

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: ( Brotherhood of Maintenance of Way Employes  
( St. Louis Southwestern Railway Company

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

(1) The disqualification of Mr. D. L. Wright as a roadway machine mechanic was arbitrary and unwarranted (System File SSW-D-1193/53-870).

(2) Regional Engineer R. A. Engelbert failed to disallow the claim presented to him by General Chairman R. L. Loch on July 18, 1985 as contractually stipulated within Section 1(a) of Article 15.

(3) As a consequence of either or both (1) and/or (2) above, Roadway Machine Mechanic D. L. Wright shall be compensated

'... for all lost wages beginning from April 16, 1985 and continuous thereafter, until such time he is returned to service and his record cleared of being disqualified as a Mechanic.'

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.

The Claimant held seniority as a roadway machine mechanic at the time this dispute arose. He had established seniority in this classification beginning in April 1981, under the provisions of Article 2 of the applicable Agreement, which states in relevant part:

"Employment shall be considered temporary for sixty (60) days following the first day of compensated service pending approval or disapproval of application. Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the carrier must be declined in writing to the applicant."

On April 16, 1985, the Carrier addressed two letters to the Claimant regarding his qualifications as a mechanic. One was a letter of instruction signed by the infield Welder Supervisor and stated that it was "intended to help you carry out your duties as a mechanic in a more workman like, and professional manner." The other, signed by the Regional Manager, stated that "due to your inability to perform your duties as roadway machine mechanic you are disqualified from this position."

On June 3, 1985, the Claimant requested a conference under Article 48 of the Agreement. On July 18, 1985, the Organization filed a claim on behalf of the Claimant on the basis of the Carrier's alleged unjust treatment of the Claimant in disqualifying him and its failure to grant him a conference under Article 48.

On September 23, 1985, the Organization wrote a letter to the Carrier stating that because the Carrier had not responded to the claim within sixty (60) days it must be granted. At that point the Carrier granted a conference under Article 48, and on November 8, 1985, the Carrier sent a letter to the Claimant stating that in the Carrier's opinion, the Claimant was not able to perform his work in a satisfactory manner and that he had been given sufficient time to qualify as a mechanic.

On November 20, 1985, the Carrier sent a letter to the Organization stating that the Organization erred in filing a claim under Article 15 before an Article 48 conference had been held. The Carrier also stated that the Claimant had not been treated unfairly in his disqualification. The Parties could not resolve the dispute and it proceeded to this forum.

As a threshold procedural issue the Organization claims that the claim must be granted because the Carrier failed to respond to the initial claim within sixty days. The Organization relies upon Article 15, which states that if the Carrier does not notify whoever filed the claim of its denial within sixty days from the date of filing, the claim or grievance shall be allowed as presented. Decisions of this Board have held that this obligation is mandatory or absolute and it does not matter whether the initial claim is invalid on its merits. Third Division Awards 9760, 10138, 12233, 20900. According to the Organization, this Board should sustain the claim on this procedural basis without even reaching the merits.

Carrier relies upon another line of decisions which states that if the initial claim is void ab initio, then the Carrier's failure to respond within the time limit is irrelevant and the claim must be dismissed. Second Division Award 8924; Third Division Awards 27656, 26549, 25208. Part of the rationale behind these cases is that "an original defect in perfecting the processing of a claim renders irrelevant or moot further later alleged defects." Third Division Award 25208.

Here, the Carrier contends that the Organization violated Article 48 which gives an employee a right to an unjust treatment conference and which states:

"Failing to dispose of the complaint in such conference, appeal may be taken in accordance with Article 15."

According to the Carrier, the Organization violated the procedure outlined in Article 48 by proceeding with a claim under Article 15 before the conference was held under Article 48. By filing the claim when it did the Organization asserts that the Carrier failed to hold the conference within a reasonable length of time and therefore it had a right to file the claim.

This case is somewhat different than the ones relied upon by the Carrier, where the Organization typically filed a claim too late to meet the procedural guidelines. Here, the Carrier argues that the Organization in effect filed the claim too early.

A claim based upon Article 48 in general cannot be filed until the conference is held. This Rule permits Article 48 to function as it should, to resolve cases with an unjust treatment hearing where resolution is possible, and to avoid the filing of unnecessary claims.

If a Carrier fails to schedule a conference under Article 48 after a reasonable time has elapsed, however, the Organization should have the right to file a claim under Article 15. Otherwise there would be no way to enforce Article 48's requirement that the Carrier hold an unjust treatment conference. Therefore, the Board finds that the provision in Article 48 suggesting that a Claimant or his Organization may not resort to Article 15 until there has been a conference under Article 48 is not absolute. Furthermore, the language in that sentence refers to the timing of an "appeal." Where there has been no initial hearing, no appeal is possible because there is no decision from which to appeal.

Notwithstanding the Board's ruling that the Organization may file a claim under Article 15 even before a hearing has been held, the Organization must allow the Carrier a reasonable amount of time in which to schedule such a hearing. Here, the claim was filed on July 18, 1985, approximately six weeks after the Claimant had originally requested a hearing in a letter dated June 3, 1985. The Carrier asserted in a letter dated November 20, 1985, that the conference was not scheduled earlier "due to circumstances beyond the control of the Carrier." The letter also stated that the conference had been postponed on two separate occasions "at the request of the Organization."

The Organization responded that its representative had rearranged his schedule three times to accommodate the Carrier. It is not clear whether this schedule-juggling occurred before or after the claim was filed. But in any case, the Organization has not established that the reason for the delay was due solely to the Carrier's refusal to hold a hearing.

Furthermore, even if the Organization had established that the Carrier was totally at fault for the delay between the request for a hearing and the filing of the claim on July 18, 1985, this period is not so long as to be unreasonable per se. If the Organization had shown that the Claimant was being kept out of service pending a hearing or some other circumstance demanded a quick hearing, the Board might resolve this issue differently. But because there is no evidence to this effect, and because it is not entirely clear which Party was responsible for the delay, the Board concludes that it was not unreasonable for the conference not to be held or scheduled by July 18, 1985.

Therefore, the Board concludes that the Organization "jumped the gun" in filing this claim before the Carrier had a reasonable length of time to ensure that a hearing was scheduled under Article 48. This is not a case in which a Carrier totally refused to hold a hearing. A hearing was held, and the Board has concluded that the delay was not unreasonable. Therefore, the Organization was not justified in filing a claim until the hearing was held, and the Carrier is correct in asserting that the Organization violated the procedural requirements of Article 48 by filing a claim when it did.

However, the Organization's defect in the original filing of the claim is not as clear-cut as the defects in the cases cited by the Carrier. In each of those cases the Organization filed a claim later than the time limits which were explicitly established between the Parties. Here, there was no established time limit. The Organization had to decide whether a reasonable time had elapsed in which the Carrier should have scheduled a hearing.

Under these circumstances the claim was not void ab initio. However, given the unusual procedural stance of this case, the Board also concludes that the Carrier had a reasonable belief that the claim was procedurally invalid on its face, because no conference had been held under Article 48. Therefore the Board will not conclude that the Carrier erred when it failed to respond within sixty (60) days.

Because the Board has concluded that there is no procedural defect in the case, the Board will consider the merits of the claim, i.e., that the Claimant was not treated fairly when he was disqualified from the mechanic's position. The Carrier has provided ample authority for the view that the Carrier has the ultimate authority to determine the qualifications of an employee. The Board concludes that the Carrier must demonstrate the reasons for an employee's disqualification with substantial evidence when there is a disqualification after the employee has worked a long time in a position for which the Carrier at one time determined he was qualified.

After reading all the documentation in this case, the Board concludes that the Carrier has carried this burden. It has demonstrated that the Claimant's work leading up to the disqualification was so poor on several occasions that it threatened the safety of his equipment and his fellow employees. The Claimant was made aware of this problem and had been disciplined for it prior to his disqualification.

The Board also has considered the statements of the Claimant and his supporting witnesses and concludes that they do not adequately refute the Carrier's evidence. In some cases they corroborate the problems with machines on which the Claimant had worked, and they do not offer convincing alternative explanations for the conditions of these machines.

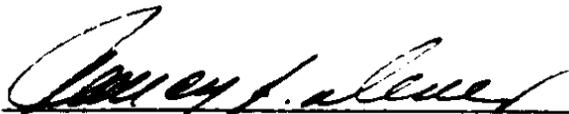
Therefore, the Board concludes that the Carrier has established that it had sufficient cause to disqualify the Claimant from his position. There is not sufficient evidence that the Claimant was treated unjustly or unfairly to support the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
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Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.