

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35928
Docket No. CL-36133
02-3-00-3-230**

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Intermodal Terminals, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the TCU (GL-12586) (CS 97-073-D) that:

- (1) CSX/Sealand Terminal Inc., acted in a harsh, unreasonable and capricious manner when, by letter dated October 30, 1997, it assessed Intermodal Service Representative James E. White, a ten (10) day suspension. Five (5) days to be served and five (5) days held in abeyance during a six-month probationary period beginning from the receipt of the October 30th letter.
- (2) As a result, Terminals Company, Inc. shall be required to remove any and all record of this investigation and discipline, and compensate Claimant for five (5) days served and compensate Claimant White for his attendance at the investigation held on October 1, 1998.
- (3) The Company is further in violation of Rule 36(a) when it did not respond or notify the Claimant in writing within sixty (60) days of the date the claim was filed the reason the claim was disallowed, as such the claim must be allowed as presented.”

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.

By letter dated September 24, 1997, the Claimant was notified to attend a Hearing. The Claimant was charged with two counts of conduct unbecoming an employee for his actions on September 16, 1997. It was alleged that he had a verbal altercation with a truck driver for Trimex International and secondly, was rude and uncooperative toward CPG employees inspecting freight and providing damage reports. Following the Investigation, the Claimant was notified under date of October 30, 1997 that he had been found guilty as charged.

The Organization asserts both procedural issues and a failure of proof. It also considers the Carrier's discipline harsh and unreasonable. On the property, it maintains that the Carrier failed to provide due process and allow for a fair and impartial Investigation. It argues that there was a fatal procedural error in the Carrier's violation of time limits. On the merits, the Organization points out that the entire case lacks any probative evidence. The Carrier denies any procedural error and considers the finding of guilt substantiated by the evidence and the penalty assessed proper.

Central to this dispute and preliminary to any consideration of the merits is the time limits issue raised herein. In this instant record, the undisputed facts are that a conference was held on January 29, 1999 and the time limits for the Carrier's response were extended for 60 days. Additionally, time limits were further extended by 30 days. By letter dated August 16, 1999, the Organization notified the Director of Labor Relations that it had still not received a response and, therefore, considered "the time limits . . . to have expired." After no response from the Director of Labor Relations, the Organization's next letter dated October 8, 1999 to the Vice President Human Resources requested an answer.

The record indicates that by letter dated October 14, 1999, the Vice President Human Resources replied in pertinent part that:

“ . . . I received the letter yesterday and discussed the matter with Mr. Rafanowicz late last evening.

Files in Labor Relations reflect that responses to all claims were sent June 24, 1999, within extended time limits that had been mutually agreed upon.

Labor Relations has no record of receiving the August 16th letter, however, advises that the time extensions reiterated therein accurately reflect the mutual understandings.

*** * ***

A duplicate copy of the responses will be forwarded via overnight carrier.”

The record on the property reflects that the Organization received the “duplicate copy” and responded on October 19, 1999 by Certified Mail, Return Receipt Requested as follows:

“I have received your response of October 14, 1999 and I personally believe you were given a fairy tale.

CSX did not receive and TCU did not receive.

CSX received and did not send is more realistic, but it will never happen again. All mail to that department will be sent Certified, Return Receipt Requested.

‘Second to None’ does not apply here.

I assume that the attached was never received either!”

The Carrier did not further respond and the record on the property was closed.

The Agreement between the parties required timely denial. While the Board does not comfortably decide issues on procedural grounds, it must do so when the record is persuasive that a time limits violation occurred. The letters of April 14, 1998, May 12, 1998, January 11, 1999 and March 24, 1999 were timely sent and received. There is no evidence in this record of problems with the postal service between the parties. Until the August 16, 1999 letter asserting a time limits violation and requesting information on "when arrangements will be made to satisfy . . . these appeals, as presented in accordance with Rule 36 . . ." there existed no probative evidence of a problem. There is no response in this record to the Organization's October 19, 1999 certified letter. There is no denial in this record by the Director of Labor Relations that letters were mailed over these several independent claims; only from the Vice President Human Resources that "files . . . reflect . . ." they were denied. We are persuaded that a time limit violation occurred and therefore we may not reach the merits.

Accordingly, the Board finds Rule 36 clear. When claims are not timely denied, they must be allowed as presented. We are without power to ignore the Agreement and within this record we cannot conclude that the procedural timeliness issue lacks merit. We are clearly constrained to reach a sustaining conclusion on the procedural issue of timeliness without reaching the merits.

AWARD

Claim 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 22nd day of January, 2002.