

Award No. 6225

Docket No. 6025

2-DT&IR-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

(1) That under the current agreement Carman B. E. Rogers was unjustly suspended from the service of the Carrier from March 2, 1969 to April 30, 1969, inclusive, at Delta Yards, Delta, Ohio.

(2) That accordingly the Carrier be ordered to compensate Carman B. E. Rogers for all time lost from March 2, 1969 to April 30, 1969, inclusive, with vacation rights unimpaired, without loss of hospital, surgical and medical benefits for all time held out of service.

EMPLOYEES' STATEMENT OF FACTS: Carman B. E. Rogers, hereinafter referred to as the claimant, was regularly employed by the Detroit, Toledo and Ironton Railroad Company, hereinafter referred to as the carrier, as a Car Inspector, at Delta Yards, Delta, Ohio, with a work week of Monday through Friday, Saturday and Sunday rest days, from the hours of 8:00 P. M. to 8:00 A. M.

The claimant has been in service of the carrier approximately seventeen and one-half (17½) years. The carrier charged claimant with alleged dereliction of duty in that he failed to detect a missing door on Car N&W 219839 on January 23, 1969 at about 8:45 P. M. The claimant received a letter from General Car Foreman, G. T. Rhea, dated February 19, 1969, notifying him that he was suspended from service, charged with alleged negligence and will be assessed discipline without pay beginning March 2, 1969 and end April 30, 1969, both days inclusive.

Local Chairman, J. C. Ward, wrote to the General Car Foreman, G. T. Rhea, under date of February 28, 1969 requesting a hearing as provided by Rule 28 of the working agreement. The letter was acknowledged by the carrier's General Car Foreman on March 3, 1969 and the hearing was sched-

A) specifically outlines the basis for the charge and the proof of such is contained in the transcript.

In regard to the contention that Mr. McBee's track patrolman's report does not warrant 60 days' suspension, Carrier submits that such contention shows that the Organization agrees that it has some bearing on the suspension assessed, although it should be for a lesser amount.

The contention that the suspension was premeditated is not supported by the record and such allegation by the Organization has not been supported with facts.

The Carrier has conclusively shown that the case should be dismissed by the Board in view of its untimely presentation pursuant to the rule and that the discipline assessed is warranted and justified.

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant received notice from Carrier's General Car Foreman G. T. Rhea, that his failure to detect the missing door on N&W Car No. 291839 and his failure to secure defect card protection for said car amounted to failure to properly perform his duties as an interchange car inspector and that he was charged with negligence, and his punishment assessed at sixty (60) calendar days' suspension from the payrolls of Carrier.

Carrier, by letter dated February 28, 1969, addressed to Mr. Rhea, was advised by the Organization's Local Chairman, J. C. Ward, that a hearing is requested for and on behalf of claimant in regard to said suspension.

Claimant was advised by letter dated April 17, 1969 by Carrier's said General Car Foreman, G. T. Rhea, that he found, after reviewing the transcript of the hearing, the charges against him to be supported therein. The Organization's James A. Klimtzak by letter dated July 1, 1969 addressed to Carrier's Superintendent Car Department, D. W. Brammer, appealed Mr. Rhea's decision of April 17, 1969. After Mr. Brammer turned down the Organization's appeal, the Organization then appealed to Carrier's Personnel Manager, Robert J. O'Brien. Mr. O'Brien, by letter of December 1, 1969 to the Organization's Mr. Klimtzak declined the appeal. Again, by letter dated June 1, 1970, addressed to the Organization's Mr. Klimtzak, Carrier's Mr. O'Brien, after referring to conferences held on February 3, 1970, advised that inasmuch as Supt. Brammer's decision of August 25, 1969 was not appealed to him until October 20, 1969, said appeal was not in compliance with the time limit provisions of Rule 28(c), wherein notice of appeal must be given within thirty (30) days of the date of decision to be appealed.

At the outset Carrier raises procedural questions, namely that the Organization failed to comply with Rule 28(c) of the Agreement in that notice of intent to file an ex parte submission to the National Railroad Adjustment Board was not accomplished within a 90 day time limit period set out in said Rule 28(c); and the Organization failed to give notice of appeal of Mr. Rhea's decision within the thirty (30) days' time limit period as required by Rule 28(c) of the Agreement.

In support of its position in regard to these alleged procedural defects, Carrier cites Award No. 6144 involving the same parties to this dispute. In said Award, this Board found that the Organization violated Rule 28 in regard to the 30 day notice of appeal period, when it failed to appeal Carrier's decisions within a 30 day time limit period. However, we do not agree with the Board's conclusion in said Award No. 6144. The Organization has directed us to a new rule, Rule 30½, in Memorandum of Understanding No. 21, entered into between the parties on March 1, 1955.

Said Rule 30½ entitled "TIME LIMIT ON CLAIMS AND GRIEVANCES", the pertinent part thereof provides as follows:

"1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) * * * * *

(b) If a disallowed claim or grievance is to be appealed, such appeals must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of Carrier shall be notified in writing within that time of the rejection of his decision. * * *."

(c) * * * All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. * * *."

We find that Rule 30½ supersedes and replaces Rule 28(c) as agreed to by the parties in said Memorandum of Understanding No. 21. The rule became effective January 1, 1955 and this claim occurred after that date. Rule 30½ refers to "all" claims or grievances. (Emphasis ours.) Also, Carrier's argument that said rule does not apply to discipline cases is without merit. Said Rule 30½, paragraph 3, directly alludes to discipline cases, wherein in part it reads: "with respect to claims and grievances involving an employe held out of service in discipline cases, * * *."

Therefore, it is the opinion of this Board that Award No. 6144 is palpably erroneous and not controlling in this dispute. We find that Carrier's contentions in regard to said procedural defects are without merit and must be denied. We further find that the Organization complied with the procedural requirements of said Rule 30½, applicable to this instant dispute.

Concerning the merits, the Organization's position is that claimant did not receive a fair and impartial hearing because Carrier's General Car Foreman, G. T. Rhea, assessed the discipline originally, heard the appeal of said discipline, and rendered a decision upholding his own original decision of discipline; that the hearing officer, Mr. Rhea, prejudged the case precluding claimant from receiving a fair and impartial hearing.

We find that the hearing officer in this instance had prejudged Claimant's guilt so as not to afford claimant a fair and impartial hearing. This is clearly seen by the hearing officer's testimony, when asked a question by claimant's representative at the hearing, Mr. Ward, which question and answer are as follows:

"Ward: Mr. Rhea, did you notify Mr. Rogers on the 24th that the door was missing on the subject car so he could issue a defect card just in case that the door was missing when it arrived from the PC? Did you wire or call him in regards to that or did anybody else at Flat Rock, do you recall?

Rhea: Mr. Rogers was charged with negligence in failing to perform his duty and he is a car inspector at Delta charged with inspecting these cars. I am not answering any policy of the DT&T Railroad. My statement to you and Mr. Rogers is that he failed in his job." (Emphasis ours.)

We are of the opinion that the hearing officer in this instant dispute showed substantial bias toward claimant before the hearing was completed so as to prevent claimant from receiving a fair and impartial hearing. As was said in First Division Award No. 21046: X-1

"After studying the transcript of the investigation the Division is persuaded that petitioner's position is valid. At this late date there is little excuse for the managerial personnel of a carrier to ignore the principle that in a discipline case carrier is essentially, and must conduct itself like, a trial court. Among several things this means that the carrier official who conducts an investigation of a charge made by a carrier against an employe (1) should not normally have been involved in the occurrences leading up to the leveling of the charge and (2) should comport himself at the investigation, in his questioning of all witnesses (managerial as well as employe), in a truly objective and aloof manner, just as would an outside judge. If, as here, the evidence shows that the investigating officer did not so behave, then this Division, as a court of appeals, must find the trial court subject to procedural error and reversal."

For the aforesaid reasons, we find that Carrier violated the agreement in this instance. However, in view of the fact that Rule 28 (d) provides that if the charges are not sustained, the employe will be restored to his former position with seniority unimpaired and compensated for all wages lost less compensation earned elsewhere, we will sustain the claim for all time lost from March 2, 1969 to April 30, 1969, inclusive, with vacation rights unimpaired, but will deny the claim for hospital, surgical and medical benefits during said suspension period. See Award No. 3883. y. 2

AWARD

Claim sustained in accordance with the opinion.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: E. A. Killeen
Executive Secretary**

Dated at Chicago, Illinois, this 3rd day of December, 1971.