NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21996

THIRD DIVISION

Docket Number MW-21969

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood. of Maintenance of Way Employee
(Louisville and Nashville Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

Track Repairman D. M. Brady shall be paid for all time lost from the date of his dismissal from service (6-30-75) to the date he was returned to service with seniority unimpaired (10/6/75) because of the Carrier's failure to timely render decision following the investigation held on July 10, 1975 (System File 1-9(75)/D-106131; E-306-9).

OPINION OF BOARD:

On June 3.0, 1975, Claimant was dismissed from service for ah asserted insubordination, and he requested an investigation. The investigation was conducted on July 10, 1975. Although Rule 27(b) provides:

> "Rule 27(b) An employe disciplined, shall, upon making a written request to the Division Engineer, within 10 days from date of information. be given a fair and impartial hearing within 10 days thereafter. Decision will be rendered within 30 days from date investigation is completed. The employee shell have a reasonable opportunity to secure' the presence of necessary witnesses and may be representedby the elected committee of the employes or fellow employes of his own choosing." (Underscoring supplied)

Carrier was four days late in rendering its decision which sustained that he was guilty of insubordination, and which reaffirmed the dismissal.

On the property, the Organization sought total reinstatement because of the failure to comply with the 30-day time limit.

In response, on September 3, 1975, Carrier conceded that "... the decision was not rendered within the 30 day time limit..." and it stated that in view of that:

"I am willing to reinstate (Claimant) with seniority unimpaired without pay for time lost since his dismissal."

Claimant declined the offer because it did not repay him for time lost and for expenses. Thereafter, on October 2, 1975, Carrier restored Claimant to service (effective October 6, 1975) but without compensation.

The Organization contends that the Employe is entitled to full reinstatement with pay for all time lost and seniority unimpairedbecause of the failure to comply with the time limit mandate. Conversely, Carrier asserts that the proper remedy would be an award of no more than four (4) days of pay.

In support of its position, Carrier has cited various Awards, such as First Division Awards 13 845 and 15 579, as well as Third Division Awards 20423 (which dealt with a failure, to provide the Employes' representative with certain material), Award 19842 (which dealt with an improper holding out of service pending investigation) and a 1954 Decision of the United States Court of Appeals (4th).

Yet, the author of Third Division Award 20423 stated, in Award 21018:

"It is well established that a Claim which has not been progressed in accordance with the Agreement does not meet the requirements of the Railway Labor Act and this Board lacks jurisdiction to consider it. In one of a large number of Awards on this subject, Award 12767, we said:

'...the Board finds that in order to have avoided the time limitations, the Organization must have filed its appealbefore midnight on January 31, 1960. Since it waited one day too long, the time limits expired at midnight, January 31, 1960, and the claim is therefore barred.'

Similarly, in the instant case, the Organization simply was at least one day too late. The inescapable conclusion is that the Board has no jurisdiction over this dispute."

In Award 18352, we note:

"We have consistently held that an employe who has failed to initiate action within the time limitations fixed in an agreement is barred from initiating an action at a later 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."

See; also, Award 20657.

Quite recently, this Division adopted Award 21873 which cited, with favor, Award 21675. There it was determined that:

". . .time limit provisions are to be applied as written by the parties and that any deviation from this principle would amount to rewriting the parties' Agreement, which no third party is empowered to do."

When it agreed to a rule which stated that a"...Decision will be rendered..." (underscoring supplied), Carrier assumed a mandatory obligation. Employers are quick to assert that Employes are without a remedy if they fail to comply with a contractual time limit. Accordingly, we sustain the claim.

FINDINGS : The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1978.

CARRIER MEMBERS' DISSENT TO AWARD NO. 21996
DOCKET NO. MW-21969 (REFEREE SICKLES)

In this case the referee granted pay for all time lost because of Carrier's failure to render the discipline within thirty days as provided in the Agreement. The Carrier was four days late in rendering its decision. This remedy goes beyond the scope of the Agreement, and in addition it does not have any basis in contract law. Rule 27(b) does not contain e specific penalty that nullifies the entire discipline proceeding for failure of the Carrier to render e decision within thirty days.

It is a basic principle of the common law of damages that absent any specific penalty provision, a remedy for breach of contract must be limited to actual proven damages.

This principle has been specifically applied to cases before this Board vhere the Carrier has failed to notify the claimant of discipline within the proper time limit and there was no contractual penalty for same. In a well-reasoned opinion Referee Mabry stated in First Division Award 15579:

> "Likewise we find no merit to the contention that because the 'decision' here involved was not given within forty-five days from the date of the meeting at which the matter was discussed, as the rule requires, carrier's right to have its discipline upheld is lost. Toe rule provides no penalty for failure to comply strictly with its terms, and, absent some showing of prejudice to claimant the failure to render such decision within forty-five days is not fatal to carrier's position. No prejudice is here claimed or shown.' (Emphasis supplied).

In an earlier First Division Award 13845 Referee Robertson made the following observation:

> "Notice of the discipline assessed was not delivered to claimant until seven days after hearing. The discipline rule requires that the result of the investigation be made known within five days. In all other respects the procedural requirements of the discipline rule were followed by Carrier.
>
> "So long as the period of delay is so short, the failure of the Carrier to literally comply with the Agreement with respect to notice of result of hearing does not vitiate the entire proceeding. The letter of dismissal was dated November 8, 1948 (five days after the date of thehearing). The record does not account for the delay in delivery. In any event, the Agreement will be satisfied if the Carrier is required to pay the claimant for those two days."

Decisions such as the one in this case which impose a penalty for a technical violation where none is provided in the Agreement can lead to absurd results especially where the discipline imposed is just, warranted and necessary. The minority suspects referees would be hesitant to vitiatt the proceedings of a discipline case for a serious offense such as violence on a mere technicality where the discipline has the purpose of protecting the Carrier's employees and property. This suggests that an expedient double standard might result unless the referee shows more forethought and wisdom than vas shown here. As Referee Carter said in Third Division Award 2945, and Referee Lieberman in Third Division Award 19558:

> "Truth and technicality should be the controlling factor in making decisions of this kind."

Referee Schedlerrecognised the underlying weakness of the reasoning and lack of wisdom behind decisions such as the Instant one and recognized the potential for absurdity and injustice. He stated in Second Division Award 2466:

"Admittedly the carrier exceeded by some three (3) days the time limit of sixty (60) days within which it was to confirm in writing its decision. The organization contends that because of this breach the carrier is obligated to reinstate the claimants. The purpose of such a rule is to keep claims from growing stale and to expedite the proceedings covered by the rule. We find no merit in the contention that because of a few days' delay in issuing a statement the carrier has lost the right to have discipline upheld. There is no showing in the record that the claimants were injured by this brief delay. Most certainly the parties should attempt to stay within time limitations prescribed for procedural requirements, but the failure to do so cannot otherwise void the proper exercise of disciplinary control. Agreements of this kind regulating the employer-employe relationship must be given a reasonable, workable construction and not construed so narrowly as to defeat justice."

The possibility of absurdity and injustice is one reason there is no penalty written in the contract for this type of technical violation.

During discussion of the case the carrier cited Third Division Award 20423 (Lieberman). In Award 20423 Referee Lieberman held technical violations do not vitiate the entire discipline unless there is a penalty provision that provides same, and further the remedy is limited to proven prejudicial damage. Referee Lieberman stated:

"At the outset we must point out that the disciplinary process in this industry does not follow the careful technical procedures required in criminal trials; on the other hand the rights of employes to due process and equity in the investigative process must be scrupulously preserved. The Board's function, in reviewing the disciplinary activity on the property, is of course restricted . . . . .Claimant's undenied guilt is significant in our consideration. The claim herein does not allege a violation of the Agreement in Carrier's error per se, but rather through the improper dismissal of claimant. Under these circumstances it would be entirely improper for this Board to reinstate claimant with substantial back pay in accordance with Article V Section 5-a; such justice could be considered arbitrary and capricious (Award 10547). It would be impossible to hold that the charges against claimant have not been sustained

"and there is no contractual remedy provided for violations of Section 3 unless there was some negative affect on claimant's rights to due process. The claimmust be denied."

In an attempt to ignore Award 20423, and to rationalize his decision the referee in this case points to Third Division Award 21018 also by Referee Lieberman. Evidently this referee feels he could ignore Award 20423 by insinuating, by citation of Award 21018, that Referee Lieberman reversed his earlier decision. This is not true. There is no inconsistency between the two and Award 21018 can not lend any support to the erroneous decision here. Award 20423 still is directly on point for the decision the carrier urges. An examination of Award 21018 reveals the fundamental distinction between it and the instant case. Award 21018 is a time limit on claims case and the rule in question in Award 21018 contains a specific penalty for failure to observe certain time limitconditions. Many contracts provide similar specific penalties for failing to progress or disallow claims within certain time limits, but in the instant case there is no similar penalty provision for failure to render a decision within time limits. The Award inthe instant case and the few others like it ignore this fundamental distinction. The Referee here failed to recognize the reasoning behind and distinction between Award 21018 and Award 20423 and further casually by-passed the force of the common law principle on damages.

In addition, this decision ignores the fact that a referee does not have the authority to add to the contract through the guise of interpretation something that is not there. If the parties had desired a

penalty for delay in rendering a discipline decision, the written contract would so reflect this.

The referee's rationale that the phrase in the Rule 27(b) ". . . . decision will be-rendered...." is mandatory as opposed to directive is equally erroneous. The proper interpretation of the word "will." would recognize it as directive in meaning. In Third Division Award 16172 the majority interpreted a discipline rule (Rule 24) that read in pert the ".... decision in writing will be rendered." The majority stated:

> "The Claimant contends that under the provisions of Rule 24, an employe is provided with certain rights in instances where the Carrier places charges against him in connection vith an alleged offense; That among these rights is that the hearing shall be held within 10 days from the date when charged with the offense or held from service...."
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> "The Carrier, on the other hand, contends that the provisions of Rule 24, with which we are concerned, are not mandatory, but directory.
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> "It is a well settled rule of law that in determining as to whether a provision of an agreement is mandatory or directory, the end sought to be attained by the provisions of the agreement is always important to be considered. One of the tests for determining whether the provisions of an agreement sre mandatory is whether it contains negative words which renders the performance of the act improper if compliance is not made with the provisions of the agreement. The absence of negative words tends to show that the language used is directory and not mandatory. The negative need not be expressed but may be inferred. If the agreement imposes a penalty for its violation, we may reasonably assume that the parties intended that its provisions be followed, and hence the provisions are construed as being mandatory. The fact that the agreement is framed in mandatory words, such as 'shall' or 'must' is not the determining factor as to whether it is mandatory or directory,

> "Rule 24 does not contain any negative words, It does not contain any language to the effect that the failure to comply with its provisions or terms will void and/or nullify the result of any proceedings had pursuant to and in accordance with its provisions. It imposes no penalty if its provisions are not followed. We hold, therefore, that the provisions of Rule 24 are directory and not mandatory"

There are also many cases which hold in general that similar procedural errors and delays in discipline, such as delays in holding hearings, are not prejudicial and do not vitiate the entire proceedings. Those cases involving procedural delays hold that damages; if any, must be limited to the time of delay. See for instance, First Division Award 16007, Third Division Awards 19842, 14348, 11775, and Second Division Award 6360.

The reasoning behind these awards, which have general relevance to this case, can best be paraphrased by a reading of the decision of the U. S. Court of Appeals, Fourth District. February 9, 1954. (210 F(2d) 812). The Court stated:

> "The purpose of the ten-day provision is to expedite the proceedings for which the rule provides, not to serve es a limitation upon their being held: and the remedy for violation of that provision is damages for any delay that may have occurred, not reinstatement with an unassailable record or damages for an indeterminate period on the theory that the proceedings otherwise regularly held were a nullity. Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity."

The Carrier strongly dissents to this Award in light of the principles and well-reasoned decisions discussed above. The proper decision in this case would have been to deny the claim because damages and prejudice due to the four day delay were not proven, and had they beer, the Award should have limited back pay to the time of the delay.

Gil Vernon-

W. F. Euker

J. E. Mason

J. W. Gohmann