PUBLIC LAW BOARD NO. 1844

AWARD NO. 26
CASE NO. 31

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The five day suspension of Mr. W. E. Neville Jr. is excessive, without just and sufficient cause and based upon unproven charges.

(2) The hearing in this instance was not held in conformance with the Agreement.

(3) Mr. Neville's record be cleared and that he be compensated at his straight time rate of pay for all time lost.

OPINION OF BOARD:

At the time this claim arose, Claimant was an employee with nearly six years service in Carrier's Maintenance of Way Department. In December 1976 and January 1977 he was working as a track foreman on Winter Gang No. 1 at Altoona, Wisconsin. Under date of February 2, 1977 he was served with a notice to appear for an investigation on February 10, 1977 into charges reading in pertinent part as follows:

> Charges: (1) Your responsibility in failing to report for duty on January 24, 1977. (2) Your responsibility in falsifying work reports on December 28, 1976, January 7, 1977, and January 20, 1977.

The hearing was adjourned once and rescheduled for February 22, 1977. On the latter date Claimant asked for another adjournment when a witness he

had requested to appear failed to show up. That request was denied and the hearing proceeded. On the basis of evidence adduced at the hearing, Carrier concluded that: (1) Claimant had shown himself reporting for work at 7:30 A.M. on December 28, 1976 when he did not actually report until 10:30 A.M. that date; (2) on January 7, 1977 Claimant showed a trackman who worked in his gang as starting work at 7:30 A.M. although the employee did not report for work until 8:00 A.M.; (3) on January 20, 1977 Claimant reported plowing snow between MP-92 and MP-97 but inspection on January 21, 1977 showed that the track had not been plowed; and (4) on January 24, 1977 Claimant called the agent at Merrillan to report that he was sick, however he failed to contact the Roadmaster for permission to layoff and he did not report for work on that day. The record shows that Roadmaster Smits discussed all of these incidents with Claimant on January 25, 1977 and told him there would probably be no investigation.

Following the investigation Claimant was assessed five days actual suspension without pay. At the hearing on February 22, 1977 Claimant and his representative had entered little substantive evidence save an assertion that the track between MP-92 and MP-97 had been plowed. The main thrust of Claimant's defense at the hearing was that the hearing of February 10, 1977 had been untimely under Rule 19 - Discipline and, therefore, the whole procedure was defective. This theme was repeated in the Appeal filed on April 29, 1977 as follows:

> Vice Chairman F.M. Larson contested the time limit for the hearing which was to be held within ten (10) calendar days the information concerning the alleged offense has reached the Assistant Division Manager-Engineering. Until such proof is shown the hearing was not in accordance with the current Agreement, effective date August 1, 1974, therefore, improper to assess discipline.

By letter dated June 3, 1977 Carrier responded as follows:

> This subject of the ten days was brought up at the hearing and is part of the transcript when Mr. Larson brought up the apparent time lag of 8 days from the date that Roadmaster Smits discussed the incident with Mr. Neville and the date notices were mailed.
>
> What was not mentioned in the hearing was the fact that there were circumstances that caused this time lag in information from the Roadmaster to the Assistant Division Manager-Engineering.
>
> The discussion between the Roadmaster and Mr. Neville took place on Tuesday, January 25, 1977. Mr. Smits, Roadmaster at Altoona, had a major derailment at Fall Creek, Wisconsin occur on January 23, 1977, which in combination with Mr. Nadeau, ADM-E at St. Paul, being off the division attending a seminar at the University of Iowa at Iowa City, Iowa until Thursday, January 27, 1977, it was not possible for a conclusion to be reached on the matter until the following week and notices for the hearing were sent out on Wednesday, February 2, 1977, directing Mr. Neville to appear at Altoona, Wisconsin on February 10, 1977 for the investigation. This was later postponed to February 22, 1977.
>
> Based on the fact that Mr. Nadeau was not aware of the matter until Monday, January 31, 1977 at the earliest and the original scheduled date for the hearing was on February 10, 1977, which was in the 10 day time limitation, I must deny the claim as presented.

As we read this record there is no substantive issue for us to decide. The only point presented for our consideration is whether Carrier complied in this case with that portion of Rule 19 which reads as follows:

> ... 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-Engineer....

In this connection, the organization sites, among others, Third Division Award 8714. We concur with the general conclusion of that Award that Carriers must comply with requirements expressly made essential to the imposition of discipline by agreement provisions. We also note with approval the observation in that Award that procedural requirements cut both ways and must be

enforced consistently. But such conclusions have no application unless the record contains persuasive evidence that a violation of mandated procedural requirements has been committed. Under the controlling language at issue herein, the hearing must be held within ten calendar days of the alleged offense or within ten calendar days of the date when the ADME learns of the alleged offense. The obvious intent of that language is to require expeditious investigation so that evidence will be fresh and memories vivid; and so that an accused employee will not be kept in limbo. Failure to abide by those express requirements could invalidate an otherwise proper imposition of discipline.

A word about burdens of proof under such language is appropriate at this point. A party alleging a procedural defect (in this case the Organization) carries the initial burden to show a prima facia 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 facia showing the burden shifts to the Carrier to show extenuating circumstances, if any. 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.

Applying the foregoing principles to the instant case, we find that the hearing originally was scheduled to be held 18 days from the occurrence of the last cited offense (January 24, 1977), and 43 calendar days after the first cited offense (December 28, 1976). A prima facia case for violation of the ten day rule having been made the burden shifts to the Carrier. In our judgement, Carrier has explained adequately the 8 day time lag in communication between the ADME and the Roadmaster who reported the event of January 24, 1977. But there is no similar justifiable explanation why the Roadmaster delayed reporting the incidents of December 28, 1976 and January 7 and 20, 1977. Indeed, the record shows that the Roadmaster knew about these events as they occurred but had already reached a decision not to press for disciplinary investigation. However, when the incident of January 24, 1977 occurred he reported all four incidents to the ADME and a "catch-all" investigation was held. That is precisely the kind of lying-in-wait and lumping together of old offenses that the ten day rule patently is designed to prevent.

On the basis of the foregoing we find that the investigation of the charges of falsifying work reports on December 28, 1976 and January 7 and 20, 1977 was in violation of Rule 19 and cannot be used as a basis for discipline. The investigation of the charge of failure to report for work on January 24, 1977 was held in accordance with Rule 19. The evidence at the investigation does show that Claimant improperly failed to notify the Roadmaster of his absence on January 24, 1977. Since the finding of culpability is limited to that offense alone, and in light of Claimant's otherwise unblemished personnel record, the penalty must be reduced to a letter of reprimand for failure to obtain proper authorization to be absent on January 24, 1977. Carrier shall clear Claimant's personnel record of the five-day actual suspension and compensate Claimant at the straight time hourly rate for all time lost.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was violated.

AWARD

Claim sustained to the extent indicated in the Opinion. Carrier is directed to comply with this Award within 30 days of issuance.

Dana E. Eischen, Chairman

H. G. Harper, Employee Member

R. W. Schmiege, Carrier Member

Dated: Dec. 6, 1978