

The Second Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

Parties to Dispute: (System Federation #16, Railway Employees'
(Department, A.F.L.-C.I.O.
((Boilermakers)
(
(Norfolk and Western Railway Company

Dispute: Claim of Employee:

1. That under the current agreement, Boilermaker Thomas M. McPherson was unjustly suspended from the service of the carrier beginning February 20, 1974 and ending May 20, 1974.
2. That accordingly the carrier be ordered to compensate claimant McPherson for all time lost during suspension period.

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.

Subsequent to investigation on a charge of unauthorized removal of Company material into his truck, Claimant was assessed a ninety (90) day suspension.

The evidence developed at the investigation revealed that on January 10, 1974, two property protection patrolmen observed Claimant remove several fabricated iron pieces from the Carrier's Repair Shop and place same into his personal pick-up truck which was parked in an unauthorized area.

The incident occurred at 5:45 A.M., more than an hour before Claimant's 7:00 A.M. shift starting time. Claimant stated that his intention was to take the material to the scrap pile, so as to avoid

any difficulties with his foreman because he had assembled the iron pieces into a welding frame during previous lunch periods without authorization.

However, the patrolmen testified that when Claimant was apprehended, he admitted "he guessed he'd been caught", and further, he implored them not to take him to jail, stating that he would resign from the Company if they would cooperate in his request.

The Organization contends the Carrier violated Rule 34(c) when it failed to notify Claimant within thirty (30) days that his appeals had been denied.

Rule 34(c) states:

"(c) The right of appeal by an employe or his duly accredited representative in the regular order of succession up to and including the highest official designated by the Management to whom appeals may be made is hereby established. If an appeal is taken it must be filed within ninety (90) days of date of notification of discipline and each subsequent appeal must be made within ninety (90) days of date of decision of previous officer. Decisions of appeals will be rendered within thirty (30) days of receipt of appeal unless extension of time is mutually agreed upon between the Management and the General Chairman. If the appeal on the original decision of discipline or on any subsequent decisions is not made within the time limits specified above in this Paragraph, unless an extension of time has been agreed upon by the Management and the General Chairman, the case will be definitely and finally closed."

Carrier, however, maintains that Rule 33 B(a) 1 is applicable, which states:

"(B)(a) All claims or grievances arising on or after January 1, 1955, shall be handled as follows:

1. All claims or grievances must be presented in writing by or on behalf of the employe 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 employe 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."

Although Carrier concedes that Rule 34(c) also addresses the issue, it declares that the 30-day time limit has never been used, and because the two sections can be read in conflict, past practice dictates that Rule 33 takes precedent over the unused section.

Moreover, Carrier cites Third Division Award 8712 in support of its position that Rule 33 B is applicable in a discipline case.

After a thorough examination of the record, we concur with Carrier that there is a conflict. The employees did not dispute the past application of Rule 33B. While past procedures may not justify an ongoing violation of an Agreement, in a case such as this, the past procedures assist us in identifying the intent of the authors of the Agreement. Accordingly, we do not find that Carrier's use of the 60-day time limit violated the Agreement.

The Organization claims further that the investigation was arbitrary and capricious because the General Foreman was:

1. the official who initially interviewed the Claimant.
2. a witness at the investigation regarding the initial interview
3. the Carrier's official who sent the notice of investigation
4. the official who imposed the 90 day suspension.

Moreover, it states that Carrier merely asserts that Claimant intended to steal the material, but that it produced no proof to support the accusation.

Carrier notes that the Agreement is silent regarding the participation of a Carrier Official in the investigation; which official later assesses the discipline and consequently, it maintains that it has the power to determine the role to be performed by its officials.

While this Board recognizes that certain multiple duties being performed by one official could operate to an employee's detriment, we are unable, under this record, to find a violation.

Clearly, in the instant case, Carrier presented a *prima facie* case, and it became incumbent upon Claimant to rebut that showing. We are inclined to find that Claimant failed in this regard. No persuasive evidence was presented to dispute the obvious implication to be

drawn from the showing that Claimant was apprehended while loading material, resembling a welding frame, into his truck (without authorization) in an unauthorized area. The fact that he may not have succeeded in removing the material from the property is not controlling. See Award 6875. Moreover, the record shows that the employee admitted guilt to the patrolmen at the time of the incident. Based upon all of the evidence of record, we are unable to find that the discipline imposed was unjustified or excessive.

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 Lies
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 21st day of September, 1976.