PUBLIC LAW BOARD NO. 2960

AWARD NO. 3

CASE NO. 3

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Machine Operator T. W. Burns was without just and sufficient cause and excessive. (Carrier's File D-11-24-50)

(2) The hearing in this instance was not held in accordance with Rule 19(a).

(3) Machine Operator T. W. Burns shall be reinstated with seniority and all other rights unimpaired and compensated for all wage loss suffered.

OPINION OF BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the employees and the Carrier involved in this dispute are respectively employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

The Claimant was employed as a Machine Operator with approximately five years seniority.

During the period August 23 to September 24, 1979 the Claimant was away from his headquarter point and was entitled to full expenses. Sometime during this period the Claimant indicated to Roadmaster

Keith W. Maxon that he was staying at the Queen Motel in Ft. Dodge, Iowa. During the first week in September, Mr. Maxon attempted to call Mr. Burns at the Queens Motel and was told by the motel clerk that he was not staying there and to her knowledge had never stayed there. Mr. Maxon testified that he was "inquisitive" as to why Mr. Burns had told him he was staying at the Queen Motel but that he had never been there. Mr. Maxon further testified he kept track of Mr. Burns' expense account for the week of September 3rd through the 6th and when his expense account come (sic) in we discoverd that the Queens Motel was where he had stayed on his expense account." The distinct possibility was raised at this point that Mr. Burns was defrauding the Company by charging the Company for expenses he was not incurring.

On October 22, 1979, the Assistant Division Manager-Engineering (ADM-E) directed a letter to the Claimant scheduling an investigation for October 29. The charge against Mr. Burns was "your responsibility in falsifying your August 23 to September 24, 1979 expense account." The hearing was held November 9, 1979 after one request for postponement by the Organization. Subsequent to the hearing the Claimant was dismissed from service.

The applicable discipline rule (Rule 19) reads as follows:

"Rule 19 - Discipline

(a) Any employe who has been in service in excess of sixty (60) calendar days will not be disciplined nor dismissed without a fair and impartial hearing. He may, however, be held out of service pending such hearing. At the hearing, the employe may be assisted by an employe of his choice or a duly accredited representative or representatives of the Brotherhood. The hearing will be held within ten (10) calendar days of the alleged offense or within ten (10) calendar days of the date information concerning the alleged offense has reached the Assistant Division

Manager-Engineering. Decision will be rendered within ten (10) calendar days after completion of hearing. Prior to the hearing the employe will be notified in writing of the precise charge against him, with copy to the General Chairman, after which he will be allowed reasonable time for the purpose of having witnesses and representative of his choice present at the hearing. Two working days will, under ordinary circumstances, be considered reasonable time. The investigation will be postponed for good and sufficient reasons on request of either party."

The Organization argues initially that the entire discipline should be overturned because the time limits on Rule 19 for holding a hearing were violated. This objection was registered in a timely fashion during the investigation. The Organization points out that a hearing must be held within 10 days of the alleged offense or within 10 days of the date the information concerning the alleged offense reaches the Assistant Division Manager-Engineering. The Organization argues the hearing was not held within 10 days of when the information concerning the alleged offense reached the ADM-E. During the hearing the General Chairman produced a copy of Mr. Burns' expense account which showed a date stamp indicating the report was received on October 2 by the ADM-E office. The Board also takes notice of the testimony of Roadmaster Maxon which indicates he reported the discrepancy in Mr. Burns' expense account as early as September 26. Mr. Jorde, the General Chairman, asked Mr. Maxon the following questions during the hearing:

"Q. When did you report this inconsistency of Mr. Burns' expense report to the ADM-E office?
A: That day that we discovered the receipt for that week.

Q: Could you tell me what date that was?
A: I can't tell you the date, it was the time that it was turned to the Roadmaster's office in Eagle Grove, is date that it was reported.

Q: Would this have been approximately September 26th or 27th, in that vicinity?

A: I was trying to think as to what date the 23rd came on in the month of September, it seems to me like it was on a weekend, I am not sure, I don't have a calendar with me. It was Monday or Tuesday of the following week I believe that it was reported, the 23rd was on a Sunday and I am not sure at that particular time whether Mr. Burns had his expense turned in on time or not, it seemed like it was late so it might have been the 26th of September. I can't verify it without going back and checking.

Q: At that time did you notify the office in Mason City of the error or the apparent error in Mr. Burns' expense reports?

A: Yes, I did."

The above facts more than establish a prima facie case that the time limits were violated. The ADM-E had knowledge of the offense as early as the 26th of September and the hearing was not scheduled originally until October 29, 1979, more than 30 days later. In making the determination that a prima facie violation of the time limits was established, we are mindful of the comments of the Referee Eischen participating in Case No. 31, Award 26 Public Law Board 1844 involving these same parties:

> "A party alleging a procedural defect (in this case the Organization) carries the initial burden to show a prima facie violation of time requirements. Under the language before us we deem that this initial burden is met if it is shown that the hearing was held more than ten calendar days after the occurrence of the alleged offense. Upon such a prima facie showing the burden shifts to the Carrier to show extenuating circumstances, if any."

The Carrier defends against the lateness of the hearing by asserting that at the time the discrepancy was reported to them the ADM-E didn't have sufficient information to act. The ADM-E then contacted Special Agent Ackenback (approximately October 8 according to Ackenbach's testimony) to investigate the incident. His report wasn't made until

October 15, 1979, at which time the ADM-E was on vacation, not returning until October 22. The ADM-E, according to the Carrier, scheduled the hearing within ten days of when he had sufficient information to act, i.e. October 22. In this connection the Carrier argues, "it is noted from the precise language of this rule (Rule 19) that the time limits run from the date the Assistant Division Manager-Engineering has sufficient information concerning the alleged offense."

While Rule 19 doesn't use the term "sufficient" it can be reasonably implied that a Carrier cannot act on a charge without sufficient information. The Carrier should not be obligated to proceed with an investigation on the basis of pure speculation or simple suppostion to the extent a fair hearing on the facts cannot be conducted. This is in the interest of the employees as well. We agree to this extent with Carrier, that the time limits do not run until the ADM-E has sufficient information or what also might be termed as reasonable cause to believe a violation of Carrier rules has occurred. However, in this case, the information provided the ADM-E by Mr. Maxon did constitute sufficient information regarding the charge in order to schedule a hearing. Mr. Maxon provided the ADM-E more than speculative evidence as early as September 26 that Mr. Burns may have been in violation of Company rules. The information Mr. Maxon provided was not much less than that presented at the hearing. The evidence gathered by the Special Agent went beyond sufficient information necessary to justify an investigation. The information gathered by the Special Agent was only to take written statements from Mr. Maxon, the motel clerk and owner, and Mr. Burns. The fundamental information contained

in all of these statements except Mr. Burns' was known to the Carrier as early as September 26. Mr. Maxon testified he had talked to the motel and they did not have knowledge Burns had ever stayed there and he also testified he had receipts from Mr. Burns indicating he stayed there. This was simply enough information at this time to believe that Mr. Burns may have violated Company rules and enough information to obligate the Carrier to act within 10 days. The effect of the Carrier's argument is to equate "sufficient information" with "probative evidence." The Carrier cannot justify delay in setting an investigation date when they have sufficient information and when the effect of the delay is to perfect their case against an employee. To do so would gut the rule of any meaning. The hearing officer at the hearing further justified the delay by stating it was necessary to have the Special Agent investigate Mr. Burns because of the "seriousness" of the offense. Many offenses are serious and the parties were certainly aware of this when giving the Carrier up to 10 days to hold a hearing. Regardless of the seriousness of the offense, where the Carrier has "sufficient information" to believe an offense is worthy of a disciplinary investigation they are obligated to act within the 10-day limit. It is further noted that a procedure for postponements once a hearing is scheduled is provided for in Rule 19.

The burden on the Carrier is a heavy burden. Further, we subscribe to the description of this burden by Referee Eischen in Award 26, supra, when he stated:

> "Where, as here, Carrier avers that the hearing was held within ten calendar days of the ADME's knowledge of the alleged offense, then Carrier has the burden of proving that fact, as well as the additional burden of showing good reason for any delay in the ADME acquiring knowledge of the offense.

The latter point must be a required burden of proof in such cases to vitiate the potential for unilateral manipulation of the negotiated time limits if the ADME is negligently or even intentionally kept in the dark about an alleged offense."

We must also consider Carrier's argument that the Claimant wasn't prejudiced in any way by the delay. This is similar to the "de minimus" argument made in Award 62 of PLB 1844. It was stated:

"The case comes to us on a procedural/timeliness issue stemming from the requirement of Rule 19 Discipline which reads as follows: 'Decision will be rendered within ten (10) calendar days after completion of hearing". There is no getting around the fact that in this case the decision was rendered one day late, i.e. on the eleventh calendar day after the hearing. Carrier urges that this error is de minimis and should not invalidate the disciplinary action, but rather, at most, should result in a reduction of the penalty by the one day dereliction. In support of this approach Carrier cites Award 3-21289. Analysis of that decision persuades us that the approach taken therein was limited to the peculiar facts of that case and is without precedent value to us. 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. See Awards 1-16366; 3-743; 3-2222; 3-21675; 3-21873; 3-21996, et al. Because of the patent violation of Rule 19 we must sustain the claim but in so doing we neither express nor imply any finding regarding the merits or lack thereof in the substantive claim."

In view of the fact the hearing was not held in compliance with the time limits of Rule 19, the claim must be sustained without regard to the merits.

AWARD

Claim sustained.

Gil Vernon, Chairman

H. G. Harper, Employe Member

J. D. Crawford, Carrier Member

Date: Oct 26, 1981