

NATIONAL MEDIATION BOARD, Administrator

PUBLIC LAW BOARD NO. 2512

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

and

SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO-CLC
BROTHERHOOD OF RAILWAY CARMEN OF THE U.S. AND CANADA

Award No. 28
(Docket No. 29)
(C&NWT File No. D-7-1-426)

S T A T E M E N T O F C L A I M

1. Carman H. G. Soenksen was erroneously charged with theft of a carton of cereal on February 15, 1980.

2. Carman H. G. Soenksen was unjustly dismissed from service on March 11, 1980, following investigation held February 29, 1980. (Investigation was not held within the time limits as per Rule 35.)

3. That the Chicago and North Western Transportation Company be ordered to reinstate Carman H. G. Soenksen and make him whole with all benefits that are a condition of employment unimpaired, and compensate him for all lost time plus 13.5 interest on all such wages, as per Rule 35.

F I N D I N G S

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee

within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the dispute involved herein.

Following an investigative hearing, the Claimant and another employe, a Car Repairman, were dismissed from service on March 11, 1980. The Organization raises two procedural matters involved with the handling of these claims.

The first is that there was a "violation of Claimant's rights" in that a joint investigative hearing was held by the Carrier to investigate both employes. The Organization argued that each employe was entitled to a separate hearing. Because of the particular circumstances involved in these disputes, concerning similar or identical allegations involving theft of Carrier property, the Board finds that the rights of the Claimant, as prescribed in any applicable rules, were not violated and that the Claimant had full opportunity to defend himself at the hearing and, if necessary, to distinguish his circumstances from the other employe.

The other procedural point raised by the Organization has to do with the application of Section (b) and (k) of Rule 35, Discipline and Investigation. The text of these sections, together with other sections to which reference will be made, is as follows:

(a) Except as provided in section (f) hereof, an employe in service more than sixty (60) days will not be disciplined or dismissed without a fair and impartial investigation. Such investigation shall be scheduled promptly and held not later than thirty (30) days from the date of occurrence, or not later than thirty (30) days from the date information concerning the alleged offense has reached his supervising officer.

(b) In the case of an employe held out of service pending investigation account serious infractions of rules the investigation shall be held within ten (10) days from the date withheld from service. At the time held out of service the employe will be notified the reason thereof. . . .

(d) A decision will be rendered within fifteen (15) days following the completion of investigation, and written notice of discipline will be given the employe, with copy to the organization's local representative.

(e) The employe and the duly authorized representative shall be furnished a copy of the transcript of investigation not later than twenty (20) days subsequent to the date discipline is administered. The employe or his representative will not be denied the right to take a stenographic or tape recording of the investigation. . . .

(h) If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from his record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension, less any amount earned during the period such disciplinary action was in effect. . . .

(k) If investigation is not held or decision rendered within the time limits specified herein, as such time limits are extended by agreement or postponement, the charges against the employe shall be considered as having been dismissed. . . .

At the investigative hearing and in the processing of the dispute thereafter, the Organization consistently took the position that the Carrier had failed to meet the time limits specified in Rule 35 (b) and that the charges against the Claimant should be "considered as having been dismissed," as provided in Rule 35 (k).

The chronology is that the Claimant was suspended from service on February 16, 1980, pending investigation. A letter was sent to him dated February 20 concerning an investigation. The investigation was scheduled for February 28, 1980, and then rescheduled at the direction of the hearing officer for February 29, 1980, on which date the investigative hearing occurred. No evidence was shown to demonstrate that the original date or postponed date of the hearing were by mutual agreement but rather were as directed by the Carrier.

Using either February 28 or February 29, it is a clear certainty that the hearing was held in excess of ten days

following the date (February 16) on which the Claimant was held out of service, presumably for alleged "serious infractions of rules" as provided in Rule 35 (b).

In formulating Rule 35, the Organization and the Carrier did not leave the consequences of violation of Rule 35, Sections (a), (b), and (d) for case-by-case later determination. Instead Rule 35 (k) was inserted, and no other purpose can be perceived therefor except to provide self-effectuating consequences of failures to meet the specified time limits. In such event, "the charges against the employe shall be considered as having been dismissed". The Board may not evade the mandate of these words, and their meaning must be applied before consideration, if any, is given to the offense involved which led to the charges.

The Carrier relies on Award No. 6 by this Board to suggest that the time-limit violation may be ignored. The procedural matter in Award No. 6 dealt with the Carrier's failure to supply a copy of a hearing transcript within 20 days, as required by Rule 35 (e). The essential difference is that neither Rule 35 (k) nor any other section prescribes any penalty for failure to provide a transcript in timely fashion, thus differentiating it from the consequences of failure specified in Rule 35 (k).

The Organization cites Second Division Award No. 8089 (Scearce) in defense of its position. In that dispute, the Carrier failed to make any reply at one of the steps of the claim processing until reminded to do so by the Organization. The reply was long after the prescribed time limit. The comparable rule states that in the event of such untimeliness "the claim or grievance shall be allowed as presented" -- which is what Second Division Award No. 8089 provided.

The Organization also cites a number of instances where an organization's failure to pursue a claim within specified time limits has resulted in findings that the claim may not be considered, regardless of its possible merits (for example, Second Division Awards No. 5809 (Stark) and 6296 (Cole) and Fourth Division Award No. 3539 (Lieberman)).

In response, the Carrier points to a number of awards in which similar procedural violations were remedied by providing back pay for a limited period only and permitting the dispute to go forward on the merits. None of these, however, appears to have the self-effectuating language which is in Rule 35 (k).

In considering this case, a majority of the Board (with the Organization dissenting) found that, while the Carrier

violated the time limit provided in Rule 35 (b), it nevertheless held an investigation within the 30 days provided in Rule 35 (a). This finding was taken by the Organization to United States District Court, Northern District of Illinois, Eastern Division. The Court found that the Board "went beyond the scope of its authority" (82 C 882, Joel M. Flaum, District Judge, February 28, 1983).

This decision was appealed by the Carrier to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the District Court's decision (88-1536, Bauer, Eschbach, and Coffey, Circuit Judges, March 5, 1984).


Based on the court action, related above, the Board revises its original majority finding.

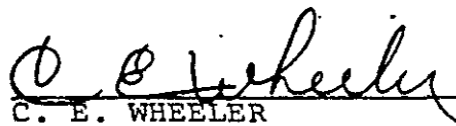
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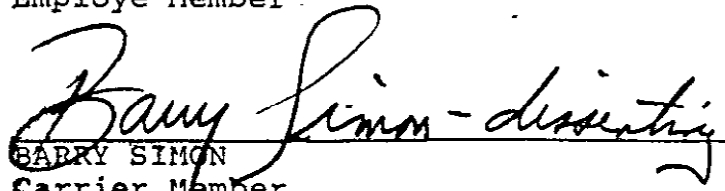
Claim sustained to the extent provided in Rule 35 (h). The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.

DATED:

8/21/84


HERBERT L. MARX, JR.
Neutral Member


C. E. WHEELER
Employee Member


BARRY SIMON
Carrier Member