

The Second Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

Parties to Dispute: ( Savatore DiBenedetto  
( Missouri-Kansas-Texas Railroad Company

Dispute: Claim of Employees:

1. That the Missouri-Kansas-Texas Railroad Company failed to make a reasonable accommodation or to attempt a reasonable accommodation of the religious beliefs and practices of non-journeyman Carman Salvatore DiBenedetto, in violation of the duty imposed by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Section 2000e(j).
2. That the Missouri-Kansas-Texas Railroad Company violated the terms of the controlling agreement and the Railway Labor Act when it dismissed non-journeyman Carman Salvatore DiBenedetto by certified mail, October 28, 1981.
3. That the Missouri-Kansas-Texas Railroad Company be ordered to reinstate non-journeyman Carman Salvatore DiBenedetto and pay him for all time lost, and any and all benefits he would have been entitled to receive since October 23, 1981.

Findings:

The Second 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 waived right of appearance at hearing thereon.

This case came about after the Claimant, who had been employed since August 3, 1978, told the Carrier on October 16, 1981, that he would no longer work from Friday sundown until Saturday sundown because of his religious beliefs. Accordingly, he did not work on that date. Moreover, he testified at the investigation, which followed his alleged failure to protect his assignment, that his unwillingness to work future Friday/Saturdays dates would be permanent. The Carrier found, after the investigation, that the Claimant had not protected his assignment on October 16, 1981, and dismissed him from the service.

The Carrier essentially argues that, while it understands and is not without sympathy with the Claimant's wishes, it cannot accommodate his religious practices without waiving or setting aside certain provisions of the controlling Agreement.

On the other hand, the Organization argues, as is well documented in the record before us, that the Carrier had a number of ways available to it, short of dismissal, to resolve this dispute. In summary, a number of contentions are advanced which rely upon the contract and other authorities to conclude that the dismissal of the Claimant was not a reasonable action on the part of the Carrier.

The Board has thoroughly reviewed the extensive record before it and we find that the claim must fail. While the Board is not unmindful of the numerous well argued contentions advanced in support of this claim, we find that the Claimant failed to protect his job on Friday, October 16, 1981, the incident that led to this dispute. We find no contractual basis for finding that his absence is excused because of his religious convictions. Furthermore, the Claimant's announcement that he would not work his assignment on Fridays from that date on provides further substance to the Carrier's conclusion and the resultant discipline imposed.

Certainly, it is not unreasonable to argue that the Carrier has a degree of responsibility to accommodate the sincerely-felt religious beliefs of its employes. However, such a course of action is at its discretion, since it does have the right to expect its employes to fulfill their obligation to work all of the assigned work days and to protect the duties for which they were hired. There is no rule in the Agreement which entitled the Claimant special consideration because of his religious beliefs.


In the case herein, the Carrier did make efforts to accommodate the Claimant. However, Carrier could not so do without breaching or waiving key provisions of the duly negotiated Collective Bargaining Agreement, such as the seniority system or its work schedule. Accordingly, a reasonable accommodation could not be reached and the finding of the Carrier will not be disturbed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1985.

Labor Member's Dissent to  
Second Division Award No. 10290  
to Docket No. 10142  
(Referee Eckehard Muessig)

Rule 24(d) in pertinent part:

"Any appeal to the Director of Labor Relations must be made by the employees or their duly accredited representative within 30 calendar days of the date of such decision. A conference on the appeal shall be held between the Director of Labor Relations and the employees or their designated representative of the Organization within 30 Calendar days of the date of the appeal. A decision on the appeal shall be rendered within 30 calendar days of the date of conference. - - -  
- - -. (Emphasis ours.)

Rule 24(h)

Time limits set forth in this Rule may be extended by mutual agreement.

The Referee in addressing the procedural time limit issue on Page 2, 1st paragraph, of the award documented the processing of the dispute with the Carrier by the Organization. Such documentation conclusively demonstrates that the Carrier ignored Claimant's timely appeal by the Organization from February 4, 1982 until the conference of June 30, 1982, a total of 146 days.

In clear, concise, and unambiguous language Rule 24 (d) stipulates:

"A conference on the appeal  
shall be held - - - - -  
within 30 calendar days of  
the date of the appeal."

Thus it is unquestionably demonstrated by the rule language that the rule requires the Carrier to schedule and hold a conference with the Organization "within 30 calendar days of the date of the appeal."

The agreement further stipulates in clear, concise, and unambiguous language in Rule 24(d):

"A decision on the appeal shall be rendered within 30 calendar days of the date of conference."

Thus it is unquestionably demonstrated by the rule language that the rule requires the Carrier to render a decision "within 30 calendar days of the date of conference."

The rule demonstrates that at a maximum, a decision shall be rendered by the Carrier within 60 days of the appeal. It can be less than 60 days from the date of appeal, depending on the scheduling of the conference within the first 30-day period of the rule but no longer than 30 days after the appeal conference.

Rule 24(h) provides that the time limits of this rule may be extended by mutual agreement. The record in this instant dispute demonstrates no agreement between the parties to extend any time limits. The record further demonstrates no request by either party to extend time limits.

In the third paragraph on Page 2 of the Award, Referee Muessig states:

"Moreover, the Rule does require 'a conference on the appeal.' However, the Rule is silent with respect to the parties' responsibility to schedule a conference."

This is ludicrous. The responsibility to schedule a conference on an appeal is the Carrier's. The Rule requires the Carrier to conference the appeal. "A conference on the appeal shall be held - - - - within 30 calendar days of the date of the appeal." And since the Carrier is obligated by the Rule to conference the appeal, it flows like a river to the sea that the Carrier is also obligated to schedule the conference.

Referee Muessig, in the same paragraph, documents the Carrier's contention that "it has been a practice of the parties to hold an appeal in abeyance pending a conference to be scheduled at a mutually agreeable time and date, in essence, contending that it is a shared responsibility with respect to the scheduling of a conference."

The Agreement in clear, concise, and unambiguous language, which is controlling, states:

"The time limits set forth in this Rule may be extended by mutual agreement."

and the processing record of this instant dispute documents that neither party to the Agreement in this instant dispute requested, much less was granted, an extension of time of the time limits mandated by the rule. As far as a practice is concerned, which we emphatically deny existed, such a practice contrary to the precise and unambiguous language of the agreement can be abrogated by either party to the agreement at any time simply by merely applying the provisions of the rule. No practice existed. (See employees exhibit "L").

Without question, the Referee in the instant dispute at bar fully recognized the existence of a procedural error on the part of the Carrier in its processing of the dispute with the Organization on the property and then exceeded his authority as a referee to interpret the Rule of the Controlling Agreement by "modifying the rule" to the extent that his Award as applied to the rule bares absolutely no resemblance.

In this instant dispute, the record, in conjunction with Rule 24(d) of the Controlling Agreement, bares witness that the Carrier violated the agreement by violating the procedural time limit requirements of the agreement. That the Referee exceeded his authority and by his award changed the Rule. That the Referee should never have proceeded beyond the procedural issue and addressed the dispute on its merits. That the Referee should have yielded to the time proven precedents of this Board and issued a sustaining award of the Claimant's prayer to the Board based on Carrier's procedural violation.

The Referee may consider this dissent as bitter and he is absolutely right. The opening sentence of Rule 24(d) states:

"Any appeal to the Director of Labor Relations must be made by the employees or their duly accredited representative within 30 calendar days of the date of such decision."

Had the organization violated this clear, concise, and unambiguous rule language by one (1) day, the Carrier would have raised the time limit issue by applying the Rule. Practice or anything else within the 30 calendar day appeal limits would have resulted in a dismissal award on procedural grounds - regardless of the merits of the dispute. In this instant dispute and under the facts as documented in this record, Claimant was entitled to a sustaining award on procedural grounds.

Award 14139, third Division, NRAB, addressing the time limit issue:

"This Board has universally rejected identical contentions, Awards 10688 (quoting first Division Award 18054) 11777, 12417, for example. The Rule itself provides the method of extending the time: Agreement. We have no power to vary the terms of a contract negotiated in conformity with the Railway Labor Act."

That this principle applies to discipline disputes, see Award 17301 and 21125, 1st Division.

Other disputes where the Board has refused jurisdiction because not progressed within the time limits are First Division Awards 15375, 16834, 17439, 17818, and 20553. Third Division Awards 6185, 11051, 13253, 13254, 13673, 14171, and 16446.

Consistently where a "Claim was not progressed in accordance with the applicable Time Limit Rule" it has been dismissed, First Division Awards 18317, 18341, 18530, 20035, 21133, 21227, 21331, and 22130.

The National Railroad Adjustment Board cannot amend an agreement by either adding or deleting provisions thereof, Second Division Awards 6274, 3086, 1181, 3305, 7077; Third Division Awards 10755, 11040, 19068, 19142; First Division Award 21459.

Procedural defects, claims are procedurally defective if time limits are violated, Second Division Awards 1847, 4297, 5308, 6471, 6637, 2268, 526, 6627, 3685, and 4367.

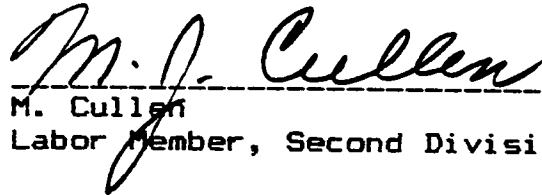
Past practice and custom is not a consideration when rule or agreement is unambiguous or specific, Second Division Awards 1479, 1898, 2210, 3111, 3220, 3405, 3431, 3686, 3873, 4096, 5365, 5547, 6438, 2315, 7200, 8444, and 4241. Third Division Awards 20711, 20899, 14599, and 19552.

CONCLUSION

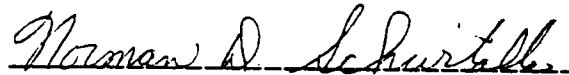
Award 10290 is untenable. There is no agreement support for its findings. Referee Muessig exceeded the bounds of his authority and his award is based upon his modification of the rule of the controlling agreement negotiated between the parties in accordance with the Railway Labor Act, as amended. An action he has absolutely no authority to consummate. Award 10290 is palpably erroneous, of no precedent value and to which is filed this most vigorous dissent.



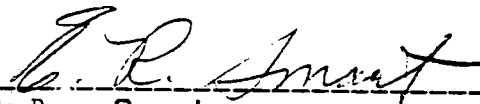
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F. V. Celona  
Labor Member, Second Division



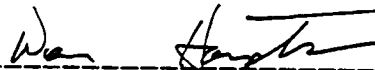
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