PUBLIC LAW BOARD NO. 5644

Case No. 1 Award No. 1

PARTIES TO DISPUTE:

International Association of Machinists and Aerospace Workers
- and -
Consolidated Rail Corporation

BACKGROUND: On August 24, 1993, the Carrier's Senior Vice President (at that time), Mr. David LeVan, provided each of its Unions with an "advanced copy" of guidelines that would govern discipline for non-major offenses ("Levan Guidelines"). The stated objective of these guidelines was to provide a more reasonable prospect for consistent evaluation and application of discipline. It placed an emphasis on counseling and provided that each employee would begin with a "clean slate" as of September 1, 1993, the date when the LeVan Guidelines became effective.

On September 22, 1993, the Organization met with the Carrier to discuss its concerns about the new discipline policy. Because the parties could not resolve their differences, the Organization memorialized its objections in a letter to the Carrier, dated October 5, 1994. The letter in pertinent part read as follows:

> "The Machinists cannot agree with your positions concerning the Company's new Discipline Policy. Under the provisions of our current Rule 6, if an employee's discipline is suspension, regardless of the offense, the period of suspension is deferred for six months. If he/she does not commit a second offense within this six month period for which discipline is imposed, they will not be required to serve the suspension. The discipline does, however, remain a matter of record as it would under the new policy.
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> It is also possible under the current application of Rule 6 for an employee to commit four "non-major" (minor) offenses within a 1, 2, 3 or 4 year period and receive only reprimands. With this new policy, it would appear that once an employee is disciplined with a reprimand, each subsequent offense would result in defined periods of suspension and ultimately dismissal. This is a drastic change and an infringement on the historical application of Rule 6.

The new Discipline also grants supervisors the authority and responsibility to "judiciously employ counseling, suspension and dismissal as warranted". Presently, while supervisors might bring charges against an employee, discipline is assessed by non-agreement personnel.

The new Policy also allows for the dismissal of an employee following a fourth minor infraction even though the fourth minor infraction might occur beyond the four year period.

While uniformity and consistency are the stated goals of this Policy, we believe that due to the flexibility and discretion this policy allows the "responsible managers", we will again see only inconsistency and discrimination in the application of discipline by various Company representatives throughout Conrail's extensive system.

Finally, the Machinists believe that Conrail's new Discipline Policy is a violation of certain provisions of the Railway Labor Act and of the moratorium provisions of the July 31, 1992 National Agreement imposed upon the parties by federal statutes.

Accordingly, you are requested to either rescind the new Discipline Policy from Machinists or join with the IAM in expedited arbitration to determined if Conrail's new Discipline Policy violates the provisions of Rule 6 of the controlling Agreement, the moratorium provisions of the July 31, 1992 National Agreement and/or the provisions of Sections 152, Seventh of the Railway Labor Act which provides, in pertinent part that: 'No Carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in Agreements except in the manner prescribed in such Agreements or in Section 156 of this Title.' (Emphasis Ours)"

Subsequently, the dispute was progressed to this Board for final and binding arbitration.

ISSUE TO BE DECIDED

Do the guidelines for non-major offenses set forth in the August 27, 1993, Memorandum from Senior Vice President of Operation, David M. Levan, to all members of the Operating Department conflict with the provisions of Rule 6 - Discipline of the Collective Bargaining Agreement between the Consolidated Rail Corporation and the International Association of Machinists and Aerospace Workers, dated May 1, 1979?

POSITIONS OF THE PARTIES

The following is believed to be an accurate abstract of the parties' substantive positions in this dispute. The absence of a detailed recitation of each and every argument or contentions advanced by the parties does not mean that these were not fully considered.

The Organization

The Organization has relied upon the Railway Labor Act ("RLA"), the July 1992 National Agreement and Rule 6 of the Conrail/IAM Collective Bargaining Agreement ("The Agreement") in its objections to the LeVan Guidelines. Specifically, the Organization contends that the new discipline policy runs counter to Section 152, Seventh of the RLA because it unilaterally changed the "rules" and "working conditions" of its members, an action prohibited by the RLA. Moreover, the 1992 National Agreement prohibits any changes of the parties' Agreement prior to January 1, 1995 and only then after proper notice, etc. Central, however, to the Organization's contention is its construction of Rule 6 of the Agreement. That rule reads as follows:

Rule No. 6--Discipline

> 6-A-1 (a) Except as provided in Rule 6-A-5 employees shall not be suspended nor dismissed from service without a fair and impartial trial, nor will an unfavorable mark be placed upon their discipline record without written notice thereof to the employee and his union representative.
>
> (b) When a major offense has been committed, an employee suspected by the Company to be guilty thereof may be held out of service pending trial and decision only if their retention in service could be detrimental to themselves, another person or the Company.
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> 6-A-2. An employee who is required to make a statement prior to the trial in connection with any matter which may eventuate in the application of discipline to any employee, if he desires to be represented, may be represented by a union representative. A copy of the employee's statement, if reduced to writing and signed by him, shall be furnished him by the Company, and a copy shall be given to the union representative.

6-A-3. (a) An employee who is accused of an offense, and who is directed to report for a trial in connection therewith, shall be given reasonable advance notice, in writing, of the exact offense for which he is to be tried and the time and place of the trial. The trial shall be scheduled to begin within thirty (30) calendar days from the date the employee's General Foreman or equivalent officer had knowledge of the employee's involvement. A copy of this notice will be given to his union representative. For a valid reason, a trial may be postponed for a reasonable period at the request of the Company, the employee or his union representative.

(b) If he desires to be represented at such trial, he may be accompanied by a union representative(s). The accused employee or his union representatives (not to exceed two (2)) shall be permitted to question witnesses insofar as the interests of the accused employee are concerned. Actual, pertinent witnesses to the offense will be requested to attend the trial by the Company. The employee shall make his own arrangements for the presence of any witnesses appearing in his behalf, and no expense incident thereto shall be borne by the Company.

6-A-4. (a) If discipline is to be imposed following trial and decision, the employee to be discipline shall be given written notice thereof not later than thirty (30) calendar days after the trial is completed and at least fifteen (15) calendar days prior to the date on which the discipline is to become effective, except that in cases involving dismissal such dismissal may be made effective at any time after decision without advance notice. The employee and his union representative shall be given a copy of the notice of discipline and the trial record.

(b) (1) If the discipline is suspension, the period of suspension shall be deferred if within the succeeding six (6) month period following notice of discipline the accused employee does not commit another offense for which discipline is subsequently imposed.

(2) If, within such succeeding six (6) month period, the employee commits one (1) or more offenses for which discipline is subsequently imposed, the initial suspension shall be served and suspensions resulting from offenses committed during the six (6) month period shall not be deferred. However, should the employee be disciplined by suspension for an offense committed subsequent to a six (6) month period, the first such occurrence shall be the basis for the succeeding six (6) month period referred to in paragraph (b) (1) of this rule.

(3) If the discipline is suspension, the time the employee is held out of service shall be:

(A) Considered part of the period of suspension for the offense if the suspension is served.

(B) Considered time lost without compensation if the suspension is not served.

6-A-5. (a) An employee may be disciplined by reprimand or suspension without a trial, when the involved employee, his union representative and the authorized official of the Company agree in writing to the responsibility of the employee and the discipline to be imposed.

(b) Discipline determined in accordance with paragraph (a) of this rule will be subject to Rule 6-A-4 (b) (1), (2) and (3).

(c) Discipline imposed in accordance with this rule will be final with no right of appeal.

The Organization contends that Rule 6, most importantly paragraph (b) of Part 6-A-4, imposes certain restrictions and requirements upon the Carrier that the LeVan Guidelines changed. It submits that the Carrier's new policy establishes a four-step progression of discipline with defined periods of suspension that would result in dismissal upon the fourth minor offense in a four year period. It asserts that this is not the case now. This conflicts with Rule 6 because that Rule mandates that any suspension will be deferred provided that the involved employee does not commit another disciplinary offense within a six month period. For example, the Organization notes that a suspension beginning January 1 would be deferred through June 30 of that year, after which it can no longer be applied. If that same employee was suspended on July 3 of that same year, that suspension would also be deferred for a period of six months.

The Organization argues that, had it been the intent of the parties to limit or to restrict the applicability of deferred suspensions or to follow a precise schedule of progressive discipline, the parties would have placed these conditions into the Agreement.

In summary, the Organization maintains that the Carrier has unilaterally imposed a new process for addressing non-major offenses that is in conflict with Rule 6 of the Agreement. These changes unilaterally made by the Carrier can only be accomplished by negotiation between the parties.

The Carrier

Fundamental to the Carrier's position is its contention that it has a basic management right, absent an inconsistency with the parties' Agreement, to promulgate disciplinary guidelines. It asserts that because the Organization has not proven a conflict, the Organization's claim must be rejected.

To support its basic position, the Carrier has provided a detailed analysis of the Policy and how, in its judgment, it complements Rule 6. In addition, it has provided a number of arbitral decisions which it claims support its contentions in this case.

FINDINGS AND CONCLUSIONS

After a review of the entire record and with full consideration of the well-presented advocacy before the Board by both parties, I find that the claim of the Organization must be denied.

There are two underlying questions in this dispute. These are:

1. May the Carrier set policy and issue instructions to its managers to govern the assessment of discipline?
2. And, if the answer to Question 1 is in the affirmative, do the LeVan Guidelines conflict with the RLA and/or the Agreement?

With respect to the threshold questions, there have been a number of arbitral decisions that have addressed this issue, some of which are on point to this case with respect to the salient facts and circumstances. For example, in 1985, the Chicago and Northwestern Transportation Company ("CNW") unilaterally issued a policy which changed

the manner in which discipline was assessed. The Union Transportation Union advanced a challenge to the CNW policy to Public Law Board No. 4817. That Board, in Award No. 1 (dated May 7, 1990) held in pertinent part as follows:

> "The C&NW has the right to set policy on matters such as discipline. Our review indicates that the policy established by the C&NW in July 1985 does not appear to amend, alter or delete any schedule rules and agreements. Those rules related to discipline define the procedures involved in notifying employees of the charges, require investigations to be held prior to the assessment of discipline and establish time limits within which the notices of charges, discipline, etc. must be served. The C&NW policy does not address these procedural matters other than to say they will be complied with as they had been under previous discipline systems.
>
> The major change in the policy involves eliminating investigations and discipline for the majority of trivial incidents. Before the new discipline system went into effect, 20 percent of C&NW employees were investigated on an annual basis and in many cases received discipline. The C&NW determined that it was not necessary to formally charge employees, hold investigations and discipline them for rules infractions when employees have good work records. In most cases, discussions with employees for the purpose of explaining proper compliance of a rule or a regulation serves the purpose of correcting the behavior.
>
> Under the current system, discussions and reviews, whether issued verbally or in writing, are not considered discipline. Under this new discipline system, an employee is formally notified that he is being placed on the system only when he has repeatedly failed to follow Carrier rules and regulations and supervisors' counseling. Once he has been counseled and warned of his placement on this discipline system, and if he continues to violate rules, such violations and/or infractions are handled in accordance with applicable schedule rules regarding discipline. The employee is notified of the charges, an investigation is held, and after a review of the transcript, if the charges are proved, discipline is assessed in accordance with the policy. That policy provides for a five-day suspension to be assessed after a letter of warning is received and, in the event an additional rules violation occurs and an investigation is held and the employee adjudged culpable, a 10-day suspension may be assessed. The

> next infraction for which an investigation is held and the charges are proved may result in dismissal of the employee. ***
>
> The result of this new discipline system has been that the number of useless investigation has been reduced and apparently fewer employees have been disciplined as a result of the change in policy. The apparent effect of the new discipline system has been to reduce the number of investigations, eliminate the disciplining of employees with good work records, improve performance, minimize confrontation, and provide a system to identify, warn and eliminate troublesome employees within a reasonable amount of time. Such employees were properly handled under schedule rules and agreements.
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> It was proper for the C&NW to change the existing practice of assessing discipline on this property as long as such policy does not change schedule rates and agreements related to discipline and due process is assured. In view of the record before us, it was proper for the C&NW to issue the discipline letter of July 24, 1985. This discipline policy dated July 24, 1985 does not change UTU-CNW rules 83 and 23(c) and UTU-CNW rules 46a, 59a and 113."

Likewise, Second Division Award 12257 (Duffy), dated February 19, 1992; Public Law Board 4291, Award No. 5 (Hayes); Public Law Board No. 3514, Award No. 310 (Muessig); Public Law Board No. 4615, Award No. 1 (Buchheit); Second Division Award No. 9144 (Bender), dated June 16, 1982 and First Division Award No. 15636 (Carter), dated July 28, 1952, all upheld the notion of the Carrier's right to implement rules and policies in such areas as discipline, drugs and safety.

Accordingly, we follow a long line of decisions that have upheld the Carrier's right to set policy on such matters as discipline, when that policy does not conflict with the Agreement. Thus, in this case, the sole remaining issue is whether the LeVan Guidelines are in conflict with the RLA or Rule 6 of the Agreement. This issue was addressed by the Court after the UTU threatened to strike over the implementations of the LeVan Guidelines. The Carrier sought a temporary restraining order to prohibit the strike. Following an evidentiary hearing on the merits, the United States District Court for the Eastern District of Pennsylvania conclued in pertinent part as follows:

"26. This dispute between Conrail and the UTU concerns the issuance of the 1993 guidelines to Conrail's managerial employees for the administration of discipline. Conrail considers the 1993 guidelines to be consistent with the terms, both express, and implied by past practice, of the 1981 Collective Bargaining Agreement between the parties. The UTU argues that the 1993 guidelines changed the terms of the 1981 Agreement between the parties.

* * *

33. Conrail has demonstrated that the issuance of the 1993 disciplinary guidelines published on September 1, 1993 was arguably authorized by the 1981 Agreement. First, the text of the 1991 (sic) Agreement does not expressly prohibit the establishment of counseling and it is arguable whether implementation of that additional procedure violated the 1981 Agreement. Second, the parties' past practice of permitting Conrail to unilaterally implement disciplinary guidelines also supports Conrail's position that past practice enables Conrail to act unilaterally in this matter. Moreover, it is arguable whether counseling even constitutes 'discipline' as the term is used in the 1981 Agreement. Certainly, Conrail's interpretation of the agreement and practice is not frivolous or insubstantial.

* * *

36. Therefore, this dispute between Conrail and UTU concerning the discipline guidelines is subject to compulsory and mandatory arbitration under section 3 of the RLA, 45 U.S.C. § 153 First. See Conrail, 491 U.S. at 304.

* * *

IV. SUMMARY

As plaintiff has established that the implementation of the 1993 guidelines was arguably justified considering the terms of the 1981 Agreement and the parties' past practice, I shall declare that this dispute is 'minor,' and, accordingly, is subject to the compulsory and mandatory arbitration mechanisms set forth in section 3 of the RLA, 45 U.S.C. § 153. In addition, I shall enjoin defendants from striking or conducting any other job action other than those provided for in the RLA for the resolution of minor

disputes. Finally, I shall deny defendants' motion for injunctive relief and authorize plaintiff to implement the 1993 guidelines pending arbitration of the minor dispute.

An appropriate order follows."

The remaining issue of whether the LeVan Guidelines are in conflict with Rule 6 are more difficult because the Organization has raised a number of points which appear to be reasonable. There has been a change in the Carrier's approach to how its managers will administer and assess discipline for non-major offenses. Now there is a formal approach to the disciplinary process which provides an orderly progression for the quantum of discipline to be assessed for the first four infractions committed by an employee. Therefore, the Organization argues, the Levan Guidelines conflict with Rule 6. In this respect, the LeVan Guidelines in pertinent part read as follows:

Responsibilities of Supervisors

Supervisors have a responsibility to ensure that their instructions are clear and properly disseminated. When misconduct occurs, they must judiciously employ counseling, suspension and dismissal as warranted. Any punitive action taken must be commensurate with the offense and the employee's discipline record, and must not violate any provision of an applicable collective bargaining agreement.

Non-Major Offenses

In dealing with lesser offenses, I expect supervisors to place their initial emphasis on counseling rather than punishment. Many infractions are caused by inexperience or inattention rather than deliberate disobedience. These should be dealt with by explaining the performance deficiency and clearly stating expectations regarding future conduct. Every reasonable effort should be exerted to address non-major offenses through counseling. Not only is that the most humane approach, it is the most efficient. Conducting investigations and replacing dismissed or suspended employees are activities requiring substantial expenditures of time and money.

Assessment of Discipline
For Non-Major Offenses

Notwithstanding the above, I realize that there are some employees who, for whatever reason, simply will not conform their conduct to that which is reasonably expected. After every reasonable effort has been exerted using the counseling tool, formal discipline is the only alternative. I do not believe that the assessment of lengthy suspensions serves a useful purpose where non-major offenses are involved. I also don't believe that employees who repeatedly demonstrate their unwillingness to abide by prescribed standards of conduct, including Safety Rules, should be retained in service. However, if all employees are to have an equal opportunity to demonstrate their willingness to learn from constructive counseling, it is only fair that we all start this new process from the same point. Therefore, effective immediately and irrespective of an employee's previous discipline record, the following schedule of penalties for non-major offenses should be applied unless unusual and extenuating circumstances are present:

Non-Major Offenses Subsequent to September 1, 1993	Penalty
First	Reprimand
Second	5-Day Suspension
Third	10-Day Suspension
Fourth	Dismissal

Generally speaking, a non-major offense should not result in dismissal unless it is the fourth non-major offense which has occurred during the preceding four-year period. While I am establishing a schedule of penalties because I believe the application of formal discipline should be progressive and as consistent as possible, I also understand that absolute consistency is not always possible or desirable. There may be instances in which a fourth relatively serious non-major offense occurs shortly following the expiration of the four-year period which commenced with the commission of a first offense. In such a case, the involved manager conclude that dismissal rather than second 10-day suspension is warranted. Alternatively, there may be instances in which a fourth less serious non-major offense occurs shortly before the expiration of the four-year period which commenced with the commission of a first offense in that case, the involved manager may conclude that a 10-day suspension

> rather than dismissal is warranted and leave such adjustments to the discretion of the respective managers recognizing that they can better assess the particular circumstances involved and the character of the employee in question.

Thus, the LeVan Guidelines attempt to focus upon a positive approach to employee behavior which provides for progressively more formal and strigent measures when the counseling fails to correct behavior. Additionally, as an objective of the guidelines, employees now have a clearer understanding of the degree of discipline that would be assessed and the progressive nature of this discipline should they commit non-major offenses. This supports the Carrier's claim and shows its intent to apply the guidelines in a constructive fashion.

The Organization is primarily concerned that the LeVan Guidelines conflict with Rules 6-A-4 or 6-A-5, particularly because of the sequence of the penalties. The Organization claims that the guidelines establishes a sequence of discipline under which an employee would be separated after four minor offenses. Clearly, this is a valid point. However, it must be judged in the context of the Carrier's basic right to assess discipline and the question of whether the table of penalties, i.e., the "four step sequence," change Rule 6.

Rule 6 does not specify the length of any suspension assessed under the Rule. Therefore, given the Carrier's right to assess and determine the amount of discipline, we find no conflict with Rule 6 because the LeVan Guidelines specify a progression and degree of discipline for each offense. This is merely an extension of the Carrier's role in these matters.

With respect to the deferrment question, Rule 6-A-4 would still apply, when applicable to the circumstances. Whether a suspension is for five or ten days, it still would be deferred when the conditions of Rule 6-A-4 are present. If an offense occurs within six months after a deferred suspension, the employee would serve both the five and ten day suspensions.

Nonetheless, it is likely, as actual discipline cases arise, that honest differences of opinion, particularly concerning the element of deferred suspensions, will occur. For example, under the worst case senario, an employee who commits a fourth non-major offense within a

four year period would be subject to dismissal under the LeVan Guidelines There is a legitimate concern that discipline guidelines, such as here, may be applied by rote. One might speculate that this could happen. However, the LeVan Guidelines themselves suggest that there may be situations when the strict application of the guidelines would not be appropriate. For example, the guidelines state that "any punitive action taken must be commensurate with the offense and the employee's discipline record, and must not violate any provision of an applicable collective bargaining Agreement." In addition, there are a number of established safeguards because each formal discipline assessed under the LeVan Guidelines must be preceeded by an investigation and hearing pursuant to Rule 6, unless waived by the parties. Moreover, if desired, the Organization may continue an appeal of adverse discipline through the normal channels as provided by the Agreement.

AWARD

The LeVan Guidelines, as identified in the body of this Award, do not conflict with the parties' Collective Bargaining Agreement. The claim of the Organization is, therefore, denied.

W. F. Mitchell	Eckehard Muessig	J. H. Burton
Union Member	Neutral Member	Carrier Member

Dated: June 5, 1995