

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29987
Docket No. MW-30260
93-3-91-3-730

The Third Division consisted of the regular members and in addition Referee Robert T. Simmelkjaer when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former Monon
(Railroad Company)

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

- (1) The five (5) day overhead suspension imposed upon Equipment Operator S. L. Huddleston for alleged failure '...to move your machine, prepared to stop short of the crossing and not proceed over the crossing until the way was known to be clear, resulting in the subject crossing accident.', on November 12, 1990, was on the basis of unproven charges and in violation of the Agreement [Carrier's File 12(91-177) MNN].
- (2) The Claimant's record shall be cleared of the charges leveled against him and of the five (5) day overhead suspension imposed upon him."

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.

By letter dated November 28, 1990, Carrier's Division Engineer directed Claimant to report for a formal Investigation to determine

his responsibility, if any, in connection with a crossing accident which occurred at 9:05 A.M., November 12, 1990, involving Tie Handler 538 and an automobile.

Following the December 12, 1990 Investigation and by letter dated January 9, 1991, the Division Engineer assessed Claimant a 5 day overhead suspension for three months based on testimony developed at the Investigation which purportedly proved that Claimant had failed to move his machine prepared to stop short of the crossing and not proceed over the crossing until the way was known to be clear, resulting in the accident.

The Carrier maintains that Claimant acknowledged that he had operated the particular machine since June and that his brakes and horn were in working order. The Carrier further maintained that Claimant acknowledged that his visibility was restricted on one side of the crossing. According to the Carrier, Claimant admitted that although he was only travelling about 5 mph when he applied the brake, he had no intention of stopping for he "...looked away to check the other direction of traffic..." The automobile was approaching the crossing between 15 and 20 mph when he further admitted:

"When I seen her approaching the crossing I assumed that my machine already being in the crossing and one on the other side, just leaving the crossing, and the signals working that she definitely knew, you know, to stop. When I noticed that she wasn't going to stop she was pretty much on the crossing at that point, and that's when I let off of the travel and started to hit the brake."

The Organization raised a procedural issue, namely that Rule 19 (a) was violated by the Carrier when, following the Investigation conducted on December 12, 1990, it did not issue the discipline letter until January 9, 1991. In pertinent part, Rule 19 (a) reads:

"Decision will be rendered within ten (10) days after completion of hearing."

There exists a dichotomy in Board decisions with respect to the impact of procedural violations on the merits of a case.

On the one hand, the Carrier cites those decisions which hold that while carriers should attempt to stay within the procedural time limitations prescribed, failure to do so cannot otherwise void the proper exercise of disciplinary control. It is further

maintained that where Agreements contain directory rather than mandatory provisions regulating employer-employee relationships, the interpretation of procedural requirements must be given "a reasonable, workable construction and not so narrowly construed as to defeat justice." This is particularly so absent a provision in the Agreement specifying a remedy (See Second Division Award 2466).

In reviewing the cases where procedural lapses have been deemed de minimus, the Board finds that for the most part serious charges involving dismissal of Claimants from service predominate. Where the Board has been satisfied that sufficient evidence existed to sustain the discharge, without evidence that Claimant has been hampered in perfecting his appeal, the procedural objections have been overruled. In this regard, the Board held in Third Division Award 29471:

"With respect to the substantive charges this Board finds that there is sufficient probative evidence in the record to establish that the Claimant is guilty of the charge against him.... In addition, the Carrier demonstrated sufficient persuasive precedent to excuse the delay in rendering the discipline, absent a provision in the Agreement specifying a remedy." (See also Third Division Award 11775 and Second Division Awards 12249 and 2466).

In Third Division Award 20423, this Board was reluctant to reverse Claimant's dismissal on procedural grounds due to the Carrier's "inadvertent failure to send a copy of the disciplinary decision to the General Chairman." In finding the delay not fatal, the Board cited two factors: 1) Claimant's undenied guilt; and 2) no negative effect on Claimant's right to due process.

The Board has been similarly disinclined to find procedural violations where the Claimant has been discharged for being under the influence of alcohol, intoxicants or narcotics. It has also discounted procedural omissions in extreme extenuating circumstances such as the seventy two car derailment in Third Division Award 22703.

An interim position has been taken in Third Division Award 28833 which sought to balance the strict enforcement of the parties' time limit provisions, absent showing of a particular prejudice, with the alternative of setting aside a dismissal where there has been "a relatively short delay in rendering a decision." Despite the Labor Member's Concurrence and Dissent, the Board majority, as a compromise, held that Claimant should be paid for

each day of delay. Claimant was found guilty on the merits and received a suspension.

On the other hand, an equally persuasive line of cases strictly apply the procedural requirements, accepting substantial compliance as the sole equivalent performance. For example, in Third Division Award 24623 the Board held that the Carrier's failure to adhere to Rule 47 (a-1) requiring the issuance of the written decision within 30 days after the Investigation was mandatory and thus exonerated the Claimant on the charge and expunged his verbal reprimand.

"There is no authority within the agreement to extend the time in which to issue a decision or to make it orally. This Board is not authorized to revise agreements by holding that clear mandates thereof may be ignored at the convenience of either party...."

In a similar vein the Board in Fourth Division Award 4211 held that the Carrier's failure to provide the Regional Chairman with a copy of the notice of discipline involving a 30 day suspension constituted reversible error and further noted that the Organization was equally entitled to receive the Carrier's decision after the Investigation on a timely basis in order to prepare its appeal.

The Board has further found in two cases with elements comparable to the instant case that procedural violations, irrespective of whether prejudice to the Claimant has been demonstrated, constitute sufficient grounds for setting aside disciplinary decisions. A 60 day suspension was vacated when the Carrier exceeded the 15 day Rule requirement in issuing a decision following its Investigation (See Fourth Division Award 4295). And in reversing a 60 day suspension in Fourth Division Award 4662 the Board concluded that "when Carrier did not render its decision assessing discipline within the time limits provided in the Rule it forfeited its right to do so."

Untimely notice has also provided grounds for reversing discipline (Third Division Awards 22748, 26719) as well as delayed Investigations following the submission of the charges (Third Division Award 28927).

With respect to violations of Rule 19, the Rule relevant to the instant case, the Board has rejected the de minimus argument and in citing Award 62 of Public Law Board No. 1844 stated:

"Carrier urges that this error is de minimus and should not invalidate the disciplinary

action, but rather, at most, should result in a reduction of the penalty by the one day dereliction.... The weight of authority favors the position of the Organization that time limits are to be construed strictly and that they are two-edged swords which cut equally whether to work a forfeiture against an employee or to invalidate action taken by the employer."

As a result, the Board did not address the merits of Claimant's 5 day suspension.

The Board, given the foregoing review of precedent, concludes that insofar as the instant case is concerned the Organization's procedural argument should prevail. The Carrier clearly violated Rule 19 (a) when it failed to issue the discipline letter within the ten day period following the Investigation. The Carrier presented no extenuating circumstances for this delay, but rather, based its procedural defense on the cases noted above which construed the Rule requirements as directory.

The Carrier also maintained that Claimant's admission of guilt provides an additional basis for upholding the discipline imposed. However, in the Board's view the merits of the dispute, including any admissions, cannot be considered where violation of a threshold requirement has occurred. Numerous Awards have so held, such as Third Division Awards 22748, 26719, 28769 and 28927 that a showing of prejudice is not a prerequisite to enforcement of the parties' Agreement.

The instant case is distinguished from cases referred to by the Carrier in which the Claimant's admission obviated strict adherence to the procedural mandates. In Third Division Award 23155 Claimant's admission was incidental to the substantial compliance the Board found with respect to the notice requirements. And notwithstanding contrary findings in Fourth Division Award 2705 and First Division Award 8275, the Board, in the instant case, accords greater weight to more recent decisions. An exception can be found in Third Division Award 28318 where once the Claimant's testimony established his guilt, a defective procedure was deemed insufficient to reverse the discipline.

Where the parties negotiate an Agreement incorporating procedural safeguards, the toleration of procedural irregularities undermines their express intent. Unless strict adherence to the time requirements is reinforced as expected behavior, minor deviations could become substantial breaches and thus reduce these procedural strictures to a nullity. The fact of Claimant's

admission does not detract from the finding that absent procedural due process, substantive due process cannot be attained. For example, in the criminal law context failure to advise a suspect of his/her Miranda rights would exclude any confession obtained thereafter. Moreover, as noted in Third Division Award 21996:

"When it agreed to a rule which stated that a '...Decision will be rendered...' (underscoring supplied), Carrier assumed a mandatory obligation. Employers are quick to assert that Employees are without a remedy if they fail to comply with a contractual time limit. Accordingly, we sustain the claim."

As in prior Awards where a balancing test has been utilized to ascertain the extent to which procedural violations should affect the case on the merits, this Board finds the weight of the evidence supports the Organization's claim.

Therefore, we find the unambiguous and mandatory language of Rule 19 (a) precludes consideration of the merits.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 17th day of December 1993.