

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13273

Docket No. 13191

98-2-96-2-97

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

(International Association of Machinists and
(Aerospace Workers

PARTIES TO DISPUTE: (

(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

"1. That the Indiana Harbor Belt Railroad Company (hereinafter referred to as the 'Carrier') violated the provisions of the Controlling Agreement, specifically Rule 36, as amended May 18, 1988, when, subsequent to an investigation which was neither fair nor impartial, it unjustly and improperly suspended Machinist employee Robert Scepkowski (hereinafter referred to as the 'Claimant') from service for a period of sixty (60) working days commencing September 8, 1995 and ending November 28, 1995.

2. That accordingly the Carrier compensate Machinist Scepkowski for time lost for vacation and other employee benefit rights, and expunge from his personal record all reference to the investigation proceedings, including reference to the unjust discipline which was assessed."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

By letter dated September 11, 1995, the Claimant was directed to attend an Investigation in connection with the following charges:

- "1. On Friday, September 8, 1995, at 10:50 A.M. you were away from your assigned work area and off company property without permission.
2. Violation of Maintenance of Equipment Safety Rule Book S7-D, Rule 4004, when you crossed over CSX 223 train on the roundhouse lead between cars TTGX 971114 and TTGX 910462, without proper train movement protection and cars were not equipped with crossover walk boards."

Subsequently, the Claimant was found guilty of the charges and he was assessed discipline of a 60 actual day suspension. This is the matter that is now before the Board for final adjudication. The Organization contests this discipline on procedural as well as substantive grounds.

The Board, after careful review of the record, finds it unnecessary to address each and every contention and argument advanced by the parties because we find that the claim must be sustained due to a fatal procedural error by the Carrier. Nonetheless, it must be noted that, while the Carrier did not carry its burden of showing the Claimant left the property without permission, the Claimant did cross between two freight cars of a freight train on the Carrier's main track, in violation of the Carrier's Safety Rule 4004.

All employees have an obligation to work in a safe fashion, not only to protect themselves, but also fellow workers and the public at large. The Claimant did not do so in this instance and, therefore, the Carrier's decision to discipline him was reasonably drawn.

Given the Claimant's very poor work record, a 60-day suspension was not an abuse of discretion. However, the suspension must be removed and the Claimant must

be made whole because the Carrier violated Paragraph 9, Rule 36 - Discipline, which reads as follows:

"The decision shall be rendered and transmitted in writing to the employee, with copy to the duly authorized representative, within twenty-one (21) days after completion of the hearing. If a decision is not rendered within the specified time, no action will be taken by the Company and the employee's record will be cleared."

The record shows that while the Hearing was scheduled for September 20, it was actually held on September 21, 1995. The Carrier's notice of decision following the Investigation assessing discipline was dated October 11, 1995 which is 20 days after completion of the Hearing. However, the letter was postmarked October 13, 1995, i.e., the 22nd day following completion of the Hearing.

The time limit question is not a matter of first impression. The procedural rule in this case is whether the Carrier complied with the 21-day time limit in Rule 36.

First Division Award 16366 held that when the Rule requires a decision to be "rendered" in writing within 10 days, "rendered" was properly construed as meaning "sent." It further held in pertinent part as follows: "We do not deem that 'rendered' means the making of the decision or even just the writing thereof to the employee involved. The written decision must be dispatched." It also concluded that:

"On the other hand, we do not think that 'rendered' means 'delivered' or 'received' by the employee. It is clear that, just as a decision, once written, could be held indefinitely in the hands of the carrier and not dispatched, so a dispatched decision could be indefinitely delayed in actual receipt by or delivery to the employee, e.g., if he were away on vacation or for other reasons.

Our question thus boils down to whether the written decision was sent to Sinnott in conformance with Article 13(a)'s time limits. On this issue, we deem the date of postmark to be the only conclusive evidence. And on this evidence the carrier may properly be judged to have delayed at least one day beyond the specified time limit."

Third Division Award 25609 also ruled on a factually similar case. It held, in part, that:

“Rendered does not mean received. It means that Carrier must take appropriate steps to send the decision to Claimant within ten days of the investigation.”

Similarly, that Award, as well as others, held that notice provisions ordinarily are satisfied by dispatching the notice in the U.S. mail, with the postmark serving as the triggering date of the time limit requirements in the Rules. In this case, there is nothing in the record to show that it had not been a practice of both parties to use the U.S. mail service in communications such as at issue here.

In summary, while the Board much prefers to resolve claims based on the merits of the dispute, when a clear violation of the procedure for handling claims as prescribed in Rule 36 is shown to exist, there is no other alternative but to sustain the claim.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 18th day of May 1998.