BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY

Case No. 167 Award 149

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. The dismissal of Foreman D. R. Menter for alleged violation of Rule G was without just and sufficient cause, unsupported and capricious (Organization File 4LF-2308D; Carrier File 81-89-119).

2. The Carrier violated the Agreement when it did not timely notify the General Chairman of the discipline imposed and provide a copy of the investigation transcript as required.

3. As a result of either 1 or 2, D. R. Menter shall be allowed the remedy prescribed in Rule 19 of the June 1, 1985, Agreement.

FINDINGS:

Claimant D. R. Menter was employed by the Carrier as a foreman at Arlington, Nebraska.

On April 24, 1989, the Carrier notified the Claimant to appear for a formal investigation in connection with the following charge:

> Your violation of Rule G when you had illegal drugs in your system while on duty on April 17, 1989.

After two postponements, the hearing took place on May 30, 1989. On June 2, 1989, the Carrier notified the Claimant that he was being dismissed from service effective that date, having been

found guilty of violating Rule G. On July 24, 1989, the Organization filed a claim on the Claimant's behalf stating that the Claimant was involved in the incident as a passenger and did not contribute to the cause of the accident. The Organization also cited the Carrier's gross procedural errors, including violation of Rule 19, violation of Iowa law, and that the dismissal of the Claimant was prejudicial, unsupported, without merit, and capricious. The Carrier thereafter denied the claim stating that the Organization's late receipt of the transcript and discipline notice was an error on the Carrier's part which was corrected; that the Claimant had illegal drugs in his system on April 17, 1989; and the Claimant was charged according to Nebraska law, even though he was an Iowa resident and employee, because the incident occurred in Nebraska. The parties being unable to resolve the issues, this matter came before this Board.

This Board has reviewed the procedural objections raised by the Organization, and we find them to be without merit. First of all, the Organization charges that the Carrier did not timely notify the General Chairman of the discipline imposed and provide him with a copy of the investigation transcript. Rule 19 requires that when discipline is administered, a copy of the discipline notice and transcript will be furnished to the employee and the General Chairman within ten days of the hearing. The record reveals that the discipline was assessed on June 2, 1989, following the May 30, 1989, hearing. However, the General Chairman did not receive his copy of the notice and the

transcript until June 22, 1989. This Board finds that the Organization and the Claimant were not prejudiced by the delay; and although a technical violation occurred, there is no basis for this Board to sustain the claim based upon it.

The Organization also points out that the notice indicates that the Claimant was dismissed for having illegal drugs in his system while on duty on April 14, 1989, whereas the notice of hearing indicated that the incident took place on April 17, 1989. This Board finds that that was obviously a typographical error and is not a basis for sustaining the claim.

In addition, this Board finds that the incident in question took place in the state of Nebraska and, therefore, although the Claimant was a resident of the state of Iowa, the Iowa state law does not apply. The probable cause collision and the violation of Rule G took place in the state of Nebraska, and therefore that law would apply in this case.

With respect to the merits, this Board has reviewed the evidence and testimony in this case and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of a violation of Rule G. His urinalysis revealed the presence of cocaine in his system at the time that the accident took place. The Carrier certainly had probable cause to require the test since the Claimant was a foreman in the gang that was operating the machinery which was involved in the collision. The Claimant was not peripheral to the incident, but was a direct participant in it.

Consequently, this Board finds that the Carrier had

reasonable cause to test the Claimant and the test showed a clear violation of Rule G.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its action to have been unreasonable, arbitrary, or capricious.

This Board has held on numerous occasions in the past that a violation of Rule G is a sufficient basis to legitimate the termination of an employee. Given the record of this Claimant, this Board cannot find that the Carrier violated his rights when it terminated his employment as a result of the Rule G violation. Therefore, the claim will be denied.

AWARD:

Claim denied.

PETER R. MEYERS
Neutral Member

Carrier Member

Organization Member

Date: 7/25/91

924-149

LABOR MEMBER'S DISSENT
TO
SPECIAL BOARD OF ADJUSTMENT 924, AWARDS 149, 150 AND 151
(Referee Meyers)

The Majority erroneously ruled on the procedural argument raised by the Organization when it held:

> "With respect to the procedural issues raised by the Organization, this Board finds them to be without merit. Although the Carrier admits that it did not mail the transcript to the General Chairman within the time limits required, that error is not sufficient to sustain the claim. The Claimant's rights were not at all affected by that delay, as he still had a right to appeal his dismissal to this Board."

The requirements of Rule 19 are clear and unambiguous and in pertinent part reads:

> "(a) *** Decision will be rendered within ten (10) calendar days after completion of hearing. ***
>
> (b) When discipline is administered, copy of the discipline notice and the transcript will be furnished the employe and the General Chairman. Divisions will issue transcripts to the General Chairman at the time the discipline notices are issued to the employe, that is, within 10 days of the hearing."

Prior to the inclusion of the last sentence of Rule 19(b) into the Agreement, the parties entered into a letter of Agreement involving the issuance of the transcript to the General Chairman. This Board, with another Referee as Chairman, considered that letter of Agreement and held:

"Section (b) specifically stipulates that a copy of the discipline notice and transcript will be furnished the employe and the General Chairman. The record also contains a letter Agreement between the authorized representatives of the parties dated February 21, 1980, and which reads in pertinent part:

> 'You stated that you would advise me whether the cases could be disposed of on the basis that the divisions will issue transcripts to the General Chairman at the time the discipline notices are issued to the employe, that is, within ten days of the hearing, and it appears that the divisions will be able to comply with your request.'

The record is clear that the transcript of the investigation that was conducted on November 3, 1982, was not furnished to the General Chairman within ten days of the hearing, as required by by (sic) the Letter Agreement of February 21, 1980.

While we are always hesitant to dispose of claims or disputes on technicalities, where the language of an agreement is clear and unambiguous, we must apply it as written. We will sustain the claim for difference between trackman's rate and foreman's rate, where applicable, for the one-year period following reinstatement in May, 1983." (Award 20 of Special Board of Adjustment No. 924)

Rule 19 was considered by another Board and another Referee and held:

"The record persuasively establishes that the Notice of Discipline was typed on Thursday, April 12, 1979, within the ten day limit. But the decision was not mailed until Monday, April 16, 1979, apparently because of mail backlog in Carrier's office due to the Easter holidays. On those facts, the decision was 'rendered' for purposes of the ten day requirements of Rule 19(a) when it was placed in the mail by Carrier. See Awards 3-12001 and 3-13219. The postage meter date on the envelope in which Carrier mailed the decision is April 16, 1979. Clearly, this is more than ten days from the completion of the hearing on April 4, 1979. We have on other occasions held that the time limits of Rule 19 are meaningful provisions which must be strictly enforced. See PLB 1844, Awards 19, 28, 58, and 62. We shall sustain the claim due to Carrier's violation of Rule 19(a), without

"reaching the merits." (Award 79 of Public Law Board No. 1844)

A third Board has considered Rule 19 and held:

"*** The Carrier cannot justify delay in setting an investigation date when they have sufficient information and when the effect of the delay is to perfect their case against an employee. To do so would gut the rule of any meaning. The hearing officer at the hearing further justified the delay by stating it was necessary to have the Special Agent investigate Mr. Burns because of the 'seriousness' of the offense. Many offenses are serious and the parties were certainly aware of this when giving the Carrier up to 10 days to hold a hearing. Regardless of the seriousness of the offense, where the Carrier has 'sufficient information' to believe an offense is worthy of a disciplinary investigation they are obligated to act within the 10-day limit. It is further noted that a procedure for postponements once a hearing is scheduled is provided for in Rule 19.

The burden on the Carrier is a heavy burden. Further, we subscribe to the description of this burden by Referee Eischen in Award 26, supra, when he stated:

> '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.'

We must also consider Carrier's argument that the Claimant wasn't prejudiced in any way by the delay. This is similar to the 'de minimus' (sic) argument made in Award 62 of PLB 1844. It was stated:

> 'The case comes to us on a procedural/timeliness issue stemming from the requirement of Rule 19 Discipline which reads as follows: "Decision will be rendered within ten (10) calendar days after completion of hearing". There is no getting around the fact that in this case the decision was rendered one day late, i.e. on the eleventh calendar

"day after the hearing. Carrier urges that this error is de minimis and should not invalidate the disciplinary action, but rather, at most, should result in a reduction of the penalty by the one day dereliction. In support of this approach Carrier cites Award 3-21289. Analysis of that decision persuades us that the approach taken therein was limited to the peculiar facts of that case and is without precedent value to us. The weight of authority favors the position of the Organization that time limits are to be construed strictly and that they are two-edged swords which cut equally whether to work a forfeiture against an employee or to invalidate action taken by the employer. See Awards 1-16366; 3-743; 3-2222; 3-21675; 3-21873; 3-21996, et al. Because of the patent violation of Rule 19 we must sustain the claim but in so doing we neither express nor imply any finding regarding the merits or lack thereof in the substantive claim.'

In view of the fact the hearing was not held in compliance with the time limits of Rule 19, the claim must be sustained without regard to the merits." (Underscoring in original) (Award 3 of Public Law Board No. 2960)

When the Carrier admitted the time limit violation, the bottom line of the award should have read "Claim Sustained" period! These three awards are palpably erroneous and of no precedential value.

Respectfully submitted,

D. D. Bartholomay
Labor Member