**Form 1** **NATIONAL RAILROAD ADJUSTMENT BOARD**
**THIRD DIVISION**

**Award No. 43374**
**Docket No. MW-44505**
**19-3-NRAB-00003-170653**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

**(Brotherhood of Maintenance of Way Employes Division –**
**(IBT Rail Conference**
**PARTIES TO DISPUTE: (**
**(Toledo, Peoria & Western Railway**

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

**(1) The discipline (dismissal) imposed upon employe S. Herndon by letter dated June 30, 2016 for alleged violation of GCOR 1.6, 1.19, 1.1.3 and 1.2.7 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-16-D070-8 TPW).**

**(2) The claim* as presented by Vice General Chairman G. Loveland on July 14, 2016, shall be allowed as presented because the claim was not disallowed in accordance with Rule 21.**

**(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, the Carrier shall rescind the aforesaid dismissal decision and Claimant S. Herndon shall be reinstated to service immediately with seniority and benefits unimpaired, be compensated for any time lost, made whole for any losses associated with the outcome of this investigation (financial, medical, personal, etc.) until he is returned to work.**

***The initial letter of claim will be reproduced within our initial submission."**

**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.**

**After Investigation held June 2, 2016 and by letter dated June 30, 2016, the Claimant – an employee in the Carrier's service since April 2014 – was dismissed for being in an accident while backing a Carrier vehicle without a safety spotter into a Carrier signal mast; failing to report damage; and theft of a belt tensioner purchased with a Carrier credit card.**

**This Board is unable to reach the merits of this dispute. That is because the Carrier did not comply with the time requirements in the Agreement as it did not deny the Organization's appeal within the time limits specified in the Agreement.**

**Rule 21 provides, in pertinent part [emphasis added]:"RULE 21. CLAIM AND GRIEVANCE PROCEDURE**

> **"A. All claims or grievances must be presented in writing by or on behalf of the employee involved to the officer of the Carrier authorized to receive same within thirty (30) calendar days from the date of the occurrence on which the claim or grievance is based. Should any claim or grievance be disallowed, the Carrier shall, within thirty (30) calendar days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.**
> **B. If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within thirty (30) calendar days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of**

**his decision. Failing to comply with this provision, the matter shall be considered closed ...**
**C. The requirements outlined in Sections A and B of this Rule pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer....”**

**The Organization appealed the Claimant’s June 30, 2016 dismissal by letter dated July 14, 2016, which was denied by the Carrier by letter dated August 12, 2016. See Carrier Exhibits B, C.**

**By letter dated August 26, 2016, the Organization appealed the Carrier’s August 12, 2016 denial. See Carrier Exhibit C. By letter dated October 3, 2016, the Carrier denied the Organization’s appeal stating that the Organization’s August 26, 2016 appeal was “... received on August 31, 2016.” Id.**

**Rule 21(A) (which is extended to appeals taken to succeeding Carrier officers through Rule 21(C)) states in no uncertain terms that “[s]hould any claim or grievance be disallowed, the Carrier shall, within thirty (30) calendar days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance” [emphasis added]. The Carrier acknowledged in its October 3, 2016 denial that the Organization had filed an appeal which the Carrier “... received on August 31, 2016.” The Carrier did not deny that appeal until October 3, 2016 – more than 30 days beyond the date the Organization wrote the appeal (August 26, 2016) and also more than 30 days beyond the date the Carrier received the appeal (August 31, 2016).**

**There is no discretion here. Rule 21(A) as extended by Rule 21(C) provides in no uncertain terms that the Carrier “... shall, within thirty (30) calendar days ...” deny the appeal. The Carrier failed to meet that time requirement when, by letter dated October 3, 2016, it denied the August 26, 2016 appeal which the Carrier received on August 31, 2016.**

**The consequences of the Carrier’s failure to timely deny the Organization’s appeal are clearly set forth in Rule 21(A) and (C) – i.e., “[i]f not so notified, the claim or grievance shall be allowed as presented ...” [emphasis added]. The self-enforcing terms of the provisions of Rule 21 therefore require that this claim be sustained “as presented.”**

**In a series of recent cases, this Board came to the same result under the same language as found in Rule 21, although with a 60-day response requirement instead of the 30-day requirement found in Rule 21. See Third Division Award 43323:**

> **"... That is clear contract language requiring that the Carrier must deny an appeal from the denial of a claim within 60 days and if the Carrier does not do so 'the claim or grievance shall be allowed as presented ...' [emphasis added]. The phrase 'shall be allowed as presented' leaves nothing to discretion.**
>
> **The Carrier did not respond to the Organization's October 18, 2016 appeal within the 60-day time provisions of Rule 14. By operation of clear contract language, the claim must be allowed as presented. The claim shall therefore be sustained."**
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> *** * ***
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> **Under the facts of this case, just as the Carrier would properly rely upon the time provisions in Rule 14 obligating the Organization to timely file claims '... within 60 days from the date of the occurrence ...' and to appeal denials of claims '... within 60 days from receipt of notice of disallowance ...' with the consequence that '[f]ailing to comply with this provision, the matter shall be considered closed ...', the Organization can rely upon the similar provisions in Rule 14 that, with respect to appeals of denials, the Carrier '... shall, within 60 days from the date same is filed, notify whoever filed ... [and i]f not so notified, the claim or grievance shall be allowed as presented ....'**
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> **In light of the above and given that clear contract language governs this case, the Carrier's position that the underlying ... dispute lacked merit is not relevant. If the procedural prerequisites requiring timely denials of appeals do not apply in this case, then the Organization would have the same ability to argue that untimely filed claims or appeals that have merit should nevertheless be considered and sustained by the Board even though the Organization's claims or appeals of denials are untimely. ...**

**The bottom line in this case is that the result is driven by clear contract language and this Board has no authority to ignore that language. See Third Division Award 35515:**

> **'... However, a fundamental rule of contract construction is that clear language must be enforced even if harsh or against the expectations of one of the parties. This is such a case. The language is clear. The result is unavoidable.**

**See also, First Division Award 24819:**

> **The language is clear. We can go no further. The interpretation must therefore be literal. ... This Board simply has no authority to change or ignore clear language, no matter what inequities the employees may perceive. Clear language must be enforced even if the result is unfair. ...'**

**See also, Third Division Awards 43324, 43325, 43326, 43327 and 43328 following the logic of Third Division Award 43323, supra.**

**The Carrier argues that "[t]here is no evidence that the Organization was disadvantaged or adversely affected by the timing of the [Carrier's]... denial of appeal dated October 3, 2016 [and that t]he Carrier continued to progress this matter at the Organization's request by holding a conference on December 12, 2016." Carrier Submission at 17. Prejudice (or lack thereof) is irrelevant in the face of mandates from clear contract language. See Third Division Award 22748:**

> **"The Carrier takes the position that any defect in the timeliness of the notice was not prejudicial and hence should not be the basis for overturning the discipline assessed.**
>
> **... [W]e believe that the awards of this Board which hold the parties to their agreements with respect to time limits should be followed. The wording of the rule is clear; 5 days written notice is required. That is a bargained for right of an employe subject to discipline. In the instant case the employe being subject to discipline lay claim to that right at**

> **the outset of the hearing. While holding the parties to the time limits set out in their agreements may from time to time work an injustice for either a carrier or claimant, we must apply the agreements as written and not by case law create exceptions which have not been agreed on by the parties."**

**Again, as found in Third Division Award 43323, supra, "[t]he bottom line in this case is that the result is driven by clear contract language and this Board has no authority to ignore that language."**

**The fact that this is a discipline case and that Third Division Award 43323 and the awards which followed were subcontracting/rules cases does not change the analysis or the result in this matter. The obligation to follow contractual time limits else claims are sustained without reaching the merits also applies to discipline cases. See e.g., Third Division Awards 24220, 41682 and 22748, supra; First Division Award 24651 – all of which were discipline cases and were sustained in full without addressing the merits because of the respective carriers' failure to comply with contractual time limits for progressing claims.**

**This Board is cognizant of its broad authority to decide these cases – authority which is subject to extremely narrow judicial review. See e.g., Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific Railroad Co., 707 F.3d 791, 796 (7th Cir., 2013) [citations omitted]:**

> **"… We add, for guidance should there be further judicial proceedings, that the scope of judicial review of the Board's awards is, as with judicial review of other arbitral awards, exceedingly narrow – indeed it's been said to be 'among the narrowest known to the law.' … 'As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award – whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act – is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.' …"**

**In this case, for this Board to agree with the Carrier and to find that the time limits provided in Rule 21 ("... the Carrier shall, within thirty (30) calendar days from the date same is filed ...") and the self-enforcing consequences of the Carrier's failure to comply with those time requirements ("[i]f not so notified, the claim or grievance shall be allowed as presented ...") [emphasis added] are not applicable so as to sustain this claim, then such ignoring of that clear contract language would exceed that broad authority this Board has to "interpret ... the contract." This claim shall therefore be sustained.**

**As a remedy, the Claimant shall be reinstated to his former position without loss of seniority and benefits and made whole. As formulated in Third Division Award 41682, supra, "[t]he Carrier is entitled to ensure the Claimant is fit for duty, in all of its normal ways, prior to allowing this individual back into the workplace, and to make any deductions in backpay it normally would, including in mitigation.**

## 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 18th day of January 2019.**