NATIONAL RAILROAD ADJUSTMENT BOARD

Award **Number 26382**

THIRD DIVISION Docket Number MU-26149

Marty E. Zusma", Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

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

1. The Carrier violated the Agreement when it disciplined (reprimand - 'AW Warning Letter' for October 25, 1982) Mr. J. F. Buxton without agreement in writing between him, his union representative and the Carrier's authorized official **and/or without** benefit of a hearing as stipulated in Section 2(a) of Agreement Rule 27 (System Docket CR-314/MW-27-83).

2. The 'AW Warning Letter' mentioned in Par: (1) hereof shall be removed from the Claimant's record."

OPINION OF BOARD: There is no dispute in the record on the essential facts. Claimant called to report off from duty at 8:34 A.M. on October 25, 1982. His tour of duty was to begin at 7:00 A.M. Shop policy was that employees were to call prior to 8:00 A.M. if they wished to report off. The Claimant argued that his call was made as soon as possible in compliance with Rule 28(a). The Carrier issued a" "Unauthorized Absence Letter" which went into the Claimant's file.

The Organization advanced its Claim taking exception to the imposed discipline. It argued that under Rule 27, Section 2, an employee could only be reprimanded if there was a Hearing or in its absence, a waiver. Since there had been neither a Hearing, "or a waiver, the discipline could not stand.

The Carrier denied that Rule 27, Section 2 prohibited its actions. It argued that it had Rule support from Rule 27, Section 1 (a), which permits the issuance of the reprimand without a Hearing. It argued that it had acted properly and within the Rules.

The Rules herein disputed state in pertinent part:

"Rule 27. Section 1. Hearings

(a) Except as provided in Section 2 of this Rule, employees shall not be suspended nor dismissed from service without a fair and impartial hearing nor will an unfavorable mark be placed upon their discipline record without written notice thereof.

Rule 27. Section 2. Alternative to hearings.

(a) An employee may be disciplined by reprimand or suspension without a hearing, when the involved employee, his union representative and the authorized official of the Company agree, in writing, to the responsibility of the employee and the discipline to be imposed.

(b) Discipline imposed in accordance with paragraph (a) of this Section is final with no right of appeal."

In the record of this case, the Claimant was issued an "unfavorable mark" against his record without a Hearing. That "Unauthorized Absence Letter" the Carrier asserts is in full compliance with Rule 27, Section 1, in that it is neither a suspension, nor a dismissal which would require a Hearing. It was required by the Rule which mandates that "nor will an unfavorable mark be placed upon their discipline record without written notice thereof." The Carrier's major argument in support of its position is in its letter of November 8, 1983. That letter listed numerous Rules negotiators may have been aware of and noted that the new Rule differed in two ways. First, previous Rules required a Hearing prior to any discipline, whereas Rule 27 required a Hearing only for suspension and dismissal. Second, there is no restriction on issuance of an "unfavorable mark" except that of providing a written notice. As such, the Carrier has complied with the Rule.

The primary function of this Board is to interpret the written Agreement of the parties. We do not read as clear probative evidence such intent from the Carrier's November 8, 1983, letter. The record is devoid of any past practice establishing the meaning of the provision.

Rule 27, Sections 1 and 2 are clearly interrelated in contract construction. As such, they must be considered wholly and jointly to provide the intent of the parties. Section 1 pertains explicitly to "Hearings" as clearly and expressly written into the Agreement. It is ambiguous only with regard to reprimands. Section 2 provides and was written for "Alternatives to Hearings." A reprimand is clearly delineated in Section 2 as discipline which can be provided without a Hearing if agreed by the parties and, as per part (b), as final without right of appeal.

An "Unauthorized Absence Letter" cannot be viewed as other than a reprimand and an unfavorable mark. As such, it follows that Section 1 cannot be construed as to permit a reprimand without a Hearing, as that is the meaning and intent of Section 2. There would be no reason for Section 1 to provide no right to a Hearing when reprimanded (within a section designated to Hearings) and then to further provide In Section 2 an alternative whereby employees waive their right to a Hearing for a reprimand.

This Board rejects the Rule construction advanced by the Carrier which would allow the Carrier to issue written reprimands into the employee's discipline file without the right of a Hearing. Reprimands are clearly included in Section 1, "Hearings." This Board does not question, abridge or deny the right of the Carrier to discipline employees who violate important Rules. However, employees, under Rule 27, have the right to a Hearing to adduce the proper facts and reduce any errors before an unfavorable mark becomes a part of their permanent disciplinary record. This Board sustains the Claim.

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD NOS. 26382, 26383
DOCKET NOS. MW-26149, MW-26150
(Referee Zusman)

The Board majority has erred in their interpretation of Rule 27.

The Board majority has seriously violated the well settled principle that the Adjustment Board does not make new agreements for the parties, nor insert or delete words under the guise of construing ambiguous provisions. (Third Division Award Nos. 20276, 21221).

While Rule 27, Sections 1 and 2 are clearly interrelated, the contract is most specific in that Section 2 is an exception to the hearing requirement of Section 1. Section 2 only provides that the required Section 1 hearing may be waived when the parties agree on the employee's responsibility and the discipline to be assessed.

Thus, Section 2 can only become involved after the employee is notified to appear for a hearing under Section 1. In the case at hand, the employee was not ordered to appear for a hearing because there was no intent to suspend or dismiss him for his dereliction. Section 1 is clear that a hearing is required only if the employee may be subject to suspension or dismissal. There is simply no requirement in Section 1 to hold a hearing when an unfavorable mark is to be placed on the employee's discipline record. The only restriction is that such a mark cannot be made without written notice thereof to the employee. Consequently, even if the "Unauthorized Absence Letter" issued to the claimant could be considered as an unfavorable mark on his discipline record, under no circumstances would such action require a hearing.

A vigorous dissent is required because of the erroneous interpretation placed on Rule 27 by the majority that this rule grants the right to a hearing before an unfavorable mark becomes a permanent part of a discipline record. They have done violence to the language and construction of the rule and the clear intent of the negotiators.

For the above reasons, we do, therefore, vigorously dissent.

Robert L Hicks
R. L. Hicks

M. W. Fingerhut

M. C. Lesnik
M. C. Lesnik

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost