Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6806
SECOND DIVISION Docket No. 6621
2-CRR-MA-'75

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Clinchfield Railroad Company

Dispute: Claim of Employes:

1. That under the terms of the Agreement, Machinist J. D. Kniceley was unjustly and improperly suspended from service of Clinchfield Railroad Company for a period of thirty days (30), beginning on the date of May 17, 1972, ending on the date of June 16, 1972.

2. That accordingly, the Clinchfield Railroad Company be ordered to compensate Claimant in the amount of eight (8) hours at the pro rata rate for each of the following dates: May 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31, June 1, 2, 5, 6, 7, 8, 9, 12, 13, 14 and 15, 1972, a total of twenty-two (22) days.

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, J. D. Kniceley, under date of May 17, 1972 received the following letter notifying him of disciplinary action:

"Mr. J. D. Kniceley:

During the first three months of this year, you did not protect your assignment on 26 days, allegedly due to your illness.

"On April 12, 1972, you were referred to a company physician for examination to determine whether you were physically able to protect your assignment. The Chief Surgeon subsequently advised that you are able to perform your duties as a machinist.

On May 11, 12 and 15, you were again absent, again allegedly account of illness, yet you were observed on each of these dates working at a local service station. Obviously if you are able to work at a service station, you are able to protect your assignment with this company. For your failure to do so, you are hereby suspended from this company for a period of 30 days effective May 17, 1972. You may return to work on June 16, 1972.

Our records further indicate that you were absent 3 days in April 1972 for a total of 32 absences so far this year. After you return to work on June 16, you will be expected to protect your assignment if you wish to remain in the employ of this company.

/s/ G. E. BOWMAN
G. E. Bowman
General Locomotive Inspector"

The instant claim was instituted by letter dated June 22, 1972 reading in pertinent part as follows:

"Mr. Knicely was not given benefit of a hearing or a chance to defend himself of these charges. Your attention is called to rules 12 and 19 of the September 1949 agreement.

Please consider this letter as a time claim for Mr. Knicely for 8 hrs. per day for each day he was held out of service as a result of Mr. Bowmans letter.

Yours truly,

/s/ EARLE M. WALKER
Earle M. Walker
Local Chairman I. A. of M."

Failing settlement on the property the claim has been appealed to our Board for disposition.

Claimant admittedly is owner and operator of an automobile service station in Erwin, Tennessee, known as "Don's Service Center". Claimant, however, denies that he was performing repairs on automobiles on the dates in issue herein. Moreover, claimant contends that by marking off sick on May 11, 1972 he was granted permission by Carrier to be off and that his subsequent suspension for absenteeism violates that portion of Rule 12 of the Agreement which reads as follows:

> "In case an employe is unavoidably kept from work he will not be discriminated against and he shall notify his foreman as soon as possible."

Carrier denies that its foreman granted claimant permission to take a leave of absence.

Petitioner, on behalf of claimant, argues that Carrier violated Rule 19 of the controlling Agreement by suspending claimant without first according him an investigative hearing, albeit neither claimant nor his representative requested same. In this connection, Petitioner points out that Article V of the National Agreement of 1954 extends time limits on claims and supersedes contrary local rules such as Rule 19 in regard to the time and manner for filing claims or grievances.

In addition to Rule 12 supra, pertinent Agreement provisions cited in this case read as follows:

Rule 19 - Grievances

> "Should an employee subject to this Agreement believe he has been unjustly dealt with, or any of the provisions of this Agreement have been violated, the case shall be taken to the Foreman, General Foreman, each in their respective order, by the duly authorized Local Committee or their representatives, within ten (10) days. ... Grievances not filed by the Committee with a representative of the Company within fifteen (15) days will not be considered.
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> .....
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> Suspension in proper cases pending a hearing, shall not be deemed a violation of this rule, but if it is found that an employee has been unjustly suspended or dismissed from service, such employee shall be reinstated with his

"seniority rights unimpaired and compensated for wages lost, if any. No employee shall be discharged without being given an investigation." (Emphasis added)

* * *

Article V - National Agreement

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

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, 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 Carrier as to other similar claims or grievances."

The record of handling of this case on the property and in the submissions to this Board shows a melange of conflicting and unsupported factual allegations, credibility conflicts and new issues interjected for the first time at the Board level by each of the parties. It should be well understood that our Board does not resolve credibility issues nor do we consider matters not raised and properly joined in handling on the property. Viewed in the light of these established principles this record indicates only a single issue appropriately presented for our consideration: "Was Rule 19 violated when claimant was suspended without an investigative hearing?"

Close scrutiny of the Agreement language shows that Rule 19 mandates an investigation before discharge of an employee but is silent regarding required investigations in other disciplinary situations short of discharge. (Emphasis added) Under well established arbitral rules of contract interpretation, it is said that where the parties specifically mention items intended to be covered, all things not mentioned were intended to be excluded (Expressio unius est exclusio alterius). See Third Division Awards 4439, 8172, 11165, 13719 et al. Additional impetus is given this interpretation by the clear and convincing evidence that the Agreement has been so applied for some 20 years. Moreover, Rule 19 itself allows for a hearing where

an employe believes he has been "unjustly dealt with". The thrust of the Rule is that such hearing is not Carrier instituted in non-discharge cases, however, and must be requested by the agrieved employe or his representative within certain time limits.

Petitioner asserts that the time limits for grievance handling under Rule 19 are superseded by Article V of the National Agreement of August 21, 1954 and this is, we think, correct. But this has no effect one way or another on this case because the plain fact is that at no time, neither within 10 days nor within 60 days, did claimant or his representative actually request an investigation. Absent such a request, we cannot find in Rule 19 the requirement for an investigation in a non-discharge case. The result in an individual case could be harsh but we cannot add to or amend the clear language agreed to by the parties. As we observed in an earlier case "... The parties, through negotiation have agreed upon provisions having to do with investigation and discipline. If the procedure is faulty then it is up to the parties to change it." Award 6001.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:. Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 6th day of January, 1975.