CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24106
Docket No. 43770
91-1-91-1-S-6556

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(
(Southern Pacific Transportation Company
((Western Lines)

STATEMENT OF CLAIM:

"Claim of Portland District Engineer J. R. Carrick for compensation for time lost from October 7, 1989 to April 1, 1990."

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On October 17, 1989, a Carrier Trainmaster detected an odor of alcohol on Claimant's breath when he reported for duty at 11:00 P.M. Claimant admitted, in conversation with the Trainmaster, that he had consumed "a couple of beers" earlier in the day. Claimant was withheld from service and charged with a two count violation of revised Rule G; one, reporting for duty under the influence of intoxicants and, two, using intoxicants while being subject for duty. Following an Investigation on these charges, Claimant was adjudged to be guilty of both and was dismissed from service. While the dismissal was under appeal Claimant was conditionally reinstated to service and after passing the required medical examination did so on April 1, 1990.

Before this Board a plethora of arguments have been advanced and debated by both the Carrier and the Organization in support of their respective positions. The Organization argues, inter alia, that the Investigation was procedurally flawed in that the conducting officer exhibited manifest bias. Also, transcripts were not timely furnished, following the hearing, as required by the Agreement. It also raises a number of questions concerning the triggering episode and whether the Trainmaster had license or a sound basis to even question whether or not Claimant was in violation of Rule G and seek to have him tested.

On the merits, the Organization argues that there is no showing that Claimant was under the influence of intoxicants at the time he reported for duty and this is supported by the negative results of a blood test he took at his own expense shortly after his removal from service. With regard to the consumption of beer, sometime near midday on October 17, 1989, several hours before reporting for duty, it is pointed out that Claimant had marked off for ten hours rest and was not "subject to duty" at the time the alcohol was consumed, over 8 hours before he reported.

Carrier denies that procedural flaws are present. The Agreement does not provide specific time limits within which Investigation transcripts are to be provided and submitting a transcript 11 days after the close of the hearing was not prejudicial in this matter. With regard to the blood test Claimant took after he was taken out of service, Carrier points to time frame deficiencies and raises chain of custody questions about the test. It also suggests that the methodology used was inadequate and the results reported are inconclusive for purposes of its Rule G, which requires zero test indications (0.0%) in order to be eligible for duty.

On the argument that Claimant was not subject to duty at the time he consumed alcohol, Carrier suggests that marking off for rest does not place an engineer outside Rule G, because in doing so he is aware of the fact that after the rest period is over he will be called for duty. In this instance, it argues that the alcohol consumed was done but 4 to 4-1/2 hours before Claimant could have been subject to call, which by any standard would be within the proximate time of "subject for duty." If an employee wishes to consume alcohol he must mark off completely, Carrier stresses.

This Board, upon review of the complete record, finds that it is unnecessary to address but one matter. We conclude that the procedural arguments advanced by the Organization on failure to timely furnish a transcript of the Investigation has merit. A similar dispute, involving the same Carrier and a similar provision dealing with the furnishing of transcripts, was disposed of in Award 3229 of Special Board of Adjustment No. 18. There it was stated:

> "The Board agrees with the Organization that without a copy of the transcript a fully informed and intelligent appeal isn't possible. In fact, it is easy to imagine that it would be difficult in many cases for the Carrier to make a full and fair decision on the evidence without a transcript. If the transcript could be provided after the disciplinary decision the Claimants's right to 90 days in which to appeal the decision would be prejudiced and abrogated."

We do not find Award 3229 to be in error, it will be followed here, and this Claim will be sustained on procedural grounds without consideration of the merits.

A W A R D

Claim sustained.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 3rd day of October 1991.

CARRIER MEMBERS' DISSENT
TO
FIRST DIVISION AWARD 24106, DOCKET 43770
(Referee Fletcher)

The Majority decision is founded entirely on Award 3229 of Public Law Board No. 18. In that dispute, the assessment of discipline was made on March 23, 1987; the Organization's initial appeal was made "about three weeks later" (the Award does not provide the date); and the transcript was furnished on June 11, 1987.

In our dispute, the discipline was assessed October 31, 1989; the transcript was furnished on November 11, 1989; and the Organization's initial appeal was made on December 14, 1989.

Even assuming, arguendo, that Award 3229 was correctly decided, the factual differences between that dispute and the one here makes Award 3229 wholly inapposite. In that case, the transcript was furnished almost three months after the discipline was assessed; here the transcript was furnished 11 days after the assessment of discipline. There the transcript was furnished about 10 days before the Organization's time to appeal would have expired; here the transcript was furnished 79 days before the expiration of the time to appeal. There, the initial appeal was filed before the Organization had been furnished a copy of the transcript; here the initial appeal was filed more than 30 days after the transcript had been furnished.

The factual distinctions between the two cases is not merely of academic interest. In accordance with the consistent and repeated approach taken by the Board in such matters, each dispute must be considered on its own factual base to determine whether the Carrier's conduct violated an Agreement due process right of the employee and, if there was a violation, whether it somehow prejudiced the employee or the Organization's ability to prosecute a claim on his behalf.

Had the Majority followed such approach in this dispute it would of necessity have found that the facts show the absence of any Agreement due process right violated by the Carrier and certainly no prejudice to the Claimant or the Organization in handling the claim.

Initially, Article 32(f) of the parties Agreement requires only that two copies of the transcript be furnished the Local Chairman. The Article provides no time requirement concerning the matter. Thus, there is not even a basis for a finding that the Agreement was violated. In addition, there has been no showing of any adverse impact on the Claimant or the Organization even if the Agreement had been violated. Such fact is perhaps best evidenced in the initial appeal letter of the Organization dated December 14, 1989, more than a month following receipt of the transcript. The appeal is a three-page letter and begins with the

statement: "The evidence is contained in the transcript of investigation held at Eugene, Oregon, October 17, 1989." The bulk of the letter is a detailed discussion of the evidence adduced at the Investigation in an attempt to show the lack of substantial evidence to support the assessment of discipline. The penultimate paragraph turns to the contention that the Claimant did not receive a fair and impartial hearing. Nowhere in the letter does the Organization either allege a late receipt of the transcript or that such late receipt was a ground for setting aside the discipline.

The Majority should have denied the procedural issues raised by the Organization and considered the merits of the dispute.

M. W. Fingerhut

R. L. Hicks

LABOR MEMBERS' CONCURRENCE
TO
FIRST DIVISION AWARD 24106, DOCKET 43770
AND
RESPONSE TO THE CARRIER MEMBERS' DISSENT

An Employee's appeal of disciplinary action the Carrier has taken against him is a vitally important due process right. A fully informed appeal is impossible without access to the transcript containing the testimony and other evidence the Carrier purports is the basis for the disciplinary action taken. In this case the Carrier failed to provide the transcript until eleven (11) days following its decision to dismiss the Claimant.

The Organization objected to the delay in the delivery of the transcript. Decision 5838 of SBA No. 18, among others, was cited in support of this objection. Carrier's answer was that the delay in the cited case was longer than in this case. Since our delay was shorter, we were, the Carrier claimed, not as prejudiced, and therefore, no harm was done. The Majority correctly rejected the Carrier's argument, endorsing the logic and language of the previous decision cited in this Award 24106.

The Organization is entitled to the full term provided by the Agreement to perfect its appeal. It is important to keep in mind that by virtue of the demands of their contemporaneous employment with their respective Carriers, time is a critical concern to the local representatives who must fashion appeals. That the Claimant's local representative was able to write an appeal in this case is not evidence of a lack of prejudice, but more an indicator of extraordinary commitment and industry on the representative's part.

A second, significant component of the Organization's argument concerning the delay in the transcript delivery was the substantively uncontroverted evidence that transcripts had <u>always</u> been

provided on the day or the day after the Carrier issued a disciplinary decision (Employees' Exhibit J). Since the Agreement Rule in question had been historically viewed by the parties to require concurrent delivery of the transcript with the corresponding disciplinary decision, Carrier's argument that the rule should now be interpreted differently rings hollow.

While we were not at all unconfident of our position with respect to the merits of this dispute, we cannot agree with the Dissentors that the merits of this case should have been reached.

R. K. RADEK

G. R. DeBOLT

L. W. SWERT