

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29787
Docket No. CL-30449
93-3-92-2-324

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

PARTIES TO DISPUTE: (Transportation Communications International
(Union
(CSX Transportation, Inc. (formerly
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Union (GL-10795) that:

1. The Carrier violated and continues to violate the terms of the Clerks' Agreement and amends thereto when they held this investigation on the date of October 18, 1989, and not allowing Mr. Gibson to return to duty.
2. That Mr. S. D. Gibson be returned to service immediately and that he be compensated for all time lost dating from September 29, 1989."

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 employe 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.

Claimant was employed by Carrier as an Inventory Control Clerk at Clifton Forge, Virginia. On September 29, 1989, Carrier learned Claimant had admitted to stealing five payroll checks of fellow employees and cashing them. Claimant was thereupon removed from service and was referred to civil authorities, who charged him with five counts of forgery and five counts of uttering a forged check. These were felony charges.

On October 12, 1989, Carrier served notice upon Claimant, directing him to appear at an Investigation in connection with his obtaining these checks and converting the money to his own use. This Investigation was scheduled for October 18, 1989, and was conducted on that date. At the Investigation, Claimant admitted his guilt.

The Organization has raised a procedural issue which must be addressed before the Board considers the merits in this case. The Organization asserts the Carrier's actions must be reversed because it failed to hold Claimant's investigation within ten days of the date he was removed from service. Rule 27, which governs investigations, reads, in part, as follows:

"(a)...An employee will within a reasonable time prior to the investigation be apprised in writing of the specific charge or charges against him, with copy to the Local Chairman, and will have reasonable opportunity to secure the presence of necessary witnesses and duly accredited representatives. The investigation will be held within ten (10) days from date charged with the offense or held out of service (unless an extension of time is agreed to between the proper Officer and Local Chairman)....

(b) If an employee is suspended, the suspension shall date from the date he is taken out of service.

* * *

(d) If the final decision decrees that the charges against the employee were not sustained, his record shall be cleared of the charge. If dismissed or suspended (or disqualified as provided in Section (e) of this rule), on account of unsustained charge, the employee will be reinstated and paid what he would have earned had he not been taken out of service, less any compensation earned in outside employment."

Although Claimant's Investigation was within ten days of the date he was charged, the Organization avers the rule was violated because it was not within ten days of his being held out of service. According to the Organization, Carrier's delay in holding the Investigation rendered it void ab initio.

This is hardly a matter of first impression before this Board. There is, however, a clear split in the opinions. Learned Referees, examining identical agreement provisions, have reached contrary conclusions.

In many cases, this Board has looked to the rule to determine if there is a stated penalty for violation of a time limit. For instance, time limit rules governing the handling of grievances usually dictate that a claim is barred if the Organization fails to make a timely appeal, or that the claim shall be paid as presented if the Carrier fails to make a timely denial. In some discipline rules, the parties have explicitly stated that the Carrier's failure to comply with time limits shall render the discipline null and void. Such language is not present in this case. The parties herein, in Rule 27(d), have agreed only to reinstate the employee and pay him what he would have earned "if dismissed or suspended on account of unsustained charge." No mention is made of such a remedy in the event the Carrier fails to hold a timely Investigation.

This does not mean Carrier can blatantly disregard the Rule. The intent of the Rule is to afford the employee under charge with a prompt hearing. If the employee is withheld from service, Carrier should ensure he is not required to suffer a loss of compensation for an undue amount of time. In this case, Carrier conducted the hearing within ten days of the date it issued the charge, but more than ten days after Claimant was removed from service. During the handling of this dispute on the property, Carrier compensated Claimant for the time he lost from September 29, 1989, the date he was removed from service, through October 11, 1989, the day before he was charged by the Carrier. (Carrier did not compensate Claimant for October 2, 1989, as he was incarcerated that day.) While Carrier could have removed Claimant from service when it charged him, based upon the seriousness of the charge, it is the Board's opinion the Carrier forfeited the right to do so when it had already withheld him from service in excess of the time permitted by the Rule. Accordingly, we will direct that Carrier compensate Claimant for the additional time lost from October 12, 1989, through October 24, 1989, after which he was dismissed.

Turning to the merits, we find there is substantial evidence to support the Carrier's charge. Claimant admitted stealing the pay checks of his fellow employees, forging their signatures, and cashing the checks. This is a very serious violation of Carrier rules, and fully justifies permanent dismissal. We find no reason to modify the Carrier's decision.

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A W A R D

Claim sustained in accordance with above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin sh
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 20th day of September 1993.

LABOR MEMBER'S CONCURRENCE AND DISSENT TO
THIRD DIVISION AWARD 29787 DOCKET CL-30449

(REFEREE B. E. SIMON)

The case at bar requires Concurrence and Dissent. We are in agreement with the Neutral wherein he determined that the Investigation was held in an untimely manner and we agree with him in making the Claimant whole for losses sustained between October 12 and 24, 1989, but beyond that we are in total disagreement. Claimant should not have been made whole for only the aforementioned period inasmuch as he should have been returned to service with seniority and all other rights unimpaired with full backpay.

This was a case wherein the Referee should never have reached the merits as the only issue properly before the Board was whether or not the Carrier held a timely hearing.

The simple facts of the Case are:

- 1.) Claimant was removed from service of the Carrier pending Investigation on September 29, 1989.
- 2.) Claimant wasn't charged with a violation of any Carrier Rules and the Investigation wasn't scheduled until October 12, 1989, which wasn't held until October 18, 1989.
- 3.) Claimant was subsequently dismissed on October 25, 1989.

Rule 27 (a) recopied on page 6 of our Submission states that the Investigation will be held within 10 days from the date charged with the offense or held out of service.

There are two qualifying circumstances which start the clock running on the time limit provision of the rule. The first is when the employee is charged with the offense and the second is when they are held out of service.

The Claimant's time limit clock began on September 29, 1989, when he was held out of service. The Investigation wasn't held until October 18, 1989, some 20 days after that date. The last possible date the Investigation could have been held absent a mutual postponement by the parties would have been October 8, 1989. The Investigation was held 10 days over the time limits.

The Carrier has admitted it's procedural error in their letters of October 27, 1989, Employees Exhibit #12 and February 1, 1990, Employees Exhibit #F. They suggested that this procedural violation was minor and shouldn't be considered as being fatal, unfortunately the Neutral bought that argument which is incorrect.

The Investigation was untimely and whether an employee is held out of service with or without pay does not change the mandatory requirement that the Investigation should be held within 10 days

from being held out of service.

The Claimant's admission of guilt should not have played any part in the rationale of the Referee because what is far more important in this instance is the issue that the time limits must be enforced for the greater good of all the members. This Board does not have the discretion to extend the time limit provision of any rule that the parties fixed upon themselves and because of such the Neutral has erred. The Neutral would have been far wiser to follow those Awards which adhere to the proposition that states:

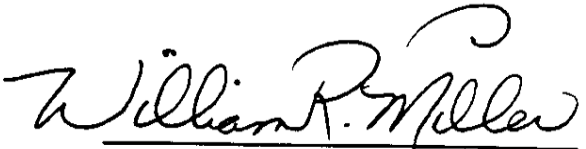
"When a Carrier fails to hold a timely hearing it forfeits a right to discipline."

See Third Division Awards: 6446
 12103 (Involving the same
 parties)
 16262
 16586
 18050
 18352
 20657
 22162
 22898
 23042 (Involving the same
 parties)
 23120

You will note that two of those better reasoned Awards were from the same property involving the same parties which should have been followed as being precedential.

For the foregoing reason Award 29787 requires Concurrence and Dissent.

Respectfully submitted


William R. Miller

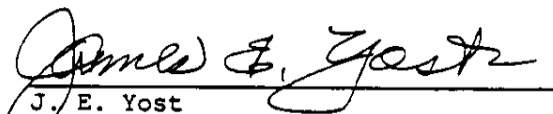
Date: September 20, 1993

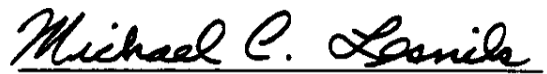
CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S CONCURRENCE & DISSENT
TO
AWARD 29787, DOCKET CL-30449
(Referee Simon)

The Minority's Dissent is directed to the referee's interpretation and application of Rule 27(d) governing disciplinary investigations. While it is true that Carrier acknowledged that it did not hold a timely investigation, it is equally true that Rule 27(d) does not carry a stated penalty for failure to hold a timely investigation.

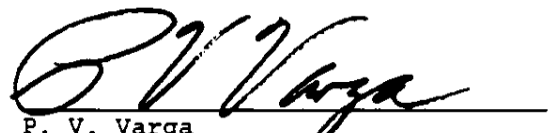
As noted in the Award, claimant was paid for the time held out of service prior to the date of charge except for one day that claimant was incarcerated. In addition, the Majority found good reason for compensating claimant from October 12, 1989, through October 24, 1989, after which he was dismissed from the service.


The record before the Board revealed that claimant admitted stealing payroll checks of his fellow employees, forging their signatures and cashing the checks. This is a very serious violation of not only Carrier's rules, but of Federal and State laws. Based upon these facts, plus the absence of any penalty specified in Rule 27(d) for failure to hold a timely investigation, the Majority was correct in proceeding to resolve this dispute on its merits.


J. E. Yost


M. C. Lesnik


M. W. Fingerhut


P. V. Varga


R. L. Hicks