

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19741
Docket Number MW-19636

John H. Dorsey, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Inc. (Formerly Spokane, Portland
& Seattle Railway Company)

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

(1) The Carrier violated the Agreement when it failed to schedule the thirty (30) day suspension of B&B Foreman Smith to begin within five (5) days of notification thereof (System File 336 F/MW-20(b) - 1/25/71 A).

(2) B&B Foreman Smith be compensated for all wage loss suffered and his record be cleared of the discipline assessed because of the violation referred to within Part (1) of this claim.

OPINION OF BOARD: On October 23, 1970, the track motor car, hand crane and push car assigned to B&B Gang 16 was struck by train 1313-23 Extra NP 810 West. Claimant was the regularly assigned Foreman of the Gang on that date. On October 26, 1970, Claimant, among others, was notified to attend an investigation to be held on November 2, 1970. The investigation was held at the appointed time and place. Claimant attended. In a letter addressed to Claimant, by Carrier, under date of November 19, 1970, he was notified that he had been found guilty of violation of certain specified Rules and Instruction; and, discipline was assessed as follows:

For the above indicated violation of the Transportation, Maintenance Rules and General Instructions for Track, Bridge and Building and Communication and Signal Foreman and Employees, you are hereby actually suspended from service for a period of thirty days, effective Monday, November 30, 1970. You will return to service on December 30, 1970. (Emphasis supplied)

During the period November 19, through November 29, 1970, Claimant was on earned vacation with pay.

Rule 23(a), Article V, of the Schedule Agreement contains the following provision:

If decision results in suspension or dismissal, it shall become effective as promptly as necessary relief can be furnished, but in no case more than five (5) calendar days after notice of such decision to the employee. If not effected within five (5) calendar days, or if employee is called back to service prior to completion of suspension period, any unserved portion of the suspension period shall be cancelled.

The Claim raises no issue as to Carrier's finding of Claimant's guilt or the reasonableness of the 30 days suspension.

It is Employees contention that: (1) Carrier having found Claimant guilty on November 19, 1970, it was obligated to schedule the 30 day suspension it assessed to begin within 5 calendar days of November 1970; and, when Carrier scheduled the suspension to begin effective Monday, November 30, 1970 -- more than 5 calendar days after Carrier's decision of Claimant's guilt -- it violated Article V, Rule 23; and, therefore, voided the suspension in its entirety; and (2) consequently Carrier is contractually obligated to compensate Claimant for loss of wages during his 30 days suspension from service beginning November 30, 1970.

Carrier contends:

...because Claimant Smith was in the midst of a two week paid vacation (November 14-29) on November 19, 1970, the day the decision to suspend him from service was rendered, it would have been meaningless to have that penalty start running prior to his return from vacation. In such a case, he would have been penalized something considerably less than 30 days without pay because the penalty period would have included his two weeks' paid vacation. Accordingly, November 30, 1970 was the logical and proper time to start the penalty running.

We find that: (1) Claimant had earned his paid vacation which was for a fixed period; (2) Carrier's finding of Claimant's guilt as prescribed in the November 19 notice to him and the 30 day suspension assessed against him for his failure to comply with Rules and Instructions on October 23 were of Claimant's making; (3) Claimant's vacation was a contractually earned asset; (4) the 30 day suspension was a valid contractual liability; (5) the asset and the liability could not run concurrently and the asset used as a setoff of the liability.

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

Award Number 19741
Docket Number MW-19636

Page 3

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

Carrier did not violate the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of May 1973.