

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood Railway Carmen/Division of TCU
(South Buffalo Railway Company

STATEMENT OF CLAIM:

1. That the South Buffalo Railway Company violated the controlling Agreement dated September 1, 1987 and the September 3, 1987 Agreement as it applies to Paragraph 3.7, Deduction for Public Pension, of the August 23, 1984 Pension Agreement.
2. That the South Buffalo Railway Company violated the Favorite Nation/Me Too letters dated September 3, 1987 when they failed to apply all economic aspects of the Carrier's contractual proposals uniformly to all bargaining unit represented Crafts and Classes of employes.
3. That the carrier violated Rule 30 of the controlling agreement when it failed to respond to the Organization's appeal dated May 12, 1988 within the 60 day requirement, and therefore, claim to be allowed as presented.

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 were given due notice of hearing thereon.

In considering this dispute, there are two threshold procedural questions that must be carefully assessed. Firstly, the Organization points out that Carrier's Ex Parte Submission does not contain a signature as required by Circular No. 1 and thus the instant Claim must be allowed consistent with the precedential decisions of the Board. See for example Second Division Awards 9701, 11616 and Third Division Awards 23170 and 23283.)

Contrariwise, Carrier contends that its Ex Parte Submission was properly executed, since the designated official's name and title were properly typed at the closing portion of the Submission. Several Awards were cited to support Carrier's position. (Second Division Awards 11616 and 9701; Third Division Awards 27658, 23283, 23170; Fourth Division Awards 4600 and 4469.)

Secondly, the Organization contends that the Claim should be allowed as presented, since Carrier failed to respond to its second step appeal in a timely fashion. Specifically, the Organization charges that Carrier did not respond to its May 12, 1988 appeals letter until July 25, 1988, some fourteen (14) days after the expiration of the mandatory sixty (60) days limit. Article 30, Grievances, Paragraph C reads as follows:

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing, and must be taken within 60 days from receipt of notice of disallowance, to the Superintendent of the Railroad or his designee. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the Employees as to other similar claims or grievances. The Superintendent or his designee shall make the final decision on behalf of the Company, and such decision shall be made within 60 days after the receipt by him of the appeal. If the Superintendent or his designee shall fail to make his decision within such 60 days, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."

It cited as controlling Second Division Awards 7652, 8089, 8116, 8243, 9354, 10157, 10880 and Awards 4 and 25 of Public Law Board 3166.

In response, Carrier asserts that even if an untimely response is established, liability can only be restricted to the date of late denial, which herein was July 25, 1988. It cited Third Division Awards 26213 and 24269 as controlling on this interpretative point. In Third Division Award 24269, which Award 26213 relied upon, the Board held:

"However, Carrier's liability is not infinite. As the National Disputes Committee ruled in Decision No. 16, '(the) receipt of the Carrier's denial letter . . . stopped carrier's liability arising out of its failure to comply with Article V of the August 21, 1954 Agreement.' Here Carrier's denial of the claim was dated April 23, 1980. Thus, Carrier's liability should cease on April 23, 1980, the presumed date of the Organization's receipt of Carrier's denial."

In reviewing the Organization's assertion of an unsigned Submission, the Board takes judicial notice of Fourth Division Award 4469, where the Board held that a typewritten name on the Submission was a sufficient identifying signature. Accordingly, since the name and title of Carrier's official was typed at the end of the Carrier's Ex Parte Submission herein, we find the Submission in accordance with the requirements of Circular No. 1.

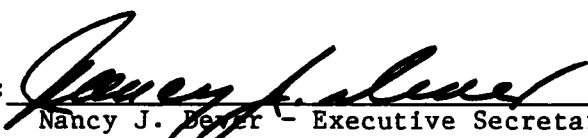
On the other hand, the evidence is clear that Carrier failed to respond to the Organization's May 12, 1988 appeals letter in a timely fashion and, thus, a procedural violation indisputably occurred. There are no indications that the Organization waived its procedural rights on the property or that the parties habitually failed to observe the grievance appeals time limit requirements and no estoppel elements present that would reasonably bar the Organization from asserting such rights. As to our disposition, we are certainly mindful of the interpretative parameters of Third Division Awards 26213 and 24299, but said decisions considered the relevancy of Decision No. 16 of the National Disputes Committee. This Committee was established in 1963 by various non-operating unions and Carriers to resolve certain disputes that were submitted to the Third Division. The Organization herein was not a member of said Committee and rested its position upon the applicable case law developed under the judicial auspices of the Second Division. In examining these Awards, particularly Second Division Awards 7652, 8089, 8243, 9354, 10157, 10880 and Awards 4 and 25 of Public Law Board 3166, we find that the Claims involved were allowed where Carrier failed to comply with applicable procedural time limits. We will not reiterate verbatim the rationale of these decisions except to note that the Board has never considered procedural violations as occupying a lesser status of judicial significance or as a basis for ignoring the sixty (60) day time limit appellate requirements, where the Claim on its face appears without defensible substance. We further note in this connection that had the Organization failed to comply with the Agreement's time limits, the Claim would have also been dismissed in toto on procedural grounds. This would have been so under the explicit language of Article 30, even assuming arguendo that the Claim was on its face meritorious and involved extensive liability. The Sword of Damocles falls both ways. We were not privy to the parties negotiations and hence we are constrained by the applicable provision's language and the decisions of the Division. Article 30, Paragraph C states in pertinent part that if the Superintendent or his designee fails to make his decision within "such 60 days" the claim or grievance shall be allowed as presented. There are no qualifications, restrictions or waivers appended to this default. For these reasons, and consistent with our decisions in the Second Division Awards cited and the two (2) decisions of Public Law Board 3166, the Claim as presented shall be allowed. We shall not address the merits of the case.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1990.