

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30998  
Docket No. MS-31420  
95-3-93-3-172

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

(Hotel Employees and Restaurant Employees  
( International Union  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

- "1. That the Agreement was violated when Carrier assessed a Sixty (60) day suspension to Outfit Manager R. L. Williams, beginning November 8, 1991.
2. Carrier shall now compensate Mr. Williams for all time lost resulting from this suspension."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On November 8, 1991, Claimant was notified of an Investigation, to be held November 25, 1991, alleging "that in April of 1989 and May of 1991 you were sexually harassing female employees over a period of time." Claimant received the notice on November 11, 1991. He was withheld from service pending the Investigation.

The Hearing was postponed to and held on December 4, 1991. On December 23, 1991, Claimant was advised that he was assessed a 60 day suspension, beginning with the date he was first held out of service.

The Organization argues that Carrier failed to prove the charge against Claimant. The Organization further contends that Carrier violated Rule 1(a) by unilaterally postponing the Hearing to a date more than 20 days beyond the date Claimant was first withheld from service. The Organization also maintains that Carrier violated Rule 1(c) by not holding the Hearing at Claimant's home terminal, which Claimant contends was Omaha, Nebraska.

Carrier contends that it proved the charges by substantial evidence. Carrier argues that it complied with Rule 1(a) when it scheduled the Hearing within 20 days of the date Claimant was withheld from service. Carrier contends that it postponed the Hearing to allow all witnesses to be present and that the Organization acquiesced by not objecting when notified of the postponement. Carrier argues that Omaha was not Claimant's home terminal and contends that Rule 1(c) allows it to schedule the Hearing in a location different from Claimant's home terminal when scheduling at the home terminal is not practical.

The Board regards the charge of sexual harassment to be very serious. In today's workplace, Carrier not only has the right, but also the legal duty, to take stern disciplinary action against such intolerable conduct. The charge in the instant case was particularly serious, as Carrier maintained that Claimant, an Outfit Manager, created a work environment that was sexually hostile and intimidating for two female employees whom he supervised in a remote location in which they were the only women working with approximately 85 men.

The Organization, of course, hotly contests the Carrier's argument that the charge was proven. Given the seriousness of the charge, we are reluctant to avoid reaching the merits. We find, however, that the procedural objections raised by the Organization tie our hands and that we must sustain the claim on that basis.

Rule 1(a) provides:

"No employee shall be suspended or dismissed without a fair and impartial hearing. Hearing shall be held as promptly as possible, except that if an employee is suspended in proper cases without a hearing, hearing shall be held within twenty (20) days from the date of suspension. . . ."

Rule 1(a)'s language is mandatory. It requires Carrier to hold the Hearing within 20 days of an employee's suspension. In the instant case, the Hearing initially was scheduled within the 20-day period. However, Carrier unilaterally postponed the Hearing to a date beyond the 20-day period.

At the Hearing, the Organization's representative objected to the failure to hold the Hearing in a timely manner. He stated that Carrier failed to request the Organization's agreement to a postponement. Rather, he stated, Carrier telephoned him and told him that the Hearing would be postponed. There is no evidence to the contrary in the record.<sup>1</sup>

Carrier contends that the Organization did not object when informed of the postponement and, therefore, should be held to have acquiesced in it. The Organization, however, was simply presented with a fait accompli; it was not asked if it had any objection. The Organization raised a timely objection at the Hearing.

Prior decisions of this Board make clear that such conduct violates the agreement. Furthermore, they make clear that we must sustain the claim without reaching the merits. See, e.g., Third Division Awards 22258, 23082, 23459, 24237, 24247.

In reaching our decision, we have considered Third Division Award 26309. In that case the Board found a violation when the carrier unilaterally postponed a Hearing beyond the contractual time limits, but did not set aside the discipline. Instead, the Board awarded the claimant backpay for the period of delay in holding the Hearing. That decision, however, involved unique circumstances not present here.

Specifically, the Board in Third Division Award 26309 observed that some prior Awards involving the same carrier had treated similar violations by only awarding backpay for the period of the delay in the Hearing, while others had sustained the claims in their entirety. The Board opined that it would be "manifestly unfair" to sustain the claim in its entirety because the prior Awards had given the parties "mixed signals" concerning the remedy for a time limit violation.

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<sup>1</sup> The Hearing Officer merely stated that he had been advised that a Hearing postponement request had been handled through the Organization representative's department. The Hearing Officer's statement was not based on personal knowledge and there is no evidence in the record of a request to or agreement from the Organization regarding a postponement.

The Board warned the carrier that the time limit "language was negotiated by the parties and it has no meaning if the Carrier continues to assume that it meets its obligation by setting a Hearing within the seven day period and then unilaterally postponing the proceeding to a date beyond the seven day limit only to suffer the potential liability of compensation to the employee for that period of time beyond the seven days." The Award placed the carrier on notice that future violations would result in the Board sustaining the claims in their entirety.

In the instant dispute, there is no evidence of the parties receiving similarly mixed signals concerning enforcement of time limits. In the language of Award 26309, it would leave the language of Rule 1(a) without meaning were we to only award compensation for the delay in holding the Hearing. In accordance with the dominant view of this Board, we sustain the claim in its entirety.

AWARD

Claims sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.