

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32988
Docket No. TD-32815
98-3-96-3-125**

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

**(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers**

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Pursuant to Rule 19(c), this is to appeal the March 27, 1995 decision of Hearing Officer, R. A. Herz and subsequent sustaining of this decision by G. Devecchis, General Manager New England Division. Wherein the Carrier held Train Dispatcher M. Bennett from service, without pay, for fifteen days prior to and after the investigation. In addition, the Claimant was assessed an additional thirty days suspension, which was held in abeyance."

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.

On March 13, 1995 Claimant was serving as the Dispatcher of Record monitoring and supervising a Trainee Dispatcher at the time. Claimant was away from the dispatch

console at all times relevant to the matter herein. At or about 1:10 P.M. a Foreman asked Claimant for foul time on Track Nos. 1 and 2 at milepost 212.6 so that he and his crew might commence work on the section of track in question. The Trainee gave the Foreman foul time on Track No. 1 until 1:30 P.M. and on Track No. 2 until 2:00 P.M. In addition, blocking devices were applied by the Midland Dispatcher so that the area in question would be protected from activity that might place the crew working in the protected area at risk. At no time before 1:30 P.M. did the Foreman or any other individual ask the Trainee to clear the area in question. At some point during the period, however, the Foreman did in fact radio that he was "clear" when he heard his name mentioned on the radio, but he did not direct his communication to the Trainee, nor did the Trainee acknowledge his communication. Later, at some point before 1:25 P.M. the Foreman and his crew left the track area. In doing so the Foreman noticed that the track signal was "clear" despite the fact that he did not request that the track be cleared and that his foul time had not yet expired. At that point the blocking devices had been removed by the Midland Dispatcher and Train No. 175 went through the area. Shortly thereafter, at or about 1:30 P.M. the Foreman asked the Trainee to clear the area.

The following day the Foreman reported the matter to his Supervisor, who in turn advised the Claimant's Supervisor. An Investigation was conducted and the Claimant was removed from service under Rules providing that an employee may be so removed "... if his retention in service could be detrimental to himself or another person or the corporation."

On March 22, 1995 a Hearing was conducted. After the Hearing, the Claimant was suspended for 15 days, with an additional 30 days held in abeyance.

In contesting the discipline meted out in this matter the Organization attacks both the procedure used by the Carrier to impose the discipline and the merits of the charge of misconduct by the Claimant. As a threshold matter, however, the Carrier contests that the Statement of Claim was untimely filed.

In support of the argument that the appeal to the Board was untimely filed the Carrier contends that the only communication by the Organization within the required time limits was a letter to the Carrier that the matter was being forwarded to the Organization's President "for further handling." Thus, the Carrier argues that it was not placed on notice that the Organization was contesting the matter to the Board.

We disagree. A close examination of the correspondence in question makes it clear that the Carrier was aware of the fact that the Organization did not rest on the Carrier's earlier assertions that the discipline was warranted. Thus, to process the matter further would not deprive the Carrier of any right to due process or expose it to undue prejudice.

With regard to the merits of the claim, the Organization argues that there is no evidence that the Claimant was responsible for removing the block from Track No. 1 enabling Train No. 175 to travel over the track in question and that the Foreman did in fact report that he was clear of the area. We disagree. First, the record shows that although the Foreman transmitted that he was clear, there is no evidence that the Trainee heard or acknowledged the report. Second, the record is clear that the Claimant was responsible for the Trainee who was at the dispatch console at the time in question and that only the Claimant or the Trainee could have directed the Midland Dispatcher to remove the block. Finally, the Organization contends that the discipline meted out was excessive. However, we have already determined that the risk in this matter was substantial. Moreover, all of the cases it cites in support of its argument involved some basis for concluding that the discipline was improper either because of disparate treatment or mitigating or extenuating circumstances. No such claim is made in the instant matter and the record supports no such conclusion.

One of the Organization's procedural arguments, however, warrants close examination. In this regard the Organization contends that the Carrier violated the parties' Agreement when it failed to defer the Claimant's suspension. On this point it relies on Rule 19(f) which provides that if an employee is to be suspended the suspension "... 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." More particularly, the Organization points out that the Claimant was removed from service on March 14, the Hearing was held on March 22, the suspension was imposed on March 27 and the Claimant returned to work on March 29. In support of its argument it cites to Third Division Award 30071, between the same parties as involved herein, by Referee Wesman holding that an employee may be suspended under Rule 19(f) only with no actual days served without pay in the absence of a subsequent suspension within six months. In reply the Carrier points to the Carrier Members' strong Dissent to that Award.

Clearly the Award in that case is a determination of the precise contract language between these same parties that has not been changed bilaterally in collective bargaining. Thus, the only basis for disregarding the Wesman Award is if it can be shown that it is patently erroneous. Having closely examined Award 30071 we conclude that although its holding can be easily understood, it does not warrant application in this matter.

When Section (f) of Rule 19 is considered standing alone, the conclusion in Award 30071 is quite understandable. For example, when applied to misconduct that does not rise to the level of detriment to persons or the Carrier, a limitation which does not appear in Section (f), the use of a deferred suspension, a sort of probation, makes imminent sense. This is true because in those cases the employee in question is put on notice of his or her misconduct and knows the reward for staying "suspension free" in the succeeding six month period.

However, when the misconduct in question for which a suspension is imposed makes the retention of the employee a detriment to him or herself, other persons, or the Carrier, other important issues come into play. Indeed, this fact, as well as the importance of those issues, was apparently acknowledged by the parties when they included Section (a) to Rule 19. Thus, we must consider the interplay between those issues and Section (f) of the Rule.

Under one view of the language interpreted in Award 30071, the view urged by the Organization herein, an employee could engage in misconduct causing a fatal crash, and he or she could be removed from service, as justified by Section (a) of the Rule, but not suffer any withholding of pay, as Section (f) was interpreted in the Award. Such a construction of these two provisions is not wholly unreasonable for it enables the Carrier to take action that would eliminate the safety risk (the rationale underlying Section (a)) without assessing an economic penalty to the employee (the literal language of Section (f)).

The Board believes, however, that such a construction of these two provisions diminishes the impact of discipline as a remedial device precisely because the employee pays no price for his serious misconduct. Moreover, if the remedial nature of the discipline is diminished in these circumstances the risk of further misconduct that might rise to the level detriment to persons or the Carrier is exacerbated.

We do not believe that the parties mutually intended such a result when they agreed to Sections (a) and (f) of Rule 19.

Thus we conclude that where the retention of an employee in service is a detriment to him or herself, other persons, or the Carrier, Rule 19(f) does not require that the suspension be without pay. Rather, a reading of Rule 19(f) in those cases, and thus implicating Rule 19(a), does not preclude the action the Carrier took in the instant matter.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 23rd day of December 1998.

See Orig. dissent