Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31492
Docket No. MS-31290
96-3-93-3-170

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

PARTIES TO DISPUTE: (Hotel Employees and Restaurant Employees
(International Union
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"(1) That the Agreement was violated when the Carrier assessed a thirty day suspension to Outfit Manager R. L. Williams, beginning December 1, 1992.

(2) Carrier should now compensate Mr. Williams for all time lost resulting from this suspension."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant in this case was employed by Carrier as an Outfit Manager. In this capacity, he was responsible for the preparation and serving of meals to track gangs in whose work areas the Outfit cars were located. On July 14, 1992, Claimant was instructed to appear for a hearing in connection with the following charge:

"Dear Mr. Williams:

Please report to the Office of Supervisor, Commissary Services, 2745 North Interstate Avenue,

Portland, Oregon, on Monday, July 20, at 10:00 A.M. regarding your being absent without leave on July 1 and 2 in violation of Part Rule IV-General Rules- Rule 3 between the Company and D.C.E.U., Schedule of Rules effective November 1, 1977, and your allegedly falsifying payroll records on June 25 and June 26, 1992, while you were working as Outfit Manager.

This investigation and hearing will be conducted in conformity with Rule 1 Part Rule IV- General Rules-Discipline and Adjustment Procedure, Part (A) between the Company and Dining Car Employees Union Local No. 43 Schedule of Rules effective November 1, 1977. You are entitled to representation as provided in that rule and you may produce such witnesses as you may desire at your own expense."

After several agreed upon postponements, the Hearing was eventually held on October 21, 1992, at which time Claimant was present, represented and testified on his own behalf. Following the completion of the Hearing, Claimant was notified by letter dated November 6, 1992, as follows:

"Dear Mr. Williams:

After carefully considering the evidence adduced at the hearing held at Portland, Oregon, on Wednesday, October 21, 1992, I find the following charges against you have been sustained:

Being absent without leave on July 1 and 2 in violation of Part Rule IV-General Rules- Rule 3 between the Company and D.C.E.U., Schedule of Rules effective November 1, 1977.

Therefore, you have been assessed a thirty (30) day actual suspension commencing with the first day you submit a release from your physician certifying you are medically qualified to resume service. Moreover, you must continue to work with our Employee Assistance Department."

Subsequently, by letter dated December 1, 1992, Carrier sent the following notice to Claimant's representative:

"Mr. Issac Monroe
Administrative Assistant
HE&RE Union
1130 South Wabash Avenue
Suite 405
Chicago, IL 60605

Dear Mr. Monroe:

RE: RONALD L. WILLIAMS

This morning I received a fax of Mr. Ron Williams' release dated August 28, 1992 authorizing his return to work effective September 1, 1992.

As provided in my November 6, 1992 letter Mr. Williams' 30 days suspension will thus become effective today December 1, 1992.

Very truly yours,

/s/ M. E. Boltin

cc: Mr. R. L. Williams
Mr. B. T. Hotchkiss"

At no time during any of the handling of this case on the property was the obvious overlapping of dates as detailed in the exchanges of correspondence referenced above ever addressed or explained by the parties. The dispute was finally presented by the Organization for handling by this Board on March 23, 1993. Subsequently, by letter dated October 29, 1993, the Organization informed the Secretary of this Board as follows:

"Lastly, regarding the Organization's July submissions to the Board there exist a typographical error on page one (1) of the submission for case 93- 3-170, Docket No. MS-31290. In the statement of claim, whereas the Organization cited the commencement of Employee's suspension as December 1, 1992, the correct date is November 8, 1991."

Again, this alleged correction is not explained anywhere in the case record and has not been explained by anyone during the handling of the case by the Board.

During the handling of this dispute, the Organization has advanced two procedural issues which will be addressed by the Board before ruling on the merits of the dispute. First, the Organization alleged that the notice of charge was not issued in a timely manner, and secondly, that the location of the Hearing was

not in accordance with the provisions of the Agreement. Matters involving discipline are addressed in the Agreement as follows:

"DISCIPLINE AND ADJUSTMENT PROCEDURE

RULE 1. DISCIPLINE AND ADJUSTMENT PROCEDURE.
(a) No employe will be suspended or dismissed without a fair and impartial hearing. Hearing shall be held as promptly as possible, except that if an employe is suspended in proper cases pending hearing, hearing will be held within twenty (20) days from date of suspension. When an employe is dismissed or suspended he will be apprised in writing of the precise cause of his dismissal or suspension. Pre-hearing conference may be held with the employe and his representative prior to the hearing date in which the employe and hid (sic) representative may waive hearing and voluntarily accept dismissal or suspension for a specific number of days. If a dismissal or suspension is not voluntarily accepted at a pre-hearing conference, investigation on charges preferred will be held. If suspension is assessed or voluntarily accepted, the time withheld from service pending the investigation will be considered as part of the time of the assessed suspension.

(b) No employe will be put off train while en route unless the offense and/or violation is of a serious nature.

(c) Hearing notice will be in writing and will specify charges, place, date and time of hearing, and must be served within ten (10) days from date occurrence to be investigated is known to exist. Hearing will be held at the home terminal of the employe as far as practicable, and at such time as not to cause the employe involved to lose time.

(d) The employe shall have a reasonable opportunity at his own expense to secure the presence of witnesses, and the right to be represented by his duly accredited representatives. Each party shall have the right to interrogate witnesses produced by the other party. Copy of complete transcript of hearing will be furnished within twenty (20) days to the duly accredited representatives, General Chairman, and the employe. Hearing will be held on the date specified by the Company but may be postponed by mutual consent. The party

desiring postponement shall make timely request on the other party.

(e) Decision will be rendered within twenty (20) days after completion.

(f) An employe dissatisfied with the decision of the Manager Commissary Services has the right of appeal to the Carrier's highest officer. Such appeal must be in writing and must be made within sixty (60) days of the date of decision being appealed, conference on appeal will be granted, if requested, within ten (10) days after receipt of written request. If no appeal is made within said sixty (60) days, the claim or grievance shall be barred and will be deemed to have been abandoned.

(g) When appeal is made pursuant to section (f), decision will be rendered within thirty (30) days, of date appeal is received or within ten (10) days, of the date conference is concluded, if conference is held thereon. If not so notified, the claim or grievance shall be allowed as presented.

Appeal must be made in writing to the Carrier's highest officer within sixty (60) days of the date of the decision being appealed. Conference on appeals will be granted within ten (10) days, of receipt of request and if conference is held thereon, the Carrier's decision will be rendered within ten (10) days, of the date conference is concluded.

(h) Decision of the Carrier's highest officer will be final and the claim or grievance shall be barred and shall be deemed to have been abandoned, unless within sixty (60) days after the date of decision of Carrier's highest officer is notified in writing by the employe of (sic) his accredited representative, General Chairman, that the decision is not accepted.

(i) If, on appeal to the Carrier's highest officer, the charge against the employe is not sustained, the employe's record will be cleared of the charges; and, is (sic) suspended, or dismissed, the employe will be reinstated and compensated for the wage loss, if any, suffered by him. Such compensation will be the amount the employe would have earned less compensation received in other employment or benefits received under any unemployment insurance law.

(j) All claims or grievances involved in Carrier's highest officer's decision shall be barred and deemed to have been abandoned, unless:

1. Notice that the decision is not accepted has been given to the Carrier's highest officer within sixty (60) days of the date of said decision; and

2. Within six (6) months from the date of said highest officer's decision, proceedings are instituted before a tribunal of competent jurisdiction established by law or agreement to secure a determination or adjudication of the rights of the parties.

(k) The General Chairman of the DCEU, Local No. 372, will be furnished with copy of any letter or other document concerning any employe who has lost his protective status for any reason, including advice as to any employe who has been attrited."

Paragraph (c) as quoted above addresses both of the Organization's procedural contentions. As to the timeliness of the charge notice, the evidence of record supports the position that the occurrence to be investigated was not known to exist until July 6, 1992. The notice of charge was, therefore, issued in a timely manner. As for the second contention of the Organization relative to the location of the Hearing, the Board is convinced, on the basis of the unrefuted position of the Carrier, that the home terminal of the Outfit cars has historically and regularly been the same as the home terminal of the Supervisor under whose direction the Outfit cars operate. In this case, that practice was applicable and there was no violation of Rule 1, paragraph (c) in the holding of the Hearing at the home terminal of the Supervisor. Therefore, both procedural contentions as advanced by the Organization are rejected.

The Board has reviewed the ninety-four page Hearing transcript and is able to make our determination on the basis of that Hearing record. In most discipline cases, there are two and usually opposite positions advanced. In this case, the Carrier's primary witness was the Supervisor, Commissary Services. His account of the series of conversations which he had with the Claimant are clear and understandable. On the other hand, the unrefuted testimony of the Claimant relative to his need for time off during the vacation period as requested and his unchallenged history of having had the same vacation period in prior years is equally clear and understandable.

The one point in this case which is most disturbing to the Board is the testimony of both the Claimant and the Supervisor relative to the actions and instructions which were interjected into this scenario by the Division Engineer, Track. The Supervisor acknowledged that the Division Engineer had, in fact, instructed Claimant to close the Outfit car on June 30. There is no probative evidence to suggest or support the conclusion that the closing of the Outfit car on June 30 had any adverse impact on the operations of the track gangs. Claimant denied that the Division Engineer had instructed him to contact the Supervisor when the Division Engineer ordered the closing of the Outfit car. This leaves the Board with a clear and unresolved conflict which is important to the disposition of the dispute. This conflict could have easily been resolved by Carrier by having the Division Engineer offer first-hand testimony or some type of written evidence relative to his specific involvement in the affair. Carrier elected not to do this.

As the moving party in a discipline case, Carrier is responsible to establish by substantial probative evidence the guilt of a charge. The term "substantial evidence" has been defined for us by the U.S. Supreme Court as:

> ". . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Con. Ed. v. N.L.R.B. 305 US 197,229)

The Division Engineer, Track is a management official whose instructions and orders are to be followed by subordinate employees. His first-hand involvement in this case is necessary to making a determination of whether or not there is substantial evidence to support the conclusion of guilt. Carrier's reluctance to attempt to gather this necessary evidence and/or testimony is a defect which is detrimental to its position. On the basis of the record as it stands, there is not sufficient substantial evidence to support a conclusion of guilt. Therefore, the discipline as assessed cannot be permitted to stand. The claim of the Organization is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of May 1996.