

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 445

Case No. 445
UP File 890760

Parties to Dispute Brotherhood of Maintenance of Way Employees and Union Pacific Railroad
(Former Missouri Pacific Railroad Company)

Statement

of Claim:

1. Carrier violated the agreement, especially Rule 12, and 12.2(a) when Track Foreman R. J. Smits was dismissed from service on May 4, 1989.
2. Claim in behalf of Mr. Smits for eight (8) hours each work day, including holidays and any overtime that would have accrued to him had he not been dismissed, beginning April 18, 1989 and continuing until he is reinstated to service with seniority, vacation and all other rights unimpaired on June 5, 1990.
3. Carrier violated Rule 12.2(a) of the Agreement when Mr. Dennis failed to reply to this claim within the allotted sixty (60) days; therefore, this claim is due and payable as presented.

Findings: The Board has jurisdiction by reason of the parties Agreement establishing this Board therefor.

The Claimant, Track Foreman R. L. Smits, following a formal investigation on the charge that he had been observed with an alcoholic beverage in his possession at the business car track in Spring, Texas, was concluded culpable. He was discharged from service on May 4, 1989 as discipline therefor.

The claim for the Claimant's reinstatement and pay for time lost was sent to Superintendent-Operations J. E. Dennis, on June 16, 1989 via certified mail, signed for by the Carrier Agent on June 19. Dennis failed to reply to the appealed claim within the prescribed 60 days. Thus there was a violation of Rule 12.2. Said Rule identical to Article V, of the August 21, 1954 National Agreement, reads:

"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 60 days from the date of occurrence on which the claim or grievance is based. Should any claim or grievance be disallowed, the Carrier shall, within 60 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 or waiver of the contentions of the Carrier as to other similar claims or grievances." (underscoring added)

In the instant case the appeal (claim) was filed June 16, 1989, covering a claim commencing April 18, 1989 (some 58 days prior). The Carrier failed to deny said claim until February 16, 1990 at which time the claim was denied to the General Chairman.

The time limit failure, apparently, caused the Claimant to be reinstated on May 25, 1990. After a physical examination and other external requirements the Claimant went back to work June 5, 1990.

The issue raised herein is for the proper payment for Carrier's violation of Rule 12.2 - Time Limits.

Carrier argued on the procedural deficiency that the National Dispute Committee's (NDC) Decision No. 16, should govern. Therefore, the Carrier's liability should be cut off as of the date of its first denial which was February 16, 1990.

NDC Decision 16 involved a non-discipline case. It was a continuing claim which in pertinent part reads:

"The alleged violation commenced July 17, 1959. The Local Chairman's letter dated October 5, 1959...was not received by the Carrier until October 15. The National Disputes Committee rules that under the circumstances in this case the claim shall be considered "filed" on October 15, the date received by the Carrier.

As to the contention of the Carrier that even though Article V of the August 21, 1954 Agreement was violated, the claim for payment must be disallowed inasmuch as the claimant was on leave of absence during the period involved. The National Disputes Committee rules that Claimant's leave of absence does not relieve the railroad of its liability for payment of a claim arising out of the railroad's failure to comply with the requirements of Article V of the August 21, 1954 agreement.

The National Disputes Committee rules that receipt of the Carrier's denial letter dated December 29, 1959 stopped the Carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement. Claim for compensation. Decision for each date from August 16, 1959

to December 30, 1959 shall be allowed as presented, on the basis of the failure of the Carrier to comply with the requirements of Article V of the Agreement of August 21, 1954, but this shall not be considered as a precedent or waiver or the contentions of the Carrier as to this claim for dates subsequent to December 30, 1959, or as to other similar claims or grievances..."

The Carrier contended that its liability running since April 18, 1989, was tolled when the claims were denied on February 16, 1990 to the General Chairman and the merits of the case were addressed. It asserts that the Carrier is entitled to offset its liability by any monies received by the Claimant during the period in question.

On the merits, Carrier argues that Claimant was properly handled under Rule 12 and that there was sufficient evidence adduced to support the decision of culpability concluded by the Carrier.

The Employees argued that the claim as made is payable when time limits are violated by the Carrier. They do not understand that National Disputes Decision No. 16 applies to discipline cases. The Union offered 6 awards in support of its position. NRAB - Second Division Award 9354 - to the effect that NDC #16 did not apply in dismissal cases. Third Division 27842 - made an analysis of awards involving NDC 16 application. Third Division 21755 - NDC #16 - was not raised on property. Third Division 9554 on this property between the same parties sustained a violation of this time limit rule. Also, Award 7 of our SBA 279, had sustained a violation of Article 12. Last, Award 133 of SBA 924 sustained a claim because Carrier denied it on 61st day.

The Employees also contended that this issue was never raised on the property.

Assuming but not so deciding that NDC Decision No. 16 was properly introduced by the Carrier on the basis that board awards, so to speak, are always in the picture. Our Board is not deciding that the issue represented thereby, i.e., a cessation of continuing liability, was or was not raised on the property.

Because of the parties interest in NDC No. 16 the Board will address the weight that it believes should be assigned to NDC No. 16. Said decision was rendered in a non-disciplinary case and involved a continuing time claim.

The various Divisions of the National Railroad Adjustment Board have dealt with NDC No. 16. Third Division

Award 27842 pointed out therein (p-6) that:

"The Labor Member's Dissent to Award 4600 denies that Decisions 15 or 16 were intended to apply to disciplinary cases, and states, in part:

'Decisions No. 15 and 16 both involved rule violations, neither of which were discipline cases. Awards 10754 and 24298 took in part that rationale and then decided it applied equally in discipline matters when in fact the National Disputes Committee never decided that such an interpretation should apply in discipline cases. If, however, those Awards had paid closer attention to the concluding remarks of Decision No. 15, they probably would have arrived at a different conclusion. That last paragraph states the following:

'In this connection the National Disputes committee points out that where either party has clearly failed to comply with the requirements of Article V the claim should be disposed of under Article V at the state of handling in which such failure becomes apparent. If the carrier has defaulted, the claim should be allowed at that level as presented;...'"

Also, pointed out therein:

"Third Division Award 21996 concerned the failure to render a decision within 30 days from completion of the investigation. The Board here also refused to reach the merits citing with approval the following:

'We have consistently held that an employee who has failed to initiate action within the time limitations fixed in an agreement is barred from initiating an action at a latter date. Satisfaction of identified action within fixed agreed upon time limitations is mandatory as to each of the parties. Time limitations set by contractual agreement have the same force and effect as those found in statutes and court rules - a party failing to comply by nonfeasances finds himself hoisted by his own petard.' (Third Division Award 18352.)

'...time limit provisions are to be applied as written by the parties and (that) any deviation from this principle would amount to re-wiring the parties' Agreement which no third party is empowered to do.' (Third Division Award 21675).'"

Also, that:

"The Board rejected the rationale of Decision No. 16, holding that the awards cited in support of the result reached in that case "do not involve discipline. Rather, they represent this Board's holdings in cases involving a 'belated denial of a continuing claim...'"

The Board further held:

Rule 17 imposes mutual obligations. The Carrier did not meet those imposed upon it. We remind the parties that Carriers consistently deny employee claims when they fail to comply with contractual time limits.

Stating that its decision was in accordance with 'a long line of precedent which far outweighs cases cited by the Carrier.' (Citing Fourth Division Award 4211)."

Third Division Award 27842 in sustaining the time limit violation therein in part opined:

"The cases cited on behalf of the Carrier do not express a clear rationale as to why a tolling of Carriers' liability should occur only in appeals from decisions of the Carriers where a disciplinary decision has been grieved. Decision No. 16 contains no such rationale. Its weight derives from the composition and purpose of the Committee rendering it. The decision clearly runs counter to the last paragraph of Decision 15, cited above.

The language of Rule 44 (a) in the present case is identical to Article V in Decision No. 16. However, in that case the Claimant was on leave during the entire period involved in his claim. There was a jurisdictional issue and apparently a question as to whether Claimant should have exercised his seniority and worked or whether he was justified in taking leave and making the claim. Under these circumstances, the Committee's ruling suggests a view of the issue on the merits as one involving a continuing grievance. This interpretation of its insertion of the phrase 'as to this claim for dates subsequent to December 30, 1959' into the language of the Rule, seems more logical than an intent to distinguish between time-limits in different phases of the disciplinary process.

This interpretation of Rule 44 (a) is more consistent with that portion of the last paragraph of Decision No. 15, quoted in the Dissent to Fourth Division Award 4600. A

contrary finding would result in the principle of default for violation of time-limits being applied against all time-limit violations by a Organization and against all procedural violations by a Carrier except for violation of the time-limit for disallowance of a Claim."

Our SBA 279 on June 4, 1959 rendered its Award No. 7. Therein we sustained a claim of a violation of Article V, Section 1 of the August 21, 1954 National Agreement. The Carrier's Assistant General Manager failed to make a timely denial.

Third Division Award 9554, on this property and between these parties, was decided on September 16, 1970. It was a non-discipline case involving 224 hours claimed on 4 dates for an alleged classification failure. The claims were declined and reasons given in writing at all levels except at the highest officer level. There only a denial was issued. The claim was sustained because of lack of reasons for the declination.

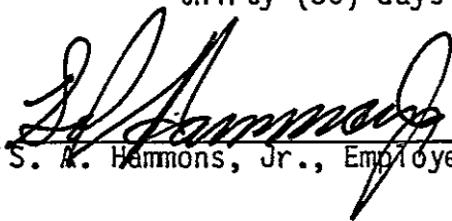
NDC Decision 16 was rendered on March 17, 1959. That's why there was no reference to the 1955 and 1956 claims in the two above property Awards (9554(3) and 7 (279)).

Our Board is impelled to conclude that when the claim, as here, involves discipline then NDC 16 holds no application and need not be followed. However, when discipline is not involved then NDC 16 can be followed.

Therefore, this claim, as made, will be sustained. The period covered therein was between April 18, 1989 and June 5, 1990 less the usual offsets.

Award: Claim sustained of as per findings.

Order: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.


S. M. Hammons, Jr., Employee Member


D. A. Ring, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member