

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 5244**

<b>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES</b>	)	
	)	Case No. 21
and	)	
	)	Award No. 4
<b>NORTHEAST ILLINOIS REGIONAL COMMUTER</b>	)	
<b>RAILROAD CORPORATION (A PUBLIC CORPORATION)</b>	)	

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Martin H. Malin, Chairman & Neutral Member  
M.J. Schappaugh, Organization Member  
J.S. Morse, Carrier Member

Hearing Date: August 26, 1992

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

Claimant L.R. Frank's discipline and transcript of hearing should be removed from his personnel record. Claimant Frank should also be compensated for thirty-five (35) days wage loss suffered and made whole for all rights affected by his unjust discipline.

**FINDINGS:**

Public Law Board No. 5244, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On November 7, 1991, Claimant was notified of a formal hearing to develop the facts relating to an incident which

occurred on November 5. The notice charged Claimant with violating General Rules A, B, and I, and Basic Safety Rules B20, B24, E170, and Metra Electric Special Instruction Rule 10F for

allegedly entering the track area just south of Van Buren St. station without receiving proper authority and without taking proper safeguards . . . [which] caused the vehicle you were using to foul track #2 blocking train #117 and causing it to back up until the area was cleared.

The hearing was originally scheduled for November, 14, 1991, but was postponed to and held on November 19, 1991. On December 6, 1991, Claimant was advised that he was found to have violated Rule A, B, I, B20, B24, E170 and 10F. Claimant was assessed a thirty-day actual suspension. In addition, Claimant was advised that a five-day deferred suspension assessed the same day as a result of a different incident would be served in conjunction with the thirty-day suspension.

On November 5, 1991, a truck driven by an employee other than the Claimant, assisted by two other employees, drove onto track number 1, which was out of service. The employees did not have proper authority to enter the track. Because of the truck's size, it also fouled track number 2.

Claimant was using his truck to move a welding machine. Claimant entered track number 1 behind the first truck. Claimant did not have proper authority to enter track number 1.

A train approached on track number 2. The employees with the first truck were unable to back up to get out of the way of the train because Claimant's truck was blocking them. As a result, the train was unable to pass. The incident did not cause any damage or injury.

The other three employees waived hearing and received thirty-day deferred suspensions. As of the date of the hearing, Claimant, who was hired on November 9, 1987, had no prior discipline. However, Claimant was involved in another incident on October 17, 1991, resulting in a charge of failing to properly protect company equipment. Hearing on that matter was postponed until November 20, 1991. On December 6, 1991, the charge was sustained and Claimant was issued a five-day deferred suspension. On the same day, the instant charges against Claimant were sustained and Claimant was issued a thirty-day actual suspension and ordered also to serve the five day suspension which had been deferred. Both decisions were made by the Department Head Engineering.

Claimant observes that he was not solely responsible for fouling track 2. Claimant contends that he should not have received more severe discipline than the three other employees who were also charged in the incident. Claimant argues that Carrier improperly relied on his five day deferred suspension to justify imposing a more severe penalty in the instant matter. Claimant contends that the penalty in the instant matter must be based on his record as it was entered into evidence at the investigation, i.e., a record which showed no prior discipline. In Claimant's view he is the victim of improper disparate treatment.

Carrier observes that Claimant admitted that he entered track 1 without proper authorization. In Carrier's view, this admission conclusively established that Claimant was guilty of the charges against him.

Carrier disputes Claimant's allegation of disparate treatment. Carrier observes that the other employees had no prior discipline, whereas Claimant had received a five day deferred suspension. Carrier contends that Claimant's deferred suspension justified the discipline imposed in the instant case, particularly because, in Carrier's view, it is not possible to give two deferred suspensions in a row.

Carrier argues that it did not violate Claimant's due process rights even though Claimant's personnel record, as introduced at the hearing, showed no prior discipline. Carrier contends that the peculiar timing of the proceedings leading up to the five day deferred suspension made it impossible to have produced that aspect of Claimant's record at the hearing. According to Carrier, Claimant's discipline was progressive and, therefore, was proper.

The Board finds that the record established that Claimant was guilty of the charges. All of the evidence in the record, including Claimant's own testimony, showed that Claimant entered track 1 without authorization. Although other employees acted similarly, Claimant cannot, and does not, rely on their actions to excuse his own misconduct. The only issue raised by this claim in the quantum of discipline imposed.

Carrier relies on Claimant's prior five day deferred suspension to justify the discipline imposed. Claimant contends that this was improper because his personnel record, as introduced during the investigation, showed no prior discipline. Based on the peculiar, perhaps unique, facts of this case, we agree with Claimant's position.

Claimant's personnel record as introduced in the investigation of the charges at issue in this proceeding showed no prior discipline. Of course, it would have been impossible for the five day deferred suspension to have

appeared on his record at that time because the investigation of the incident which led to that discipline did not occur until the following day.

The decisions on both investigations were made the same day by the same Carrier official, the Department Head Engineering. It would appear that he reviewed the November 20 investigation first and imposed a five day deferred suspension. Subsequently, on the same day, he reviewed the November 19 investigation and relied on his prior decision to impose a thirty day actual suspension along with the five days which he had just previously deferred.

The discipline in the instant case was progressive only in an extremely mechanical sense. Progressive discipline, however, is designed to serve a corrective purpose. Disciplinary action emphasizes to an employee the seriousness of his misconduct or performance deficiencies and warns him that if he does not correct his behavior, he will be subject to more severe sanctions. The use of a deferred suspension further serves a corrective purpose by warning the employee that any rule violations during the year following the suspension will not only subject him to further sanction but will also result in his having to serve the deferred suspension.

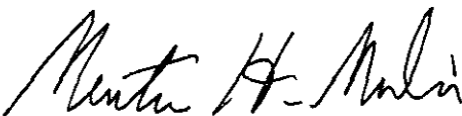
When a deferred suspension issued earlier in the day is used to justify an actual suspension issued on the same day, the employee is denied any of the corrective benefits of the deferred suspension. The suspension deferral is illusory because it will be converted to an actual suspension immediately following the second disciplinary action of the day. Moreover, the actual suspension imposed in the second disciplinary action cannot be justified on the ground that the employee's misconduct occurred despite his having previously been warned by a lesser disciplinary action to cease violating the rules. Under these circumstances, we conclude that the thirty day actual suspension was excessive and order that it be reduced to a thirty day deferred suspension and that Claimant be compensated for his lost time.

#### **AWARD**

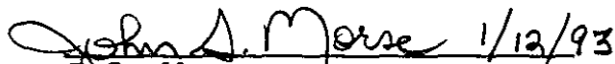
Claim sustained in accordance with the findings.

## ORDER

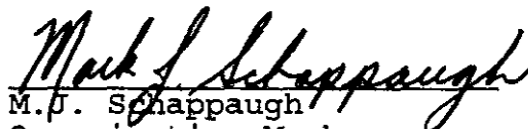
Carrier is ordered to comply with this award within thirty (30) calendar days of the date two or more members affix their signatures thereto.



Martin H. Malin, Chairman



J.S. Morse  
Carrier Member



M.J. Schappaugh  
Organization Member

Dated at Chicago, Illinois, December 21, 1992.