

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

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That under the Current Agreement, Electrician J. Pritchard was unjustly treated when he was held out of service of the Consolidated Rail Corporation for a period of ten (10) days, eight (8) actual and two (2) suspended, commencing on April 18, 1979.
2. That accordingly, the Carrier be ordered to compensate Electrician J. Pritchard for all the time held out of service eight (8) days the total suspension removed from his record.

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 employe 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 was working his 7:00 AM to 3:30 PM tour of duty on April 18, 1979, when at approximately 7:05 AM he had a discussion with foreman Ernie Niedermeyer about the possibility of his going home. The Claimant maintains he told Niedermeyer he was sick and was going home; foreman Niedermeyer asserts that the Claimant never said he was sick and simply left the job. A trial was held on April 25, 1979, in connection with the following charges:

- "1. Leaving your job without permission on April 18, 1979;
2. Falsifying your time card for April 18, 1979;
3. Insubordination, by not returning to work when ordered to do so by Foreman E. J. Niedermeyer on April 18, 1979."

A Notice of Discipline dated April 26, 1979, was read to the Claimant on May 1, 1979. The Notice indicated that he would be disciplined by a ten day suspension. An appeal dated May 21, 1979 was submitted to the Carrier.

The Carrier asserts that the abovementioned appeal was untimely and in violation of Rule 7-A-1 (a), which reads as follows:

"Appeal from discipline must be made in writing by the employee or on his behalf by his union representative to the Superintendent-Labor Relations within 15 calendar days after receipt of written notice of discipline..."

There is no dispute that the appeal was made beyond the contractually specified 15 calendar day limit and, absent any procedural irregularity on the Carrier's part, the Board would be inclined to dismiss the claim on a procedural basis. But the Organization argues in its letter of November 16, 1979, that filing of the claim did not take place within the contractual specified 15 days because the Carrier failed to provide it with a timely copy of the discipline notice and trial transcript, thus violating Rules 6-A-1, 6-A-4(a), and 7-A-1(a). Rule 6-A-1 states in pertinent part:

"(a) ... employees shall not be suspended nor dismissed from service without a fair and impartial trial, nor will an unfavorable mark be placed upon their discipline record without written notice thereof to the employee and his union representative."

Rule 6-A-4(a) states:

"If discipline is to be imposed following trial and decision, the employee to be disciplined shall be given written notice thereof not later than thirty (30) calendar days after the trial is completed and at least fifteen (15) calendar days prior to the date on which the discipline is to become effective, except that in cases involving dismissal such dismissal may be made effective at any time after decision without advance notice. If so represented at the trial, his union representative shall be given a copy of the notice of discipline."

The Carrier argues that the Notice of Discipline (Form G-32) was given to the Local President and that nothing in the record supports a claim to the contrary. Careful review of the record, however, tends to confirm the Union's claim that it did not receive the form. In his May 14, 1979 letter to H. A. Laurello, Shop Superintendent of the Collinwood Diesel Locomotive Shop, Local President Charles Steidel states:

"As of the above date I have not received a copy of the Trial that was held on Crane Operator J. Pritchard, which was held on April 25, 1979, or a copy of the Notice of Discipline (sic) if there was any."

Obviously, the Organization must be informed of the discipline invoked before it can legitimately decide whether to appeal. The parties apparently contemplated this when they negotiated Rule 6-A-4(a). That Rule requires that the Claimant's "union representative" be given a copy of the notice of discipline. Elsewhere in the controlling Agreement (Article III-B) the term "union representative" is defined as "an individual certified by the International Brotherhood of Electrical

Workers". In the instant matter, though, the record does not indicate that the Carrier gave a copy of the notice to anyone but the Claimant.

On balance, the record is unclear as to whether the Carrier met its obligation under Rule 6-A-4(a). Accordingly, the Board will not regard the Organization's untimely appeal as an automatic obstacle to its jurisdiction to consider the merits of this case. The parties negotiated the language of Rules 6 and 7 to resolve disputes over discipline situations and, given the possibility that both parties to the instant matter committed procedural irregularities in processing this claim, the Board declares jurisdiction to review the case on its merits.

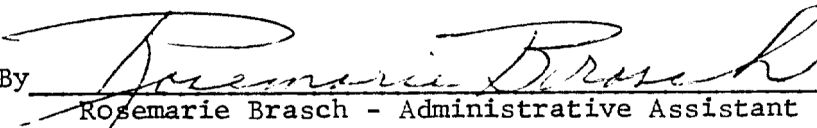
The outcome of this case rests on the respective credibility of the Claimant and Foreman Niedermyer. If, as the latter testified, the Claimant simply walked off the job without permission, never mentioned illness, and refused to return, the Carrier's discipline decision should not be disturbed. On the other hand, if the Claimant actually told Niedermyer he was sick and had legitimate concerns about his own safety and that of his fellow employees should he be required to work, his refusal to work may have been justified. There were no witnesses to the 7:05 A.M. conversation between the two men and this Board is unable to determine from the record which of them is the more credible. Therefore, and in accordance with a plethora of previous Board decisions (e.g., Third Division Awards 14356 and 19696, and Second Division Award 8336), we have no alternative but to deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of August, 1982.