NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26358

THIRD DIVISION Docket Number MW-26284

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Northeast Illinois Regional Commuter Railroad Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The eighteen (18) days of suspension imposed upon Assistant Track Foreman S. Gildart for alleged violation of Rule 'G' was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File NIRCRC-D-1115/08-13-43R).

2. The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD! By letter of September 30, 1983, the Claimant was notified by the Carrier to attend a formal Hearing on his alleged violation of Rule "G". The Hearing was held on October 6, 1983. Following the Hearing the Claimant was found guilty and assessed a" 18-day suspension by notice dated October 14, 1983.

The Organization argued on the property that the Carrier violated Rules 17 and 18 of the Agreement and in addition, failed to prove the charges against the Claimant. Those Rules read in pertinent part:

> "Rule 17. DISCIPLINE AND GRIEVANCES. (a) An employee who has been in the service ninety (90) days will not be disciplined or dismissed without a fair hearing, . . . A decision will be rendered within ten (10) days after the completion of the hearing.
>
> Rule 18. ADVICE OF CAUSE. An employee disciplined or dismissed will, on request, be furnished a statement in writing showing cause therefor. In case of appeal, transcript of the employee's evidence, when taken in writing, will be furnished upon employee verifying and signing same."

The Organization appealed based upon the fact that the notice dated October 14, 1983, "was back-dated to read such date, when in fact, such was not completed until October 18, 1983." It argues that the Claimant was handed his notice on October 18 and the General Chairman received his postmarked by

machine on October 18 and by the post office on October 22, 1983. As such, a decision was not rendered within ten (10) days as required by Rule 17. The Organization noted in its December 8, 1983. appeal that neither the Claimant nor the General Chairman had been presented a copy of the Transcript. As the decision was made without reviewing a typed copy of the Hearing, the action taken against the Claimant was unfair and unjust.

It is the Carrier's position that Claimant was notified of the decision within ten days. The Carrier notes that the decision was dated October 14, 1983, and that Claimant refused to sign it. It also notes that the Claimant returned to work on October 17. As such, he had been clearly advised as to the discipline and decision. As Rule 17 only states that the decision will be rendered within ten days and written decisions are not required, the Carrier has complied with the Rule.

As for Rule 18, the Carrier notes that the Hearing was taped and the Rule clearly states that the Transcript "when taken in writing will be furnished." Since the Transcript is not required by the Rule and no time limits are required, no violation occurred. The Carrier further maintains that the Transcript was mailed to the Organization and a second copy was sent when the Organization indicated non-receipt. In addition to denying procedural violations, the Carrier argues that the Claimant's guilt was documented.

This Board has reviewed the record in the instant case. The procedural issues raised by the Organization have been closely examined. It is not rebutted on the property that the Claimant returned to work on October 17, 1983. As such, the decision was submitted in some manner to the Claimant. There is nothing in Rule 17 that requires a written decision. carrier acts at its own peril in such cases to prove, as it has here, that the decision was rendered.

With respect to a Transcript of the Hearing (Rule 18), the Rule does not include a time limit. In the interest of appeal, such Transcript might be necessary and significant for the Organization. Nowhere on the property do we find any argument by the Organization that the appeal was hampered, impeded, or the rights of the Claimant prejudiced. There is nothing on the property to indicate that the Organization requested an extension based upon the lack of a Transcript. Finding no arguments that the rights of the Claimant were prejudiced and no violation noted in the language of the Rule, the procedural argument must be denied.

As to the Claimant's guilt, the Carrier must document such charges by clear, convincing and strong probative evidence. In the case at bar the Claimant admits that he was talking low and holding his head down because he knew his breath smelled. He admits to having alcohol, but states it was many hours earlier. Four Carrier witnesses smelled it on his breath and one of them at three feet away. Two Carrier witnesses indicated that he had slurred speech. One witness noted "a slight swaying motion, and his eyes appeared to be bloodshot and watery." At the time of the incident the Claimant never discussed, debated or claimed that he had failed to brush his teeth or indicated that he was insisting upon or expected a breath test. There is strong probative evidence in the record of the Claimant's guilt. As such, the Organization's Claim must be denied.

FINDINGS: The 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 Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

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

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of June 1987.