

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12585
Docket No. 12466
93-2-91-2-273

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

(International Brotherhood of Firemen and
(Oilers
PARTIES TO DISPUTE: (
(Illinois Central Railroad

STATEMENT OF CLAIM:

- "1. Under the current controlling Agreement, Mr. D. Brower, Laborer, Fulton, Kentucky, was unjustly dealt with when suspended for a period of twenty (20) days (March 2, 1991 through March 21, 1991), following a hearing held on February 19, 1991.
2. That accordingly, the Illinois Central Railroad be ordered to compensate Mr. Brower for all time lost at the pro rata rate and the mark 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.

On January 29, 1991, the Claimant, who was employed at Fulton, Kentucky, climbed on lead Locomotive 8330 to cut the air out so he could separate it from trailing Locomotive 9549. He then climbed on Locomotive 9549 to set it up as a lead locomotive. He uncoupled the two locomotives and moved Locomotive 8330 to the turntable, leaving the turntable in that position. Some three hours later he returned to Locomotive 9549 to move it closer to the turntable to make room for another that was due to arrive shortly for servicing. In moving Locomotive 9549, it ran into the turntable pit, although the Claimant tried to stop its movement with the brakes before he

jumped off just before it entered the pit. On January 30, 1991, the Carrier notified the Claimant to be present at a formal Investigation set for February 19, 1991, to determine what responsibility the Claimant had for running Locomotive 9549 into the turntable pit. Following the February 19 Hearing, the Claimant was found to be at fault and was assessed a 20 calendar day suspension.

There are three issues to be resolved by the Board: 1) whether the timeliness of the Investigation is properly before the Board; 2) whether the Carrier sustained the burden of proof on the basis of the evidence in the record; and 3) whether the 20-day suspension was warranted.

There is no dispute between the parties that the incident occurred on January 29, 1991, and that the Hearing took place on February 19. However, the Carrier contends that the Board has no jurisdiction regarding the alleged time limit violation because the Organization did not claim a time-limit issue in its notification of intent to file an ex parte Submission to the Board. It states that the Board is limited to those issues raised in the Organization's formal statement of claim and therefore the Board should disregard the alleged time limit violation raised by the Organization. Notwithstanding its position on the Board's jurisdiction on the issue of timeliness, the Carrier claims that it did not violate the 21-day time limit for holding the Hearing under Rule 11(C) of the Agreement. The Organization holds that the Hearing was held on the 22nd day, or more precisely, 21 days and nine and one-half hours, after the Carrier had knowledge of the offense under investigation.

With respect to the merits, the Carrier contends that the brake application tests made after the incident at Fulton and at Memphis proved that the brakes on Locomotive 9549 were indeed operational at the time of the accident. Furthermore, Claimant's release of the independent brake prior to moving the locomotive (and then seeing the air pressure falling) is proof that the air brake system was functioning properly. The Carrier points to the Claimant's own testimony that he saw the air pressure falling in the unit from 40 lbs./psi to zero as the brakes were releasing and asserts that this shows that the unit was charged with air. It also submits that the General Locomotive Foreman's testimony that the locomotive was in the lead position shows that the unit had operational brakes. The Organization holds that there was some conflicting testimony among the Carrier witnesses at the Hearing, that the Claimant had only nine hours of training prior to being assigned to work alone moving locomotives, and that it was apparent that the air compressor on Locomotive 9549 had temporarily failed and, therefore, there was no air when the Claimant applied the

brakes. In sum, the accident was caused by the failure of the brakes, not by the Claimant.

With respect to the penalty imposed, the Carrier maintains that it was lenient in assessing a 20-day suspension in view of the extensive damage caused as a result of the accident and its potential for serious injury to employees. The Carrier maintains that it was only because of the Claimant's previous work record that the discipline was lenient. The Organization claims that the Carrier failed to sustain the burden of proof that the Claimant was guilty of any Rule violation and that the discipline was therefore unwarranted.

The Board has reviewed the entire record, including the transcript of the Hearing, and the numerous Awards provided by both parties in support of their positions on all three issues. In response to the parties' differing position on the issue of timeliness, the Board notes that the Organization had already raised the question of the timeliness of the Hearing at the Hearing itself and during its appeal on the property. The fact that it did not specifically cite the timeliness issue in its initial November 20, 1991, notice of intent to the Board does not preclude it from including it, as it did, in its subsequent ex parte Submission to the Board. The timeliness issue before the Board was firmly grounded on the property, both at the Hearing and in the Organization's March 27, 1991 appeal of the Claimant's suspension (cf. particularly Fourth Division Award 4585 and First Division Award 23931). Therefore, the Board is not precluded from addressing the issue of timeliness in relation to Rule 11(C), which reads:

"C.1. The hearing shall be held within twenty-one (21) days from the time the company has knowledge of the offense(s) under investigation unless it has been postponed by request of either the employee, the duly authorized representative, or the company.

2. If the hearing is not held within the specified time, no action will be taken by the company on the charges(s), and no notation shall be entered on the employee's record."

The issue of whether the Hearing was held within the 21-day period prescribed by Rule 11(C) depends on whether one starts one's count with the day of the incident or begins one's count on the following day. It is only common sense that one does not count the day of the incident in computing the 21 days. If one were to count the entire day on which the incident took place, one would, in effect be charging the Carrier that portion of time before the

incident took place (or, more precisely, before the Carrier had knowledge of the incident). Since the parties have expressed the deadline in terms of days rather than in terms of hours, it is only common sense that one count whole days, not fractions thereof. To claim that the 21st day expired at 3:30 A.M. on February 19, as the Organization claims, is not reasonable. Normally, the 21-day period would expire at close of business on February 19. The Board finds that the Hearing took place within the 21 days, as called for in the parties' Agreement.

With regard to the merits, the Board finds that the evidence supports the Carrier's contention that the Claimant was responsible for running Locomotive 9459 into the turntable pit. The brakes obviously were working before the incident and testimony shows they were working when tested after the locomotive was removed from the pit. Although the Organization contends that there was a temporary failure of the brakes, it offers no plausible theory or corroborating evidence to explain why the brakes should fail temporarily when they were working both before and after the incident. Testimony from a witness that it is possible for an air compressor not to work one time and work another time is of no probative value: we are dealing here with probabilities, not possibilities. If such testimony regarding possibilities, coupled with the Organization's claim that there was a temporary failure of the brakes (with no evidence to show why there should be a temporary failure at the time of the accident) were sufficient to carry the day, it would mean that it would be impossible for the Carrier to ever prove that an employee was at fault in operating a locomotive's brakes.

The Board also finds that the 20-day suspension was warranted. There is no claim here of disparate treatment--only the assertion that the Claimant was not properly trained. However, as the Carrier points out, the Claimant successfully moved locomotives for over three months without incident.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 15th day of September 1993.

CARRIER MEMBERS' CONCURRING AND
DISSENTING OPINION TO
AWARD 12585, DOCKET 12466
(Referee Fibish)

When resolving disputes in this industry, Referees must exercise caution. The parties, more often than not, raise a myriad of issues and it takes an experienced eye to discern which issue(s) is determinative of the dispute.

Here the Board had before it a simple discipline case. The Referee noted at page 2 of the Award:

"There are three issues to be resolved by the Board:
1) whether the timeliness of the Investigation is properly before the Board; 2) whether the Carrier sustained the burden of proof on the basis of the evidence in the record; and 3) whether the 20-day suspension was warranted."

The Board correctly found that:

- 1) Claimant's Investigation took place within 21 days, as called for in the parties' Agreement,
- 2) the record evidence supported the Carrier's contention that the Claimant was responsible for running Locomotive 9459 into the turntable pit, and
- 3) the 20-day suspension was warranted.

Since the Referee found that Claimant's Investigation took place within 21 days, as called for in the parties' Agreement, there was no need to express an opinion relative to the jurisdictional question of whether the Board had authority to consider the matter at all because the issue was not raised in the Statement of Claim presented to the Board. The Referee's decision rendered that issue MOOT.

The Referee should have concluded with no further comment in recognition of the doctrine which precludes consideration of moot questions or abstract propositions or the affirmation of principles

which do not affect the matter in issue. (See Third Division Award 20746.)

Obviously, the Referee should have deferred the jurisdictional issue to another day, to another dispute. Adding injury to injury, the Referee came to an erroneous conclusion.

The most recent and better reasoned Awards have held that the Board has no authority to go beyond the issues raised in the Statement of Claim presented to the Board. See Second Division Award 12522, Third Division Awards 28995, 28529, and Fourth Division Awards 4867 and 4868.

This is a classic example of dictum which Referees should avoid like the plague.

For the foregoing reasons, we have no choice but to concur and dissent to this Award.

Michael C. Lesnik

M. C. Lesnik

Robert L. Hicks

R. L. Hicks

James E. Yost

J. E. Yost

M. W. Fingerhut

M. W. Fingerhut

P. V. Varga

P. V. Varga