

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4544

John C. Fletcher, Chairman & Neutral Member
Jerry H. Grant, Organization Member
Michael D. Phillips, Carrier Member

BROTHERHOOD RAILWAY CARMEN DIVISION
TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION

and

UNION PACIFIC RAILROAD
(former C&NWT)

Docket No. 133
Award No. 133

Date of hearing - September 25, 1995
Date of Award - August 24, 1996

STATEMENT OF CLAIM:

Claim of Coach Cleaner Rossie Boyd, for removal discipline of dismissal, following investigation on November 15, 1994, on a charge of failure to report an injury that occurred on July 21, 1994, and for pay for time lost.

FINDINGS:

Public Law Board No. 4544, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

As a threshold issue the Board must deal with the contentions of the Organization that Carrier breached Rule 29, the time limit rule, when it failed to respond to the claim appealing the discipline assessed within 60 days, as required by the explicit language of the Rule. The facts in this record conclusively demonstrate that the initial claim, contesting the discipline imposed, was filed on December 3, 1994. Upon denial, the claim was appealed to the next highest designated officer, under date of February 13, 1995. That

officer did not respond to the appeal until April 28, 1995, a date outside the 60-day response period he was provided in the Rule. The failure of this Officer to deny the appeal within 60 days of receipt requires that the claim be "allowed as presented."

Carrier has argued that the teachings of NDC Decision No. 16 should be applied to this case, and that it should only be responsible for a monetary liability up to the date of denial, and the case should go forward, after that date, for decision on its merits. This contention, for a variety of reasons, is not found to be persuasive by this Board.

First the contemporary understanding when NDC No. 16 was adopted thirty years ago, was that it was only applicable to "rules" cases, and that it would have no application to discharge cases. The minutes and notes of the members of the National Disputes Committee will show that discipline cases were to be dealt with in a later decision. The case involved in NDC 16 was the claim in the Docket before the 3rd Division in Award No. 13780, BRC and DRGW, (July 29, 1965). That docket was not a discipline case - it was a rules case - it involved the abolishment of a position. And, review of the early awards applying the teachings of NDC 16 indicate that few if any were dismissal cases.

Second, even if NDC 16 were to be considered as applicable to discipline cases, the Carman Organization was not a party to the decision. In this record there is no showing that the Carman Organization, formally or by practice, embraced NDC 16 as applicable to its Craft in either rules or discipline matters.

And, third, and perhaps most important, applying the concepts of NDC 16 to discharge cases is patently unfair. If a Carrier would "blow the time limits" all that is necessary is that they make a monetary payment and the case proceeds on its merits thereafter. However, if the Organization "blows the time limits" for whatever the reason, the matter is ended then and there, and the Grievant would never be able to have the matter considered on its merits. For example, the Grievant would not just lose the monetary remedy he was seeking, but the merits aspect of the case as well. Without involving NDC 16 into dismissal cases the players are on even ground.

In Support of its arguments on the application of NDC 16, Carrier has cited 2nd Division Award 12151, involving the parties before this Board. While Award 12151 did apply NDC 16 to the case under review there, it should be noted that the matter under review did not involve discipline - it was a rules case. Even if this Board were to subscribe to the notion that NDC 16 is applicable to Carman, an Organization that was not a party to that particular National Disputes Committee, the fact that Award 12151 involved a "rules" case makes it totally inapplicable as precedent here.

Accordingly, the Board will sustain the claim, as presented, on the basis that Carrier failed to effect a timely denial of the appeal. No determination is made with respect to the merits, except to note that if we were to get to the merits we most surely would have determined that the discipline assessed, in the least, was extremely excessive, in the circumstances present.

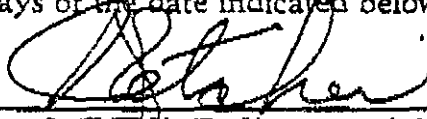
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Claim sustained as presented.

ORDER

Carrier is directed to restore Claimant to service and make all payments due within thirty days of the date indicated below.



John C. FLETCHER, Chairman & Neutral Member



Jerry H. GRANT, Employee Member



Michael D. PHILLIPS, Carrier Member

Dated at Mount Prospect, Illinois, this 24th day of August, 1996.