BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

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

Case No. 168 Award 150

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

1. The dismissal of H. E. Smith for alleged violation of Rule G was without just and sufficient cause, on the basis of an unproven charge, and in violation of the Agreement (Organization File 4LF-2306D; Carrier File 81-89-118).

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, H. E. Smith shall be allowed the remedy prescribed in Rule 19 of the June 1, 1985, Agreement.

FINDINGS:

Claimant H. E. Smith was employed by the Carrier as a trackman.

On April 20, 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 14, 1989. This is . . . to notify you that you will be held out of service pending investigation.

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 for

violation of Rule G. On July 24, 1989, the Organization filed a claim on the Claimant's behalf challenging his dismissal on the grounds that the Carrier had made gross procedural errors in dismissing the Claimant, i.e., issuing the dismissal notice 23 calendar days after the hearing (violation of Rule 19); disciplining the Claimant for a rule violation on a date not on the original notice of hearing; and disciplining the Claimant in direct violation of Iowa Code. The Organization also claimed that the dismissal of the Claimant was without merit on the basis that the Carrier wrongfully tested the Claimant for drugs and failed to prove that the Claimant indeed was in violation of Rule G. The Carrier thereafter denied the claim stating the procedural errors were corrected, that Iowa Code did not apply to the Claimant as the incident occurred in Nebraska, and that the Carrier had every right to test the Claimant as he was injured at a Nebraska job site which, the Carrier asserts, may have been caused by the Claimant's use of drugs. The parties being unable to resolve the issues, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization and we find them to be without merit.

With respect to the late issuance of the dismissal notice, this Board finds that it was a violation of Rule 19, but that that violation was a technical violation and not sufficient enough to sustain this claim. The Claimant was not prejudiced by the procedural error of the Carrier.

With respect to the difference in the dates, this Board

finds that a typographical error caused the notice to indicate that the Claimant was dismissed for having illegal drugs in his system on April 17, 1989, when the original notice of the charge stated that he had illegal drugs in his system on April 14, 1989. Once again, that typographical error was de minimus and did not have any impact on the Claimant or his ability to process his claim. It is not sufficient to sustain the claim.

With respect to the failure of the Carrier to follow Iowa state law, this Board finds that the alleged Rule G violation and the accident took place while the Claimant was working in the state of Nebraska and, therefore, Iowa law would not apply.

With respect to the merits, this Board has reviewed the record 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 Rule G violation when the Carrier discovered traces of marijuana in his urine after he was tested subsequent to the accident in which he was involved.

The fact that the Claimant injured his finger while loading a plate lifter was sufficient reasonable cause for the Carrier to order him to take the urine test. The urine test demonstrated that the Claimant had a metabolite of marijuana in his system. Claimant also admitted that he had used marijuana the night before.

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

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find its action to have been unreasonable, arbitrary, or capricious.

This Board has found on numerous occasions in the past that a Rule G violation is sufficient cause to terminate an employee, even on the first offense. This Board can find no basis upon which to question the action of the Carrier in this case. Therefore, the claim must be denied.

AWARD:

Claim denied.

PETER R. MEYERS
Neutral Member

Carrier Member

Organization Member

Date: 7/25/91

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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