

AWARD NO. 8

CASE NO. 16

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Foreman D. R. Barrett was without just and sufficient cause and wholly disproportionate to the alleged offense (System File D-11-24-23).
- (2) The claim presented by General Chairman S. C. Zimmerman on July 22, 1975 to Division Manager D. B. Carlisle is allowable as presented because said claim was not disallowed by Mr. Carlisle in accordance with Rule 21.
- (3) Because of (1) and/or (2) above, Foreman D. R. Barrett be reinstated with all rights unimpaired and with pay for all time lost."

OPINION OF BOARD:

This case involves the dismissal from service of Mr. D. R. Barrett following an investigation at which he was found responsible for "falsifying payroll time report." The charges stem from Claimant's absence from work on May 20, 1975 and his subsequent claiming and receiving pay for having worked that day. Two Carrier officers making an inspection trip on May 20, 1975 observed Claimant's crew working without him. At the time of his dismissal Claimant was foreman of that section crew. Three of the crew members stated that Claimant had laid off that day. Subsequently Claimant made out his own payroll record and claimed pay for having worked that day. At his hearing and investigation Claimant

conceded that he did not work on May 20, 1975 and stated that he must have made a mistake in making out his payroll report. Further, Claimant attempted to justify receiving pay for time not worked on the grounds that he frequently used his own private car to haul tools or materials for Carrier.

The record shows that Claimant kept his own time record and submitted it to Carrier's payroll department for payment. A very important question in this case remains unanswered on the record and the Board is uninformed as to how frequently the payroll records were submitted by employees in Claimant's position. Specifically, we are unable to determine from the record before us when Claimant submitted his pay claim for May 20, 1975. We do know that on June 27, 1975 he was advised by the Roadmaster to report for a formal investigation on July 3, 1975 into a charge reading as follows: "Your responsibility in connection with falsifying payroll time report." The hearing was held as scheduled and Claimant was represented by his Organization. Following the hearing Claimant was advised, under date of July 8, 1975, that he was dismissed effective that date.

The discussion on the property and the presentations to our Board dealt very little with the merits of the dismissal and focused for the most part on two alleged procedural violations by the Carrier. Specifically, the Organization alleges that the Carrier violated Rule 19 (a) because the hearing was held on July 3, 1975 which is more than ten days after May 20, 1975, the date upon which Claimant was absent but for which he claimed and received pay. The Organization maintains that these facts establish a per se violation of that part of Rule 19 which reads as follows:

"Rule 19 -- Discipline

"(a) ***The hearing will be held within ten (10) calendar days of the alleged offense or within ten (10) calendar days of the date information concerning the alleged offense has reached the Assistant Division Manager--Engineering.***"

The record does not show the date information concerning the alleged offense reached the ADM-E but the Organization maintains that the hearing must have been held within ten days of May 20, 1975. Upon careful consideration of the evidence we cannot concur in this reasoning. In the first place the operative date is not May 20, 1975 because although Carrier knew Claimant had not worked on that day it had no way of knowing that he was subsequently going to claim pay for that date. Rather the date upon which the alleged violation of Rule 19 must turn is that date upon which information concerning the falsified time report reached the ADM-E. As noted supra the record is barren of evidence on this point. We may not bridge this evidentiary gap by supposition or speculation. As moving party the Organization has the burden of proving every material element of its allegations. We have no information on the record regarding the submission date of the inaccurate time record nor of the mechanics of payroll processing. In the absence of such evidence we cannot assume that the ADM-E had information concerning the alleged offense more than ten days before July 3, 1975. Because of this evidentiary insufficiency we cannot find a violation of Rule 19 on this record.

The Organization is on firmer footing when it charges a violation of Rule 21 in the handling of the claim. The original claim was submitted under date of July 22, 1975. The claim was submitted to the Division Manager in accordance with Rule 21 and Carrier's directive of August 30, 1973 regarding the procedure of submitting and appealing cases. The Division Manager failed to deny the claim and on December 26, 1975 the General Chairman cited this violation of Rule 21 and demanded that the claim or grievance be allowed as presented. By letter dated February 19, 1976 Carrier's top appeals officer denied the claim on the merits and reserved judgment on the alleged violation of Rule 21. We find that

Rule 21 was violated and the only question remaining is the appropriate remedy. The Organization contends that the Rule by its express terms requires that Claimant be reinstated with back pay as remedy for the time limit violation. Carrier does not deny that the time limit was violated but contends that the appropriate damages for this procedural violation is compensation up to the time the claim was denied by the Carrier's Director of Labor Relations (Non-Operating). The respective positions on this point were developed fully, carefully analyzed and decided by us in our Award No. 5, Case No. 17. In that Award for reasons developed fully therein we held that the Carrier denial by the highest appeals officer, albeit a late denial, was effective to toll Carrier's liability for the procedural violation as of that date. That reasoning is easily applicable in this case. Accordingly we find that for the Rule 21 violation the appropriate remedy is compensation to Claimant at his straight time hourly rate from July 22, 1975 through and including February 19, 1976.

Upon review of the entire record including the transcript of hearing we find no reason to overturn the finding of culpability for falsifying a payroll time report. The punishment is severe but not arbitrary or unreasonable in the circumstances. Accordingly we shall deny that portion of the claim seeking reinstatement on the merits of the case.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

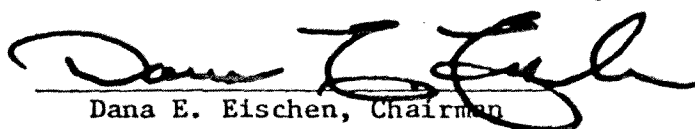
1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was violated.

AWARD

Part 1 of the claim is denied.

Part 2 of the claim is sustained to the extent indicated in the Opinion.

Part 3 of the claim is denied.


Dana E. Eischen, Chairman


O. M. Berge, Employee Member


R. W. Schmiede, Carrier Member

Dated: Aug 18, 1977

PUBLIC LAW BOARD NO. 1844

INTERPRETATION NO. 1 to AWARD NO. 8

(CASE NO. 16)

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

INTERPRETATION BY THE BOARD:

Upon application of the Carrier involved in the above Award, that this Board interpret the same in light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

This requested interpretation arises because Carrier seeks to deduct certain earnings of Claimant in outside employment from the amount of money damages awarded by this Board in Award No. 8 (Case No. 16). In furtherance of that intent Carrier has requested Claimant to submit a statement of earnings in outside employment, if any, during the period covered by our Award. Claimant has refused to provide any such information. Carrier asserts that Claimant's earnings on his former position during the period of time involved would total some \$7,531.19, but Carrier has refused to pay over that amount unless Claimant furnishes copies of his W2 IRS forms, page 1 of his tax returns from 1975 and 1976, and an affidavit as to his earnings in outside employment during the period involved. The Organization maintains that Carrier's argument for deduction of outside earnings is untimely raised, that both Rule 21 and the Award are silent about outside earnings, and that the demand for income tax information constitutes an unwarranted invasion of privacy.

The claim presented to us for disposition in Case No. 16 read as follows:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Foreman D. R. Barrett was without just and sufficient cause and wholly disproportionate to the alleged offense (System File D-11-24-23).
- (2) The claim presented by General Chairman S. C. Zimmerman on July 22, 1975 to Division Manager D. B. Carlisle is allowable as presented because said claim was not disallowed by Mr. Carlisle in accordance with Rule 21.
- (3) Because of (1) and/or (2) above, Foreman D. R. Barrett be reinstated with all rights unimpaired and with pay for all time lost.

In Award No. 8 we denied the claim insofar as it alleged insufficiency or proof or excessive discipline. But we found a procedural violation of Rule 21 in that the Division Manager failed to deny the claim submitted on July 22, 1975 by the General Chairman, and a proper denial was not made until the Director of Labor Relations caught the error in February 1976. Citing an early Award dealing with such procedural defects, we concluded as follows:

Rule 21 was violated and the only question remaining is the appropriate remedy. The Organization contends that the Rule by its express terms requires that Claimant be reinstated with back pay as remedy for the lost time limit violation. Carrier does not deny that the time limit was violated but contends that the appropriate damages for this procedural violation is compensation up to the time the claim was denied by the Carrier's Director of Labor Relations (Non-Operating). The respective positions on this point were developed fully, carefully analyzed and decided by us in our Award No. 5, Case No. 17. In that Award for reasons developed fully therein we held that the Carrier denial by the highest appeals officer, albeit a late denial, was effective to toll Carrier's liability for the procedural violation as of that date. That reasoning is easily applicable in this case. Accordingly we find that for the Rule 21 violation the appropriate remedy is compensation to Claimant at his straight time hourly rate from July 22, 1975 through and including February 19, 1976.

We turn first to the Organization's assertion that the question of outside earnings is untimely raised at this time. It is well known that an

interpretation request is not a vehicle for sub rosa reargumentation of a decided claim. Nor may new arguments regarding the claim itself be raised in such a proceeding, any more than in an ex parte submission or in oral argument before the Board. On the other hand, an Award can give rise to questions regarding its meaning and application which theretofore the parties had not had occasion to raise and discuss. In our judgment, it is not improper or violative of the general prohibition against raising new evidence and arguments at the appellate level to present such questions to the Board in a petition for interpretation. Typical of such questions is the instant debate about whether the Award we rendered contemplates the deduction of outside earnings or not.

Rule 21 does not speak expressly to the question, but rather requires that an untimely denial results in allowance of the claim "as presented". The claim as presented on July 22, 1975 alleged violation of Rule 19 and sought as damages that Claimant be "reinstated and compensated at his straight time rate for all time lost." We found no merit in the suggestion that Claimant was unjustly dismissed but we did award monetary damages for the period during which Rule 21 was violated. Standing alone, Rule 21 provides no measure of damages. Rather, that rule draws its vitality from and for purposes of computation of damages must be interpreted as incorporating by reference the alleged violation of Rule 19. The latter Rule does expressly provide for the deduction of outside earnings less expenses incurred by the employee in securing and performing outside work. Not only proper contract construction but also the rule of reason requires that Claimant should not recover more for a procedural violation than he would have recovered if his claim had been sustained on its merits.

Both the claim as presented and our Award provided for "compensation" of Claimant. This connotes compensatory or make-whole damages for the loss

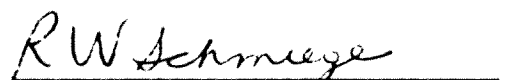
of income occasioned by the procedural violation during the period July 22, 1975 to February 19, 1976. Accordingly, Carrier is entitled to offset Claimant's straight time earnings during that period, less actual and necessary expenses of Claimant in securing and performing such work.

We are aware of some difference of opinion in published precedent involving this issue. In our judgment, the sound principle enunciated in Second Division Award 1638 states the prevailing view in arbitration and applies fully to this case: "Whatever the method of calculating the compensation may be, a deduction of outside earnings is required unless there is a clear and definite intention that the adjustment is on some other basis." See Award 15765, First Division. See also Interpretation No. 1 to Award 12422; Interpretation No. 1 to Award 17766; and Interpretation No. 1 to Award 20033 (Third Division).

Finally, we do not find persuasive the suggestion that Carrier is violating Claimant's "right to privacy" by requesting that he provide information regarding his income during the period for which damages were awarded. So far as we know it is not uncommon for employers in this industry and others to require proof of outside earnings in order to compute compensatory damages flowing from arbitration awards. While most persons consider their income information privileged, there are times, especially during litigation, when disclosure becomes necessary. This is such an occasion. If Claimant wishes to recover the compensatory damages he has been awarded by this Board, he must provide the requisite information without which such damages cannot be computed.


Dana E. Eischen, Chairman


H. G. Harper, Employee Member


R. W. Schmiede, Carrier Member

Dated: 11/2/75