

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12451
Docket No. 12473
92-3-91-2-280

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

Appeal of discipline of disqualification as Radio Maintainer that was assessed against Radio Maintainer T. I. Kirkwood by the Consolidated Rail Corporation (Conrail) on October 12, 1990, Harrisburg, PA.

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 employes 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.

On August 20, 1990, the Claimant was instructed to install a spare IDA telephone radio interconnect at the Maintenance of Way radio base at Newport, Pennsylvania. Unable to do so, the Claimant was instructed to bring both IDA units, the original and the spare, back to the shop on that same date. On August 21, he checked out the spare unit in the shop and, having ascertained that it worked all right, returned to Newport to install it. On August 22 and 24, 1990, the Claimant was assigned to repair the original IDA unit he had removed from Newport. Since he was unable to do so, the repair work was assigned to another employee who completed the repairs on August 27.

On September 7, 1990, the Carrier notified the Claimant to attend a Hearing scheduled for September 17, 1990, in connection with the following charges:

"(1) Failure to properly perform your assigned duties, while employed as a radio maintainer on 8/20/90, when you were sent to install a spare IDA telephone-radio interconnect in the Maintenance of Way radio base at Newport, PA, and were unable to complete your assignment.

(2) Failure to properly perform your assigned duties while employed as a radio maintainer when on 8/22/90 and 8/24/90 you were unable to make repairs to the defective IDA telephone-radio interconnect you removed from the Newport M of W radio base on 8/17/90."

The Investigation was postponed at the request of the Organization until September 20, 1990. Testimony was taken on that day, and on October 1, 1990. On October 12, 1990, Claimant was notified of the discipline assessed as "Disqualification as a Radio Maintainer," effective immediately.

The Organization maintains that the Carrier's disciplinary action was capricious, arbitrary, and discriminatory. Specifically, with respect to Charge (1), the Organization maintains that the Claimant did, in fact, complete his assignment on August 20, 1990, when he brought the IDA spare unit back to the shop for repair, as finally instructed, after being unable to install it, as initially instructed.

With respect to Charge (2), it maintains that the Claimant had only three hours of prior experience, and no training, in repair of IDA units prior to August 1990, and that this was hardly enough time to even read the maintenance manual, let alone to become proficient in the operation, maintenance, troubleshooting, installation, and repair requirements of IDA units. It points out that the other employee to whom the assignment of repairing the original IDA unit was finally given on August 27, after the Claimant failed to repair it on August 22 and 24, had had much more experience in repair and maintenance of IDA units. Furthermore, this other employee had had the advantage of observing the Claimant's efforts to repair it for a full workday on August 24 and therefore knew better how to trouble shoot the problem and repair the unit on August 27.

The Organization questions the Carrier's bringing up prior charges against the Claimant at the Hearing in this instant claim, charges which were the subject of an earlier Hearing, and which neither the Claimant nor the Organization had been advised would be included in the September 20 and October 1 Hearings on this instant claim. Finally, the Organization states

that, under Rules 2-A-3(a)(1) and (2), 2-A-3(b) and 2-A-1(a) of the Agreement, it is not unusual for an otherwise qualified mechanic of the craft to need specialized training in order to become qualified to do such specialized work as repair of IDA units and that failure to become qualified or proficient in such specialized work does not equate to total disqualification from the craft of Radio Maintainer. In short, it maintains that the discipline assessed the Claimant is excessive.

With respect to Charge (1), the Carrier maintains that the Claimant, as a fully qualified Radio Maintainer, should have been able to install the spare IDA unit on August 20 at the M & W radio base in Newport instead of bringing it back to the shop, where he checked it out, made a few minor adjustments, and subsequently installed it in the field base on August 21. The Carrier claims that these adjustments could have been made, and should have been made, in the field.

With respect to Charge (2), it points out that the Claimant was unable to repair the original IDA unit although he worked on it for two days, while another qualified employee of the craft was able to repair the unit within a two-hour period. The Carrier states that the Claimant has had the same amount of training and had, at his disposal, the same instruction tapes and manuals as all other Radio Maintainers. Therefore, the only reason for his failure to install and/or repair the IDA units is that he did not possess the necessary skills to do so and thus is not qualified to perform the duties of a Radio Maintainer.

The Carrier also refers to the Claimant's prior discipline record, pointing out that he had been disqualified as a Radio Maintainer on June 2, 1990, for failure to properly perform duties, which discipline was subsequently changed to a suspension. Although the Carrier claimed that this earlier discipline was not used to consider the Claimant's guilt in this instant claim, it does state that it was used to reach the "degree of discipline to be assessed" in the instant claim.

The Board has reviewed the entire file, including the transcript of the Hearing and the Awards cited by both parties in support of their positions.

The Board finds that the Claimant failed to perform the assigned work at issue. Although the record supports the Organization's contention that the Claimant's exposure to the repair of IDA units had been minimal, it should be noted that the Claimant had 11 years of seniority as a Radio Maintainer with the Carrier as of August 1990, and that repair of IDA units is work that is expected of a Radio Maintainer.

In determining the degree of discipline to be assessed in this case, the Carrier acknowledged that it took into consideration the earlier discipline. However, the Board has been advised by the Carrier and the Organization that a claim on the earlier discipline was still on appeal as of October 12, 1990, when the Carrier assessed discipline in this case. Therefore, this Board finds that it was improper for the Carrier to take it into consideration when it assessed discipline in the instant case.

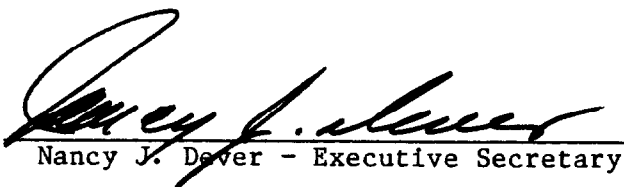
Inasmuch as the Carrier acknowledged that it used the earlier disciplinary matter in assessing the penalty it imposed, even though that matter was still under appeal at the time the Carrier assessed discipline in this case, this Board mitigates the penalty to a one-month suspension. The Board sustains the claim in part and directs that the Claimant's October 12, 1990, disqualification be converted to a one-month suspension.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1992.

CONCURRING AND DISSENTING OPINION
TO
AWARD 12451, DOCKET 12473
(Referee Fibish)

In this case for the first time in the history of the Board, that we are aware of, this Majority is attempting to thrust upon the Board the precedent that as long as any part of a prior discipline is on appeal when assessing the latest discipline, it cannot be considered.

This has to be challenged. It cannot lie there unrefuted. Even though the Majority's phraseology would lead one to believe that it is Board precedent, anyone who has been in the industry knows differently.

Contested disciplines take time to resolve. Years can pass. In this case alone, from the date of the incident until the proposed Award was adopted by the Board, 31 months elapsed. In contrast, in a file drawer collecting dust is another contested discipline relating to an incident that occurred in August of 1987. It is still on appeal awaiting the decision of the neutral.

To hold that the Carrier cannot consider any prior discipline that is on appeal, clearly would thwart the progressive discipline process. Granted, there is risk for the Carrier when it does consider prior discipline that is on appeal, and occasionally, the Carrier suffers the consequences when the prior discipline is overturned. As an example, note the following

from Third Division Award 28915:

"This Board has reviewed three cases involving this Claimant--the instant case and two prior cases. In the first case, that we reviewed, we found a procedural violation serious enough to warrant setting aside the discipline and clearing Claimant's record of 30 demerits, Third Division Award 28908. In the second case, Third Division Award 28909, the Board denied the Claim and upheld the discipline imposed, 35 demerits. When Claimant's past record is reviewed in the instant case, his record should indicate that he has received 35 demerits, not 65, as Carrier states.

Since Carrier has implemented a demerit system, we conclude that Claimant should be assessed a number of demerits for his infraction, but not dismissed from service. This Board will assess a 60 demerit penalty on Claimant, thereby bringing the total demerits assessed him to 95. This is five demerits short enough on which to base a dismissal. We are therefore forced to direct that Claimant be reinstated to service with seniority unimpaired and pay for all time lost from the date of his dismissal."

However, that is a risk this neutral is determined that Carrier cannot take.

In this industry, it is not unusual to find disputes before the Board involving the same Carrier, the same Claimant, and incidents giving rise to the assessment of minor discipline leading to a dismissal that also is before the Board. Note Second Division Awards: 11972, 11973, 11974 (all before the same neutral); likewise, Third Division Awards: 26265, 26266.

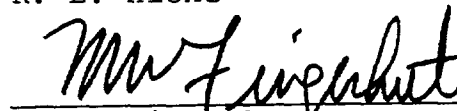
It is to be noted that not one single neutral had ruled that the prior discipline (which was obviously on appeal) could

not be considered when assessing discipline because at the time of assessment, the prior discipline was on appeal. The neutral in 28915 knew the outcome of the prior disciplines when the Award was proposed, just as the neutral knew in Awards 11972, 11973, 11974, and just as the neutral knew in Awards 26265 and 26266; JUST AS THE MAJORITY IN THIS DISPUTE KNEW.

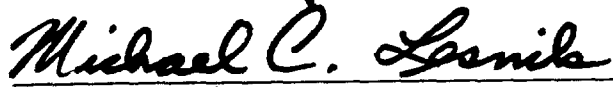
The fallacious reason given for modifying the discipline in this dispute is the purpose of this Dissent. Perhaps we should at least appreciate the Majority's sanctioning a 30 day period of disqualification, but that appreciation is overshadowed by the lack of logic of the Award in its entirety.



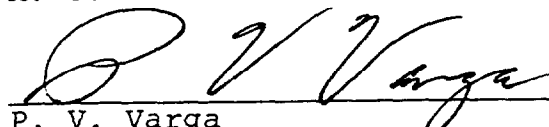
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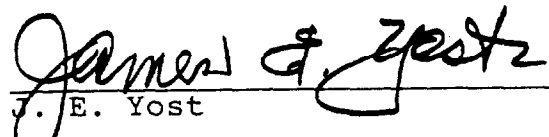
M. W. Fingerhut



M. C. Lesnik



P. V. Varga



J. E. Yost

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