Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32987
Docket No. TD-32814
98-3-96-3-124

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Pursuant to Rule 19(c), this is to appeal the March 27, 1995 decision of Hearing Officer, R. A. Herz and subsequent sustaining of this decision by G. Devecchis, General Manager New England Division. Wherein the Carrier suspended Train Dispatcher J. T. Carmac from service, without pay, for fifteen days."

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.

On March 13, 1995 Claimant was serving as a Trainee Dispatcher under the monitoring and supervision of the Dispatcher of Record at the time. Claimant, who had been in service as a Trainee Dispatcher since January 1995, was at the dispatch console at all times relevant to the matter herein. At or about 1:10 P.M. a Foreman asked

Claimant for foul time on Track Nos. 1 and 2 at milepost 212.6 so that he and his crew might commence work on the section of track in question. Claimant gave the Foreman foul time on Track No. 1 until 1:30 P.M. and on Track No. 2 until 2:00 P.M. In addition, blocking devices were applied by the Midland Dispatcher so that the area in question would be protected from activity that might place the crew working in the protected area at risk. At no time before 1:30 P.M. did the Foreman or any other individual ask the Claimant to clear the area in question. At some point during the period however, the Foreman did in fact radio that he was "clear" when he heard his name mentioned on the radio, but he did not direct his communication to the Claimant, nor did the Claimant acknowledge his communication. Later, at some point before 1:25 P.M. the Foreman and his crew left the track area. In doing so the Foreman noticed that the track signal was "clear" despite the fact that he did not request that the track be cleared and that his foul time had not yet expired. At that point the blocking devices had been removed by the Midland Dispatcher and Train No. 175 went through the area. Shortly thereafter, at or about 1:30 P.M. the Foreman asked the Claimant to clear the area.

The following day the Foreman reported the matter to his Supervisor, who in turn advised the Claimant's Supervisor. An Investigation was conducted and the Claimant was removed from service under Rules providing that an employee may be so removed "... if his retention in service could be detrimental to himself or another person or the corporation."

On March 22, 1995 a Hearing was conducted. After the Hearing, the Claimant was suspended for 15 days.

In contesting the discipline meted out in this matter the Organization attacks both the procedure used by the Carrier to impose the discipline and the merits of the charge of misconduct by the Claimant. As a threshold matter however, the Carrier contests that the Statement of Claim was untimely filed.

In support of the argument that the appeal to the Board was untimely filed the Carrier contends that the only communication by the Organization within the required time limits was a letter to the Carrier that the matter was being forwarded to the Organization's President "for further handling." Thus, the Carrier argues that it was not placed on notice that the Organization was contesting the matter to the Board.

We disagree. A close examination of the correspondence in question makes it clear that the Carrier was aware of the fact that the Organization did not rest on the Carrier's earlier assertions that the discipline was warranted. Thus, to process the matter further would not deprive the Carrier of any right to due process or expose it to undue prejudice.

With regard to the merits of the claim, the Organization argues that there is no evidence that the Claimant was responsible for removing the block from Track No. 1 enabling Train No. 175 to travel over the track in question and that the Foreman did in fact report that he was clear of the area. We disagree. First, the record shows that although the Foreman transmitted that he was clear, there is no evidence that the Trainee heard or acknowledged the report. Second, the record is clear that only Claimant or the Dispatcher of Record could have directed the Midland Dispatcher to remove the blocks. Finally, the Organization contends that the discipline meted out was excessive. However, we have already determined that the risk in this matter was substantial. Moreover, all of the cases it cites in support of its argument involved some basis for concluding that the discipline was improper either because of disparate treatment or mitigating or extenuating circumstances. No such claim is made in the instant matter and the record supports no such conclusion.

One of the Organization's procedural arguments, however, warrants close examination. In this regard the Organization contends that the Carrier violated the parties' Agreement when it failed to defer the Claimant's 15 day suspension. On this point it relies on Rule 19(f) which provides that if an employee is to be suspended the suspension "... shall be deferred unless within the succeeding six (6) month period, the accused employee commits another offense for which discipline by suspension is subsequently imposed." More particularly, the Organization points out that the Claimant was removed from service on March 14, the Hearing was held on March 22, the suspension was imposed on March 27 and the Claimant returned to work on March 29. In support of its argument it cites to Third Division Award 30071, between the same parties as involved herein, by Referee Wesman holding that an employee may be suspended under Rule 19(f) only with no actual days served without pay in the absence of a subsequent suspension within six months. In reply the Carrier points to the Carrier Members' strong Dissent to that Award.

Clearly the Award in that case is a determination of the precise contract language between these same parties that has not been changed bilaterally in collective

bargaining. Thus, the only basis for disregarding the Award is if it can be shown that it is patently erroneous. Having closely examined Award 30071 we conclude that although its holding can be easily understood, it does not warrant application in this matter.

When Section (f) of Rule 19 is considered standing alone, the conclusion in Award 30071 is quite understandable. For example, when applied to misconduct that does not rise to the level of detriment to persons or the Carrier, a limitation which does not appear in Section (f), the use of a deferred suspension, a sort of probation, makes imminent sense. This is true because in those cases the employee in question is put on notice of his or her misconduct and knows the reward for staying suspension free in the succeeding six month period.

However, when the misconduct in question for which a suspension is imposed makes the retention of the employee a detriment to him or herself, other persons, or the Carrier, other important issues come into play. Indeed, this fact, as well as the importance of those issues, was acknowledged by the parties when they included Section (a) to Rule 19. Thus, we must consider the interplay between these two issues.

Under Award 30071 an employee could engage in misconduct that rises to the level of a detriment, suppose for example misconduct causing a fatal crash, and he or she could be pulled out of service, as justified by Section (a), but not suffer any withholding of pay, as Section (f) was interpreted in Award 30071. Such a construction of these two provisions is not wholly unreasonable for it enables the Carrier to take action that would eliminate the safety risk, the rationale underlying Section (a), without assessing an economic penalty to the employee, which is of course the literal language of Section (f).

The Board believes, however, that such a construction of these two provisions diminishes the impact of discipline as a remedial device precisely because the employee who engaged in the serious misconduct pays no price. Moreover, if the remedial nature of the discipline is diminished in these circumstances the risk of further misconduct that might rise to the level of detriment to persons or the Carrier is exacerbated.

We do not believe that the parties mutually intended such a result when they agreed to Sections (a) and (f) of Rule 19.

Thus, we conclude that in those cases where the retention of an employee in service is a detriment to him or herself, other persons, or the Carrier, Rule 19(f) does not require that the suspension of any employee be without pay. Rather, a reading of Rule 19(f) in those cases, and thus implicating Rule 19(a), does not preclude the action the Carrier took in the instant matter.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of December 1998.

LABOR MEMBER'S DISSENT
TO
AWARDS 32987 AND 32988
DOCKETS TD-32814 AND TD-32815
(Referee Perkovich)

The Majority has improperly and erroneously reached conclusions in these Awards which exceeds the authority and jurisdiction of the Board. Therefore, I dissent.

In reaching their erroneous conclusions, the Majority substitutes its belief of the parties' intent for the literal language contained in the Agreement. By doing so, the Majority is changing the Collective Bargaining Agreement, something the Board is barred from doing.

In making its case, the Organization argued that the carrier violated the Agreement when it failed to defer the Claimants' suspensions. The Organization relied on Rule 19(f) which reads:

> "If the discipline to be imposed is suspension, its application shall be deferred unless within the succeeding six (6) month period, the accused employee commits another offense for which discipline by suspension is subsequently imposed.".

In support of its arguments, the Organization pointed to Third Division Award 30071, Referee Wesman, between these same parties. In that Award, the Board properly concluded:

> "...unless Claimant committed another offense for which discipline by suspension was assessed, under Rule 19(f), she would have served no actual days on suspension without pay. Carrier may not include actual days out of service without pay in a suspension assessed under the provisions of Rule 19(f)."

The Majority correctly recognizes "the literal language of Section (f)". The Majority correctly recognizes that Award 30071 was "a determination of the precise contract language between these same parties that has not been changed bilaterally in collective bargaining." In view of this, however, the Majority imposes its beliefs in these

Awards, even though its beliefs are irrelevant given the "precise" contract language of the Agreement.

The Majority points to Section (a) of Rule 19, which reads in part:

> "...The employee may be held out of service pending investigation only if his retention in service could be detrimental to himself, another person, or the corporation."

The Majority "considers the interplay" between Sections (a) and (f) and incorrectly determines "that such a construction of these two provisions diminishes the impact of discipline as a remedial devise precisely because the employee who engaged in the serious misconduct pays no price" and "we do not believe that the parties mutually intended such a result when they agreed to Sections (a) and (f) of Rule 19."

The Majority exceeded its jurisdiction when it ignored the "literal" and "precise" contract language of the Agreement in favor of its own beliefs. This is evidenced by the following Awards.

> Third Division Award 16835 (Referee Devine): "It is well established that the Board must accept the rules as it finds them. We have no power to alter, amend or add to the terms the parties agreed upon."
>
> Third Division Award 20956 (Referee Norris): "Prior Awards of this Board are legion on the established principle that the Agreement must be applied and interpreted as written and as negotiated between the principals."
>
> First Division Award 24883 (Referee Eischen): "The arbitrator's primary goal must be to effectuate the intent of the parties. Ordinarily intent can best be ascertained from the plain words used in the collective bargaining agreement. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. In that connection, Professor Elkouri states in his renowned treatise that:

> '...[A]n arbitrator cannot...ignore clear cut contractual language, and he may not legislate new language since to do so would usurp the role of the labor organization and employer. Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to unambiguous will enforce the clear meaning.' Elkouri & Elkouri, How Arbitration Works, 4th ed., p. 348-349 (1985).

> In this case, the plain language of the Agreement requires a sustained Award. Carrier's complaints that compliance with the literal and unambiguous contract language would be inefficient, costly and disruptive are more appropriately raised at the bargaining table than in the arbitration forum. As this Board held in a related case, First Division Award 24884: 'The applicable Agreement language in this case is clear on its face, and therefore, must be literally construed....Even if, arguendo, Carrier was correct in its assertion that Claimant's exercise of seniority would have been 'uneconomical or otherwise inconvenient', economy and inconvenience are simply not sufficient grounds to set aside collective bargaining agreement provisions."

It is not unusual for Agreements to contain paid suspension provisions, such as is contained in Section (f). Paid suspensions, or Administrative Leaves, are also the policy of other industry and government entities. They are commonly used as a means of educating and training employees which is a benefit not only to the employee, but to the employer as well.

A paid suspension in the circumstances as required by Section (f) does not mean an employee escapes discipline as his personal record is marked and considered in the event of any subsequent discipline matters. This is evidenced by the Carrier Submissions included in the record of these cases as both Claimants' prior work records were considered when the discipline was assessed by the Carrier.

On page 12 of Carrier Exhibit 2 attached to its submissions, the Carrier officer assessing the discipline wrote the following:

> "BASED ON THE DECISION OF THE HEARING OFFICER AND IN CONSIDERATION OF YOUR PRIOR WORK RECORD, I ASSESS THE FOLLOWING DISCIPLINE..." (Underscoring added.)

These Awards are erroneous and without precedential value.

David W. Volz
Labor Member