Case No. 9
Award No. 9

BEFORE

PUBLIC LAW BOARD NO. 3863

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM: Claim, alleging improper assessment of 10-day suspension against Norman Gomes, seeks reimbursement "for all wage loss suffered and his record cleared of the charge against him."

THE FACTS: On October 19, 1982, the claimant suffered an injury while lifting a desk which he and a fellow carpenter were directed to move from one floor to another of a Carrier Maintenance of Way facility.

On October 26, the claimant was notified to attend a trial on the following charge:

> "Alleged violation of Safety Rule 4256 of Amtrak Safety Rules and Instructions and your responsibility, if any, in connection with the alleged personal injury sustained by you on October 19, 1982 at approximately 11:30 AM at MP 185.1, Providence Station."

Safety Rule 4256 consists of a listing of ten separate stipulations as to what to do "When lifting material or other object alone or with others." (Items (a) - (j))

Following the trial, the claimant was assessed discipline of a ten-day suspension for the offense as stated in the charge. The Notice of Discipline was dated November 23. It was received on November 24. By notice dated December 7, 1982, received by the Carrier on December 9, the claimant appealed initially to the Assistant Chief Engineer. The appeal was denied at that step and at the next higher level.

The Brotherhood challenges the discipline on two grounds: First, the trial was held in violation of Rule 71, because the claimant was

not informed in advance, or at the trial, of "the exact charge" on which he was to be tried. The Brotherhood notes the failure of both the charge and the Hearing Officer to specify which of the ten specifications listed in Safety Rule 4256 was allegedly violated. As a second ground, the Brotherhood asserts lack of substantial evidence to support the charge.

The Carrier urges dismissal of the claim for the jurisdictional reason of time bar under Rule 74 (a), which reads:

> "An employe who considers that an injustice has been done him in discipline matters and who has appealed his case in writing to the Chief Engineer within fifteen (15) days, shall be given a hearing."

Holding that the 15-day period runs from the date the Notice of Discipline is sent, the Carrier finds that the appeal was received one day late.

The Carrier also defends the adequacy of the charge, the sufficiency of the proof, and the validity of the measure of discipline imposed.

FINDINGS: The Arbitrator finds on the whole record and all the evidence that the carrier and each employee involved in this dispute are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over this dispute.

We discuss first the timeliness of the initial appeal. Since Rule 74 (a) does not specify the particular event that triggers the start of the 15-day period, we must determine the parties' intention in this respect by other accepted standards. We look then to the other language of the rule as a guide to what must reasonably and sensibly be considered the point from which the 15-day period starts to run. Accordingly, we hold that point to be when the employee receives the Notice of Discipline. That is when he first becomes aware of the action against him, which is when he can first consider "that an injustice has been done him." We see no reasonable support for the Carrier's interpretation.

We hold that the appeal was timely and that this claim is not barred from this Board's consideration. We add that the Carrier in any event may be said to have waived that issue by failing to raise it on the initial appeal level.

We next consider whether the claimant was given advance notice of "the exact charge" on which he was to be tried, as required by Rule 71. We must conclude that the notice he was given did not meet that requirement. By using the key word "exact," the parties emphasized that the charge must be clear and specific, so that the employee can understand the precise nature of the accusation against him and prepare an intelligent defense.

There is serious doubt as to the claimant's ability to understand precisely which of the ten different stipulations of Safety Rule 4256 he was being accused of violating in connection with the lifting he performed. Rule 71 protects against such uncertainty; it eliminates the need to speculate. Denial of that protection is sufficient reason to invalidate the discipline.

We note further that the error was compounded at the trial by the Hearing Officer's total disregard of Rule 71 and his insistence on restricting the testimony to the general charge of violation of the Safety Rule "as a whole."

We conclude that the charge was invalid, and that this essential defect invalidated the entire disciplinary proceeding. Thus the discipline was improperly imposed. The claim must be sustained.

AWARD: The claim is sustained.

Dissenting

Neutral Member and Chairman

Carrier Member

Brotherhood Member

(Written Dissent Attached)

November 29, 1985

PUBLIC LAW BOARD 3863

AWARD NO. 9

CARRIER DISSENT

The majority has exceeded the authority granted in Paragraph 3 of the Agreement establishing this Board by stating that Rule 74(a) intended that the 15-day period for appeal in a disciplinary matter starts to run when the employee receives the Notice of Discipline while at the same time acknowledging that "Rule 74(a) does not specify the particular event that triggers the start of the 15-day period" and dismissing the Carrier's interpretation of Rule 74(a) which it has consistently applied on this property. The Carrier's interpretation finds ample support in the succeeding provisions of Rule 74. This decision should it be considered precedential has the effect of writing a new rule between the parties.

The principle that a Board lacks such authority is not only clear in Paragraph 3 of the enabling Agreement establishing this Board but is also well established through numerous long standing decisions of the National Railroad Adjustment Board. Quoting Referee Tipton, Third Division Award 1248, in pertinent part below:

> "This 'Board must construe and apply agreements as the parties make them, and it has no authority to change them even to avoid inequitable results from their application'. Award No. 794." (Emphasis supplied)

The Carrier dissents to Award No. 9 and does not consider it as precedential.

L. C. Hriczak
Carrier Member