

Public Law Board No. 4064

Parties to Dispute

Allied Services Division/Brotherhood of)	
Railway, Airline and Steamship Clerks,)	
Freight Handlers, Express and Station)	Case No. 1
Employees)	
)	Award No. 1
vs)	
)	
Missouri Pacific Railroad)	

STATEMENT OF CLAIM

1. The Missouri Pacific Railroad violated Rules 22 and 24 as well as related past practices regarding firearms when it would not permit J. Josue to carry firearms of his choice and also failed to grant an unjust treatment hearing when requested.
2. The Carrier shall now be required to allow Officer J. Josue to carry these weapons or reimburse him for the cost of these weapons which is approximately \$1,025.00.

FINDING

The two Rules at bar read as follows:

Rule 22: An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the right of hearing, appeal and representation as provided in Rules 20 and 21, if written request which sets forth the employee's complaint is made to his immediate superior within seven (7) calendar days of cause of complaint.

Rule 44: Typewriters will be furnished where the management requires their use. The management shall also furnish flashlights, flashlight batteries and bulbs and 600 rounds of ammunition.

The Claimant has a seniority date of March 19, 1976. From that time until April 1, 1984, the Carrier did not have a written policy on the types of weapons a patrolman could carry while on duty. The record shows that there was no past practice for the Carrier to pay for weapons carried by special officers while on duty, although the Carrier did provide ammunition in accordance with Rule 44. The weapons which the Claimant had purchased and which he armed himself with while on duty prior to April 1, 1984, were the following:

- (1) AMT, 380 cal. 9 mm Kurz, back-up stainless, serial No. A18886.
- (2) Thompson Semi-automatic, 1927 A5 cal. 45, serial No. 2519P.
- (3) Smith and Wesson, 1500 7mm. mag w/9 power scope, serial No. PN18480.

On April 1, 1984, the General Director for Security and Special Services of the Carrier issued Directive No. 3001 which stated the following changes with respect to firearms for special officers. For the record this Directive is quoted in full.

I. Handgun Requirements

A. All positions to be determined by management will carry a loaded service weapon and a minimum of six extra rounds or one spare magazine of service ammunition while in performance of their duties and will qualify at least semi-annually on Course I (A) with each authorized handgun of different barrel length carried on duty.

II. Service Weapon

Service weapon defined: Service weapon in this Directive will be a weapon owned by and registered to the department member. All handguns carried on duty will be registered by make, model and serial number, and other identifying features with Firearms Instructor.

A. Revolvers

1. Will be a Colt or Smith & Wesson.
2. .38 Special or .357 magnum caliber.
3. Two-inch to six-inch in barrel length.
4. Cylinder capacity of six rounds.
5. Single or double action.
6. Revolver will have tripper-pull not less than 3 lbs. single action. Verification by Firearms Instructor.

B. Semiautomatic

1. Browning, Colt or Smith & Wesson.*
2. 9mm parabellem or .45 ACP.
3. Must be of standard factory barrel length.
4. Must not be modified to override factory standard safety features.

*Other makes may be authorized by management upon written request. Requests outlining make, model and standard features of weapon, will be submitted to the General Director for authorization. (emphases added)

On April 9, 1984, the Claimant submitted a request to the General Director in writing for authorization to continue to carry the three weapons noted in the foregoing. The General Director was Mr. C. W. Shaffer. Under date of June 6, 1984, the request was denied under the signature of D. K. Brake. Under date of June 12, 1984, the Claimant again wrote a letter to Mr. C. W. Shaffer, Director of Security and Special Services complaining about the new policy relative to handguns. In that letter the Claimant outlined his reasons for wanting to carry the weapons he had in the past. This letter to the Carrier also contained a request "...under Rule 22 of our working agreement a hearing with the company" concerning the denial of his earlier request to carry the three firearms in question. The alternative to this was further request that the Claimant be reimbursed

the cost of the weapons which he had purchased: over \$1,000.00. The Claimant stated in his claim that he had "...purchased (the) weapons in good faith to be carried on duty and for police use only. Now under the new directive these weapons are no longer authorized."^{1/} Absent response by the Carrier the Claimant made claim for forfeiture by the company of the June 12, 1984 request under the applicable time-limit rules of the current Agreement. This request for forfeiture was made by the Claimant on August 13, 1984. After this request was denied by the Carrier on August 29, 1984, the claim was appealed by the Organization up to and including the highest Carrier officer designated to hear such before this case was docketed before this Public Law Board for final adjudication.

In its first denial of the forfeiture claim by the Claimant the Carrier argued that it was the obligation of the Claimant, after he had received the denial letter of June 6, 1984, to have resubmitted a request to carry weapons not authorized in Directive 3001, in lieu of filing the claim that he did on June 12, 1984. The Carrier argued that this would have been the proper procedure for the Claimant to have followed in view of the following paragraph contained in its June 6, 1984 letter to the Claimant:

In the event you would elect to resubmit a request to carry weapon(s) not authorized in Directive 3001, I would recommend you submit the specification of the weapon and any available supporting information i.e. reliability in the field, police agencies that have authorized or are using the weapon, etc.

^{1/} The Claimant also sent an additional undated protest letter to the Director of Security and Special Services, apparently, shortly after his June 12, 1984 claim. This letter was received by the Carrier on June 16, 1984 (Carrier's Exhibit E, p.1-2).

Such request by management, while certainly within its purview, appears to have gone somewhat beyond the procedural requirements outlined by Directive 3001 of April 1, 1984. That Directive simply stated that: "other makes may be authorized by management upon written request. Requests outlining make, model and standard features of weapon will be submitted to the General Director for authorization" (emphasis added). The reasonable conclusion is warranted herein that the Claimant had fulfilled the requirements of Directive 3001 in his original request dated April 9, 1984. In view of management's request for additional information which went beyond the requirements stated in Directive 3001 the Claimant, in turn, was certainly within his rights, under the collective bargaining contract, to resort to potential protections found in Rule 22 rather than simply to re-submit a request to carry the weapons he had carried prior to April 1, 1984. An unjust treatment hearing would have reasonably provided management with all additional information they might have requested, upon which management could have made further determinations in this matter. While it is true that resort to the protections of a contract provision such as Rule 22, which is a rule fairly peculiar to contracts negotiated by the Brotherhood of Railway and Airline Clerks, often deals with employees' ability to perform the requirements of certain positions which they might have bid on or attempted to bump to and the employees' disagreement with the assessment by management over their abilities, there is no doubt that this Rule was

applicable to the idiosyncratic circumstance at bar which was disagreement over variations of types of equipment needed by the Claimant to both perform his job and protect himself. Further, while management may have ultimately disagreed with the Claimant over the type of appropriate equipment, there is also no doubt that he had legitimate reasons for his position in this matter. He gave those reasons in his claim dated July 12, 1984, in the penultimate paragraph of that correspondence. For the record, the Claimant stated the following:

...I have been sent on assignment where company special agents were up against rifles with scopes where even the Illinois State Police had to back off because they weren't armed as well as the persons they were up against. Further, I was also assigned on a train detail where rifle shots were being fired a(t) train crews. Other railroad agents in this area have come under automatic weapon fire, rifle fire, and small arms fire.

That part of the instant claim dealing with Rule 22 cannot be denied, therefore, on the grounds that the Claimant had no contractual right to file for an unjust treatment hearing.

It is the further argument by the Carrier, developed in subsequent denials of the first appeal by the Organization on property, that even if the Claimant did have the right to file for protection under Rule 22, he was in procedural error by the manner in which he did so. The Carrier argues that the Claimant filed the claim with the wrong person: he should have filed the claim dated June 12, 1984 with Special Agent William Wood, Jr., who was the Claimant's first line supervisor on location, and not with Director of Security and Services, C. W. Shaffer. To

support its position the Carrier references operating Agreement Rule 23(a) which states the following:

(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 sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance...in writing of the reasons for such disallowance. If not so notified, the claim or grievances 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 (emphasis added).

The Board must here emphasize also that Rule 22 states that the employee's complaint must be made to the "immediate supervisor" within seven days of the cause of the complaint. A review of the record shows that the Claimant fulfilled the seven days requirement of this Rule: his request to use the weapons which he customarily used prior to April 1, 1984 was denied on June 6, 1984, and he filed his grievance on June 12, 1984. But did the Claimant file the grievance with the correct person? As moving party to the instant claim the burden of proof lies with the Claimant (See Second Division 5526, 6054; Fourth Division 3379, 3482). While Special Agent William Wood, Jr. was the person who normally would have received all grievances at the first step from the Claimant, the Organization argues, in its appeals on property, that this officer "waived his handling and advised (the Claimant) to file any grievance on the firearms policy directly with C. W. Shaffer or H. L. Smith." While Special Agent Wood himself states, in the record, in correspondence to the Carrier's Labor Relations' Department dated May 31, 1985,

that he "... did not inform (the Claimant) that he should not handle claims and/or grievances with me" he did, nevertheless, state that:

(a)nything I told (the Claimant) regarding handling directly with the General Director of Special Services dealt only with that part of the Firearms Policy which stated: '(o)ther makes may be authorized by management upon written request.'"

Thus, there is no inconsistency in the record between the contention by the Organization that Mr. Wood waived handling of this particular subject claim and information provided in the record by Special Agent Wood himself. The subject-matter of this case substantively centers on the issue of what other "makes" of firearms were to be "authorized by management upon written request". Further, two fellow employees of the Claimant provided, for the record, affidavits to the effect that they heard Special Agent William Wood, Jr. tell the Claimant "... he did not want anything to do with the Firearms Policy and Directive at that time and he had no authority over it". By holding such a position Special Agent Woods was simply giving a literal and correct interpretation to Directive No. 3001 which explicitly stated that "... other makes (of guns) may be authorized by management upon written request...(to)...the General Director for authorization". Given the explicit and unequivocal instructions found on Directive No. 3001, as well as the first denial of his request dated April 9, 1984, by the General Director's office, and the denial by Special Agent Woods that his office was the appropriate place to file grievances dealing with this policy, the Claimant did the only thing he could when he filed his unjust treatment claim with the General

Director for Security and Special Services whose office formulated the new policy in the first place. On the basis of all evidence of record the Claimant followed the only course open to him when he filed for an unjust treatment hearing under Rule 22 with the General Director, and he was in violation of neither the intent nor the spirit of Rule 22, nor Rule 23(a) when he did so. Because of the instructions given to the Claimant by the Carrier both in Directive No. 3001 and on the local level any procedural errors of the type documented by the Carrier in Third Division Awards 18107, 20977, 21893 and 25676 emanating from the National Railroad Adjustment Board are not here on point and the jurisdiction of this Board over this case cannot be barred. The Carrier's General Director for Security and Special Services should have responded to the Claimant's June 12, 1984 request for an unjust treatment hearing within sixty (60) days of that date. Since he did not do so he was in violation of contract. The Claimant has sufficiently borne the burden of substantial evidence herein and the claim must be sustained. Substantial evidence in arbitral forums in the railroad industry have been defined as such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229)

Prior to issuing an Award in this dispute, however, the Board must deal with the issue of monetary relief requested by the Claimant in Part (2.) of the Statement of Claim. Neither past practice nor any Agreement Rule requires the Carrier to furnish firearms for its security and special services' employees.

Rule 44 of the Agreement, quoted in the foregoing, only requires that the Carrier provide ammunition. Nor does the Board accept the argument by the Organization that the Carrier is automatically liable for any additional equipment costs incurred by security employees because of changes in company policy. Nor does the Board find that the Carrier did not have a right to change its policy. Any monetary relief provided to the Claimant, therefore, because of the Carrier's violation of contract in the instant case, must be considered a penalty.

There is a long line of Awards emanating from the National Railroad Adjustment Board since Signalmen vs. Southern Railroad^{2/} in 1967 whereby that Board issued sustaining Awards for penalties relative to contract violations by Carriers. Such Awards, absent contract language providing for penalties, have dealt with violation of provisions such as sub-contracting and Scope rules (See Third Division 15689, 15808, 15888, 16009, 16430, 16830, 17093, 17108, 17931, 19337, 19354, 19552, 19899 & 20020 inter alia.). It is the position of this Board that the instant case reasonably falls within the perimeters of that line of Awards. Such conclusion is further supported by the well-known axiom of the 1937 Emergency Board to the effect that: "if rules (of contract) are to be effective, there must be adequate penalties for violation." Because of the idiosyncracies of the instant case, a sustaining Award without a penalty would effectively put the Carrier in a better position for having violated the contract at bar and the Claimant in a

^{2/} Brotherhood of Railroad Signalmen vs. Southern Railroad, 380 F. 2d 59 (1967).

worse position. Absent a penalty the Claimant will have lost protection of a contract provision negotiated in good faith by the parties and the Carrier's supervision will have been permitted to violate the contract with impunity.

Lastly, in accordance with the intent of Rule 23(a), the imposition of the penalty herein shall not be construed as precedent-setting relative to other "... similar claims or grievances".

AWARD

The claim is sustained in accordance with the Findings. The sum of \$1,025.00 shall be paid to the Claimant by the Carrier within thirty (30) days of the date of this Award.

Edward L. Suntrup, Neutral Member

D. D. Matter

D. D. Matter, Carrier Member

W. R. Miller

W. M. Miller, Employee Member

Date: _____