

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former Western Maryland
Railway Company)

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

(1) The dismissal of Trackman J. R. Simons for the alleged '... unauthorized procurement of company material by stealing copper wire at M.P. 83.2 on the Tygart Subdivision on August 10, 1989....' was arbitrary, capricious, an abuse of the Carrier's discretion and in violation of the Agreement [Carrier's File 12(89-758) WMR].

(2) Mr. J. R. Simons shall be allowed the remedy stipulated in Rule 17(f)."

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 employees involved in this dispute are respectively carrier and employees 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.

In August of 1989, the Claimant was notified of an investigation on an allegation that he had stolen copper wire after numerous warnings. He was subsequently dismissed.

At the Hearing it was shown that the Claimant had been repeatedly warned not to use or remove certain copper wire even though it was technically abandoned. Despite the warnings, the Claimant continued his actions concerning the wire, and he admitted at the Hearing that he deserved a severe reprimand.

The Organization has argued a number of procedural impediments dealing with a tape recording of the investigation, late decision to sequester witnesses, witness self-interest, hearing officer prejudice, etc. Our review of the record fails to convince us that the Organization has demonstrated a basis for the allegations of reversible error, especially when one notes that the Claimant conceded the factual basis for the charges at the investigation.

One procedural argument does give us pause, however. The Agreement requires that the disciplinary decision will be issued within a certain time frame, yet the Carrier concedes that it was four (4) days late in rendering that decision. Carrier argues, however, that its delay did not prejudice the Employee. The Agreement does not contain a provision which mandates that a claim be granted if there is a time-limit violation.

We have reviewed the Awards cited by both parties in an effort to resolve the conflict, and we do not find unanimity of opinion. Certain Awards have suggested that a procedural error dealing with time limits results in an automatic exoneration of the disciplined employee. While such a result is not unfounded when considering the time frame for bringing charges against the Employee, we find no compelling authority for setting aside a dismissal when there is a relatively short delay in rendering the decision. On the other hand, we are unable to find solace in the earlier cited Awards which seem to have merely ignored the Agreements' time limits which were established by the parties, absent a showing of a particular prejudice. Instead, we feel that the proper result is to require a payment to the Claimant for each day of delay. See Third Division Award 26239 and Awards cited therein. Thus we award the Employee four (4) days of compensation concerning the violation of the time-limit requirement.

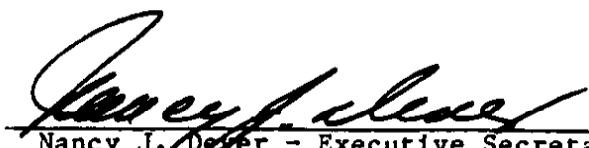
Turning to the merits of this dispute, we have certain misgivings as to the result. The Claimant conceded that his actions were improper, and clearly an employee may not substitute his judgment for that of his Supervisors when he has been warned not to remove certain Company property, even when that property is admittedly abandoned property. The record demonstrated that the employee had no prior disciplinary problems in his seven (7) year tenure with Carrier, and he was described as a good, punctual and reliable employee except for his habit of collecting "scrap" items. In this regard, one Supervisor opined that the Claimant seemed to have some type of a "problem" in that regard. It is our hope that this rather lengthy disciplinary suspension will convince the Claimant to refrain from taking forbidden items. We will restore the Claimant to service with seniority and all other rights unimpaired, but without compensation for time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 28833, DOCKET MW-29233
(Referee Sickles)

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THIRD DIVISION

Since the award was sustained in part, the small concurrence required is only to the extent that the employee was returned to service with his seniority and all other rights unimpaired.

The DISSENT is directed towards the Majority's erroneous finding that the appropriate remedy for the Carrier's admitted time limit violation when it rendered the disciplinary decision four days late was to allow the Claimant four days pay. This line of reasoning does violence to the Agreement by effectively negating the language that the parties had agreed upon. As Award 79 of Public Law Board No. 1844 held:

"Under date of May 8, 1979 the General Chairman filed the instant claim asserting a default by Carrier under Rule 19(a) for untimely rendering the decision and arguendo contending that Claimant was not guilty on the merits. Our review persuades us of the soundness of the Organization's procedural argument, and we express no opinion on the merits of this case.

Rule 19(a), which governs in this case, reads in pertinent part as follows:

Rule 19 - Discipline

(a) Any employee who has been in service in excess of sixty (60) calendar days will not be disciplined nor dismissed without a fair and impartial hearing. He may, however, be held out of service pending such hearing. At the hearing, the employee may be assisted by an employee of his choice or a duly accredited representative or representatives of the Brotherhood. The hearing will be held within ten (10) calendar days of the alleged offense

"or within ten (10) calendar days of the date information concerning the alleged offense has reached the Assistant Division/Manger Engineering. Decision will be rendered within ten (10) calendar days after completion of hearing. Prior to the hearing the employe will be notified in writing of the precise charge against him, with copy to the General Chairman, after which he will be allowed reasonable time for the purpose of having witnesses and representative of his choice present at the hearing. Two working days will, under ordinary circumstances, be considered reasonable time. The investigation will be postponed for good and sufficient reasons on request of either party.

The record persuasively establishes that the Notice of Discipline was typed on Thursday, April 12, 1979, within the ten day limit. But the decision was not mailed until Monday, April 16, 1979, apparently because of mail backlog in Carrier's office due to the Easter holidays. On those facts, the decision was 'rendered' for purposes of the ten day requirements of Rule 19(a) when it was placed in the mail by Carrier. See Awards 3-12001 and 3-13219. The postage meter date on the envelope in which Carrier mailed the decision is April 16, 1979. Clearly, this is more than ten days from the completion of the hearing on April 4, 1979. We have on other occasions held that the time limits of Rule 19 are meaningful provisions which must be strictly enforced. See PLB 1844, Awards 19, 28, 58, and 62. We shall sustain the claim due to Carrier's violation of Rule 19(a), without reaching the merits.

AWARD

Claim sustained as indicated in Opinion."
(Underscoring in original)

Moreover, the Majority erroneously relied on Award 26239 as support for its decision on the time limit issue. That award dealt with a decision on the time limits under Article V of the 1954 Agreement and the subsequent NDC 16 which has nothing to do with a separately

Labor Member's Concurrence and Dissent
Award 28833
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negotiated discipline rule as we have here. This award is palpably erroneous. Therefore, I dissent.

Respectfully submitted,


D. N. Bartholomay
Labor Member