

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23250
Docket Number CL-23265

Carlton R. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Illinois Central Gulf Railroad

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8968)
that:

1. Company violated the agreement between the Parties when it wrong-fully suspended Clerk L. E. Barney from service of Company for 5 days, October 27 through 31, 1977, following a second investigation held October 20, 1977, without rendering a decision on the first investigation which was held on September 28, 1977.

2. Company shall now be required to compensate Clerk L. E. Barney for 5 days' pay, October 27 through October 31, 1977, and his record shall be cleared of all charges as a result of the second investigation held on October 20, 1977.

OPINION OF BOARD: Claimant was found negligent, after a formal investigation, and was assessed a five-day suspension from work for his involvement in a truck accident involving the trucks driven by the claimant and a second employee while working as unloaders.

Claimant raises a procedural objection to the proceedings.

Rule 22 of the Agreement provides, among other provisions, (1) the charge must be made within 30 days of the incident, (2) the investigation must be held within 10 days of the notice of the charge, (3) the decision must be rendered within 10 days of the investigation, and (4) a record of the investigation must be supplied to a disciplined employee.

There were two investigations in this matter. Because of the failure of the recording equipment during the first investigation, the Carrier could not provide a transcript with the disciplinary action so no decision was made within the required 10 days,

Instead, the Carrier attempted to void the first charge and proceedings and reinstituted charges based upon the incident, setting a new investigation date. The second charge was within the required 30 days of the incident and the investigation was set within 10 days of the second charge date. (It was conducted at a

subsequent date at the request of the claimant which is **not** material here.) The discipline was also imposed within **the** following **10-day** period.

At issue **then** is whether the Carrier may avoid the requirement of a decision within 10 days by attempting to void the **proceedings** and reinstitute new charges in a **timely** manner. The **rule** does not cover this subject. No attempt was made by the Carrier to secure approval of the **claimant OR** the Organization to this procedure.

It is generally accepted that the time limits in such procedural rules **must** be strictly adhered to. However, Third Division Award 22462 approved the rescheduling of a hearing when the recording equipment did not function. claimant points out that in that instance the claimant waived any objection to delaying **the hearing** while in this case the **claimant** strongly objected to the procedure being **followed** by the Carrier.

In Third Division Award 22741, the Carrier was allowed **to** terminate an investigation when it was discovered there was an error as to the date of the alleged **occurrence**. A **corrected notice to the** claimant was issued and the investigation was scheduled for later in the day. See also Fourth Division Award 2792 approving a **second** hearing required because of a **mechanical** failure.

However, we **find** it unnecessary to address this issue because under the peculiar **circumstances** here, we find the second hearing itself to be defective. Although the **second** proceeding is proposed to be distinct from the first, it must be evaluated in light of the first investigation having been held and completed. We find that there is a substantive difference between the first investigation and the second one. **In** the first investigation, both drivers were charged and appeared as witnesses. In the second **investigation**, only the **claimant** was charged, because the investigating officer had decided, as a result of the first **investigation**, the other **employee** was not at fault. We **must** conclude that he also decided that the claimant was at fault or the **claimant** would not have been charged the second time. We **must** also conclude that since the **investigating** officer had already **made** up his mind, even if we were to **allow** the second proceeding to substitute for the first proceeding as a practicable solution to the problem, it **must** be judged in light of what had gone before. The second investigation was **pro forma**, **merely to reconstruct** the testimony upon which the investigating officer had previously based his decision. Under these particular circumstances, it was necessary to reconstruct the testimony as nearly as possible to the original testimony upon which the investigating officer made his decision. For that purpose, the other driver involved in the accident was an essential **witness** in the proceedings, essential for the Carrier to produce, not for the **claimant** to produce.

Since we **find** that the **second investigation** was defective, we must **find** for the claimant. We limit this decision to the facts in this case and do not **intend** to establish a precedent with respect to essential witnesses at a hearing or investigation.

FINDINGS: Ths Third Division of the Adjustment Board, upon **the** whole record **and** all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier **and** the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the **Railway** Labor Act, as approved June 21, 1934;

That **this** Division of the **Adjustment** Board has jurisdiction wer the dispute involved herein; and

That the Agreement was violated.

A W A R D

claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: _____

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 15th day of April 1981.