

Award No. 6225

Docket No. 6025

2-DT&IR-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

(1) That under the current agreement Carman B. E. Rogers was unjustly suspended from the service of the Carrier from March 2, 1969 to April 30, 1969, inclusive, at Delta Yards, Delta, Ohio.

(2) That accordingly the Carrier be ordered to compensate Carman B. E. Rogers for all time lost from March 2, 1969 to April 30, 1969, inclusive, with vacation rights unimpaired, without loss of hospital, surgical and medical benefits for all time held out of service.

EMPLOYEES' STATEMENT OF FACTS: Carman B. E. Rogers, hereinafter referred to as the claimant, was regularly employed by the Detroit, Toledo and Ironton Railroad Company, hereinafter referred to as the carrier, as a Car Inspector, at Delta Yards, Delta, Ohio, with a work week of Monday through Friday, Saturday and Sunday rest days, from the hours of 8:00 P. M. to 8:00 A. M.

The claimant has been in service of the carrier approximately seventeen and one-half (17½) years. The carrier charged claimant with alleged dereliction of duty in that he failed to detect a missing door on Car N&W 219839 on January 23, 1969 at about 8:45 P. M. The claimant received a letter from General Car Foreman, G. T. Rhea, dated February 19, 1969, notifying him that he was suspended from service, charged with alleged negligence and will be assessed discipline without pay beginning March 2, 1969 and end April 30, 1969, both days inclusive.

Local Chairman, J. C. Ward, wrote to the General Car Foreman, G. T. Rhea, under date of February 28, 1969 requesting a hearing as provided by Rule 28 of the working agreement. The letter was acknowledged by the carrier's General Car Foreman on March 3, 1969 and the hearing was sched-

uled to be held at the Chief Wauseon Hotel, Wauseon, Ohio at 1:00 P. M. on March 7, 1969.

As a result of the investigation, the claimant was given a letter dated April 17, 1969, from the Carrier's General Car Foreman reaffirming the claimant's suspension as stated in his (General Car Foreman's) letter of February 19, 1969.

This dispute has been handled with the carrier up to and including the highest officer so designated by the carrier, with the result that he, too, declined to adjust it.

The agreement effective November 16, 1947 (Revised September 1, 1949) as it has been subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that within the meaning of Rule 28, captioned "Discipline",

"(a) Employees who have been in the service more than sixty (60) days shall not be disciplined or discharged without written notice stating the charges and the discipline or discharge. The discipline or discharge shall not take effect for a period of ten (10) days from the date the notice is served on the employe personally or by depositing the same in the U.S. Mail, during which time the employe, or his duly accredited representative, may request a hearing. If a hearing is requested it shall be held within ten (10) days of the date the request is served on the Management, provided the employe shall be given reasonable time within which to secure witnesses and arrange for representation. If no hearing is requested within the specified time the discipline or discharge shall become final. When a hearing is requested as herein provided the discipline or discharge shall be suspended until a final decision is made. If the final decision involves serving time and the employe has been held out of service pending final decision, the time so held out of service shall be applied on the discipline."

which is contained in the aforesaid controlling agreement, the claimant is an employe subject to the terms of said agreement and, therefore, not only believes he has been discriminated against and unjustly dealt with, but that the provisions of the agreement were violated when he was suspended from service on March 2, 1969 through April 30, 1969, both dates inclusive.

After careful review of the correspondence and transcript of the investigation held on March 7, 1969, it is obvious to all that claimant did not receive a fair and impartial hearing, nor could he have received a fair and impartial hearing under the circumstances involved.

Under date of February 19, 1969, claimant received letter from Mr. G. T. Rhea, General Car Foreman notifying him in part as follows:

"Your failure to detect the missing door on the subject car and failure to secure defect car protection for the Detroit, Toledo and Ironton Railroad, constitutes a dereliction of duty on your part.

As a result of your failure to properly perform your duties as an interchange car inspector, you are charged with negligence and will be assessed discipline.

In accordance with Rule 28 of the current agreement between the Detroit, Toledo and Ironton Railroad and the Brotherhood of Railway Carmen of America, you will be assessed sixty (60) calendar days actual suspension from the payrolls of the Detroit, Toledo and Ironton Railroad." (Emphasis ours.)

which shows beyond any shadow of doubt that Mr. Rhea had rendered a decision and had found the claimant guilty.

When the organization requested hearing such request was granted but Mr. Rhea was the hearing officer.

The prime requisite of a fair and impartial hearing is that a hearing officer keep an open mind and limit himself to developing the actual facts surrounding the alleged offense. Certainly this cannot be done by using as the hearing officer, the same carrier representative who has already rendered a decision and assessed discipline as in the instant case.

Further, during the hearing Mr. Rhea showed that he had prejudged the case when he states in the transcript as follows:

"Rhea: Mr. Rogers was charged with negligence in failing to perform his duty and he is a car inspector at Delta charged with inspecting these cars. I am not answering any policy of the DT&I Railroad. My statement to you and Mr. Rogers is that he failed in his job." (Emphasis ours.)

On April 17, 1969, exactly forty-one (41) days after the investigation, Mr. Rhea rendered his decision, which in fact reaffirmed his own discipline assessed, thus placing him in a position of assessing discipline, hearing the appeal of such discipline and rendering decision to uphold his own decision. Any fair minded person has to admit that this falls completely short of fair and impartial treatment.

The carrier's witness during the so-called hearing was a Mr. R. L. Hayes, car inspector. Mr. Hayes, when he originally observed the car in question, showed the door off and inside the car and not missing. During the hearing it developed he had decided a couple of days later that the door was indeed missing. Also his memory was clear on this car some three months later but when asked about cars he serviced the night before the investigation he could not remember.

Also the carrier entered into the record a letter, or note, addressed to no one, signed by no one and used this as evidence that the door was not laying along the right of way. When questioned about this note Mr. Rhea answered the questions rather vaguely. The so-called writer of the note was not there for cross-examination.

It is also certainly obvious that the carrier admits that they have not proven their case where in their letter dated June 1, 1970 they have taken a different avenue in order to confuse the Board by taking a different position that the organization was not in compliance with the time limit. This, however, is absurd whereas the carrier and the organization are part of an agreement recognized as Memorandum of Understanding No. 21, Rule 29 and 30 ½ — Time Limit on Claims and Grievances — which became effective on January 1, 1955

and which is controlling in this particular matter. Furthermore, a verbal and confirmed extension regarding the appeal time limit was granted by the Superintendent of the Car Department.

It will be amply apparent, after careful review of the record of handling and the investigation that the claimant received an unfair and prejudiced hearing, that the witness relied on had convenient lapses of memory and that the note entered as evidence was of no value since it established nothing and the purported writer was not available for cross-examination, that the discipline was prejudiced, arbitrary and capricious and should be set aside by your Honorable Board and the claim sustained in its entirety.

CARRIER'S STATEMENT OF FACTS: On February 19, 1969 Mr. Rogers was notified by letter that in accordance with Rule 28, quoted next below, he was charged with negligence as a result of his failure to properly perform his duties as an interchange car inspector at Delta, Ohio on January 23, 1969. Further, that he was assessed sixty (60) calendar days actual suspension starting March 2, 1969 and ending April 30, 1969, inclusive.

"RULE 28. DISCIPLINE

(a) Employees who have been in the service more than sixty (60) days shall not be disciplined or discharged without written notice stating the charges and the discipline or discharge. The discipline or discharge shall not take effect for a period of ten (10) days from the date the notice is served on the employe personally or by depositing the same in the U.S. Mail, during which time the employe, or his duly accredited representative may request a hearing. If a hearing is requested it shall be held within ten (10) days of the date the request is served on the Management, provided the employe shall be given reasonable time within which to secure witnesses and arrange for representation. If no hearing is requested within the specified time the discipline or discharge shall become final. When a hearing is requested as herein provided the discipline or discharge shall be suspended until a final decision is made. If the final decision involves serving time and the employe has been held out of service pending final decision, the time so held out of service shall be applied on the discipline.

(b) A copy of all written statements made at hearings shall be furnished the employe or his duly accredited representative.

(c) The right of appeal by an employe or his duly accredited representative in the regular order of succession to and including the highest official designated by the Management to whom appeals may be made, is hereby recognized. Notice of appeal shall be given within thirty (30) days of the date of the decision to be appealed, otherwise the decision shall be final. If after the decision of the highest official designated by the Management, the case is to be referred to the National Railroad Adjustment Board (or other tribunal created by law for a similar purpose) notice shall be filed with the Management within ninety (90) days of the date of such decision.

(d) If the final decision decrees that charges against the employe are not sustained, the record shall be cleared of the charges; if suspended or dismissed, the employe will be restored to his former

position with seniority unimpaired and compensated for all wages lost less compensation earned elsewhere."

On February 28, 1969, Mr. J. C. Ward, Local Chairman, requested a hearing and it was held on March 7, 1969.

On April 17, 1969, Mr. Rogers was notified by letter (See Exhibit C) from the hearing Officer that the transcript of the hearing supported the charges against him and that the sixty (60) calendar days suspension starting March 2, 1969 and ending April 30, 1969, inclusive, was justified.

On July 1, 1969, General Chairman J. A. Klimtzak, appealed the case to Mr. D. W. Brammer, Superintendent Car Department. Mr. Brammer denied the appeal in a letter dated August 25, 1969.

On October 20, 1969, General Chairman Klimtzak appealed the August 25, 1969 decision to the highest official, Mr. R. J. O'Brien, Personnel Manager. Mr. O'Brien denied the appeal in a letter dated December 1, 1969.

In a letter dated June 1, 1970, the Personnel Manager confirmed the conference held February 3, 1970 with the General Chairman at which the discipline case was discussed.

On July 3, 1970, the General Chairman acknowledged the Personnel Manager's letter and enclosed a copy of an Inspector's Daily Car Report.

In a letter dated July 15, 1970 the Personnel Manager advised the General Chairman that subject enclosure supports the carrier's position that Mr. Rogers failed to properly perform his duties at Delta.

POSITION OF CARRIER: Without prejudice to the carrier's contentions stated hereinafter and before elaborating on the merits of the discipline at issue, the carrier respectfully directs the Board's attention to that part of paragraph (c) of Rule 28 — Discipline, hereinbefore quoted, which states that:

"... if after the decision of the highest official designated by the Management, the case is to be referred to the National Railroad Adjustment Board (or other tribunal created by law for a similar purpose) notice shall be filed with the Management within ninety (90) days of the date of such decision." (Emphasis ours.)

Inasmuch as the decision by the highest official was on December 1, 1969 and the notice of intent to file ex parte submission was dated August 13, 1970, such notice was not in compliance with the rule. Therefore, it is the carrier's position that the decision by the highest official is considered final pursuant to the Rule.

In view of the above, carrier requests that the discipline case be dismissed by the Board because the organization failed to progress the case to the Board within the 90-day time limit prescribed by the Rule.

In support of such request, the Board's attention is directed to the following synopses of Second Division Awards:

"Carrier's contention claim not appealed within time upheld because 'On resort to the calendar it becomes apparent * * * that the

claim was not filed with this Division within ninety days after the date of the decision of the carrier's final officer of appeal.' Obviously, recognizing this to be true the employes on rebuttal contend in substance that the decision of May 7, 1951, was not final because the dispute was reopened for further consideration and the claim was not finally denied by the carrier until June 12, 1951. The basic trouble with the employes position on this point is that the record fails to sustain or support it. Therefore, in the face of the confronting facts and circumstances, all we can do is to hold that failure to file the claim with the Board within the time required by the agreement precludes its consideration and requires its dismissal."

2 - 1510, Dis., Parker, CM v. GC&SF

" * * * the decision of the chief operating officer was a final disposition of the dispute on the property. An appeal to this Board within 60 days was available to claimant as provided by Rule 16 (e), current agreement. Claimant, however, did not present his case to this Board until 39 days after the 60-day period had expired. The decision of the carrier became final at the expiration of the 60-day period and this Board is without power to entertain an appeal after that date. We are therefore required to dismiss the purported appeal. Award 1510."

2 - 1675, Dis., Carter, EW v. UT

" * * * any period of delay, no matter how long, in handling a grievance or dispute by appeal to this Board, after it has been denied by the highest officer on the property authorized to handle it, will not in the absence of a showing by carrier that it has been or will be injured, damaged or prejudiced thereby, defeat it as there is no provision in the Railway Labor Act limiting the time within which it must be done. However, the Act contemplates that claims and disputes coming under its provisions shall be handled in a prompt and orderly manner and until Congress acts in regard thereto there is nothing in the Act to prevent the parties from entering into a reasonable provision for that purpose. We think the ninety-day provision in the parties' agreement provides a reasonable length of time in which to do so. In view of the foregoing it is apparent the appeal to this Board from the carrier's denial of the claim by its chief operating officer designated to handle disputes was not taken in time and that, because thereof, it should be dismissed."

2 - 1740, Dis., Wenke, SM v. ATSF (CL)

"Claim of laborer dismissed May 30, 1958 that carrier's action was not justified dismissed as 'The record shows the petitioner instituted proceedings before this Division of the Board on March 27, 1962, appealing from a decision of the highest designated officer of

the carrier rendered on September 25, 1959. The claim is barred by the provisions of Rule 32 (e) of the controlling agreement'."

2 - 4072, Dis., -, Ind. v. SP(Pac.)

Notwithstanding the above, in conference on February 3, 1970 the carrier advised the organization that the appeal by the organization was not in compliance with that part of Rule 28 — Discipline which states that:

"... Notice of appeal shall be given within thirty (30) days of the date of the decision to be appealed, otherwise the decision shall be final...."

The record shows that the organization's appeal on October 20, 1969 of the August 25, 1969 decision was not pursuant to the Rule and, therefore, the decision was final.

In view of the appeal record that was discussed at the February 3, 1970 conference and confirmed by the Personnel Manager on June 1, 1970, carrier again requests that the Board dismiss the case because the organization failed to appeal the decision referred to within 30 days pursuant to the rule.

In support of such request the Board's attention is directed to the following Second Division award synopsis:

"Claim that carrier removed claimant from service unjustly on a charge of being unfit for service dismissed as the controlling provision is definite and unambiguous in its requirement that the appeal must be 'presented' to the Superintendent within ten days from the day discipline notice is received. Under the normal use of the language quoted above, it is entirely clear that the appeal in question was not 'presented' within the prescribed ten day period. Time limit requirements agreed upon by the parties must be strictly enforced and we have no alternative under the circumstances of this case but to dismiss the claim. A contrary result could be reached only by doing violence to the plain language of paragraph (a) of the Agreement of May 15, 1956."

2 - 5308, Dis., Weston, SM v. LI.

Without relinquishing the above positions that the discipline case should be dismissed by the Board because of untimely presentation to the Board and the carrier under the rule, the merits of the case are hereinafter discussed.

It is the position of the carrier that Mr. Rogers was properly assessed 60 calendar days' suspension for negligence as a result of his failure to properly perform his duties at Delta Yard on January 23, 1969, because a defective car arrived at Flat Rock Yard January 24, 1969 without proper exception being taken by Mr. Rogers when the car was interchanged at Delta on the date in question.

Delta Yard, Ohio, an intermediate station, is located at Mile Post 74-3 and Flat Rock Yard, Michigan is a train terminal located at Mile Post 17-2.

The Board's attention is directed to the following excerpts of Flat Rock Yard Car Inspector R. L. Hayes' statements in the transcript relative to the condition of cars that arrived in LD-4, a Delta to Flat Rock train, that shows that Mr. Rogers failed to perform his duties at Delta Yard.

"RHEA: How long, then, have you been in the Car Department?

HAYES: Sixteen years.

RHEA: But the majority of that time has been as a Car Inspector?

HAYES: Half or better. The rest has been on the repair tracks.

RHEA: Mr. Hayes, were you on duty the night of January 24, between 12:00 and 8:00 A. M.?

HAYES: If that date falls between Sunday night and Thursday night inclusive, yes.

RHEA: You stated that you were a Car Inspector. Did you inspect train LD-4 on the morning of January 24?

HAYES: If it came in on the northbound side between those hours, yes, I did.

WARD: I wish to object to this but I'll let him continue on.

RHEA: You can question the witnesses at the proper time. Mr. Hayes, were there any cars in LD-4 with the doors missing?

HAYES: I can't say what train it came in on; there were several trips that night.

RHEA: Did you see any cars with the doors missing?

HAYES: Yes.

RHEA: Would you describe the type car it was, please?

HAYES: It was an insulated box car — yellow.

RHEA: Did you tell me whether this door was missing from the left or west side of the train?

HAYES: It was on the west side.

RHEA: By the west side, you mean next to Outbound one; is that right?

HAYES: Outbound One?

RHEA: Outbound One.

HAYES: Yes.

RHEA: And it was an insulated box to the best of your knowledge.

HAYES: Yes.

RHEA: Mr. Hayes, would you take this piece of paper and see if you can identify it?

HAYES: That's my writing.

RHEA: Would you read it, please?

HAYES: 2/12/69 N&W 291839, insulated box, door missing left side. Door was missing when came in 1/24/69. I mistook bulkhead door for plug door."

In regard to the above statement by Mr. Hayes, Mr. Rogers confirmed that Mr. Hayes correctly identified the car in question in his following statement.

"RHEA: Mr. Rogers, is that the subject car?

ROGERS: That's the subject car, 291839."

The transcript shows that Mr. Rogers neglected to take exception to a defective car at Delta Yard and, therefore, failed to properly perform his duties as charged. In support of that, the Board's attention is directed to the following synopses of Second Division Awards:

"The exercise of reasonable care on the part of these men while performing the work they admittedly did, would have revealed the defects even if only a casual inspection had been made. A superficial inspection requires some casual observation of existing conditions. It requires them to see that which is in plain sight. But in the present case, the two electricians gave the matter no attention at all, although it was their plain duty to do so. We think the evidence is sufficient to sustain the findings of the Carrier. The discipline assessed was not excessive and we can find no reason to disturb the action of the Carrier."

2 - 1767, D, Carter, EW v. Pullman.

"However, a prima facie showing of failure to service journal boxes and the placing of a symbol on them indicating that they had been serviced is not an inconsequential matter, and we must therefore hold that the case was a proper one for suspension."

2 - 3828, D, Doyle, CM v. MP (GD).

"Claim of car inspector dismissed, * * * an employe's obligation to observe reasonable care in the performance of his duties is implied in the employer-employe relationship. * * * no explicit provision in the labor agreement or the working rules is necessary to impose said obligation upon an employe. Failure to meet this obligation ordinarily

constitutes negligence. * * * an employe is generally obligated to observe a maximum degree of care and vigilance. * * * no special instructions are necessary * * * that an employe shall observe a reasonable degree of care, precaution and vigilance. * * * The right of the carrier to discipline the claimant * * * cannot be doubted. * * *

2 - 4358, D, Anrod, CM v. CRIP.

"Claimant was dismissed from service as of October 31, 1966, after having been charged with and found guilty of failure to perform his assigned duties as a car inspector and repairer when, on that date, he did not close slide hopper doors on three covered hopper cars prior to the train's departure from Knoxville. * * * the testimony developed at the investigation constitutes sufficient evidence to establish that when the hopper cars left Sevier Yard (Knoxville) the slide doors were open and the Claimant's identifying pool mark appeared thereon. Those facts, in turn, raise the reasonable presumption that Claimant did not complete the job of closing the doors on the cars involved. Since that presumption has not been rebutted by evidence of probative value, it must stand. Accordingly, we find there is substantial evidence to support the Carrier's finding of guilty as charged in this case."

2 - 5790, D, Coburn, CM v. Sou.

"Claim of car inspectors, suspended from January 19th to March 26th, 1967, for failure to inspect cars properly and permitting an improperly loaded car to depart in train, denied as 'A review of the record of investigation convinces us that the evidence presented was sufficiently substantial to warrant Carrier's decision in this case. * * *'"

2 - 5829, D, McGovern, CM v. CNO&TP.

The organization contends that Mr. Rogers did not receive a fair and impartial hearing because the hearing officer was partial, argumentative and that he was a witness, the charge was vague and not proven in the transcript, the letter dated March 6, 1969 from Mr. McBee referred to in the transcript that covers the track patrolman's report does not warrant 60 days' suspension and that the suspension was premeditated.

The transcript discloses that the hearing officer was not partial, argumentative and that he was not a witness. He was impartial and a question he asked relative to a previous admonishment of Mr. Rogers was distorted by Mr. Roger's representative to appear as if the hearing officer was testifying. In fact, the conduct of the employe's representative throughout the transcript reveals that he attempted to create confusion and that he himself was extremely argumentative.

The contention that the charge was vague and not proven in the transcript is not supported by the record. The letter dated February 19, 1969 (See Exhibit

A) specifically outlines the basis for the charge and the proof of such is contained in the transcript.

In regard to the contention that Mr. McBee's track patrolman's report does not warrant 60 days' suspension, Carrier submits that such contention shows that the Organization agrees that it has some bearing on the suspension assessed, although it should be for a lesser amount.

The contention that the suspension was premeditated is not supported by the record and such allegation by the Organization has not been supported with facts.

The Carrier has conclusively shown that the case should be dismissed by the Board in view of its untimely presentation pursuant to the rule and that the discipline assessed is warranted and justified.

FINDINGS: The Second 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 employe 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 waived right of appearance at hearing thereon.

Claimant received notice from Carrier's General Car Foreman G. T. Rhea, that his failure to detect the missing door on N&W Car No. 291839 and his failure to secure defect card protection for said car amounted to failure to properly perform his duties as an interchange car inspector and that he was charged with negligence, and his punishment assessed at sixty (60) calendar days' suspension from the payrolls of Carrier.

Carrier, by letter dated February 28, 1969, addressed to Mr. Rhea, was advised by the Organization's Local Chairman, J. C. Ward, that a hearing is requested for and on behalf of claimant in regard to said suspension.

Claimant was advised by letter dated April 17, 1969 by Carrier's said General Car Foreman, G. T. Rhea, that he found, after reviewing the transcript of the hearing, the charges against him to be supported therein. The Organization's James A. Klimtzak by letter dated July 1, 1969 addressed to Carrier's Superintendent Car Department, D. W. Brammer, appealed Mr. Rhea's decision of April 17, 1969. After Mr. Brammer turned down the Organization's appeal, the Organization then appealed to Carrier's Personnel Manager, Robert J. O'Brien. Mr. O'Brien, by letter of December 1, 1969 to the Organization's Mr. Klimtzak declined the appeal. Again, by letter dated June 1, 1970, addressed to the Organization's Mr. Klimtzak, Carrier's Mr. O'Brien, after referring to conferences held on February 3, 1970, advised that inasmuch as Supt. Brammer's decision of August 25, 1969 was not appealed to him until October 20, 1969, said appeal was not in compliance with the time limit provisions of Rule 28(c), wherein notice of appeal must be given within thirty (30) days of the date of decision to be appealed.

At the outset Carrier raises procedural questions, namely that the Organization failed to comply with Rule 28(c) of the Agreement in that notice of intent to file an ex parte submission to the National Railroad Adjustment Board was not accomplished within a 90 day time limit period set out in said Rule 28(c); and the Organization failed to give notice of appeal of Mr. Rhea's decision within the thirty (30) days' time limit period as required by Rule 28(c) of the Agreement.

In support of its position in regard to these alleged procedural defects, Carrier cites Award No. 6144 involving the same parties to this dispute. In said Award, this Board found that the Organization violated Rule 28 in regard to the 30 day notice of appeal period, when it failed to appeal Carrier's decisions within a 30 day time limit period. However, we do not agree with the Board's conclusion in said Award No. 6144. The Organization has directed us to a new rule, Rule 30½, in Memorandum of Understanding No. 21, entered into between the parties on March 1, 1955.

Said Rule 30½ entitled "TIME LIMIT ON CLAIMS AND GRIEVANCES", the pertinent part thereof provides as follows:

"1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) * * * * *

(b) If a disallowed claim or grievance is to be appealed, such appeals must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of Carrier shall be notified in writing within that time of the rejection of his decision. * * *."

(c) * * * All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. * * *."

We find that Rule 30½ supersedes and replaces Rule 28(c) as agreed to by the parties in said Memorandum of Understanding No. 21. The rule became effective January 1, 1955 and this claim occurred after that date. Rule 30½ refers to "all" claims or grievances. (Emphasis ours.) Also, Carrier's argument that said rule does not apply to discipline cases is without merit. Said Rule 30½, paragraph 3, directly alludes to discipline cases, wherein in part it reads: "with respect to claims and grievances involving an employe held out of service in discipline cases, * * *."

Therefore, it is the opinion of this Board that Award No. 6144 is palpably erroneous and not controlling in this dispute. We find that Carrier's contentions in regard to said procedural defects are without merit and must be denied. We further find that the Organization complied with the procedural requirements of said Rule 30½, applicable to this instant dispute.

Concerning the merits, the Organization's position is that claimant did not receive a fair and impartial hearing because Carrier's General Car Foreman G. T. Rhea, assessed the discipline originally, heard the appeal of said discipline, and rendered a decision upholding his own original decision of discipline that the hearing officer, Mr. Rhea, prejudged the case precluding claimant from receiving a fair and impartial hearing.

We find that the hearing officer in this instance had prejudged Claimant guilty so as not to afford claimant a fair and impartial hearing. This is clear from the hearing officer's testimony, when asked a question by claimant's representative at the hearing, Mr. Ward, which question and answer are as follows:

"Ward: Mr. Rhea, did you notify Mr. Rogers on the 24th that the door was missing on the subject car so he could issue a defect card just in case that the door was missing when it arrived from the PC? Did you wire or call him in regards to that or did anybody else at Flat Rock, do you recall?"

Rhea: Mr. Rogers was charged with negligence in failing to perform his duty and he is a car inspector at Delta charged with inspecting these cars. I am not answering any policy of the DT&T Railroad. My statement to you and Mr. Rogers is that he failed in his job." (Emphasis ours.)

We are of the opinion that the hearing officer in this instant dispute showed substantial bias toward claimant before the hearing was complete so as to prevent claimant from receiving a fair and impartial hearing. As was said in First Division Award No. 21046:

"After studying the transcript of the investigation the Division is persuaded that petitioner's position is valid. At this late date there is little excuse for the managerial personnel of a carrier to ignore the principle that in a discipline case carrier is essentially, and must conduct itself like, a trial court. Among several things this means that the carrier official who conducts an investigation of a charge made by a carrier against an employe (1) should not normally have been involved in the occurrences leading up to the leveling of the charge and (2) should comport himself at the investigation, in his questioning of all witnesses (managerial as well as employe), in a truly objective and aloof manner, just as would an outside judge. If, as here, the evidence shows that the investigating officer did not so behave, then this Division, as a court of appeals, must find the trial court subject to procedural error and reversal."

For the aforesaid reasons, we find that Carrier violated the agreement in this instance. However, in view of the fact that Rule 28 (d) provides that if the charges are not sustained, the employe will be restored to his former position with seniority unimpaired and compensated for all wages lost less compensation earned elsewhere, we will sustain the claim for all time lost from March 2, 1969 to April 30, 1969, inclusive, with vacation rights unimpaired, but will deny the claim for hospital, surgical and medical benefits during said suspension period. See Award No. 3883.

AWARD

Claim sustained in accordance with the opinion.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: E. A. Killeen
Executive Secretary**

Dated at Chicago, Illinois, this 3rd day of December, 1971.