Carrier was justified in relying on this presumption when it postponed the formal Investigation herein

beyond the 10 days allowed under Rule 36. The Rule at issue concerns a procedural process to which the parties jointly agreed. Rule 36(e) clearly indicates that the parties intended that both the Carrier and the Organization be involved in the decision to postpone a Hearing. However, the Carrier failed to pursue this available and agreed-to avenue as its first recourse and instead chose to rely on the presumption that Claimant would not cross the picket line in deciding on its own to delay the Hearing. The Board concludes that given the parties intent as expressed in Rule 36(e), the Carrier prematurely and improperly relied on the presumption. In so doing the Carrier violated Rule 36.

In light of our finding that the Carrier violated procedural requirements of the Agreement, we will sustain Parts 1 and 2 of the Claim, as modified below, on this basis without turning to the merits of the charge against Claimant. (Third Division Award 17145.)

In addition to reinstatement and compensation for lost time, the Organization seeks as remedy compensation in the form of 18 percent per annum interest. In Third Division Award 24710 the Board stated:

"The preponderance of decisions indicate that interest is not required to made (sic) the Claimant whole for losses suffered (See, for example, Third Division Award Nos. 20014, 186464, 18633.) Here, the parties did not contract for interest as part of any remedy. Therefore, for this Board to award interest would be to create new Agreement rules."


The reasoning underlying the above is applicable to the instant case. Accordingly, we will not sustain the Organization's request for interest.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1989.