

PUBLIC LAW BOARD NO. 1844

AWARD NO. 28

CASE NO. 35

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:

The fifteen days deferred suspension of Track Foreman W.L. Krause was improper because:

- (1) The notice of charge was not sufficiently precise to allow him to prepare a defense.
- (2) The hearing held relative thereto was untimely.
- (3) The claimant was not proven guilty of any alleged offense.
- (4) The claimant's record should be cleared of the charges placed against him and cleared of the discipline assessed.

OPINION OF BOARD:

In February 1977 Claimant was working as Section Foreman near Barr, Illinois. During the February 8-11, 1977 a General Track Inspector (GTI) was in the vicinity making track inspections. On February 9, 1977 the GTI found loose bolts in a railroad crossing with the CIM near Barr, a loose switch plate and spikes in the north switch, and a gap in that switch when thrown. He discussed each of these defects with Claimant, whose gang was responsible for maintenance of the track in question. Under date of February 14, 1977 the GTI wrote a report of his overall findings of Hy-Rail inspection trip on the Southern Illinois. That report was sent to Carrier's Assistant Vice President and Chief Engineer, and received by him on February 16, 1977. On February 28, 1977 Claimant was hand delivered a notice to attend

a formal investigation that day on charges reading as follows:

Failure to perform your duties on February 9, 1977
in the vicinity of Barr, Illinois.

The hearing was postponed and held on March 4, 1977, following which Claimant received a Discipline Notice applying fifteen days deferred suspension.

That discipline is appealed to us on several procedural grounds as well as on the merits. The formal procedural objection of the Organization is that the hearing was not held in accordance with the time requirements of Rule 19 - Discipline. Upon careful consideration of the record we are convinced that the Organization is correct in this case. In our Award No. 26 (Case No. 31), we discussed fully the administration of the ten-day rule for hearings in Rule 19 and the applicable burden of proof in cases where a violation is alleged. Applying those principles to this case we find that the hearing was scheduled originally on February 28, 1977, some 18 days after the alleged offense on February 9, 1977. In the face of this prima facie untimeliness, Carrier avers that the ADME did not learn of the offense until February 21, 1977. Throughout handling on the property Carrier failed to provide any evidence whatsoever to support that assertion, notwithstanding repeated requests from the Organization to do so. Carrier referred to documentary evidence it insisted would support its position, but did not produce it on the property. Finally, at the Board Hearing, Carrier presented for the first time a copy of a summary of the GTI report dated February 14, 1977. Carrier asserts that this is the source of the ADME's knowledge of the February 9, 1977 alleged offense, and that it was not received by the ADME until February 21, 1977. Even assuming arguendo that the document in question was not presented de novo at the Board Hearing, close examination shows that it does not establish the facts urged by Carrier. On its face

the document appears to be time stamped into the Engineering Department on February 16, 1977. Carrier asserts that the report was forwarded to the ADME who received it on February 21, 1977. But there is not one iota of evidence to support that conclusion. Again, assuming *arguendo* that rerouting of the report adequately explains an 11-day lag between the date of the offense and the ADME's first knowledge; there is nothing to show that the ADME in fact did receive that report on February 21, 1977 and not before. For example, there is no testimony from the ADME or anyone on his staff to that effect, and there is no time stamp showing receipt by his office. As far as the record before us shows he could as well have received it on any date between the time it was written and February 21, 1977. Under the particular language of Rule 19 Carrier has a heavy burden of showing compliance with the ten-day rule, especially when it defends against a prima facia showing of violation by asserting late knowledge by the ADME. Carrier in this case has failed to carry that burden of persuasion by probative evidence presented on the property.

We conclude that the claim must be sustained for failure to comply with the ten-day rule for hearings under Rule 19. Since we decide the case exclusively upon that procedural point, we neither reach nor intimate any conclusion regarding the merits of the charges against Claimant nor upon other procedural objections raised by the Organization.

Because of the untimeliness of the hearing the discipline must be set aside and Claimant's record cleared of the fifteen day deferred suspension imposed by Discipline Notice No. 6 dated March 11, 1977. Lest there be any doubt about the effect of our Award in this case, the fifteen day deferred suspension was void ab initio because of the untimeliness of the hearing. We note from the record in a companion case before this Board (Case No. 33)

that the invalid deferred suspension of May 11, 1977 subsequently was activated by Notice to Serve Deferred Suspension No. 3, dated May 18, 1977. Thus the "deferred suspension" was converted into an actual suspension as a result of Claimant incurring additional discipline based upon other incidents within one year of the date of the deferred suspension. Whatever the merits of the suspension for other alleged offenses with which we deal in Award No. 29, Case No. 33, the activation of the deferred suspension must be set aside. Accordingly, on the basis of this Award No. 28 (Case No. 35) Claimant is entitled not only to have his record cleared of the invalid fifteen day deferred suspension but also to reimbursement at the straight time rate for the fifteen days of actual suspension he served when the invalid deferred suspension was activated.

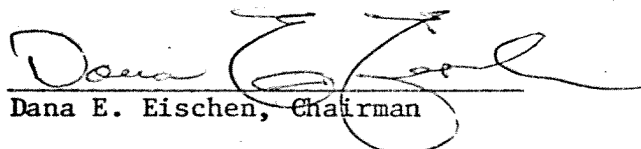
FINDINGS:

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 shall clear Claimant's record of the fifteen day deferred suspension and compensate him at the straight time for all time lost as a result of subsequent serving of the invalid fifteen day deferred suspension. Carrier is directed to comply with this Award within thirty (30) days of issuance.


Dana E. Eischen, Chairman


H. G. Harper, Employee Member


R. W. Schmiede, Carrier Member

Dated: 12/16/78