

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22373
Docket Number CL-20855

Benjamin Rubenstein, Referee

(Brotherhood of Railway, Airline and Steamship
Clerks, Freight Handlers, Express and
Station Employes

PARTIES TO DISPUTE:

(
Grand Trunk Western Railroad Company

ON REMAND FROM THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION,
ON THE PETITION OF EMERSON F. KELLEY IN CIVIL ACTION NO. 77-70789

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-7594) that:

A. Carrier unjustly assessed service record of Mr. E. F. Kelly, Yard Clerk, Port Huron, Michigan, with thirty (30) demerit marks, as result of investigation held on June 13, 1973, in which the transcript failed to support the decision of the Carrier in sustaining the charges made against Mr. Kelly in the caption of the investigation.

B. Carrier should now pay Mr. Kelly eight (8) hours at straight time rate of his position for May 16, 1973 and each subsequent day Mr. Kelly is out of service."

OPINION OF BOARD: The genesis of this dispute is found in Award No. 20826, Docket No. CL-20855, of the Third Division, National Railroad Adjustment Board, dated September 30, 1975.

The parties to the dispute in that Award were the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes versus the Grand Trunk Western Railroad Company.

The issue involved in Award No. 20826 centered around the assessment of thirty (30) demerit marks against the discipline record of Mr. E. F. Kelley as a result of an investigation conducted on Carrier's property on June 13, 1973. Mr. Kelley was present, represented by a BRAC representative, and testified at that investigation.

Subsequent to the assessment of discipline against Mr. Kelley, appropriate appeals were initiated and perfected on his behalf by the representatives of the Organization through the usual manner of handling disputes on the property as required by Section 3, First (i) of the Railway Labor Act, as amended, to and including the chief operating officer of the Carrier designated to handle such disputes, without success. Thereafter,

the Clerks' Organization, in a continuation of their representation of Mr. Kelley, placed the dispute before the Third Division, National Railroad Adjustment Board, for a final and binding decision as contemplated by Section 3, First (m) of the Railway Labor Act.

The Third Division, with Referee Louis Norris, after hearing argument from both the Petitioner (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees) and the Respondent (Grand Trunk Western Railroad Company), rendered its Award No. 20826 which was adopted by the Division on September 30, 1975. The Award outlined the dispute involved therein in detail and concluded that the disciplinary action taken against Claimant E. F. Kelley was not severe or unreasonable and made specific findings that the rules agreement between the parties had not been violated.

Under date of March 29, 1977, counsel for Mr. Emerson F. Kelley initiated Civil Action No. 77-70789 in the United States District Court for the Eastern District of Michigan, Southern Division, against the National Railroad Adjustment Board, Defendant, and the Grand Trunk Western Railroad Company, Defendant, requesting that Award No. 20826 be "set aside and held null and void" and that the matter be remanded to the National Railroad Adjustment Board for reconsideration and that petitioner (Emerson F. Kelley) be given opportunity "to be heard through counsel and to present witnesses on his behalf."

On November 28, 1977, the District Court, with the Honorable Charles W. Joiner presiding, issued its Judgment in which it was Ordered and Adjudged:

"...that the National Railroad Adjustment Board be dismissed from the case...that the case be remanded to the National Railroad Adjustment Board, Third Division, for rehearing in accordance with 45 U.S.C. § 153 First (q)."

In the Memorandum Opinion and Order which accompanied this Judgment, the Court pointed out that "in this case petitioner only claims that the Board failed to comply with the procedural requirements of the statute." The Court stated further:

"Petitioner claims that the Board failed to comply with the requirements of the statute in a number of respects but the court finds it necessary for a resolution of this case to deal with only one of these claims: that the Board failed to provide the petitioner with due notice as required by 45 U.S.C. § 153 First (j). In the proceedings before the Board, petitioner was

"represented by his union. The court notes that certain courts have held that where the employee is represented before the Board by his union, actual notice of the proceedings is all that is required. In Cole v. Erie Lackawanna Ry. Co., 541 F.2d 528 (6th Cir. 1976), the court noted:

'We agree ... that in situations where employee-grievants have authorized their union to handle their grievances, NRAB statutory notice provisions are satisfied if the employee receives actual notice of the proceedings ...

'Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim.' 541 F.2d at 534.

"In this case, the record discloses that the petitioner was notified by letter from his union that his case had been submitted to the Board. The petitioner was not given notice by the union before the time that the union filed its submission with the Board. Petitioner contends that if he had been so informed he would have taken steps to consult with the union and to relay information to the union in order to help in the presentation of his claim. While the court believes that in a case such as this there may arguably be a remedy available to the petitioner against the union for a breach of the duty of fair representation, this is an appropriate case to remand to the Board for failure of the Board to give the petitioner the statutory notice. On the record before the court, the court cannot say that the petitioner received actual notice a sufficient time prior to the proceedings to enable the petitioner to consult with the union or to exercise his options.

"Accordingly, the case will be remanded to the National Railroad Adjustment Board, Third Division, for a rehearing of petitioner's claim after proper notice."
(Underscoring in original.)

Following receipt of the Memorandum Opinion and Order of the District Court by the Board on or about April 20, 1978, and because of Referee Norris' inability to continue to serve with the Third Division, Mr. Benjamin Rubenstein was selected to sit with the Division as a Member thereof to make an Award in compliance with the Court's directive.

The Third Division, by individual notice to all of the parties in this case, set a hearing for January 15, 1979, which was postponed to January 29, 1979.

By letter dated January 19, 1979, the Division was advised by Ms. Gayle S. Boesky, counsel for Mr. Kelley, as follows:

"Please be advised that neither Mr. Kelley nor I can attend the hearing in this matter set for Monday, January 29, 1979, at 10:00 A.M. because Mr. Kelley cannot afford to be present at the hearing and cannot afford to hire counsel to do so.

"We intend the written submission of case to stand in our stead."

Neither Mr. Kelley nor his counsel appeared at the hearing which was held as scheduled on January 29, 1979. No witnesses were presented on behalf of Mr. Kelley. The "written submission" referred to in counsel's letter of January 19, 1979, supra, consisted of a nine (9) page "Submission of Case" to which were attached the following five (5) exhibits:

- I. A two (2) page affidavit from Mr. Kelley.
- II. Copy of Memorandum Opinion and Order plus Judgment of the District Court.
- III. Copy of the investigation record of June 13, 1973.
- IV. Copy of Award No. 20826.
- V. A two (2) page letter dated December 27, 1978, from Richard E. Manning, Clinical Social Worker.

The Organization and Carrier representatives who appeared at the hearing presented testimony in defense of their respective positions.

The Board is convinced that the handling afforded this case went considerably beyond the Order of the District Court. The primary argument which brought about the Order of the District Court concerned

an alleged denial of Mr. Kelley's right to appear personally before this Board to present his own case and, if possible, supply additional information which had not been heard or considered at the original hearing. His failure to appear either in person or by counsel at the scheduled hearing after individual notice had been given, negated the purpose of the Order of the District Court.

While the Board has, in this instance, effected complete compliance with the Order of the District Court, we are compelled to take notice of the apparent conflict which exists in the current interpretations which have addressed themselves to the "due notice" provisions of Section 3, First (j) of the Railway Labor Act.

This case was remanded to the Board because the Court believed that:

"... The petitioner was not given notice by the union before the time that the union filed its submission with the Board...." ^{1/} (Emphasis in the original.)

The Court in this case cited Cole v. Erie Lackawanna Ry. Co., 541 F.2d 528 (6th Cir. 1976) as precedent.

However, this Board would be remiss in its duties if it failed to point out that the United States Court of Appeals for the Seventh Circuit in O'Neill v. Public Law Board No. 550 (argued December 5, 1977; decided August 11, 1978) said:

"... Because the record demonstrates that plaintiff's representative, the United Transportation Union, received all necessary notices and represented plaintiff fully before the Board, as it was authorized to do, we find compliance with the requirements of both due process and 45 U.S.C. § 153 First (j)."

The Court went on to say:

"...we hold in contrast to the Sixth Circuit /Cole decision/ that where an individual employee authorizes his union to represent him before such boards and to receive any notices on his behalf, Section 153 First (j) does not require that actual notice be given to the individual employee."

^{1/} This point was vigorously denied by the Organization's representative at the Board's January 29, 1979, hearing.

It continued by observing that:

"Plaintiff did not serve written notice on the Union that he did not want the Union to represent him.

.....

"We have also indicated that an employee may so authorize a union to represent him in proceedings before the National Railroad Adjustment Board that any notice received by the union on the employee's behalf is sufficient to fulfill the requirements of Section 153 First (j)."

The Court concluded by stating:

"... We find that by virtue of his membership in the Union, plaintiff authorized that organization to represent him in his disciplinary and review proceedings, and to receive any necessary notices on his behalf within the meaning of Burley II. /325 U.S. 722/ As such, we find compliance with due process and sufficient satisfaction of the requirements of 45 U.S.C. § 153 First (j)."

Therefore, it is the opinion of this Board that in the instant case, notwithstanding any of the pleadings of Mr. Kelley to the contrary, the handling by this Board of Docket No. CL-20855 in the first instance was in compliance with the requirements of Section 3, First (j) of the Railway Labor Act.

Without retreating from this Board's persuasion towards the Opinion of the Seventh Circuit in O'Neill, and in deference to the Opinion and Order of the District Court, we nonetheless heard arguments from those parties who appeared in connection with this remanded case; we have read the "Submission" presented on behalf of Claimant Kelley; we have considered all of the presentations made and conclude that our previous decision reached in Award No. 20826 was proper and correct and we hereby affirm it. We cannot conclude that the penalty assessed against Claimant was severe or unreasonable.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1979.