NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 24
and	)
	) Award No. 23
UNION PACIFIC RAILROAD COMPANY	)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: March 2, 2001

STATEMENT OF CLAIM:

1. The discipline (withheld from service and subsequent Level 5 dismissal) imposed upon Mr. D. R. Paxton for alleged violation of Union Pacific Rule 1.6 while working as track patrol foreman on May 16, 1999, in connection with reporting an incident regarding Company Vehicle No. 191560334 near Edgar, Nebraska, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File W-9948-162/1209029).

2. As a consequence of the violation referred to in Part (1) above, Mr. D. R. Paxton shall now have the discipline removed from his personal record, be immediately returned to service and appropriately compensated for the full time he has been unjustly withheld from service beginning May 22, 1999 and continuing.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all 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 May 22, 1999, Carrier notified Claimant to appear for an investigation on June 10, 1999, concerning his alleged dishonesty in reporting an incident involving a company vehicle on

May 16, 1999, near Edgar, Nebraska. Claimant was withheld from service pending the investigation. The hearing was postponed to and held on June 29, 1999. On July 20, 1999, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The Organization contends that Carrier failed to comply with Rule 48(e) because it failed to render the decision within twenty calendar days following conclusion of the hearing. The Organization further contends that Carrier failed to prove the offense charged and that dismissal was an excessive penalty. Carrier concedes that it rendered the decision twenty-one days after the conclusion of the hearing, but maintains that the delay was de minimis and should not be grounds for overturning the discipline. Carrier further argues that it proved the charge by substantial evidence and that the penalty was not arbitrary, capricious or excessive, considering the seriousness of the offense.

We find that the timeliness issue is dispositive of the claim. Rule 48(e) requires that the decision be rendered within twenty days following conclusion of the hearing. The parties agree that Carrier violated this rule by rendering the decision twenty-one days following conclusion of the hearing. They disagree over the consequences of the violation, with the Organization contending that Carrier's failure to act in a timely manner invalidated the discipline and Carrier contending that, because the Agreement does not specify the consequences of a late decision, the discipline should only be overturned if the Organization can establish prejudice resulting from the delay. Both parties cite prior awards in support of their positions.

Two of the awards cited by Carrier are not on point. In Public Law Board 1900, Case No. 11, Award No. 11, the agreement provided:

> In case an employe be taken out of service for alleged cause he will be given a hearing, and shall be permitted to have an O.R.C. or B of RT Committeeman present at examination of all witnesses testifying, and a decision shall be rendered in writing in his case within five days from the time he was taken out of service.

The Board in that case reasoned that the parties did not intend to cut off Carrier's ability to discipline an employee five days after the employee was withheld from service, as long as Carrier acted promptly in holding the hearing and rendering the decision, and no prejudice to the employee was shown. The Board reasoned:

> It is obvious that some investigations take more than five days. This is not to mention the fact that it may take a few days to interview witnesses, get the proceedings together, notify the parties and witnesses to attend; get the Claimants to arrange representation. There is the possibility of sickness or injury to necessary parties; the time to write the transcript. These items would be obvious to the makers of the rule. Absence of a provision in the rule specifying a penalty that would be imposed on Carrier on midnight of day five impels the Board to the conclusion that total loss of jusridiction to discipline was not the intent. This was not just an oversight.

Rule 48(e) is very different from the rule before Public Law Board 1900. Rule 48(e) does not set a deadline that will often prove to be impossible to meet. It requires that the discipline be rendered within twenty days following the conclusion of the hearing. This is a reasonable time frame for rendering the decision. The reasoning of Public Law Board 1900 that the parties could not have intended a loss of ability to discipline upon passage of the specified time period simply has no application to Rule 48(e).

Public Law Board 4266, Award No. 30, involved a rule that required that the decision be rendered within ten days following the hearing. It was undisputed that the decision was dated and postage metered nine days after the hearing, but the letter was machine canceled by the Postal Service eleven days after the hearing and received by the Claimant twelve days after the hearing. It appeared that the Postal Service had not picked up outgoing mail on the day the decision was written and metered or on the following day. The Board held that the decision was rendered within the agreement's time frame and that Carrier could not be held responsible for the Postal Service's failure to perform its job properly.

In the instant case, there is no dispute that Carrier did not issue the decision or dispatch it for delivery to Claimant until twenty-one days following the hearing. Neither the Postal Service nor any other delivery service was responsible for the delay. Public Law Board 4266, Award No. 30, simply is not applicable to the situation presented by this case.

The third award cited by Carrier, Third Division Award No. 33955, however, is not distinguishable. The agreement in that case provided, "Decision will be rendered and the employee notified in writing, sent to last available address, within ten days of completion of the hearing . . ." The award indicates that the decision was not rendered until sixteen days after completion of the hearing. The Board held that, in the absence of express language providing the consequences of an untimely discipline decision, the Board would balance the equities in deciding whether to disturb the discipline. The Board noted that the Carrier justified the delay by the presence of difficult pharmacological issues. The Board further observed that there was no prejudice to the Claimant and that the charge, testing positive for a controlled substance following an auto accident, was serious. The Board denied the claim.

On the other hand, the Organization has cited several awards, including Third Division Awards Nos. 10035, 24623, and 32759. Each of these awards held that Carrier's failure to render a timely decision on discipline had the effect of exonerating the Claimant. In each of these cases, the agreement language did not expressly provide that failure to render a timely decision was fatal to the discipline.

We believe that the awards cited by the Organization provide the better view. With all due respect to the referee in Third Division Award No. 33955, the award in that case has the effect of ignoring clear plain Agreement language. It also ignores the well-established practice in the industry of strictly enforcing Agreement timelines. For example, when a claim is filed late or is not progressed in a timely manner it is generally dismissed. Agreements such as Rule 48(e) are designed to ensure that decisions are rendered promptly so that the charged employee is not

left in limbo wondering what his fate will be. This is particularly important where the charged employee has been withheld from service. Indeed, for an employee such as the Claimant before us, who has been withheld from service and is not being paid, each day beyond the time limit set by the Agreement for rendering a decision is inherently prejudicial.

Even if we were to follow the balancing of equities approach of Third Division Award No. 33955, we would still sustain the claim. Unlike Third Division Award No. 33955, Carrier in the instant case provided absolutely no explanation for the late decision. Moreover, Claimant's prejudice was particularly aggravated. The record reflects that, on May 16, 1999, Claimant took a Carrier vehicle without permission when he received a phone call advising him of a family emergency. Claimant drove to his home, dealt with the emergency and then drove back. While en route back to his job location, Claimant ran the vehicle off the road and into a ditch. Because it was late at night, Claimant left the vehicle in the ditch, intending to return the next morning with assistance to pull the vehicle out. However, the local sheriff impounded the vehicle and had it towed to a storage area before Claimant could retrieve it.

The next morning Claimant reported the incident to Carrier. Claimant and a Carrier supervisor retrieved the vehicle and had a flat tire, the only damage to the vehicle, repaired. Carrier offered an UPGRADE Level 2 discipline if Claimant would waive a hearing to a charge of misuse of company property. Claimant accepted the offer and signed the waiver. However, Carrier did not process the waiver and Level 2 discipline. Instead, five days later, it noticed Claimant for an investigation on a charge of dishonesty in reporting the incident. Specifically, Carrier contended that Claimant failed to report his consumption of several beers prior to the accident. Carrier withheld Claimant from service, conducted the hearing and failed to render the decision in a timely manner.

Claimant's conduct was not exemplary and should not be viewed as acceptable by his fellow workers. However, we face a situation where Claimant agreed to waive investigation, admitted to misuse of company property and accepted a Level 2 discipline. Carrier then reneged on the agreement, withheld Claimant from service and noticed him for investigation on a charge of dishonesty. At the hearing, Claimant admitted taking the vehicle without proper authorization but denied that he was dishonest when he reported the accident. Carrier issued a decision dismissing Claimant that was outside the Agreement's time limits and offered absolutely no explanation for the delay. Were we to balance the equities, the balance would clearly be weighted in favor of Claimant.

AWARD

Claim sustained.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member
CARRIER DISSENTS

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, August 24, 2001.

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Interpretation No. 1

This Board sustained the Organization's claim that Claimant's dismissal violated the Agreement. Carrier requested that Claimant provide records of any outside earnings that he had during the period he was dismissed. The Organization contended that Carrier may not offset outside earnings against lost wages. The parties have returned to the Board for an interpretation of the award.

This matter presents two issues. First, the Organization contends that Carrier may not raise the issue of offsets for outside earnings because it failed to raise the issue during handling of the initial claim on the property. Carrier responds that it may properly raise the issue in a request for interpretation of the award. Second, the parties disagree over whether the Agreement allows for such an offset.

A review of the cited awards shows that there is no consensus among referees concerning whether a Carrier must raise the outside earnings issue during handling of the initial claim in order to preserve it for consideration in the event of a sustaining award. This is certainly an issue over which reasonable minds can differ and over which reasonable referees do differ. We need not join the abstract debate, however, to resolve the dispute presented.

The claim that we sustained provided:

1. The discipline (withheld from service and subsequent Level 5 dismissal) imposed upon Mr. D. R. Paxton for alleged violation of Union Pacific Rule 1.6 while working as track patrol foreman on May 16, 1999, in connection with reporting an incident regarding Company Vehicle No. 191560334 near Edgar, Nebraska, was without just and sufficient cause, on the basis of unproven charges and in

violation of the Agreement (System File W-9948-162/1209029).

2. As a consequence of the violation referred to in Part (1) above, Mr. D. R. Paxton shall now have the discipline removed from his personal record, be immediately returned to service and appropriately compensated for the full time he has been unjustly withheld from service beginning May 22, 1999 and continuing.

The claim thus demanded that Claimant be "appropriately compensated" for lost wages. "Appropriate" compensation would be compensation as provided for under the Agreement. Carrier's position, of course, is that "appropriate" compensation includes an offset for outside earnings. There was no reason for Carrier to raise the issue of offset for outside earnings at the time the claim was handled on the property and adjudicated before this Board. Certainly, Carrier could reasonably regard the claim as seeking compensation in accordance with the Agreement.

The claim we sustained is in marked contrast, for example, with the claim sustained in Third Division Award No. 21372, one of the awards on which the Organization relies. The claim in that case demanded:

> Trackmen J. R. Johnson and C. T. Lawson shall each be allowed eight (8) hours' pay for each regular workday and each holiday beginning May 20, 1974 and continuing until they are reinstated to service with seniority, pass and vacation rights unimpaired.

In Interpretation No. 1 to Award 21372, the board held that the carrier was barred from raising post-award an offset for the claimants' outside earnings because the carrier failed to raise it during handling of the initial claim on the property. Regardless of whether we would follow Interpretation No. 1 to Award No. 21372 and similar authority in the abstract, we note that the claim before the board in that case was very specific as to how the remedy was to be calculated, i.e. "eight (8) hours' pay for each regular workday and each holiday beginning May 20, 1974 and continuing until they are reinstated to service. . ." The claim in the instant case merely asked that Claimant be "appropriately compensated." Clearly, what is meant by "appropriately compensated" is a matter that Carrier may raise in a post-award request for interpretation.

In offsetting outside earnings, Carrier relies on Rule 48(h) which provides:

> If the charge(s) against the employee is not sustained the record of the employee will be cleared and if suspended or dismissed, the employee will be returned to former position and compensated for net wage loss, if any, which may have been incurred by the employee.

Carrier relies on Interpretation No. 1 to Third Division Award No. 31140 which held that Rule 48(h)'s provision for compensation for "net wage loss" authorizes an offset for outside earnings. The Organization agrees that this was the holding of Interpretation No. 1 to Third Division Award No. 31140, but urges this Board not to follow it. The Organization argues:

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A review of Interpretation No. 1 to NRAB Third Division Award 31140 reveals a classic "split the baby" decision where, once the Catter complained (written dissent), the neutral looked for a way to reduce the Carrier's liability and did so by combining the four (4) separate issues presented by the Organization into two (2). It is the Organization's position that the interpretation does not stand as precedent.

We are not persuaded by the Organization's gratuitous attack on the integrity of the referee in Third Division Award No. 31140. Essentially, the Organization maintains that because the carrier members of the board dissented and the referee agreed with the Carrier's position in the request for interpretation, the referee must have been trying to curry favor with Carrier by "splitting the baby." Under this view, a referee could never agree with a carrier's position in a request for interpretation following a sustaining award from which a carrier board member dissented without having the referee's decision characterized as splitting the baby and not standing as precedent. The Organization's position is untenable.

We find Interpretation No. 1 to Third Division Award No. 31140 to be a reasonable interpretation of Rule 48(h). We further find it controlling in the instant case and, accordingly, we will follow it.

Accordingly, we find that the issue of offset for outside earnings is properly before us. We further find that Carrier may offset outside earnings.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, March 20, 2002.

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Interpretation No. 2

This Board sustained the Organization's claim that Claimant's dismissal violated the Agreement. In Interpretation No. 1, we held that Carrier may offset outside earnings against back pay. The parties have returned to the Board for a second interpretation. Specifically, they disagree over whether back pay includes overtime that the Claimant might have worked had he not been dismissed.

The Organization contends that Carrier may not raise the issue of overtime at this stage of the proceedings because it failed to raise the issue during handling of the initial claim on the property. The Organization made the same argument concerning offsets for outside earnings. We rejected that argument in Interpretation No. 1 and see no reason to depart from our holding in Interpretation No. 1 that Carrier may raise issues concerning calculation of the amount of compensation due by seeking an interpretation to the award.

Carrier relies on Interpretation No. 1 to Third Division Award No. 31140 which held that compensation was to be computed based on straight time hours that would have been worked had Claimant not been dismissed. As it did with respect to offset for outside earnings in Interpretation No. 1, the Organization urges us not to follow Award No. 31140. In Interpretation No. 1 we held that on property Award No. 31140 was a reasonable interpretation of Agreement Rule 48(h) and followed it. We see to reason to depart from our holding or reasoning in Interpretation No. 1. Accordingly, we will follow Interpretation No. 1 to Award No. 31140 and hold that the award of compensation for time held out of service does not include overtime that Claimant might have worked had he not been dismissed.

Martin H. Malin, Chairman

D. A. Ring,
Carrier Member

D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, June 28, 2002.