

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28993
Docket No. TD-28988
91-3-89-3-503

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

(American Train Dispatchers Association
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Appeal of reprimand assessed Train Dispatcher F. V. Bucci, 12/29/88
Carrier file NEC-ATDA-SD-115D."

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.

At the time of the incident that gave rise to the case, Claimant was employed by Carrier as a Train Dispatcher on the Philadelphia Division. On December 9, 1988, Claimant was notified to appear for an Investigation into the matter of his absenteeism during the latter half of 1988. A Hearing was held on December 20, 1988. As a result of that Hearing, Claimant was found guilty as charged and assessed a penalty of reprimand.

A transcript of the Hearing has been made a part of the record. A review of that record reveals that Claimant was given a full and fair Hearing and that he was afforded all procedural and substantive rights guaranteed by Agreement. It also reveals that Claimant was guilty as charged and that a penalty of reprimand was appropriate.

The Organization in this instance raised numerous defenses on the part of Claimant. Its chief defense was that a legitimately ill employee cannot be disciplined for absenteeism. This issue has been reviewed on many occasions by Referees in this industry, as well as by many others throughout the nation. The reasoned opinions in those situations support the proposition that an Employer has the right to expect that its employees will report to work on a regular basis. An Employer has a right to discipline an employee for excessive absenteeism, regardless of the cause.

Carrier in this instance has an attendance policy that addresses frequent absences and what penalties may be imposed. This Board concludes that the Carrier acted properly and within the terms of its attendance policy by assessing a reprimand to Claimant.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 24th day of September 1991.

LABOR MEMBER'S DISSENT
AWARD NO. 28993, DOCKET TD-28988
REFEREE DENNIS

On this property, Rule 19 of the agreement specifies procedures to be adhered to in the event an employee is subject to discipline.

Contained within this rule is a clear, unambiguous and mandatory requirement that the guilt or innocence of an employee be determined, "...by the Superintendent..."

The purpose of this rule is clear. It assures the charged employee that his case will be reviewed by the highest carrier official on his division. Such review, guarantees the employee that only the Superintendent, having immediate jurisdiction will issue any disciplinary decision.

In the instant case, the hearing officer, not the superintendent as required by Rule 19(b), rendered the decision.

This procedural error was placed before this Board in the Organization's submission and again in panel argument. Apparently, the majority chose to ignore the employee's procedural rights in this instance as this flaw is not even mention in the decision.

LABOR MEMBER'S DISSENT
AWARD NO. 28993, DOCKET TD-28988
REFEREE DENNIS

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Past awards of this Division have recognized the importance of Carrier compliance with similar contract provisions.

See for example Awards 22277 and 22770.

This award has failed to address a major procedural error in the assessment of discipline. Such failure nullifies any precedental value of its findings.

I dissent.


L. A. Parmelee
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 28993, DOCKET TD-28988
(Referee Dennis)

Rule 19 of the Agreement does not "mandate" that guilt or innocence be determined by the Superintendent. The Rule simply states that, "a decision will be rendered by the Superintendent within ten (10) days after completion of investigation."

Amtrak's investigation process requires a preliminary finding by an independent Hearing Officer as to whether the evidence presented at the Investigation proves the employee innocent or guilty of the charge. After that finding, the decision as to the discipline to be assessed is rendered by the Superintendent, in strict compliance with Rule 19.

The propriety of this process has already been upheld by this Division, on this property, with this Organization. In Award 28319, the Board stated:

"Finally, with respect to the alleged violation of Rule 19(b), the Organization's argument is not without some substance on a technical basis. However, this Board finds that this is not reason to set the matter aside. The Hearing Officer is required to convey to the deciding authority, by one means or other, his views as to the guilt of the party to the charges. Furthermore, in this case, the Organization was put on notice, on April 9, 1987, on the property by letter to the General Chairman, that a modification to the disciplinary hearing procedure had been made. All-in-all, we find no basis on procedural grounds for deciding this matter in favor of the Organization."

The precedent established by four years of practice on the property was upheld in Award 28319. There was no need to reiterate

those findings in this Award. Electing to forego redundancy does not constitute ignoring procedural rights.

In this case, the Majority properly held that "...Claimant was given a full and fair Hearing and that he was afforded all procedural and substantive rights guaranteed by Agreement."

Michael C. Lesnik
M. C. Lesnik

Robert L. Hicks
R. L. Hicks

James E. Yost
J. E. Yost

M. W. Fingerhut
M. W. Fingerhut

P. V. Varga
P. V. Varga

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
AWARD NO. 28993, DOCKET TD-28988
REFEREE DENNIS

It should be abundantly clear to anyone reading the Carrier Members' response that Award No. 28319 is seriously flawed.

Excusing the Carrier's procedural fault, as the majority did in Award No. 28319, while conceding that it is a "technical" violation, undermines the integrity of the agreement.

This Board should not be "...disposed to excuse rule violations on grounds that they are 'technical'..." (Third Division Award No. 13221).

Fourth Division Award No. 1972 held that "The principle of faithful compliance with the term and provisions of an agreement freely and voluntarily entered into, requires this Division to regard small deviations, no less than gross breaches, as violative thereof."

Of course, the Carrier Members would like nothing better than to have the reader believe that Award No. 28319 is the final word on the application of Rule 19. However, they must first overcome its inherent deficiencies and this they have failed to do.

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' RESPONSE
AWARD NO. 28993

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It is also interesting to note the majority decision in Award No. 28993 completely ignored a collectively bargained contract provision, the requirements of Rule 19, yet acknowledged and affirmed a policy on absenteeism that was unilaterally imposed by the Carrier.

When, as in the case at hand, this Board is disposed to heed Carrier implemented policies rather than Agreement provisions, strenuous dissent is warranted.


L. A. Parmelee
Labor Member