

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Trans-Continental Freight Bureau, Weighing and Inspection
(Department, South Pacific Coast Territory

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10128) that:

(a) The Bureau violated the provisions of the current Clerks' Agreement at Los Angeles, California, when it removed from Bureau service Mr. O. Culebro as a result of a formal investigation held on October 3 and 4, 1985, and

(b) Mr. O. Culebro shall now be returned to Bureau service and paid for all wages and loss of benefits commencing on September 16, 1985, and

(c) Any reference to the charges and the formal investigation held on October 3 and 4, 1985 shall be removed from the personal record of Mr. Culebro."

FINDINGS:

The Third 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 employes 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.

Claimant, with a seniority date of May 20, 1963, was employed in 1985 as Traveling Inspector, headquartered at Los Angeles. Under date of September 12, 1985, he was served with the following Notice of Discipline and Hearing by the Superintendent:

"With reference to our meeting on September 11, 1985, you are hereby removed from Service on Position No. 64, Traveling Inspector, Los Angeles, California, effective prior to reporting for duty September 16, 1985.

This removal from service is due to the following reasons after my investigation of your auditing reports:

Account No. A-3577 Simplot Foods, Inc. Los Angeles, CA

Your Audit report indicates that you audited 18 shipments forwarded via Southern Pacific and 6 shipments forwarded via Union Pacific Co. Carrier's records reflect that 2 shipments moved via Southern Pacific and 3 shipments moved via Union Pacific during the audit period covered by your report.

Account No. A-7506 Perma Plastics, Santa Fe Springs, CA

Your audit report indicates that you audited 8 shipments forwarded via Union Pacific. Carrier's records did not reflect any shipments moving during the audit period covered by your report.

Account No. A-6829 Federal Paperboard Co., Los Angeles, CA

Your audit report indicates that you audited 9 shipments of the 12 shipments forwarded via Union Pacific. Carrier's record reflect that only 6 shipments moved via Union Pacific during the audit period covered by your report.

Account No. A-6823 Delco Remy, Buena Park, CA

Your audit report indicates that you audited 40 shipments of the estimated 110 shipments forwarded via Southern Pacific. Carrier's records reflect that only 25 shipments moved via Southern Pacific during the audit period covered by your report.

Account No. A-242 Carnation Company, Los Angeles, CA

Your audit report indicates that you audited 24 shipments forwarded via Southern Pacific. Carrier's record reflects that only one shipment moved via Southern Pacific during the period covered by your report.

Account No. A-5550 Emery Industries Inc., Los Angeles, CA

Your audit report indicates that you audited 32 shipments forwarded via Union Pacific. Carrier's records reflect that only 25 shipments moved via Union Pacific during the audit period covered by your report.

Account No. A-5024 Anheuser-Busch, Inc., La Metro, CA

Your audit report indicates that you audited 240 forwarded shipments made by this firm during the period March 1, 1984 to February 28, 1985. We reviewed three months of subscriber records during the above period and were unable to determine if in fact shipments had been audited as they were not in any type of order, etc. Nor did any documents reflect initialling as you have been instructed to do so. Further, your audit report did not indicate any shipments received under Weight Agreement. I have reviewed carrier's record covering several months business and developed that numerous shipments are received under Weight Agreement each month.

Violation of General rules for the guidance of employees (Form 220)

Rule 2, Rule 3, Rule 4, Rule 10, Rule 23.

Violation of Circular 1-G, Section B.I. 10, Page 9, Auditing Agreements thru Note on Page 10.

Violation of B.I. 62 and Letter of Reprimand dated August 12, 1985, with orders to comply with B.I. 62 with instruction to initial each shipment record audited.

Violation of Verbal Instruction and Verbal Agreement to notify me of your acceptance of declination of reprimand, acknowledged by you September 11, 1985.

Hearing will be scheduled for September 24, 1985, 11:00 a.m., at 717 Market Street, Room 317, San Francisco, California.

Acknowledge receipt on the attached copy of this letter and return."

Following the hearing, Carrier determined that Claimant was guilty as charged and dismissed him from service effective November 4, 1985. Timely appeal was filed on procedural and merits grounds. During handling on the property Claimant was restored to service without backpay on March 16, 1986. The Claim for exoneration and compensation for the period of suspension was progressed to this Board.

We are met at the threshold of the case with the Organization's motion to sustain the Claim on two grounds: 1.) the Bureau's failure to include in its Submission to this Board a copy of the transcript of the formal Hearing and Investigation necessitates reversal of the discipline for failure of proof; and 2.) the Bureau voided the discipline by noticing and holding the formal Investigation more than twenty (20) days after acquiring factual knowledge of the occurrence of the charged misconduct.

We will now turn to the first procedural objection. Failure of a Carrier to provide a copy of the transcript of Hearing in a discipline or discharge case has been held fatal when the record before the Board therefore contains no evidence to support the charges and arguments. See First Division Award 12140, Third Division Award 23015, and Fourth Division Award 2210. In a case where the Organization included a copy of the transcript in its Submission to the Board, however, the Board has decided the case on the available evidence before it rather than award a forfeiture based upon a technicality. See First Division Award 23856. In the present case, we have a complete record before us, including the 172-page transcript of Hearing received as part of the Organization's Submission and relied upon by both parties in their Submissions. We will not sustain the Organization's first procedural objection.

The second procedural objection in this case is the Organization's contention that the Bureau violated time limits of Rule 19(a), thereby voiding the disciplinary proceeding, by serving the Notice of Charges and Hearing on September 12, 1985, whereas the Superintendent had full knowledge of the alleged Rules violation by Claimant as early as August 12, and no later than August 23, 1985. As evidence on this point the Organization put forth the following letters from the Superintendent to Claimant, dated respectively, August 12 and 23, 1985:

"August 12, 1985
W-7021

Mr. O. Culebro

Weight agreement audits are not being completed in accordance with I.B. No. 62 - Systematic Random Sampling, and for which you had personal instruction from Mr. E. S. Jones on this auditing procedure.

The first line outlining the procedure for random sampling which must be followed by all employees indicates that the 12 calendar months immediately preceding the month of the audit is to be audited.

Your work for the month of July indicates eight CS-40's were forwarded to this office as being completed weight agreement audits which were for periods of time less than one year. This is not acceptable. You must follow the procedures as outlined in the above mentioned Instructional Bulletin.

One audit indicates the exact same period as the completed audit by the previous auditor in the territory. This account was A-7503 - Juice Tree & Company, Garden Grove, CA.

If proper auditing procedures (including initialling individual freight bills) are not followed, disciplinary action will necessarily follow.

T. L. Tolan
Superintendent

TLT:pt

Acknowledge receipt and understanding:

Octavio Culebro

Date: _____

cc: Mr. E. S. Jones, Asst. to Supt."

* * *

"August 23, 1985
W-7012

Mr. O. Culebro

In checking our records back to the date of your receiving personal instructions on the proper method of auditing weight agreements and transit using the Systematic Random Sampling method on June 4, 1985, by Mr. E. S. Jones, it is obvious that you choose to ignore these instructions.

On June 5, June 11, June 17 and June 27, 1985, you submitted audits for periods of less than one year and continued to do this through July 1985.

An inspection of SPT Company Demurrage records on August 21, 1985, also shows that the shipments for the SPT Company as stated on your reports - CS-40's - prior to Mr. Jones' instructions of June 4, 1985, are also in error. Your reports showed that you had audited more cars than had been forwarded during the period covered by your alleged audit. The errors in car count were not known as of my letter of August 12, 1985.

Instructional Bulletins have been issued covering non inspection of records - I.B. No. 38 covering PFE (SP) and I.B. No. 39 UP TOFC/COFC movements; I.B. No. 45 ATSF allows inspection of TOFC/COFC shipments at the time of our regular weight agreement audits.

I am offering a ten (10) day disciplinary leave without pay beginning September 2nd through September 13, 1985. If this discipline is not accepted, I will be forced to continue the investigation and have a formal hearing covering these charges, if the investigation warrants.

/s/ T. L. Tolan
T. L. Tolan
Superintendent

TLT:pt

cc: Mr. C. R. Dani, Reg. Mgr., WWIB, San Francisco

cc: Mr. E. S. Jones, Asst. to Supt., TCFB, San Francisco

Discipline accepted:

Date: _____ "

The foregoing demonstrates a patent violation of the time limits of Rule 19(a) which reads as follows:

"RULE 19 - DISCIPLINE - INVESTIGATION

- (a) An employee who has been in service covered by these rules more than sixty (60) days, or whose application has been formally approved, shall not be dismissed or otherwise disciplined without a formal investigation, which shall be promptly held but in any event not later than twenty (20) days from date the Bureau has factual knowledge of occurrence of the incident to be investigated unless such employee shall waive formal investigation. He may be held out of service pending such investigation. At such investigation the employee may be assisted by his duly accredited representatives."

Claim sustained for violation by Carrier of the time limits. No opinion is expressed or implied on the merits of the disciplinary action.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.