

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Southern Pacific Transportation Company (Western Lines)

STATEMENT OF CLAIM:

"Claim of Los Angeles District Fireman R. L. Yates for removal of 30 demerits from his record and that he be compensated for attending the investigation on October 14, 1986."

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As Third Party in Interest, the United Transportation Union was advised of the pendency of this dispute and filed a Response.

The matter under review in this Award is the lead case of fourteen disputes involving the same parties. In each of the fourteen dockets, all involving discipline situations, Petitioner asks that we sustain the claim because Carrier failed to timely effect denials when the case was under consideration on the property. However, it is argued that we are without license to consider Petitioner's time limit issue because not one Statement of Claim indicates that one of the issues to be presented to the Board is an alleged violation of an Agreement provision dealing with time limits. We are asked to dismiss all fourteen claims on the basis that Third Division Awards 21543, 19790, 19507, 18239, 17512, 16955, 15523, 11006, 10194 and Fourth Division Award 4421 hold that:

"...the Rules of Procedure of the NRAB, as contained in Circular No. 1, require the petitioning party, coming before the Board with a time limit argument, to set forth such position in its Statement of Claim."

We have carefully considered the request for dismissal on the basis of an alleged defect in the Statement of Claim and in this review two remarkable facts become apparent: 1) over the past fifty years literally thousands of Statements of Claims have been docketed with the First Division which were brief and cryptic which did not result in summary dismissal, and; 2) none of the Awards cited to us as precedent on this issue arise from First Division dockets.

Nonetheless, in examining the Awards relied on in the request for dismissal we note that not all explicitly deal with a time limit issue and one that does seems to be ambivalent. For example, Third Division Award 21543 appears to be the cardinal case relied on to support the dismissal request. In that Award, the Board refused to consider a time limit issue which had not been mentioned in the Organization's Statement of Claim. In arriving at this result the Board stated:

"The Organization cites a number of awards sustaining claims under the time limit rules such as Rule 701. The Carrier, in turn, answers this procedural claim on various grounds. We need consider only that the claimant failed to make this a part of his formal statement of claim. We have reviewed all the awards cited by the Carrier and the Organization and each included the issue of time limits in its formal statement of claim with one exception, Award 20763. In that case the time limit question was raised on the property and was fully discussed in the opinion, but no mention was made that the issue was not raised in the formal statement of claim. Accordingly, we do not consider that this award represents authority contrary to the general view reflected in the awards, that the time limits issue must be included in the formal claim. That was not done here and we find it is decisive on this issue. See Awards 17512 and 11006." (Emphasis added.)

As directed by Award 21543, we did see Third Division Awards 17512 and 11006 and found that neither deal, in any fashion, with a time limit issue. Award 17512 considered a dispute involving an individual who had his application for employment rejected for physical reasons. His original claim was for reinstatement with full pay and seniority rights unimpaired. The claim presented to the Third Division asked that he be given an opportunity to be examined by a neutral doctor. Award 17512 cannot be fairly read to suggest that all time limit issues must be included in the formal claim.

Award 11006 involved a situation where Carrier awarded a Signaller's position to a junior bidder. In the final paragraph of the Award, the Board stated:

"A considerable part of the submission has dealt with what amounts to a protest to the manner of giving examinations and the way in which the Carrier has handled the training of its apprentices. This was not made a part of the initial claim nor is it encompassed in the Statement of Claim filed with the Division. We can not, therefore, make any findings with respect to such protest."

Again, we cannot read this Award to suggest that time limit issues must be included in the formal claim to be considered by the Board.

Awards 11006 and 17512 are the only two Awards cited in Award 21543 in support of the rationale that time limit matters must be raised in the Statement of Claim to be viable for consideration. The fact that neither dealt with a time limit issue causes the foundation of the Award to be suspect and substantially dilutes any credence to the remark that our Awards reflect a general view that time limits must be mentioned in the Statement of Claim to be valid.

The other seven Awards cited to us in support of dismissal on the basis that the time limit issue was not included within the Statement of Claim, namely Third Division Awards 19790, 19507, 18239, 16955, 15523, 10904 and Fourth Division Award 4421, also do not deal with time limits in any fashion.

Five years after Award 21543 was adopted, the Third Division considered a case which dealt with the very issue we have under review here. In Award 23845, a claim was sustained on the basis of a time limit violation, even though the time limit issue was not mentioned in the Statement of Claim. The Board stated:

"When the claim was submitted to this Board the Statement of Claim did not demand payment based on the time limit violation. Carrier asserts that the Employees' failure to state the time limit issue in the Statement of Claim requires the Board to dismiss it for failure to comply with Circular No. 1 of this Board.

"The Board has jurisdiction to hear and decide the case. The Statement of Claim, as submitted, placed the claim on the Board's Docket and complied with Circular No. 1. The time limit issue is not a new issue. It was handled on the property in the usual manner. Demand for payment

was twice made during handling there. The question on which the Employees desire an award was presented to the Board in the Statement of Claim, as required. The Rule under which they assert that the claim is payable (in addition to the claim on the merits) is the Time Limit Rule. Demand for payment under that Rule was made on the property and five days pay should have been allowed under the parties Rule and National Disputes Committee Decision No. 15 when the Employees pointed out Carrier's untimely handling on the property."

(From the review of the Dissent to Award 23845, it can easily be inferred that many, if not all, of the same arguments and authorities relied upon in this case were also used there but were obviously not found as being persuasive.)

It seems that the Third Division, today, is continuing to consider time limit issues in deciding cases even when such issues are not included within the formal Statement of Claim. In recent Award 27842 that Division sustained a claim asking to have discipline of dismissal set aside, with payment for time lost, on the grounds that Carrier failed to make a timely denial of the Claim on appeal.

Examination of Fourth Division Awards discloses similar results in some of its prior cases. Fourth Division Awards 3615, 3760 and 3783 indicate that time limit issues were considered, by the Division, even though that issue was not included within the Statement of Claim and even though arguments similar to those we are faced with here were put forward. In this regard a comment from Award 3783 is noteworthy:

"The argument is also made that the time limit issue must be included in the Notice of Intent filed by the Organization and in the formal statement of claim, and if not so included, the Board is not empowered to consider the issue. We do not find such argument persuasive. The Statement of Claim in the Notice of Intent and in the submission of the Organization is the same claim that was handled on the property. The time limit issue was raised by the Organization in the on-property handling in support of the claim. Further, the inclusion of alleged time limit violations in the Notice of Intent or the formal Statement of Claim has not been a consistent requirement of this Division. See Awards 1789, 2098, 3615 and 3760."

In this Claim, as well as the other thirteen, the time limit issue was raised by the Organization in the on-property handling in support of the claim and we do not have evidence that inclusion of alleged time limit violations in the formal Statement of Claim has been a consistent requirement of the First Division. Accordingly, the request that we dismiss the matter because of a failure to include the time limit issue within the Statement of Claim is rejected.

Even though we conclude that inclusion of an alleged time limit violation within the Statement of Claim is not a consistent requirement of the Board, nevertheless, to succeed Petitioner must meet minimum elements of proof and establish that such a breach did in fact occur and was not waived or acquiesced in. It is not enough to allege, without documentation that the breach occurred.

In exploring Petitioner's demand that the Claim before us be sustained on the basis of a time limits violation we are unable, in either parties' submissions in this docket, to find any correspondence dealing with a demand for payment under the time limit provisions of the Agreement. While it is true that the matter is discussed in both submissions, and some correspondence is available in some of the other dockets in this group which tends, perhaps, to fill in some of the blanks, nevertheless there is not sufficient evidence, in this docket, to support such a demand.

Petitioner suggests that because fourteen dockets were progressed as a unit they should be considered severally, and data be extrapolated from one docket to another. If we do this, we are told, we would have a complete picture which would demonstrate that each of the fourteen claims was handled on the time limits issue and that Carrier acknowledged that such time limits were breached.

We have certain fundamental problems in following this approach. It is one thing to take official or judicial notice of circumstances and/or decisions, but it is quite another situation to pick out factual data from one docket and use it in deciding another.

We also are cognizant of the fact that the Board is expected to have expertise in the settlement of railroad grievances, but we doubt that we are empowered to use this expertise for consideration of facts and review of data which neither Petitioner nor Respondent saw fit to place before us in a particular docket. It should be remembered that the Parties initially have exclusive control over the material, particularly the correspondence exchanged on the property, which they choose to place before the Board. If, for whatever reason, an election is made not to place a document or data before us in a particular case, we ought not to borrow such material from another case and use it as a basis for decision in the case in which it was not available. This not only makes good sense, but it also makes good law.

Accordingly, in this docket we have an inadequate basis to find that the time limits were breached while this matter was being handled on the property.

Even though Petitioner did not address the merits of the dispute in its submission we have license to consider the merits because we have historically held that we must base our decisions on the total record before us, even in those cases where one party fails to file a submission. (For a recent analysis of this holding see First Division Award 23856.) In this case the Carrier has submitted a copy of the complete transcript of the Investigation.

In reviewing this transcript, we note that Claimant was assessed thirty demerits following an investigation on a charge that he missed a call while he was regularly assigned to a rotating extra list. At the investigation, Claimant acknowledged that he was not at his regular calling location at the time of the call. He was attending church. He contended, though, that he was not first out, thus, he was not technically subject to call at the time. Ergo, no discipline should be assessed.

From a review of the transcript, we conclude that it has been established that adequate evidence is present to support the charge, and that Claimant's defense did not overcome this evidence. It is clear that Claimant was subject to call, the call was made, and he was not at his normal calling point, nor did he leave information where he could be reached. Also, it is our view that the discipline assessed, 30 demerits, is not disproportionate to the offense. Accordingly, the discipline will not be disturbed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Attest:

  
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 10th day of May 1989.