Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4278
Referee Marty E. Zusman Docket Number 4296

PARTIES TO DISPUTE: Railroad Yardmasters of America
Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Unassigned Yardmaster J. L. Weiss, Cincinnati, Ohio, be paid for date of February 2, 1983, eight (8) hours at yardmaster's pro rata rate of pay and one (1) hour pay at yardmaster's punitive rate of pay for attending an investigation on claim date, pursuant to the provisions of Article 27. Carrier did not comply with Article 22 in that no stenographic report of investigation was furnished nor discipline decision rendered within twenty days with copy to Regional Chairman.

OPINION OF BOARD: On February 2, 1983, Claimant J. L. Weiss spent nine (9) hours at an investigation in which he and others were directly charged with alleged responsibility in a derailment and damage to cars. By letter of March 8, 1983 the Organization filed a claim for compensation maintaining a Carrier violation of sections of Article 22 which read in pertinent part:

ARTICLE 22. DISCIPLINE.

"Stenographic report will be taken of all hearings or investigations and the employee involved and the Regional Chairman shall each be furnished with one copy."

"(b) A decision shall be rendered within twenty (20) days after completion of investigation, with copy to the Regional Chairman."

In further appeal on property by letter of April 14, 1983 the Organization makes note that "the decision of no discipline was sent...only after a claim was made and some 43 days after the investigation." In that letter it is maintained that Article 27 is controlling in the issue of compensation. Article 27 states in pertinent part that:

ARTICLE 27. ATTENDING COURT OR COMPANY INVESTIGATIONS

"Yardmasters required by the Company to attend court as witnesses, or to attend Company investigations in which they are not directly involved, will be paid for all time lost; if no time is lost they will be paid for actual time in attendance at the pro rata rate if it is a work day with a minimum of two hours pro rata..."

The primary argument being raised on property is that the Claimant was found not guilty and exonerated of the charges. As such, Claimant was not a principal at the investigation as he was neither directly involved nor tangentially involved as no discipline was assessed. Since Claimant was not directly involved, he should be compensated under Article 27.

The Carrier in denying the claim maintains that it is not in violation of Article 22 which it holds is controlling with respect to compensation. It further maintains by letter of June 13, 1983 that the failure to notify and specifically furnish a copy of the Transcript was unnecessary since no discipline was assessed. Since Article 22 is controlling as the Claimant was directly charged although later exonerated he was "directly involved" and therefore Article 27 is not applicable.

This Board has carefully considered the issues in the case at bar. With respect to the Organization's claim for compensation under Article 27 we have reviewed the numerous cases that have ruled on this same issue and even in some cases between the same parties. On the whole, with the exception of Fourth Division Award 4059 (Larney) which did not speak to the issue, but did provide compensation for attendance at an investigation when a Claimant was later exonerated, there is consistency. The Claimant in this case was directly involved as a charged principal in the investigation. Being cleared of charges after the investigation does not alter that fact or create an alternative status, such as witness. Claimant was directly involved. Consistent with numerous past awards, the Claimant is not entitled to compensation, as Article 27 does not apply (Fourth Division Awards 3398, 1162, 1140, 1030).

As for violations of Article 22, the record as developed on property clearly shows Agreement violation on the part of the Carrier. The language of Article 22 is clear and unambiguous. It states that a stenographic report will be taken at all hearings and will be furnished to the employee and Regional Chairman. The specific language is written to include all hearings, not simply those in which discipline is assessed. It also requires a decision submitted to the Regional Chairman within twenty (20) days. This Board is not constituted with the authority to add language of intent to an Agreement. The language is clear that a Transcript and discipline decision is to be submitted in all cases. A review of past awards puts the weight of support on the position of the Organization when specifically considering this issue as in the case of Third Division Award 24891 (Cohen) which stated:

> "The terms of Rule 21(c) are clear, unambiguous and unqualified by its failure or refusal to furnish a transcript of the hearing...the Carrier has violated [the Rule]. That the charges were not sustained and thus no discipline imposed...is irrelevant... The terms of the Rule are in no way modified or nullified by the outcome of the hearing."

This Board believes that Award 24891 is direct and germane to this issue. It does not agree with the interpretation of recent Award 4221 which suggests that failure to provide a Transcript and decision is not a substantive breach "as contemplated by the parties." We have carefully read the Dissent to Fourth Division Award No. 4221 and are in agreement that Award 4221 runs counter to both the function of this Board (when language is clear and unequivocal) and the past awards on this issue between the same parties (Fourth Division Awards 4221, 3850, 3797, 980).

It is the determination of this Board that the Carrier has violated the Agreement in its failure to provide the stenographic report and the copy of the decision to the Regional Chairman. It did not however violate that part of the Agreement requiring compensation for the Claimant, as the Claimant was charged and directly involved in the investigation. There being no Agreement rule to cover compensation in such cases and Article 27 not being applicable this Board may not provide such compensation. This Board also notes that the Claim does not request this Adjustment Board to order the report and decision at this time and so it shall not do so.

FINDINGS:

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

The Carrier and the 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.

The parties to said dispute were given due notice of hearing thereon.

The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June, 1985

CARRIER MEMBERS' CONCURRING OPINION AND DISSENT
AWARD 4278, DOCKET 4296
(REFEREE ZUSMAN

We concur with the Majority's Opinion that Claimant is not entitled to compensation when he is charged as a principal in this case. We disagree with the Majority's Opinion which holds that Carrier is obligated to furnish a Transcript when the Claimant has been exonerated. No contract should be construed to require parties to perform a vain and useless act. See First Division Award 20061 (Seidenberg). In Third Division Award 11519 (Miller) it was held:

> "Both statutes and contracts should be interpreted with the realization that reasonable results were intended. It is well known that many of the issues presented to the Board are of the peripheral variety; and, in these cases, there is no requirement that common sense be disregarded in contractual interpretation."

In addition to the foregoing, there is a rule of contract construction which commands that when confronted with alternatives, one of which leads to a logical result and the other an illogical one, the former is preferred. In Award 1224 (Coburn), this Division held:

> "Another established rule of contract construction, which is applicable here, is that where a contract may be susceptible to alternative constructions, one of which would lead to a reasonable or sensible result and the other to an absurd result, the contract should be construed in the light of the former. The facts here show that the labor costs for the janitor's job in one year under the agreement amounted to over $8,000. In view of the facts and evidence of record, it would be absurd to so interpret the agreement as to require the payment of over $8,000 a year for a janitor's services."

Award 1260 (Shugrue):

> "* * * Confronted with alternatives, capable of leading to a logical, or an illogical result, consistent procedure and construction dictate the adoption of the former."

Award 1640 (Sheridan):

> "The rule, Article 4 (c), states that an employe who works 'seven consecutive days will be paid the punitive rate for the seventh (7th) consecutive day of service.' The Organization argues the word 'day' should be construed as a 'tour of duty.' Now a 'tour of duty' for most employes is an eight-hour period. What it is saying, therefore, is that an employe is entitled to premium pay for his seventh (7th) consecutive 'tour of duty.' The definition of the word 'consecutive' has been submitted as meaning '* * * succeeding one another in regular order, or with uninterrupted course or succession.'
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> "We concur with the statement set forth in Fourth Division Awards 1224 and 1260. The latter states 'Confronted with alternatives, capable of leading to a logical, or an illogical result, consistent procedure and construction dictate the adoption of the former.'"

Award 3218 (Eischen):

> "* * * We have expressed approval in an earlier Award for the accepted principal of contract construction and arbitral law that holds whenever language is susceptible to alternative constructions, one leading to a reasonable result and the other to a harsh or unreasonable application the former will be preferred. We hold to this rule of reason herein and deny the instant claim."

The Courts likewise eschew absurdities in the interpretation of contracts.

In Wichita Falls and Southern Railroad v. BRAC, the Fourth Circuit stated:

> "Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity."

When the employe is exonerated, the contractual requirements for due process have been satisfied. There was no prejudice asserted and none shown. In this case, the rule of reason was discarded and replaced with a hyper-technical

interpretation which served no earthly purpose other than to further complicate the arbitration process.

We dissent,

W. F. Euker

P. V. Varga