NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29486
Docket No. MW-30189
93-3-91-3-637

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(
(CSX Transportation, Inc. (former
(Louisville and Nashville
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The ten (10) days of suspension imposed upon Machine Operator D. E. Kee for alleged violation of Safety Rule 81 on August 5, 1990 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File 11(44)(90)/12(90-1004) LNR].

(2) The Claimant shall have his record cleared of the charge leveled against him and he shall be paid for all wage loss suffered."

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 employes involved in this dispute are respectively carrier and employes 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.

Following an Investigation, Claimant was assessed a ten day suspension for failure to wear hearing protection. At the Investigation, the Roadmaster testified he observed Claimant, who was a Burro Crane Operator, approximately 30 feet from his crane. At the time, Claimant had his hearing protection, but was not wearing it. According to the Roadmaster, Claimant explained that

he did not think he needed the protection if he was not actually operating the crane.

The Organization first objects to the discipline because the Investigation was conducted in Claimant's absence. According to Claimant's representative, who requested a postponement at the beginning of the Investigation, Claimant was on vacation. We do not find merit in this objection. First of all, the fact that Claimant was not scheduled to work on the day of the Investigation did not preclude his attendance. Secondly, it was unreasonable for Claimant and/or his representative to wait until the Investigation was commenced before seeking the postponement. At that point, given the circumstances herein, Carrier was under no obligation to grant a postponement. Conducting the Investigation in absentia is not a violation of the Agreement.

Secondly, the Organization asserts Carrier failed to render its decision to discipline Claimant in a timely manner. The Organization avers, and Carrier does not deny, that the discipline notice was mailed to Claimant on November 5, 1990, more than 30 days after the October 2, 1990 Investigation.

Rule 27(b) reads as follows:

> "An employe disciplined, shall, upon making a written request to the Division Engineer, within 10 days from date of information, be given a fair and impartial hearing within 10 days thereafter. Decision will be rendered within 10 days from date investigation is completed. The employe shall have a reasonable opportunity to secure the presence of necessary witnesses and may be represented by the elected committee of the employes or fellow employes of his own choosing."

At issue is whether or not Carrier's failure to render its decision within 30 days requires a reversal of the discipline. While there is arbitral precedent for concluding it does, we think the more reasoned approach is that a tardy decision, absent evidence of prejudice, does not negate the discipline. Had the parties intended reversal to be the consequence, they could have provided for it in the Agreement. They chose not to, and it is beyond the powers of this Board to add to the Agreement. By the same token, we will not reverse the discipline due to Carrier's failure to provide a transcript of the Investigation at the same time as the discipline notice. See Third Division Award 29485 involving these parties.

Turning to the merits, we find there is substantial evidence in the record to support the Carrier's decision. It is evident the Carrier's policy regarding hearing protection required Claimant to wear the protection when he was in the vicinity of his crane, even though he was not actually operating it. According to the transcript, the crane's engine was running, thereby posing a hearing loss danger. The evidence further shows Claimant had been informed of this policy. Under the circumstances, the discipline assessed was neither arbitrary nor unreasonable.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of January 1993.