Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35500
Docket No. TD-34497
01-3-98-3-138

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department/
(International Brotherhood of Locomotive Engineers
(
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Please accept this claim filed in behalf of Train Dispatcher J. Egan, for one day's pay at the pro-rata for Train Dispatcher for each of the following dates:

November 23, 14, 25, 26, 27, 30 and December 1, 1996.

Mr. Egan was removed from service following an incident on November 20, 1996, in which a train got under cold wire on the Harrisburg Line. Following the incident, Mr. Egan was held off his regularly assigned position until December 2, 1996, ostensibly for drug test results, and then for reasons unknown.

Amtrak made no showing that Mr. Egan was detrimental to himself, another person or the Corporation. Mr. Egan has also had not, within the preceding six months, committed an offense for which (deferred) suspension was assessed. Therefore, Amtrak must have held Mr. Egan off his position for causes other than those dealt with in Rule 19 - DISCIPLINE - INVESTIGATION - APPEAL."

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 was removed from service on November 23 to December 1, 1996 as a result of an incident which occurred on November 21, 1996. On December 2, 1996, the Claimant signed a waiver letter accepting a 30-day suspension with no right of appeal. The Carrier contends that Egan was removed from service during the period at issue out of safety concerns and that these are not elements of the suspension. The Carrier continues by claiming that the provisions of Rule 30 stand-alone and are not modified by the provisions of Rule 19 as alleged by the Organization.

The Organization contends that the settlement under Rule 30 is intended to be all-inclusive meaning that the Claimant must be paid for all days off from November 23 through December 1, 1996. The Organization further contends the Carrier did not have cause to withhold the Claimant from his job.

The Carrier claims that the waiver signed by the Claimant constitutes an entire settlement with no right of appeal. The Carrier contends that the time off prior to the waiver period can be characterized as "lost time" or "non-time." The Carrier closed by contending it's right to withhold the Claimant from service because "his retention in service could be detrimental to himself, another person or the Corporation."

The record supports the position of the Carrier that it had the right to withhold the Claimant from service. The resolution of this question however does not impact upon the final determination in this case.

In support of its position, the Organization relies upon Third Division Award 30071, dealing with a situation where an employee was given a 30-day suspension, to which the Carrier applied time held out of service. The determination was that an employee assessed a suspension under Rule 19(f), will not serve any time off unless another offense is committed within the succeeding six-month period. The decision concluded by stating

that the "Carrier may not include actual days out of service without pay in a suspension assessed under the provisions of rule 19(f)."

The Carrier relies upon the following cases: Third Division Awards 29590, 31776, 32987 and 32988. The first Award dealt with an appeal of a ten-day suspension, the right of the Carrier to withhold an employee from service, and whether the Carrier gave the Claimant five days notice of the charge against her. It does not deal with the issue before us in this case.

Award 31776 dealt with a situation wherein claimants knowingly signed for a 30- day suspension including time held out of service. This case serves to demonstrate an alternative approach to Rule 30. In the instant case, the parties did not include the time off in the settlement Agreement, leading to the conclusion that the Claimant did not intend to accept both a 30-day suspension and lose pay for the time off.

Awards 32987 and 32988 concluded that investigation time off could be unpaid as a portion of a disciplinary suspension. These cases do not deal with a fact situation as presented here.

Rules 19 and 30 are closely related and must be construed together. The parties did not reference the Investigation time off in the settlement and the Claimant is accordingly entitled to pay for such period.

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 21st day of June, 2001.

Third Division Award No. 35500
Referee Donald W. Cohen
Carrier Member Dissent

The Majority of this Board has exceeded its authority. The Board's authority is limited to the interpretation of the labor agreement. The Majority is not free to ignore the clear language of a labor agreement or the common and ordinary usage of that language. But such occurred here regarding language contained in Rule 30 -Alternative to Investigation of the labor agreement between Amtrak and ATDD. A cardinal principle of contract construction is that words are to be given their ordinary and popularly accepted meaning.

In this Award, the Majority has ignored basic language construction and usage and the very purpose for which Rule 30 was negotiated on the Company's property. Rule 30 -Alternative to Investigation was negotiated subsequent to Rule 19 - Discipline - Investigation - Appeal as an **alternative**. Webster's II New College Dictionary defines "**alternative** ... *n 1. Choice between two mutually exclusive possibilities or either of these possibilities."* No less of an arbitral authority than Elkouri & Elkouri quotes arbitrators as ruling that in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary govern. And no such showing was made in this case. Thus, for the Majority to determine in this Award that "Rules 19 and 30 are closely related and must be construed together." is palpably erroneous and defies explicit language to the contrary. Rules 19 and 30 are by clear and unambiguous language mutually exclusive.

Moreover, other clear language contained in Rule 30 was ignored. Claimant having resolved his discipline in accordance with Rule 30 on the property was not entitled to any adjustment of that discipline under the following Rule 30 agreement language: "Discipline imposed in accordance with this Rule is final with no right of appeal." Thus clear language provided no legitimate right to any adjustment to the discipline and yet the Majority did so. Even so, this Board found that claimant had been properly removed from service under Rule 19(a).

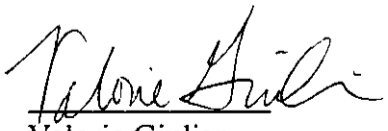
The meaning of Third Division Award 30071 is well established and confirmed, through an unsuccessful challenge of Third Division Award Nos 32987 and 32988 by the ATDD in the United States District Court, District of Massachusetts. **Time out of service under Rule 19(a) is not compensable.** Quoting in pertinent part below from the District Court's Judgement :

> ***"The Agreement does not explicitly address whether an employee taken out of service under Rule 19(a) is subject to the additional discipline of loss of pay. The Board's decision that he can be seems sound given the safety concerns involved, although the Board's reasoning in this regard is precisely the type of issue into which this court is forbidden to delve."*** *(Emphasis supplied)*

It is clear from the above that those Third Division Awards are sound since the District Court found them "sound". The Majority was not free to ignore the precedent established by Third Division Award Nos. 30071, 32987 and 32988, as affirmed by a District Court. The Majority was required to follow that precedent. This Award does violence not only to the labor agreement but the very purpose of Section 3 of the Railway Labor Act.

Third Division Award No. 35500 is palpably erroneous. The award ignores and/or misapplies contract language, basic principles of contract construction, precedent that has been found sound in a court of law and grants a payment which can not be supported by any provision of the labor agreement. Third Division Award No. 35500 is a travesty and without precedential value.

I VIGOROUSLY DISSENT.



Valorie Giulian
Carrier Member

Labor Member's Concurring Opinion
And Response To Carrier Member's Dissent
To Third Division Award No. 35500
Docket Nos. TD-34497
(Referee Donald W. Cohen)

Rule 19 is the Discipline Rule that provides "a Train Dispatcher shall not be disciplined or dismissed without a fair and impartial investigation", "Except as provided in Rule 30".

Rule 30 is an "Alternative to Investigations" that provides "An employee may be disciplined without an investigation when the employee involved and the authorized official of the Company agree in writing to the responsibility of the employee and the discipline to be imposed."

In the case decided by this Award, the Claimant was removed and held from service for seven days until an agreement was reached in accordance with Rule 30. In this Rule 30 waiver agreement, the Claimant accepted a "30 days suspension...deferred under Rule 19, Paragraph F". The Carrier refused to compensate the Claimant for the seven days lost as a result of being held out of service even though the waiver agreement provided that the suspension would be deferred in accordance with Rule 19 (f). Hence the claim for the seven days lost by the Claimant.

Clearly, seven days lost pay is discipline regardless of what the Carrier calls it. And, when the Carrier imposed this seven-day suspension without a "fair and impartial investigation" under Rule 19 it violated the Agreement, unless it was the result of a Rule 30 waiver agreement, which it was not.

The Carrier Member, in an attempt to find support for the Carrier's position concerning Rules 19 and 30, writes in the Dissent: "The meaning of Third Division Award 30071 is well established and confirmed.... The Majority was not free to ignore the precedent established by Third Division Award Nos. 30071, 32987 and 32988...". This is quite a departure from the Carrier's opinion of Award 30071 found in its submission to the Board in this case, which was:

> "Third Division Award No. 30071 (Carrier Exhibit No. 10) involved Rule 19 (f) where discipline was assessed a dispatcher following an investigation. The Award was palpably erroneous in its conclusion of not allowing the application of time held from service towards the discipline assessed.... A vigorous dissent was filed to Award 30071...."

The Majority was correct in following the "precedent established" by Award 30071 in sustaining this claim. There should no longer be any confusion as to what the established precedent is.

David W. Volz
Labor Member