NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24315
THIRD DIVISION Docket Number MW-23934

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Seaboard Coast Line Railroad Company

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

(1) The dismissal of Carpenter Helper Danny N. Metts was without just and sufficient cause, excessive and in violation of the Agreement (System File C-4(13)-DNM/12-39(79-48) J).

(2) Carpenter Helper Danny N. Metts shall be reinstated with seniority and all other rights unimpaired, his record be cleared and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: On June 4, 1979, the Carrier directed the Claimant to attend an investigation. The letter read in pertinent part as follows:

> "Arrange to attend formal hearing in the Division Office Building, 601 East Liberty Street, Savannah, Georgia, at 10:00AM, Friday, June 8, 1979, to develop facts and determine your responsibility, if any, in connection with an altercation which occurred in the Division Office Building, May 24, and to develop facts in connection with circumstances relating to that episode. At the conclusion of this hearing your personal record will be reviewed.
>
> This became known to this writer on May 25."

The investigation was held on June 25, 1979. Subsequent to the investigation, the Claimant was discharged.

The Organization has made two procedural arguments. First, they argue that the letter or charge dated June 4, 1979, was beyond the ten-day limit for preferring charges in Rule 39. Rule 39 states in pertinent part:

> "Section 7
>
> Whenever charges are preferred against an employee, they will be filed within ten (10) days of the date violation becomes known to Management. Of course, this would not preclude the possibility of the parties reaching agreement to extend the ten-day limit."

They note that the incident occurred May 24 and contend it was known to Management that day; thus, the charge would have to have been preferred by June 3. They also argue that the charges were not precise.

The Carrier argues that there was no violation of Rule 39. They note that although the violation occurred on May 24, 1979, it was not brought to the attention of the superintendent until May 25 and that the charge was preferred on the tenth day after the superintendent became aware of the altercation. The Carrier also argues that the charges were precise, and the hearing was fair and impartial. Regarding the merits, the Carrier points out that the transcript clearly established that the Claimant was guilty of coming into the Master Mechanic's office under the influence of intoxicants, creating a disturbance in that office and ultimately attacking the assistant carpenter when he was being escorted out of the office.

Regarding the Organization's arguments that the charge was not precise, the Board concludes that there is no procedural defect as a result of the nature of the notice. It is the Board's conclusion that the notice was sufficient and adequately described to the Claimant the matter under investigation. Unless the Claimant was in more than one altercation on that day in that building, there could be no confusion as to the charge.

In respect to the procedural argument on the time limit for preferring charges, the Organization vigorously supported their position by reference to recent Third Division Award 23539 involving the same rule and same Parties. In that case, information became known to the captain of the Carrier's police department on December 17, 1977, that the Claimant had been arrested on a morals charge. Evidently, the Carrier waited until after the Claimant was convicted to prefer charges. Charges were preferred February 5, 1979, 67 days after the court's decision. The Carrier defended itself in Third Division Award 23539 indicating that the charges were preferred within ten days of January 26 or 27 when the division engineer received a letter dated January 25 from the captain of the police informing him of the conviction. The Board held in Award 23539 that the time limit for the Board preferring charges began to run December 17, 1977, when the captain of the police gained knowledge of the arrest of the accused. Thus, one of the critical elements of the decision involved facts not at bar here, namely, the question of when the time limit for charges to be preferred starts when the charge involves the arrest of an employe for a public crime. Moreover, it is noted that it involved the delay of at least 67 days from the date of the court decision and at least 14 months from the date of arrest; whereas, the alleged delay in this case was only one day. The Board also found in Third Division Award 23539 that the captain of the police was "management" within the meaning of Rule 39. The Award seems to be most applicable in this sense. Based on that Award, the Organization argues that "Management" had knowledge of the instant incident on the day it occurred, because it occurred on management premises in a management office. The Organization rejects, based on Award 23539, the Carrier's argument that the time limit did not start until the next day (the 25th) when the Carrier officer in charge of disciplinary matters had knowledge of the incident.

The Board has considered the arguments and finds that there is no basis in this record to conclude that the notice of charge was untimely. The Board recognizes the Organization's argument on Award 23539, however, while there is much of Award 23539 that we agree with, it is this Board's conclusion that the

Award is overly broad in its analysis of the term "Management". The clear implication from the Award is that "Management" is anyone other than an unionized employe in that case, a police captain. There is indeed a certain amount of ambiguity surrounding the term, but is not believed, as implied in the Award, that the term meant to include all Management employes. Under the overly broad decision, the time limit would begin to run when any Management employe, (no matter how limited his or her authority and no matter how unrelated his or her position was to the alleged offense or the accused employe) became aware of such an incident. For instance, in the extreme without clarification it would seem under Award 23539, if a "Management" employe of the Carrier's Accounting Department were to observe, on his or her way to work, a track laborer sleeping on the job, the time limit would begin at that instant. The time limit would evidently not start under Award 23539 when the person in authority to prefer charges had received advice of the incident from the Accounting Department employe. The rule of reason suggests that in large companies like the Carrier's, which cover large geographic areas, have large numbers of employes, and have many departments and levels of authority, communications must follow certain procedures and channels and that such organizational communication takes time. It is reasonable to conclude that such organization realities were apparent to the writers of the Agreement. It is apparent that the writers of the Agreement did not refer to all "Management" employes when drafting the language, but intended only to refer to specific employes. The rule of reason would suggest that the time limit does not begin to run when a Management employe, who has no authority for disciplinary charges, merely becomes aware of the charge. This Board is reluctant to question Award 23539 to this degree. The Board should be extremely slow to reverse or overturn a previous award. Little stability and consistency in the interpretation of Agreements would result if we weren't. This decision should not be viewed as much as a reversal of Award 23539 as it is a clarification. The Award is viewed as one involving unique factual circumstances which had an influence on the Board's interpretation of Rule 39. This Board shares some of the views expressed in Award 23539 on Rule 39, but not others. We agree it should not be so broadly interpreted as to allow for abuse or circumvention of the clear right of the accused employe to an expeditious charge. However, on the other hand it should not be interpreted so broadly to place unrealistic expectations on the Carrier. We also agree with the Board when it stated, "it is inconceivable that the negotiators in Rule 39 had intended for the Carrier to have the right to unilaterally interpret the application of the term 'Management' on a case by case basis, designating whomever it desired to come within the meaning of the term, thereby frustrating the application of the rule." This Board agrees that the Carrier should not be allowed to indicate in one case the time limit started with one officer's date of knowledge and the next case claim that the time limit tolls with the knowledge of a different officer in a position of authority to discipline. In this respect, we also agree with the statement in the Award that indicated "... the Carrier could logically, in the extreme, contend the only person qualifying under the term would be the president of the company." However, in the instant case, there is no evidence that the Carrier was trying to avoid the application of the rule by inconsistently designating the person in the position of authority to issue the disciplinary charge. In this case, there is no evidence that anyone but the person customarily, ordinary, or effectively in the position of authority to prefer charges cited the Claimant for investigation. Had there been evidence that the Carrier had designated a higher officer who was

further removed in time and position to prefer the charges rather than the officer who ordinarily preferred the charges solely to have the appearance of timeliness, the Board would have held that a violation of Rule 39 had occurred. It is this Board's finding that Rule 39 and the term "Management" ought to reasonably refer to the person who normally and customarily prefers charges for the class of employe involved in the disciplinary situation, or it should be thought to refer to the normal designee of this person. It would seem to be a good faith gesture on the Carrier's part to designate and make known such persons to the Union.

In this case, as previously stated, there is no evidence that the superintendent was other than the officer who normally preferred charges. The question thus becomes whether he preferred charges within ten days of his knowledge of the charge. The Organization makes a plausible assertion that the altercation occurred in the same building as the superintendent's office; thus, he would have known about the occurrence on that day. However, it is the Board's opinion that this assertion is not conclusive that he had knowledge on the 24th. It is just as reasonable in the absence of proof to the contrary that the superintendent did not become aware of the incident until the next day. It is not highly unlikely that the superintendent was out of the office and did not return until the next day. The Board believes that time limits are to be strictly construed. However, where there isn't convincing proof or a strong enough presumption to establish that the time limits have clearly been violated and where there is just as reasonable basis to conclude that they were not violated as there is to conclude that they were, this Board will not find a fatal procedural error. Thus, under the unique facts and circumstances of this case, the Board finds that no procedural error occurred.

The Board is not undmindful that without further clarification of its position that this Award may be as overly broad as Award No. 23539. Our interpretation as it stands would leave open the possibility that the Carrier could abuse the rule by simply declaring by fiat that the officer in position to prefer charges did not have knowledge until a date within ten days of the charge. The Carrier should be on notice that, except in the most extreme circumstances, if the incident on which disciplinary charges are preferred occurs outside the ten days prior to the date of the charge, or if the delay involved establishes a presumption that the officer in charge could have or should have known of the incident, the Board will accept that as prima facie evidence of a time-limit violation unless the Carrier makes a clearly reasonable explanation as to why the officer responsible for preferring charges did not have knowledge until after ten days from the date of the incident. The reasonableness of these explanations must be determined on a case by case basis.

In respect to the merits, it is the Board's conclusion that the proof offered by the Carrier at the hearing is conclusive that the Claimant was engaged in an altercation while on Company property. There can be little doubt, based on the transcript, that the Claimant entered the master carpenter's office under the influence of intoxicants, became unruly and profane, and when asked to leave, while being shown out of the office, he willfully initiated an altercation with the assistant master carpenter. The seriousness of such behavior cannot be questioned and there are no mitigating circumstances which would justify the Board disturbing the Carrier's findings.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of April 1983.