

The Fourth Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Roman Putyrski

PARTIES TO DISPUTE: (

(Northeast Illinois Regional Commuter Railroad Corporation

STATEMENT OF CLAIM:

This letter represents a progression to the National Railroad Adjustment Board the appeals made on my behalf through Mr. Stafford's letter of November 2, 1988 to N.I.R.C. Carrier Officer A. Dula and his subsequent declanation of appeal dated December 2, 1988. I request that the Board review the transcript of the Investigation Hearing held June 21, 1988 and address the issues presented by Mr. Stafford. I plead that the Board will agree that the charges and subsequent discipline assessed against me was unjust and will affirm my claim.

FINDINGS:

The Fourth 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 waived right of appearance at hearing thereon.

Petitioner, a Special Agent, was assessed a forty-five (45) day suspension following a Hearing at which he was charged with insubordination, discourteous discharge of duty and quarrelsome or otherwise vicious behavior. A Claim was progressed on behalf of Claimant through the appeal process set forth in the Agreement. Claimant subsequently served a Notice of Intent to file a Submission before this Board. His Ex Parte Submission was filed on January 27, 1990. The Carrier did not file a Submission in its behalf.

The Carrier is precluded from advancing any argument before the Board as Circular No. 1 provides for the Submission as the means of introducing all argumentative facts and evidence. It further states:

"The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."


The party bearing the burden of proof in a dispute must still meet that burden to prevail, notwithstanding the failure of the other party to file a Submission. In this dispute, the Carrier carries the burden of proof as this was a disciplinary matter. Absent a Submission from the Carrier, we must conclude it has failed to meet its burden of proof. The Claim, therefore, must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of February 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 4761, DOCKET 4765
(Referee Simon)

The decision in this case is so egregious that it requires a strong renunciation so that others will not fall victim to the same errant logic.

The Majority neither relied on any provision of the Agreement nor on any of the evidence assembled and argued on the property in its disposition of this matter. Instead, the Majority relied on the language of Circular No. 1 to place an interpretation on those procedural instructions that was never intended. Further, this decision ignores the very real difference in the responsibilities of the parties and the responsibility of this Board.

As the Majority notes at page 2 of the Award, Circular No. 1- requires:

"The parties...(to) include...all known relevant argumentative facts and documentary evidence."
(Emphasis added)

Circular No. 1 also mandates:

"...disputes may be referred...to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing on the disputes." (Emphasis added)

"Position of Employees: Under this caption the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute." (Emphasis added)

"...all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth...."
(Emphasis added)

Unlike the determination made in this case, Circular No. 1 requires all parties to a dispute to submit to the Board, "all supporting data bearing upon the dispute." Circular No. 1 does

not state that the burden to provide "documentary evidence" is ONLY the responsibility of the Carrier in discipline cases and it is the Organization's responsibility in rules cases. As noted above, the burden is clearly placed on all parties to a dispute to provide to this Board all material relied upon by each to support its position before the Board. Obviously, an individual attempting to substantiate that the assessment of discipline was improper must be able to show that the conclusion reached by the Carrier is not supported by the record of the Investigation. That was the specific claim in this case.

The record of the handling of this matter on the property was contained in the record provided to the Board. Petitioner argued to this Board that he was improperly disciplined. The Notice of Charges, the investigation record (161 pages), and the record of the on-property handling via correspondence prior to Petitioner's November 1, 1989 Notice to the Fourth Division are contained in the record. Carrier DID file a Submission with the Board. However, it erred by filing a Submission involving the same parties and the same Claimant but a different incident (see Fourth Division Award 4764). While we do not minimize the Responding Party's responsibility (in this case the Carrier) to submit the record and supporting evidence bearing upon the dispute, it is equally self-evident that the Board had before it THE ENTIRE ON-PROPERTY RECORD involving this dispute. There is no dispute on this point. The only item absent from the record is the Carrier's Submission arguing that its on-property handling was correct under the Agreement and that the transcript contained sufficient evidence to support its conclusion to assess discipline. Whether the Carrier was correct in its conclusion or whether Claimant's assertion of improper discipline is correct can only be verified by this Board's review of the on-property record. That is the function of this Board!

In First Division Award 23856 (1988), the Board held:

"The Organization Members of the Board contend that Carrier's failure to timely submit a brief causes the matter to be defaulted in the Petitioner's favor and that the claim must now be sustained, as presented, without getting to the merits of the matter. In support of this contention a number of Awards dealing with defaults and other breaches of Circular No. 1, the Rule under which we operate, have been submitted for our consideration.

* * * *

From our examination of the Awards that have been submitted on the procedural aspect of this matter we are

unable to conclude that one Party's failure to timely file its brief creates a default whereby the other Party's position is automatically sustained as presented. It is our view that the Board must still arrive at its decision from the evidence properly in the record before it."

(Emphasis added)

The Board then cited with approval, prior First Division Awards 2110 (1937) and 23819 (1987) and concluded:

"...of the Awards given to us on this issue, the earliest and the most recent are in harmony and direct a decision based on the evidence in the record." (Emphasis added)

Fourth Division Award 2995 (1973) noted:

"While it is not within our jurisdiction to examine the evidence adduced at the hearing in order to make an independent judgment relative to claimant's guilt, we are required to examine the transcript and determine therefrom whether Carrier's finding was based upon substantive evidence." (Emphasis added)

In Fourth Division Award 4409 (1986), the Board, while sustaining the claim because it did not have the transcript of investigation before it, nevertheless stated:

"It is the responsibility of this Division to review the evidence presented at the Claimant's February 22, 1982 investigation to determine whether the Carrier has sustained this burden imposed on it." (Emphasis added)

In Third Division Award 27870 (1989) the Board held:

"We will now turn to the first procedural objection. Failure of a Carrier to provide a copy of the transcript of Hearing in a discipline or discharge case has been held fatal when the record before the Board therefore contains no evidence to support the charges and arguments. See First Division Award 12140, Third Division Award 23015, and Fourth Division Award 2210. In a case where the Organization included a copy of the transcript in its Submission to the Board, however, the Board has decided the case on the available evidence before it rather than award a forfeiture based upon a technicality. See First Division Award 23856. In the present case, we have a complete record before us, including the 172-page transcript of Hearing received as part of the Organization's Submission and relied upon by both parties in their

Submissions. We will not sustain the Organization's first procedural objection." (Emphasis added)

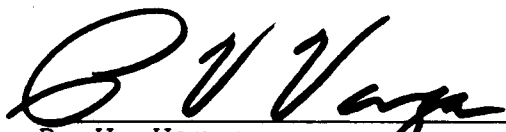
The fallacy of the Majority's position is demonstrated in the following example. Organization A and Carrier B have a dispute and fully argue their respective positions on the property. However, Organization A neglects and/or fails to include evidence that clearly supports its position in its presentation to this Board. Carrier B does include such material. According to the Majority's logic since the Organization failed to provide such evidence to the Board, its claim must be rejected even though the material was in the record before the Board. While a party, who for any reason, does not provide all of the on-property evidence in support of its position in its Submission to this Board does so at its own peril, this Board has the responsibility to consider and decide the issue based on a review of the on-property record.

A simple fact here is that the ENTIRE RECORD of the handling of this dispute was before the Board in Docket 4765.

It is also a simple fact that the Carrier advanced NO NEW ARGUMENT BEFORE THE BOARD in this case; its only arguments were contained in the on-property correspondence included in the Organization's exhibits!

Finally, it is a simple fact, with more arbitral precedent in this industry than any other item of dicta, that this Board will only review and decide a dispute based on the on-property handling. To conclude that this Board did not have a record to review - were the Organization's exhibits somehow tainted and a falsified perversion of the on-property record? - is the arbitral equivalent of an ostrich with its head in the sand.

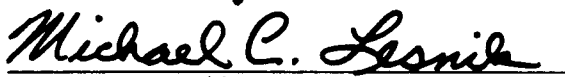
We Vigorously Dissent.



P. V. Varga



M. W. Fingerhut



M. C. Lesnik

LABOR MEMBERS' ANSWER TO
CARRIER MEMBERS' DISSENT
TO
AWARD 4761, DOCKET 4765

(Referee Simon)

The Carrier members wrote a lengthy and meaningless Dissent. If the rationale expressed by the Carrier Members were accepted as reasonable then the provisions of Circular 1 would be rendered ineffective. The Labor Members strongly agree with the opinion of the majority in the Award.

FOR THE LABOR MEMBERS

R C Arthur
R. C. ARTHUR