

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32889
Docket No. MW-33649
98-3-97-3-120**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railroad Company
((formerly The Colorado and Southern Railway
(Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) day suspension assessed Laborer R. L. Crespin for his alleged failure to report for duty at the designated time and place on August 17 and 18, 1995 was without just and sufficient cause, based on unproven charges, arbitrary and capricious (System File C-95-16D/MWD 960319AA CSR).**
- (2) The dismissal of Laborer R. L. Crespin for his alleged failure to report for duty at the designated time and place on August 21 and 22, 1995 was without just and sufficient cause, based on unproven charges, arbitrary and capricious (System File C-95-17D/MWD 960319AB).**
- (3) The claims (referenced in Parts (1) and/or (2) above) as presented by General Chairman W. F. Gulliford on November 28, 1995 to Terminal Superintendent M. A. Kotter shall be allowed as presented because said claims were not disallowed by Terminal Superintendent M. A. Kotter in accordance with Rule 27.**
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Laborer R. L. Crespin's record shall be cleared of the**

charges leveled against him and he shall be compensated for all wage loss suffered.

- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Laborer R. L. Crespín shall be returned to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS:

The Third 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.

The operative facts underlying these claims are not in dispute. Claimant had some 17 years of service at the time these matters arose in August 1995. His employment record, up to that point in time, reflected four prior instances of discipline for absence without authority. For these infractions, Claimant initially received a censure and then later suspensions of 15, 90 and 30 days, respectively. His last previous suspension was in December 1993.

Claimant was again absent without authority on August 17 and 18, 1995. August 19 and 20, 1995 were Claimant's scheduled rest days. On Sunday evening, August 20, Claimant's wife telephoned Carrier to inform that Claimant would be absent on August 21 and 22, 1995. The reason she gave was that Claimant had a death in the family. Carrier granted Claimant permission to be absent based on this representation. In reality, Claimant was incarcerated August 20 through 22, 1995. In addition to his jail time, Claimant was Court ordered to submit to an in-patient alcohol rehabilitation

program. He was admitted to the 14-day program on August 23, 1995. Upon his release, Claimant returned to work.

As a result of the foregoing events, Carrier notified Claimant to attend two separate Investigation Hearings. The first Investigation focused on the absence on August 17 and 18, 1995. The second Investigation dealt with the absence on August 21 and 22, 1995. The Investigations were postponed until September 28, 1995 to allow Claimant to complete the rehabilitation program. On October 20, 1995, Claimant was issued two disciplinary notices. The first found him in violation of Rule 1.15 for his unauthorized absence on August 17 and 18, 1995. It imposed a 30-day suspension for the period from October 21 through November 19, 1995. The second disciplinary notice imposed dismissal for Claimant's unauthorized absence on August 21 and 22, 1995.

At the Investigation Hearings, the Organization objected to the fairness and impartiality of the process for a number of reasons. Among them was the allegation that the Carrier was trying to improperly maximize the disciplinary penalties by treating the Claimant's absence as two separate instances. In reality, the Organization maintained that Claimant's absence was one continuous instance resulting from Claimant's affliction with alcoholism.

Because of the Carrier's separate treatment of Claimant's absence, the Organization filed separate claims on November 28, 1995 to challenge the disciplinary action. According to the return receipt, Carrier received the two claims on December 1, 1995. Carrier did not issue its denials of the claims until January 31, 1996. On March 19, 1996, the Organization appealed from Carrier's denials. In addition to renewing its original basis for challenging the two disciplines, the Organization also noted the Carrier's failure to respond within time limits per Rule 27(a). That Rule reads, in pertinent part, as follows:

"... Should any such claim or grievance be disallowed, the Company shall within sixty (60) calendar days from the date same is filed, notify whoever filed the claims or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."

Carrier responded to the new procedural challenge by contending that the claims were not actually received in the appropriate official's office until December 4, 1995. When measured from this date, the Carrier maintained that its denials were timely. Thereafter, the parties maintained their respective positions until the two matters were combined into one Docket submitted to the Board.

Because of the nature of the time limits issue, we must deal with it as a threshold matter. In defense of its position, the Carrier raised Decision No. 16 of the National Disputes Committee. The Organization vigorously asserted that NDCD No. 16 was not applicable to discipline disputes.

The proper application of NDCD No. 16 has been the subject of many Awards of the various divisions of this Board as well as several Public Law Boards. Most of them, if not all of them, have been provided to us. They have all been studied in detail. Because a few have already done a thorough and well-reasoned analysis of the proper application of NDCD No. 16, we will not attempt to do so again here. See, for example, Third Division Award 27842. On this property, however, the parties already have Award 63 of Public Law Board No. 4370, issued on March 7, 1997. This decision interpreted the identical time limits language. We will follow this precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling processes.

Because the absence in question has been treated as two separate claims from the outset, we must deal with them as separate matters as well. We turn, therefore, to the 30-day suspension for Claimant's absence on August 17 and 18, 1995, what we will refer to as Claim No. 1. Despite the debate raging over whether NDCD No. 16 applies to disciplinary matters as well as continuing rules claims, the operation of the decision is well settled. It operates to limit a Carrier's liability for an untimely response where the claim involved is one where liability is not fixed and continues to accrue day by day. NDCD No. 16 does not impact claims where the liability is finite and already fixed. NDCD No. 16 also made clear that the Carrier's response time limit begins running when a claim or appeal is received by the Carrier.

In Claim No. 1, we must find that Carrier failed to comply with the response time limit. The evidence establishes that Carrier received Claim No. 1 on December 1, 1995. Its response on January 31, 1996 was untimely under Rule 27(a). Given this procedural failure, the remaining question is what is the proper application of Rule 27(a) in light of

NDCD No. 16. Recall that the suspension involved in Claim No. 1 was for 30 days running from October 21 through November 19, 1995. The Carrier's backpay liability, therefore, was finite and already fixed as of November 19, 1995, the final day of the suspension. Under these circumstances, when Carrier missed the Rule 27(a) time limit, the decision in NDCD No. 16 did not operate to prevent Rule 27(a) from applying as literally written. Accordingly, Claim No. 1 must be allowed as presented. As a result, the discipline in Claim No. 1 must be set aside. Claimant's record, therefore, must be cleared of the discipline and he must be compensated for all wage loss suffered. As noted in Rule 27(a), this default disposition is without precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

Claim No. 2 deals with the absence on August 21 and 22, 1995. On this claim, we must again find that Carrier failed to satisfy the Rule 27(a) time limit. However, since Claim No. 2 involved a dismissal, the backpay liability was not finite and fixed as of the date of Carrier's procedural error. It continued to accrue with each calendar day. The proper application of Rule 27(a), as modified by NDCD No. 16, is to limit Carrier's default liability. The default remedy is to allow the claim for backpay that had already accrued up to the date of Carrier's untimely denial, which was January 31, 1996. According to the application of NDCD No. 16, the backpay liability after that date, as well as the substantive merits of the disciplinary action, remain as viable issues for determination.

We have reviewed the other procedural objections raised by the Organization and find them to lack merit. Therefore, the only remaining issue is the whether Claimant's dismissal was appropriate in light of all of the relevant circumstances shown by the record.

The evidence in Claim No. 2 shows that the Carrier's dismissal action was triggered by Claimant's absence on August 21 and 22, 1995. Carrier has specifically denied that the time Claimant spent in the rehabilitation program played any role in its disciplinary decision. The propriety of Carrier's dismissal, therefore, must stand or fall based on the circumstances surrounding the two-day absence taken together with Claimant's prior disciplinary record.

The evidence surrounding the absence in Claim No. 2 shows it to have been less egregious than the two-day absence in Claim No. 1. That absence on August 17 and 18, 1995 caught the Carrier with no advance warning. Carrier did have advance notice of

Claimant's impending absence for August 21 and 22, 1995. In fact, based on the reason Carrier was given by Claimant's wife, Claimant actually had permission to be absent. While it is true that the permission was obtained under false pretenses, the record does not justify holding Claimant accountable for the explanation. According to his testimony at the Investigation, Claimant did not tell his wife to give the false explanation nor was he aware she had done so. Carrier produced no other probative evidence to contradict this evidence. Nonetheless, Claimant's absence was unauthorized. As this Board has held many times, incarceration is not a defense to a charge of unauthorized absence. In addition, permission obtained by false pretenses is not valid.

In deciding upon dismissal, Carrier also took into consideration Claimant's past disciplinary record. For purposes of this dismissal decision, Carrier considered the 30-day suspension associated with Claim No. 1 as a valid matter of record. However, because of Carrier's time limit default in Claim No. 1, that infraction has been cleared from Claimant's record. Accordingly, it may not stand as a valid consideration in Carrier's dismissal decision.

What the record leaves in Claim No. 2, then, is a two-day unauthorized absence occurring under less egregious circumstances than the two-day unauthorized absence in Claim No. 1. It is immediately apparent that the penalty of dismissal is not warranted by the evidence. Indeed, the overall circumstances do not support a disciplinary penalty of greater severity than what the Carrier found to be appropriate for the more egregious two-day absence in Claim No. 1. Accordingly, we find Claimant's unauthorized absence on August 21 and 22, 1995 to warrant no more than a 30-day suspension.

Under the peculiar circumstances of this combined docket, there is no evidence Claimant suffered a wage loss for both his dismissal in Claim No. 2 as well as the suspension from Claim No. 1. The dismissal ran concurrently with the suspension. Since the dismissal has hereby been converted to a 30-day suspension, Claimant is entitled to backpay only from November 19, 1995. Claim No. 2 is sustained in all other respects. Claim No. 1 is sustained as to the default rescission of discipline and clearance of Claimant's record as to that matter. Because of the remedy provided on Claim No. 2, there is no backpay remedy for Claim No. 1.

AWARD

Claim sustained in accordance with the Findings.

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 Third Division**

Dated at Chicago, Illinois, this 21st day of October 1998.

**Carrier Members Dissent
to Award 32889 (Docket MW-33649)
Referee Wallin**

Dissent to this decision is required both because it ignores the facts of record and also because it misapplies National Dispute Committee Decision No. 16.

There is no dispute in this record that Claimant was absent without permission on the four dates involved in this matter. The reason given for part of Claimant's absence was determined to be false as he was incarcerated. Further, in the Investigation, Claimant admits his guilt and his failure to comply with Rule 1.15. For these unchallenged and admitted violations, Claimant was dismissed from service and such has been found to be appropriate discipline on this property PLB2206 Award 3, PLB 4161 Award 43, See also Second Division Awards 13082, 13288, Third Division Awards 32053, 32709.

On appeal, Carrier's denial of the Organization's claim, came one day late under Rule 27(a). Carrier invoked the application of National Dispute Committee Decision No. 16 on the property. Under that decision any liability would only extend until the late denial and thereafter the claim would be disposed of on its merits. The Majority acknowledges this interpretation at page 5 of the Award. However, the Majority concluded that the liability concerning the first two dates, "was finite and already fixed as of November 19, 1995..." And that therefor, ... "NDCD #16 did not operate to prevent Rule 27(a) from applying..."

The Majority makes reference to Third Division Award 27842 as an example of "well reasoned analysis of the proper application of NDCD #16." However in the review made in that Award, the Majority cited the Labor Member's Dissent to Fourth Division Award 4600 at page 6 of that decision. Had the Majority in Award 27842 given full analysis to prior dispositions it would have also cited Carrier Member's Response in that case which noted:

"...Dissenter asserts that National Disputes Committee Decision No. 16 was never intended to apply in discipline cases. The fact is that such a contention was not raised or argued by the Organization on the property.

Further of the Awards cited at page 4 [of the Dissent], eleven (11) predate the adoption of National Dispute Committee Decision 15 and 16 on March 17, 1965, and clearly can not support the Dissenter's opinion.

Of the remaining ten (10) awards, only Third Division Award 16030 refers to Third Division Award 13530 which refers to NDCD No. 15. No Award cited discussed the National Disputes Committee's decisions. Incidentally, Third Division Award 16030 was a discipline case. ...Award 4600 cites some seven (7) Awards dealing with this subject, three (3) of which were discipline cases. (Emphasis in the original)

Award 27842 concluded that the discipline would be overturned, "on the time limit issue. The merits need not be reached." Thus, that decision concluded the NDCD #16 had no application at all. That is not what many decisions have said.

NDCD #16, when raised, has application to both discipline and rules cases. See Second Division Awards 6326 and its Interpretation, 10754, 11621, 11730, 12151, Carrier's Dissent to 12346, Third Division Awards 14603, 19361, 20268, 21576, 24269, 25604, 26213, 26239, 27793, 28273, 28601, 29114, 29922, 31898, 32401, Fourth Division Awards 4600, 4772, PLB 2945 Award 73 (CR-BRAC), PLB 1844 Awards 5 (CNW-BMWE). And that such also applies to other than Third Division disputes see PLB 1459 Award 144 (CNW-UTU), PLB 2779 Award 95 (CNW-UTU)

PLB 4370 Award 63 cited at page 4 of the Award noted on this property:

"The Company admits that it failed to respond to the claim within the required 60 days. The Company contends, however, that liability under Article 27 ceases upon Division Superintendent's belated response. Both parties provided the Board with numerous previous Awards as to whether the claim should be "allowed as presented" (that is, the disciplinary action entirely rescinded and the Claimant made whole) or whether the Company's reply terminated the period for which the Company was liable (without respect to the merits of the matter). The Board is persuaded that the Carrier's position is the correct one. It should be noted that, in the instance of a dismissal (or, similarly, a demotion or failure to award a position), the damage inflicted on the Claimant (if the claim is a meritorious one) continues from day to day, becoming increasingly serious as long as a procedural defect is not cured." (Emphasis Added)

Such does not support what was done in this case.

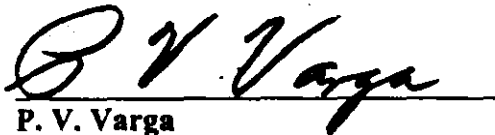
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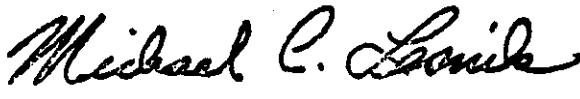
Thus, pursuant to NDCD #16, Claimant should have been allowed one day's pay and then the Board should have concluded that unauthorized absence and admitted violation of the applicable rule warranted the discipline assessed in this case.

Concerning the second claim, again it must be pointed out that Claimant admits he was AWOL; that his absence was because he was incarcerated; and that Claimant admitted his failure to comply with Carrier's Rule 1.15. However, the Majority finds this matter, "...to have been less egregious..." because the Carrier was given a dummy reason. Employees have been dismissed for being incarcerated and unable to report timely for their work assignment. See for example, Third Division Award 31627 (8/96).

The Majority has misapplied the application of NDCD #16 to wipeout the discipline assessed for being AWOL. The Majority then compounded its error by concluding that having improperly eliminated the 30 day suspension that Claimant's improper activity warranted no more than a 30 day suspension.

We Dissent.


P. V. Varga


M. C. Lesnik


M. W. Fingerhut