

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31100
Docket No. CL-31686
95-3-93-3-727

The Third Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications
(International Union
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(National Railroad Passenger Corporation
((AMTRAK)

STATEMENT OF CLAIM: "Claim of System Committee of the Organization (GL-10999) that:

In accordance with the Agreement of September 6, 1991, particularly Article XIV - Rule Modifications & Clarifications - paragraph (L) I hereby appeal the unjust treatment conference which was held on June 23, 1992 and has never been answered.

This conference should have been answered in accordance with Rule 24 of the current corporate agreement by July 3, 1992. In view of the fact that the Unjust Treatment conference has not been answered in the prescribed time limits of Rule 24, Ms. Linda Canadiate should now be put back on position of Lead Accounting Clerk-PE and compensated for all monetary loss.

If you do not place Ms. Canadiate back in her position and compensate her for her losses, please consider this a request for an appeal conference to be held.

Please advise date, time and location of the appeal conference."

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 waived right of appearance at hearing thereon.

The Claimant with a seniority date of May 12, 1980, was removed on June 8, 1992 from her partially exempt position of Lead Accounting Clerk. On the same day, the Claimant filed in writing with her supervisor a request for an Unjust Treatment Conference.

Integral to this dispute are following Agreement provisions:

"Article XIV-Rule Modifications and Clarifications

(1) Under the Corporate Agreement, if an employee who considers himself unjustly treated, otherwise than covered by the rules, shall have the right to a conference if written request which sets forth the employee's complaint is made to his supervisory officer within thirty (30) calendar days of cause of complaint. At such conference, the employee may be represented only by a duly accredited representative. The decision may be appealed in accordance with the discipline rule appeal procedure."

"Rule 24 - Discipline-Investigation-Appeal

(b) An employee and his representative shall be given written notice in advance of the investigation, such notice to set forth the specific charge or charges against him. No charge shall be made that involves any offense of which the company has had actual knowledge thirty (30) calendar days or more, except where a civil action or criminal proceeding results from the offense, in which event the charge may be made within thirty (30) days of final judgment. The investigation shall be held at the city of employment within ten (10) calendar days of the date when the employee is notified of the offenses or held from service (subject to one postponement not to exceed twenty (20) days at the request of either party, with further postponements remaining subject to agreement). At such investigation, the employee may be represented by one or more duly accredited representatives. A decision will be rendered by the investigating officer within ten (10) calendar days after the completion of investigation."

The following chronology sets forth the sequence of events involved in the dispute:

- June 10, 1992 - Carrier set June 12, 1992 as the date for the Unjust Treatment Conference postponed at the request of Claimant's Representative.
- June 23, 1992 - Unjust Treatment Conference held. Claimant and her Representative attended. At the conclusion of Conference Claimant was told she had not been unjustly treated and her removal would stand.
- July 27, 1992 - Claimant's Representative wrote Carrier's Division Manager of Labor Relations that there had been no written decision rendered following the June 23, 1992 Conference, and therefore the Claimant should be restored to her former job and compensated for any monetary losses. He added that if the Claimant was not restored to her job, the letter was to be considered as request for an appeal conference. The answer should have been made in accordance with the time limits of Rule 24.
- August 11, 1992 - Carrier wrote the Claimant setting forth reasons why Claimant had been removed from her PE position.
- September 16, 1992 Carrier's Division Manager of Labor Relations wrote Claimant's representative discussing the appeal conference held on September 2, 1992 concerning the Unjust Treatment Conference held on June 23, 1992. The Carrier asserts it complied with all the provisions of the Unjust Treatment Conference provision. It further stated that the provision provided for no time limit, but nevertheless an answer was given in its August 11, 1992 letter.
- September 24, 1992 Organization filed an appeal under Rule 24 to the Carrier's September 16, 1992 discussion of the Unjust Treatment Conference.

October 16, and December 8, 1992

Conference held on the dispute.

January 14, 1993 - Carrier reiterated its denial.

January 20, 1993 - Organization informed the Carrier of its intention to progress the claim to a proper tribunal.

When the parties were unable to resolve the matter, it was progressed to the Board.

The Organization maintains the Carrier is in error when it contends that there is no time limit provision in Article 14. The closing sentence of this provision states:

"The decision may be appealed in accordance with the discipline rule procedure."

The Organization maintains that one cannot appeal a decision unless one has that decision on the record and in hand. When the Claimant was removed from her job on June 8, she filed an appropriate request on the same day for an Unjust Treatment Hearing which was held on June 23, 1992, but 34 days later no decision had been issued (July 27, 1992). This was the date the Claimant's Representative wrote the Carrier of the time limit violation.

The Organization stresses that if under the language of Article 14 an appeal may be taken pursuant to the Discipline Rule procedure, then the conditions which inhere in the Discipline Rule are controlling. The Discipline Rule states that a decision from the Hearing Officer or (the Carrier official conducting the Unjust Treatment Conference) must be rendered within 10 calendar days after the completion of the Conference. The Organization adds that it was not until August 11, 1992 that the Carrier's Hearing Officer issued the purported findings of the Conference. The Organization states this Board has held that the penalty for failure to timely respond to a grievance is payment on the basis set forth in the initial claim.

The Organization asserts that the time limits were negotiated to ensure the procedures were expedited and to prevent undue delays on the property. The Rule demands a written response within a stipulated time frame.

The Organization stresses that on this property the Discipline Rule sets up 30 day time frames for Carrier response at succeeding

levels. It asserts the primary function of this Board is to interpret the Agreement as written. It cannot alter, add or subtract therefrom.

The Organization states that the Carrier committed other procedural errors than the Time Limit provision in its conduct of the Unjust Treatment Hearing. It states the Carrier did not inform the Claimant of the charges that led to her removal from her PE position, prior to her removal. It is a denial of due process for the Carrier to furnish the Claimant with allegations 49 days after the Unjust Treatment Conference and 64 days after she was summarily removed from her PE position. Nor did the Carrier furnish the Organization a transcript of the Unjust Treatment Conference. It states all these matters are provided for in Rule 24.

The Organization notes that the Carrier also adopted the position that it had the unilateral right to appoint and remove employees from PE positions when an employee does not meet the requirements of the position. The Organization asserts that there are many Awards of this Board holding that the Carrier does not have a sole managerial prerogative to select and remove employees from PE positions and the Carrier must be prepared to defend its actions as reasonable and not arbitrary and capricious.

The Organization stresses that the Claimant made a timely and proper request for an Unjust Treatment Conference and when the Claimant did not accept the Carrier's action in this matter, she filed an appeal under the Discipline Rule, but the record clearly shows that the Carrier did not comply with the provisions of Rule 24 - the Discipline Rule.

The Carrier maintains the Organization is in error when it asserts that the Carrier violated Rule 24, the Discipline Rule appeal procedure, because it did not issue a timely written decision following the Claimant's Unjust Treatment Conference. The Carrier further asserts Article 14 does not provide for any time limit requirements. It states time limits start only when the Claimant or the Organization decide to progress the matter under the parties' Discipline Rule.

The Carrier states that at the informal Unjust Treatment Conference on June 23, 1992, its Representatives told the Claimant and her Representative after a detailed discussion of the entire matter, that the Claimant had not been unjustly treated and that her removal from the PE position would stand. The Carrier adds that this language should have triggered the appeal process. However, the Organization took 34 days before it appealed the matter to the Division Manager of Labor Relations. Under Rule 24,

the Organization should have appealed within 30 days. Thus it was the Organization and not the Carrier which breached Rule 24.

The Carrier insists under Article XIV no written decision was required, but the Organization demanded such a decision and therefore it sent the Claimant its August 11, 1992 letter setting forth her inadequacies and the reasons for removing her from her PE job. The Carrier also stressed that the parties have negotiated an Agreement giving it the right to establish certain positions not subject to certain Rules of the basic Agreement. These rights give the Carrier the exclusive managerial prerogative to appoint or remove employees from these PE positions. To allow the Claimant or the Organization to successfully challenge this right through arbitration is to abrogate the negotiated Agreement. The Organization should not be permitted to restrict Carrier rights through arbitration when it has not been able to obtain them through negotiations.

In summary, the Carrier asserts that after the Claimant was removed from her PE position, she requested an Unjust Treatment Hearing. She was granted such a Hearing on June 25, 1992 and was informed by the Carrier that she had not been unjustly treated and her removal from the PE job would stand. The Claimant had been granted the relief that she sought. The Carrier adds that there is no merit to the Claimant's claim for compensation because there is nothing in the unjust treatment language or in any Rule of any Agreement between the parties that provides for the compensation sought for by the Organization. The Carrier cites Awards which it states support its position.

The Board finds that an analysis of the relevant Agreement provisions, i.e., Article XIV and Rule 24, sustain the Carrier's position. Article XIV, the Unjust Treatment Rule contains, per se, no mention of time limits for rendering the decision pertaining to unjust treatment. If the affected employee is not satisfied with the unfair treatment decision, the employee has a contractual right to appeal in accordance with the Discipline Rule procedure of the basic Agreement. We find that the time limits spring into being and become operative after the employee appeals the unjust treatment decision and not before. There are no express time limits applicable to the processing of the unjust treatment matter. To have such time limits in the Unjust Treatment Rule the parties have to negotiate for it. Only when the Claimant or the Organization takes appropriate measures to invoke the appeal provisions of the Discipline Rule do the time limits become operative.

The Organization's appeal of September 24, 1992 and the subsequent actions by the parties utilizing the provisions of Rule 24 were contractually correct, and neither party has interposed any procedural objection to the processing of the claim within the parameters of Rule 24.

The Board finds that since there was no merit to the claim it must be denied.

AWARD

Claim denied.

ORDER

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.