NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 30071
Docket No. TD-29854
93-3-91-3-227

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

STATEMENT OF CLAIM:

"Appeal of 30-days suspension assessed Train Dispatcher J. M. Glassing, 5/1/91. Carrier file NEC-ATDA-SD-142D"

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, entered service on February 13, 1978, and established Train Dispatcher seniority on June 23, 1987. On April 12, 1990, Claimant was assigned as a Train Dispatcher, Section 1, CETC. On that date, the overhead electric power on Track "A" between Winans and Bridge was de-energized as a safety measure, because of repairs being performed on the Hilton Street overhead bridge. Among the trains Claimant routed onto the "A" Track was Train 9418 which had an electric engine. As a result of her error, Train 9418 came to a stop, and arrangements were made to restore overhead power.

Claimant became aware of her error on her way home from work, and upon arriving home, notified the Carrier accordingly. At the Carrier's request she then submitted to a breathalizer test and urine screen at a hospital proximate to her. The tests were administered by the Division Operator, and both tests were negative. Claimant was issued an out-of-service notice at or about 7:30 P.M. of the same day.

By letter of April 16, 1990, Carrier issued Claimant a Notice to Attend Investigation at 10:00 A.M. on April 21, 1990, in connection with the following charge:

> "Violation applicable part first paragraph Special Instruction 1147-A2, Amtrak Timetable No. 2 which reads in part, '.....when a Plate Order is in effect, before a signal is displayed or permission given for movement, the employee that can authorize such movement must first ascertain that the train(s) or engine(s) to be moved do not have raised pantograph', in that during your tour of duty as Train Dispatcher, Section 1 April 12, 1990 - 7:59 AM - 3:59 PM you routed Maryland D.O.T. Train No. 9418 with electric engine 4903 to No. A Track at Winans while Catenary Power was removed."

Carrier reinstated Claimant as of 4:00 P.M. on April 16, 1990, but on April 17, again removed her from service. Investigation was held on April 21, 1990, following which Claimant received notice that she was assessed a discipline of: "Thirty days suspension, [with] time held out of service to apply."

By letter of May 17, 1990, the Organization appealed Carrier's decision. That appeal was denied on July 10, 1990.

Rules applicable to the current case read as follows:

"RULE 19 - DISCIPLINE-INVESTIGATION-APPEAL

(a) An employee who has completed thirty (30) days of compensated service as a Train Dispatcher shall not be disciplined or dismissed without a fair and impartial investigation. The employee may be held out of service pending investigation only if his retention in service could be detrimental to himself, another person, or the Corporation.[1]

(b) An employee and his representative shall be given written notice no less than five (5) days in advance of the investigation, such notice to

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[1] - The National Railroad Passenger Corporation ("AMTRAK").

set forth the specific charge or charges against him.

* * *

(f) If the discipline to be imposed is suspension, its application shall be deferred unless within the succeeding six (6) month period, the accused employee commits another offense for which discipline by suspension is subsequently imposed.

Probationary periods shall commence as of the date the employee is notified, in writing, of the discipline imposed.

* * *

RULE 30 - ALTERNATIVE TO INVESTIGATION

Alternative to Investigations

An employee may be disciplined without an investigation when the involved employee and the authorized official of the Company agree in writing to the responsibility of the employee and the discipline to be imposed. Discipline imposed in accordance with this Rule is final and with no right of appeal."

At the outset, the Organization maintains that Carrier failed to follow proper procedures under the Agreement between the Parties when it gave Claimant notice on April 17, 1990 (the letter was dated April 16, 1990, but it is unrefuted that Carrier transmitted the letter in person to Claimant on April 17, 1990) to attend the Investigation on April 21, 1990. Under Rule 19(b), cited above, Carrier is obliged to give the employee and his representative written notice no less than five days in advance of the investigation. The Organization points out that April 17 is only four days prior to the scheduled Hearing. It is apparent from the record before this Board that the Organization mounted a thoroughly competent defense of Claimant. Accordingly, she was not disadvantaged at the Hearing by the apparently tardy receipt of notice of hearing. Thus, we do not find that Carrier's actions constitute a fatal procedural flaw in this case. Notwithstanding,

Carrier must be on notice that it practices such chronological sleight-of-hand at its peril.

With respect to the merits of the case at issue, Carrier established persuasively that, in view of what might have been the consequences of Claimant's error, it was within the provisions of Rule 19(a) when it initially withheld Claimant from service pending the Investigation. There is no indication on this record that Claimant's allegedly premature "reinstatement" and subsequent "resuspension" was more than a misunderstanding, and is not probative of animus on the part of Carrier. Moreover, since Claimant was held out of service pending Investigation, and not "disciplined without an investigation," Carrier was not in violation of Rule 30, cited above.

The Organization is correct, however, in its assertion that Carrier is in violation of Rule 19(f), cited above. Rule 19(f) clearly states that if the discipline imposed is suspension, as it was in this case, "its application shall be deferred unless within the succeeding six (6) month period, the employee commits another offense for which discipline by suspension is subsequently imposed." Thus, unless Claimant committed another offense for which discipline by suspension was assessed, under Rule 19(f), she would have served no actual days on suspension without pay. Carrier may not include actual days out of service without pay in a suspension assessed under the provisions of Rule 19(f). Accordingly, Claimant is entitled to be reimbursed for wages lost during the days she would normally have worked between her removal from service and her return to work.

A W A R D

Claim sustained in accordance with the Findings.

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 February 1994.

Parker
2nd Div.
4-26-94 Adopt

CARRIER MEMBERS' CONCURRING
AND DISSENTING OPINION
TO
AWARD 30071, DOCKET TD-29854
(Referee Wesman)

The Board properly concluded that the "...Carrier established persuasively that, in view of what might have been the consequences of Claimant's error, it was within the provisions of Rule 19(a) when it initially withheld Claimant from service pending Investigation." Unfortunately, the Board erroneously concluded that the "...Carrier may not include actual days out of service without pay in a suspension assessed under the provisions of Rule 19(f)."

By letter dated May 17, 1990, the General Chairman informed the Director-Labor Relations that he desired to docket for discussion the following subject matter:

> "Discipline assessed Philadelphia Division Train Dispatcher, Jane M. Glassing, thirty (30) days suspension, time held out of service to apply, by J. S. Lightner, Transportation Superintendent, on May 1, 1990."

In his July 10, 1990 letter confirming the parties' June 8, 1990 conference, the Director-Labor Relations discussed the procedural arguments verbally advanced by the Organization. Thereafter, by letter dated August 22, 1990, the Organization, for the first time, confirmed in writing its contentions that the Carrier violated Rule 19(a), Rule 19(b), Rule 19(d) and Rule 30.

In its Submission to the Board, the Organization quoted Rule 19 in its entirety [paragraphs (a) thru (h)] as well as Rule 30. At page 6 the Organization stated that the Claimant was held out of service, without pay, for a total of nine days prior to the Investigation. It asserted that employees may be held out of service pending Investigation only if their retention in service could be detrimental to themselves, other persons, or the Carrier. It stated that the Carrier violated Rule 19(a). At page 7 the Organization contended that the Carrier violated Rule 19(b) regarding written notice to be given to the employee and his representative prior to an Investigation. Arguments relative to the Carrier's alleged violation of Rule 30 commenced at page 9. At page 12 the Organization cited Rule 19(b) relative to its argument that the decision was improperly rendered by the Hearing Officer instead of the Superintendent. The foregoing was then followed by a discussion of the merits. FINALLY, on the signature page of its 15 page Submission, the Organization argued for the first time in the history of this dispute that:

> "At the very least she should be entitled to receive her lost wages for the period of time prior to the investigation."

The point of all this discussion is simply to illustrate that at no time during the handling on the property (nor in its Submission) did the Organization ever put the Carrier on notice in clear and unmistakable terms that it allegedly violated **Rule 19(f)**.

This Board has consistently held that Agreements should be interpreted with the realization that reasonable results were intended by the parties. It is well known that many of the issues presented to this Board are of the peripheral variety; and, in these cases, there is no requirement that common sense be disregarded in contractual interpretation. The answer to the issue belatedly posed by the instant case is to be found in two basic rules of contract construction. Where two different interpretations can be made of language in a contract, that interpretation will be applied which comports best with reason and logic.

It is illogical to conclude that Carrier was well within the Agreement to withhold the Claimant from service due to the serious nature of her offense and then turn around and order that she be compensated for the period of time held out of service pending the Investigation. Even more persuasive is the principle that where language in an Agreement is ambiguous, the intention of the parties can best be ascertained by the past practice of the parties and this becomes conclusive when such past practice has continued for a long time and has not been objected to by the Petitioner. This Award seems to be sending the Carrier a message that in order to avoid having to compensate employees properly held out of service, they must be dismissed.

Furthermore, the purposes of the Railway Labor Act are effectuated when Referees avoid inconsistent and conflicting interpretations of Agreements. In this case the Referee relied upon her decision in Third Division Award 29364 involving an interpretation of Rule 18, Section 2 (b)(3) of the Agreement between the American Train Dispatchers Association and Consolidated Rail Corporation. That Rule does not read the same as Rule 19(f) involving the parties to this dispute. Moreover, in Award 29364, this Referee incredibly concluded that Conrail had not shown that the Claimant therein constituted a potential hazard to himself, to another person, or to the Carrier. More importantly, the Referee ignored the contrary findings of this Board in Third Division Awards 29590 and 28319, which involved the parties to this dispute, presumably on the basis they lacked sufficient factual detail to permit the Referee to make an informed decision. A close reading of the Labor Member's Dissent to Award 29590, however, reveals that the Organization was disenchanted with the Neutral in that case because he found its argument with respect to Rule 19(f) invalid.

Had the Carrier been put on notice on the property in the instant case that the Organization was of the opinion that Rule 19(f) had been violated, it could have mounted the same defense it raised in the dispute that culminated in Award 28319. At page 9 of its Submission for Award 28319, the Organization stated:

> "CARRIER EFFECTIVELY FAILED TO DEFER THE SUSPENSION DISCIPLINE, IN VIOLATION OF RULE 19(f)
>
> Carrier assessed discipline of suspension for thirty days (subsequently reduced to fifteen days), and treated the time held out of service pending investigation as part of the suspension (Exh. TD-3), whereas Rule 19(f) provides that suspension discipline
>
> > '...shall be deferred unless within the succeeding six (6) month period, the accused employee commits another offense for which discipline by suspension is subsequently imposed.' (underlining added)
>
> By holding Appellant out of service pending investigation and treating such time as part of the suspension imposed as a result of the investigation, Carrier effectively nullified the provisions of Rule 19(f) providing that suspension discipline shall not be placed into effect in the absence of another offense within the succeeding six month period.
>
> Appellant's rights to have any suspension deferred were thus additionally violated, and he should be compensated for the fifteen days' time lost, under the clear provisions of Rule 19(f) quoted above."

For the sake of clarity, we must reemphasize that the Organization made no such argument in the instant case. Commencing at page 14 of its Submission in Award 28319, the Carrier stated:

> "The employees also contend that the discipline assessed by the transportation superintendent, thirty (30) days suspension, time held out of service to apply, violates the requirements of Rule 19(f) and that claimant should be paid for all time held out of service. Rule 19(f) provides:
>
> > 'If the discipline to be imposed is suspension, its application shall be deferred unless within the succeeding six (6) month period, the accused employee commits another offense for which discipline by suspension is subsequently imposed.'

Initially, the carrier submits that nothing in the above rule either requires or restricts the carrier from applying time out of service against a suspension. Such action, in effect reduces the amount of time an employee would subsequently serve should he commit another offense in the succeeding six (6) month period. Additionally, paragraph (e) of rule 19 provides:

> 'If the final decision decrees that the charges against the employee are not sustained, the record shall be cleared of the charge. If held out of service (suspended or dismissed), the employee shall be reinstated and compensated for all time lost, less the amount he earned while out of service.'

Since this paragraph does not address how time held out of service must be treated when charges against an employee are sustained, it is the carrier's option to consider such time either as time lost, or to apply such time against a period of suspension.

Furthermore, past practice on this property in the handling of cases where an employee has been held out of service and subsequently assessed a suspension, has been to apply time out of service against such suspension as was done in this case, not to compensate the employee for time out of service and defer the entire suspension. Below are examples of such cases, copies of which are attached as the Carrier's Exhibit No. 5.

Case Number

NEC-ATDA-SD-15D - J. McArdle assessed a thirty (30) day suspension, time out of service to apply. No payment made for time out of service.

NEC-ATDA-SD-33D - S. Kennedy assessed a thirty (30) day suspension, time out of service to apply. No payment made for time out of service.

NEC-ATDA-SD-38D - R. Schwarz assessed a fifteen (15) day suspension, time out of service to apply. No payment made for time out of service.

NEC-ATDA-SD-42D - J. Nugent assessed a thirty (30) day suspension, time out of service to apply. No payment made for time out of service.

NEC-ATDA-SD-44D - S. Jones assessed a thirty (30) day suspension, time out of service to apply. No payment made for time out of service.

NEC-ATDA-SD-47D - C. Ragan assessed a thirty (30) day suspension, time out of service to apply. No payment made for time out of service.

Based on the accepted past practice, the discipline assessed was proper under the agreement and there clearly is no support for the employee's contention in this regard."

The foregoing illustrates why it is imperative that Referees adjudicating disputes at this Board confine their deliberations to issues joined on the property. In view of the better reasoned precedent on the property, we conclude that the Referee's finding with respect to Rule 19(f) is palpably erroneous and without precedential value.

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

LABOR MEMBER'S RESPONSE
to
CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
AWARD NO. 30071, DOCKET 29854

This Carrier is permitted to discipline employees under the conditions set forth in Rule 19. There are no other agreement provisions addressing the discipline process. So, when the Carrier decides that circumstances exist necessitating the holding of an investigation and possibly imposing discipline upon an employee, they activate the provisions of Rule 19 - IN ITS ENTIRETY.

When the Carrier engages the mechanics of the discipline process against an employee, it doesn't have the right of selection in determining which rules will apply. Rather, attached to the Carrier's decision to move the discipline process forward, is the burden to observe and protect the employee's due process rights under ALL portions the applicable discipline rule.

Some protective rights and conditions established for the employees within Rule 19 are the type that are self-executing. These rules,, including Rule 19(f) in this case, require no action on the part of the employee or the Carrier. They simply stand ready and are activated when the appropriate circumstances exist.

Contrary to the Carrier Members' opinion, the separate sections of Rule 19 do not function in a vacuum. Rather, they work in tandem to make up the entire employer/employee discipline scheme. Agreement provisions must be read as a whole and any interpretation obtained, should if possible be consistent with the rest of the Agreement [Third Division Award No. 11165].

The overall effect of the Carrier Members' position in this matter would be to segregate and disconnect Rule 19(f) from the discipline process if it is not explicitly cited by the employees in handing on the property. This, no doubt, would be the first step in a rapid erosion of the employees' due process rights.

Since the Carrier Members' primary objection seems to center on the Organization's alleged failure to raise the issue of the erroneous suspension on the property, I suggest they review the transcript of investigation where they will find the employees' initial objection to the Claimant's suspension pending investigation.

Transcript Pages 4 & 5 - Representative Brandt

"...Mrs. Glassing has been held out of service through today, without just cause...I request that the charges against Mrs. Glassing be dropped, and that she be reinstated to service immediately. She should be compensated for all lost time since 7:30 PM, April 12, 1990..."

Then, when the suspension was appealed on the property, the General Chairman, in a letter dated August 22, 1990 advised the Carrier the Agreement was violated as the Claimant was improperly held out of service pending the investigation.

Now, I know that the Carrier Members contend that the Organization didn't specifically cite Rule 19(f) during on property handling. But, considering the self-executing nature of this rule coupled with the complaints registered during the investigation and the appeal process, the Carrier cannot seriously contend that it did not know the Organization considered Claimant's suspension pending investigation improper. Raising that issue also raised the question of proper application of Rule 19(f). In sum, contrary to the Carrier Members' suggestion, it is not necessary to be hypertechnical and require "...notice in clear and unambiguous terms..." that Rule 19(f) had been violated. The Employees did all that was necessary to engage the matter during on-property handling.

Furthermore, the Carrier was, or at least should have been, aware of its responsibilities under the Agreement. They cannot escape their obligations by pleading ignorance concerning applicable Agreement provisions. This Board acted properly in reviewing all components of the discipline rule. After all, the entire Agreement is always before the Board.

[Third Division Award No. 11644]

> "It is true that generally matters raised for the first time on appeal to this Board may not be considered. This does not apply to Agreements and agreed interpretations of such Agreements. Both parties are charged with full knowledge of applicable rules, agreements and interpretations. These are always proper for Board consideration whether they were or were not specifically presented and discussed on the property..."

[Third Division Award No. 9844]

> "In construing the agreement it is, of course, elementary that we look to all four corners thereof and give effect to all provisions, so as to preserve and not destroy any particular section thereof."

The Carrier Members suggest that the Referee in this case relied on Third Division Award No. 29364 involving this Organization and another Carrier. While the same Referee sat with the Board in both matters, there is nothing in Award No. 30071 to indicate that Award No. 29364 was relied upon in resolving this dispute.

The Carrier Members' opinion further contends, incorrectly, that Award No. 29364 involved interpretation of Conrail Rule 18, Section 2(b) 3. It was Rule 18, Section 1(b) that the Board found had been violated in Award 29364.

Since Amtrak assumed its operating territory from Conrail and predecessor properties, there is a resulting similarity in the language found in many agreement provisions. Because the Carrier Members have raised the issue, the comparison below of similarities and differences in the two discipline rules provides an instructive indication of the parties' intentions.

Conrail Rule 18, Section 1(b) is virtually identical to the last sentence of Rule 19(a) in effect between the Organization and Amtrak.

Conrail - Rule 18, Section 1(b)

"(b) An employee may be held out of service pending hearing only if his retention in service could be detrimental to himself, another person or the Company."

Amtrak - Rule 19(f)

"...The employee may be held out of service pending investigation only if his retention in service could be detrimental to himself, another person, or the Corporation."

In Award No. 29364, the Board found that Conrail had improperly withheld the Claimant from service pending hearing because they had failed to establish that he was a detriment to himself, another person or the Company. In other words, the Board held that the Carrier violated Rule 18, Section 1(b). Both Amtrak Rule 19(f) and Conrail Rule 18, Section 1(b) address only the propriety of withholding an employee from service pending hearing. Neither rule addresses discipline imposed in connection with an employee who was previously suspended pending investigation/hearing. That matter is exclusively addressed by Amtrak Rule 19(f) and Conrail Rule 18, Section 2(b).

The Carrier Members are absolutely correct when they state that the rule involved in Award No. 29364 "...does not read the same as Rule 19(f) involving the parties to this dispute." In fact, during Board panel discussions this Referee clearly cited the crucial differences between the Conrail discipline rule as interpreted in Award No. 29364 and the discipline rule involved in Award No. 30071.

Conrail Rule 18, Section 2 (b) contains agreement provisions conspicuously missing from Amtrak Rule 19(f). Again, while Amtrak Rule 19(f) and Conrail Rule 18; Section 2(b) 1 are identical, the Conrail rules continue on where the Amtrak rule leaves off. Conrail Rule 18, Sections 2 (b) 2 & 3, allow suspension pending hearing provided the suspension is properly applied consistent with Rule 18, Section 1(b). Under these circumstances, the pre-investigation suspension is "Considered part of the period of suspension if the suspension is served, or...considered time lost without compensation if the suspension is not served." This is a monumental difference between the two rules.

This Referee properly recognized that Amtrak Rule 19(f) simply comes up short in contemplating anything other than <u>deferred</u> suspension for employees with no prior discipline. When, as in Award No. 30071, the Carrier imposes pre-investigation suspension upon an employee that has no outstanding deferred suspension, it does so in violation of Rule 19(f).

Lastly, this Board should not, as the Carrier Members suggest, plow blindly forward continually endorsing previously erroneous decisions solely for the sake of uniformity.

[Third Division Award No. 18001]

> "While uniformity and consistency is necessary and desirable in the administration of an agreement between the parties, and interpretations of the agreement should be followed, it is not compelling where an interpretation is on its face erroneous."

[Third Division Award No. 10063]

> "...precedent is not gospel--and relying entirely only on precedent can result in compounding mistakes and perpetuating error."

This Board must apply and interpret agreements as written [Third Division Award No. 20956]. It cannot look beyond the agreement language to supply something that is not there [Third Division Award No. 18466]. When considering the restrictive nature of the Board's authority to adjudicate disputes in conformity with the principles just cited, it is clear that Award No. 30071 comports with the clear, unambiguous language of the Agreement. No other conclusion is possible.

L. A. Parmelee, Labor Member
4-29-94