SPECIAL BOARD OF ADJUSTMENT NO. 986

Case No. 10
Docket No. NEC-BMWE-SD-1250D

PARTIES: Brotherhood of Maintenance of Way Employees
TO :
DISPUTE: Amtrak

FINDINGS:

On March 5, 1985, Claimant James Edwards was notified that an investigation would be held on March 26, 1985, into the charges that he had been excessively absent as a result of his absences from duty on February 7, 11, 25, and 27, 1985. After a hearing, the hearing officer found Claimant guilty of the charge of excessive absenteeism; and Claimant was assessed a ten-calendar-day suspension.

The Organization contends that the Carrier is precluded from bringing a charge of excessive absenteeism because the parties have entered into an Absenteeism Agreement dated October 26, 1976, limiting the Carrier's rights to discipline employees for absenteeism to specific, legitimate reasons. The Organization contends that the agreement cannot be superseded by the Carrier's arbitrary decision to charge the employees with the generic charge of excessive absenteeism.

The Organization also argues that the Carrier failed to bring the charges against the Claimant within 30 days, as specified in Rule 71, thereby denying Claimant a fair and impartial trial. The Organization further contends that the discipline imposed upon the Claimant was for a different offense than the one charged since the dates of absenteeism listed in the initial charges are different, with one exception, from the dates listed in the Notice of Discipline. The final procedural argument of the Organization is that the Carrier

violated Rule 74 when it forced Claimant to serve his suspension prior to a decision being reached on his appeal.

The Organization's substantive argument is that Claimant presented two exhibits from a hospital that documented that his absences were the result of bona fide illnesses beyond Claimant's control. Therefore, the Organization argues, Claimant should not be disciplined for those absences.

The Carrier argues that the Organization's procedural claims have no merit and that the Claimant was granted all of his due process rights. The Carrier further argues that the Absenteeism Agreement relates to unauthorized absences and not excessive absenteeism. With respect to the different dates in the charges, the Carrier contends that neither the Organization nor the Claimant made an objection at the hearing regarding the different dates, nor was there any evidence of surprise in the record. The Carrier further argues that the trial was scheduled for March 26, 1985, which may have been in excess of 30 days from the first days of absenteeism (February 7 and 11), but was within the 30-day period from the end of the excessive absenteeism period (February 27) and therefore met the requirements of Rule 71. The Carrier contends that the dates on the Notice of Discipline were typographical errors and did not affect the fair and impartial trial afforded the Claimant inasmuch as the Claimant admitted being absent on those dates. Finally, the Carrier contends that there was nothing improper with requiring the Claimant to serve his suspension prior to a decision being reached on his appeal.

With respect to the substantive arguments, the Carrier contends that the absences were established by the admissions of the Claimant and they were excessive. Therefore, argues the Carrier, the

finding of guilty was appropriate. Moreover, the Carrier argues that since Claimant had previously received two letters of warning, it was not unreasonable, arbitrary, or capricious to assess the Claimant a ten-day suspension for the third offense.

This Board has reviewed the evidence and testimony in this case, and we find that there is no merit to the procedural objections raised by the Organization.

With respect to the Organization's position regarding the Absenteeism Agreement, this Board has held, on several occasions in the past, that that agreement relates specifically to unauthorized absenteeism and does not limit the ability of the Carrier to discipline employees for excessive absenteeism. (See Award in Case No. 3 of this Board.)

This Board also finds that Claimant's due process rights were not prejudiced by the typographical errors in the original notice, which listed the wrong dates of absenteeism or the date of the hearing. The hearing was scheduled within 30 days of the final date of the excessive absenteeism period, and the Claimant was well aware that he was being charged with exessive absenteeism for several dates in the month of February. The wrongful listing of the dates did not in any way impinge on any of the rights of the Claimant.

Finally, this Board finds that no rights of the Claimant were violated when he was forced to serve his suspension prior to the completion of his appeal.

This Board also finds that there is sufficient evidence in the record to sustain the hearing officer's finding that the Claimant

was guilty of the charge of excessive absenteeism. This Carrier has previously taken the position that three absences in one month constitute excessive absenteeism, and the Claimant has admitted to being absent in excess of three days in the month of February 1985.

Once this Board has determined that there is sufficient evidence in the record to sustain the finding of guilty, we next turn our attention to the type of discipline imposed. This Board will not set aside discipline unless we find that the action taken by the Carrier was unreasonable, arbitrary, or capricious. The Claimant in this case had received two warning letters for unsatisfactory attendance within the previous eight months prior to the incident in question. Consequently, we do not find that it was unreasonable, arbitrary, or capricious for the Carrier to suspend the Claimant for ten days for this violation.

AWARD:

Claim denied.

Chairman, Neutral Member

Carrier Member

Union Member
See attached dissent

Date: 12-30-86

EMPLOYES' DISSENT

AWARD NO. 10, CASE NO. 10, SPECIAL BOARD OF ADJUSTMENT NO. 986

The Employes' take strong exception to the Board's contention that "no rights of the Claimant were violated when he was forced to serve his suspension prior to the completion of his appeal". This conclusion effectively rewrites the terms of Rule 74 of the BMWE-AMTRAK Schedule Agreement of May 19, 1976, as amended, and as such, is a case of the Board exceeding its grant of jurisdiction.

Paragraph "B" of the Agreement establishing the Board states that the Board "shall have jurisdiction over disciplinary matters which have been handled pursuant to the provisions of Rule 74 of the BMWE Agreement". Nowhere in the Agreement is the Board given the explicit jurisdiction to amend, cancel or nullify any term in the Schedule Agreement. However, the Board's decision in this case has rendered nugatory the following language contained in Rule 74(a):

> This appeal, where the discipline imposed is suspension, shall act as a stay (except in case of major offense) in imposing the suspension until after the employe has been given a hearing.

The Carrier's decision on the Claimant's appeal was not even posted in the U.S. Mails until May 17, 1985; however, the Claimant was required to commence serving his disciplinary suspension on May 6, 1985. This action by the Carrier was a literal violation of Rule 74(a), a fact admitted by the Carrier in its letter of October 10, 1985 from Director-Labor Relations L. Hriczak, wherein he answered the Employes' procedural

objection by stating:

> With regard to the Organization's contention that Carrier violated Rule 74 when it "forced" Appellant to serve the assessed discipline prior to a decision on appeal, the Carrier maintains it constructively complied with all of the applicable provisions of the Agreement. (emphasis added)

"Constructive" compliance with the unambiguous terms of Rule 74 is never enough to safeguard the appeal rights of an accused employee. The purpose of the appeal process has been cogently described as the following:

> The right of appeal serves two basic purposes: to guard the integrity of the entire disciplinary process and its functionaries; and to provide justice by finding error -- willful or inadvertent -- and correcting it. Fair notice and hearing under due process of law may be deliberately or innocently frustrated, and the adaptations required in particular circumstances may not always be made in keeping with the needs of wholesome disciplinary procedures. The right of review also offers a healthy check on arbitrariness and caprice where power may occasionally serve illicit purposes. Due process of law, in simple terms, is nothing more that enforced reasonableness and fairness; it is achieved by denying power to the exercises of bad faith, arbitrariness, and caprice that are contrary to equal justice under the law. (Due Process in Disciplinary Hearings - Decisions of the National Railroad Adjustment Board, Joseph Lazar, Los Angeles 1980)

Rule 74 further guarantees a process free of "arbitrariness and caprice" by providing that employees suspended for less than major offenses will not have to begin serving their suspensions until a decision has been rendered on their appeals. In this way the hand of the officer hearing the appeal is given freer fiscal rein; he does not have to worry about other departments complaining that the exonerated employee will now have to be paid for "sitting home". The appellant-employee, under the terms of Rule 74, will most likely not have served any of his disciplinary suspension, therefore making an adjustment in discipline that much easier to effect. When the Carrier violated the terms of

Rule 74 by making the Claimant begin serving his disciplinary suspension prior to the appeal decision, the integrity of the entire appellate system was frustrated.

The Employes contend that the proper remedy in this case, irrespective of the substantive merits of Carrier's case, is to compensate the Claimant for those days lost while serving his disciplinary suspension between May 6 and 17, 1985. Such compensation should be ordered as damages accruing to the Claimant for the Carrier's violation of his contractually protected appeal rights. Accordingly, the Employes must respectfully dissent from the Board's Award in this case.

Respectfully submitted,

Jed Dodd
Employee Member