Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 4969
Docket No. 4947
95-4-93-4-38

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

PARTIES TO DISPUTE: (United Transportation Union
(Yardmasters Department
(
(Chicago and North Western
(Transportation Company

STATEMENT OF CLAIM:

"As of today (September 2, 1993) I have not received a notice of discipline or a transcript of investigation concerning the hearing of August 19, 1992 on Mr. J. B. Birton. Therefore, I insist you reinstate Mr. Birton with full yardmaster rights and pay from August 13, 1992 to date for time lost. The carrier repeatedly has not lived up to the yardmasters contract in recent months as bulletins of jobs have not been sent me, notices of abolishments have not been sent me, and now the case with Mr. Birton.

Number 1, Rule 19b - Discipline states, "When discipline is administered, copy of the discipline notice and the transcript will be furnished the employee and the General Chairman." I understand Mr. Birton has been disciplined, but it has been 2 weeks and as yet I have not been notified or a copy of investigation sent.

Number 2, I am appealing this case to you on the grounds of my objections in the transcript of Mr. Birtons' investigation."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 was notified by certified letter dated August 13, 1992 to attend a formal Investigation. The purpose was to determine his responsibility, if any, for improperly performing his duties. The Carrier alleged that on August 12, 1992 the Claimant's actions resulted in the delay to Trains PRNOA and YYE29. The Investigation was held on August 19, 1992 and Claimant was notified the next day that he was disqualified as Yardmaster.

The Organization progressed this instant case on procedural grounds. It argues that the Carrier violated Rule 19(b) in failing for nearly two months to supply the General Chairman with a copy of the transcript and a copy of the discipline notice. It argues that the Claimant received a Notice of Investigation that was non-specific, so as to limit the Organization in preparing for a fair defense. The Organization insists that it objected to the continuance of the Investigation, but without success.

The Carrier rejected the Organization's arguments during the on-property progression of this claim. The Carrier argued that the charges were specific, the Investigation fair and the evidence sufficient to prove guilt. As Rule 19 requires only the furnishing of the transcript without a time limit, no violation occurred.

This Board does not agree and finds itself unable to advance to the merits. The parties are well informed and knowledgeable that this Board is severely constrained to reach determination on issues and evidence <u>within</u> the controlling language of the Agreement. Rule 19(a) limits the Carrier to rendering a disciplinary decision "within ten (10) calendar days after completion of hearing." Rule 19(b) operates in conjunction with Rule 19(a). Herein, the parties negotiated Rule 19(b) which states that:

> "When discipline is administered, copy of the discipline notice and transcript will be furnished the employe and the General Chairman."

The record at bar conclusively proves that the Carrier failed to submit to the General Chairman a copy of the transcript or discipline notice in a timely manner. A transcript and discipline notice was provided. It is undisputed that the Organization:

"... did not receive a copy of the transcript of the investigation until right at 60 days, and did not receive a discipline notice until after the 60 days...."

This Board has fully reviewed the record and is always constrained by the language of the Rule negotiated by the parties. Carrier's defense on property was that:

"Rule 19 only requires that a copy of the transcript be furnished; it does not set any time limits in which this transcript is to be furnished."

In the strong arguments made before this Board and in its Ex Parte Submission the Carrier maintains that no time limit exists, that the issue was "promptly cleared up," that the Claimant's appeal was not impeded or jeopardized resulting in a fatal flaw, and that the Claimant was proven guilty.

The Board notes that there is not even a dispute before us on the Claimant's guilt, but only upon the procedural issues surrounding Rule 19. This Board must follow the language of the Agreement. The parties agreed that the discipline notice and transcript would be furnished the General Chairman "When discipline is administered" (emphasis added). The fact that a specific time frame of five, ten or some other number of days is not specified does not indicate that "no time limit exists." The fact that the issue was resolved on the property prior to the submission to this Board or that it may not have affected the appeal does not satisfy the Rule. Nor does it matter if the Claimant is guilty, as the procedural issues must be resolved before this Board has the right to reach the merits. Procedurally, this Board cannot negate its function to apply the negotiated Rule to the facts. The Carrier violated the Rule in waiting more than two months to furnish the transcript and discipline notice to the General Chairman.

The Board desires to reach the merits of the case, but finds it impossible to do so. We have read the Award support presented as to finding a procedural violation while permitting discipline to hold (Public Law Board No. 1459, Award 144; Public Law Board No. 2779, Award 95). In the facts and circumstances of this case, the discipline cannot hold. The claim is sustained. Claimant is to be reinstated as a Yardmaster and made whole as per Rule 19(d).

AWARD

Claim sustained.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Dated at Chicago, Illinois, this 10th day of May 1995.

CARRIER MEMBERS' DISSENT
to the Interpretation of
Award 4969
(Referee Zusman)

There is an aphorism that bad cases make bad law. By any evaluation this Interpretation is bad law based on an improper determination of what should have been the application of common sense.

The result codified here was and is the result of the parties involved NOT providing this Board with a very pertinent piece of information. At the bottom of page 1 of the Interpretation we find:

> "The fact is that prior to even arguing this instant claim before the Board in December of 1994, Public Law Board No. 5035 dismissed the Claimant from service to the Carrier in its Award 157." (Emphasis added)

It is self evident that this fact, "would have had a material impact" on the disposition made by this Board in Award 4969. In the Court Remand of Award 4969, Judge Shadur noted:

> "...the Adjustment Board acted without awareness of this other award in a separate matter... And it's one that upheld the discipline and termination of Mr. Birton, not in the yardmaster position that was the subject of the one that's at issue now, but as a yard foreman and therefore as a Union Pacific employee." (Emphasis added)

There are two conclusions that are wrong with this Interpretation. First and foremost is the fact that this Claimant was dismissed as an employee for his failure to follow instructions long before Award 4969 was adopted. It does not matter that this discipline was administered to the Claimant while he was working as a Trainman. The central fact was and is that he was dismissed as an employee of the Chicago and NorthWestern Railroad. This Interpretation recognizes the existence of Award 157 of PLB 5035 but chooses to ignore the consequences of that decision.

When an employee is dismissed by his employer, it does not mean that he is only disciplined in that particular craft. It does not give him license to argue that he continues to be an active employee in some other capacity. In Third Division Award 28931 this Board correctly pointed out:

> "The Carrier asserts that the May 27, 1987 decision was affirmed by the Award of Public Law Board 4370; that the dismissal explicitly and completely severed Claimant's employment with the Carrier; and that the dismissal terminated his seniority with the Carrier, including seniority under both the JTD and C&S schedule agreements.... There is simply no dispute that Claimant was

dismissed...'from the service of the Burlington Northern Railroad Company for (his conduct...)....' The Carrier has drawn this Board's attention to other awards...which hold that dismissal from the parent Carrier is effective for all divisions of that Carrier, even if those divisions have separate seniority lists and schedule Agreements, when, as here, the identical dismissal is for conduct that is prohibited on a carrier-wide basis. Third Division Awards 12104, 14346, 10348, and 9974."

Third Division Award 30519 noted:

"A careful review of the record leads us to conclude that the instant claim must fail. On November 24, 1987, Claimant was dismissed, not just as a Switchman but as an employee, from the Carrier service for failure to 'pickup and sign for' the requisite Rule Book. Th Organization's argument that Claimant's dismissal from service 'as a Switch person,' had no effect upon his status as a 'track person,' is without merit. Claimant was discharged for insubordination while in furloughed status."

For this Interpretation to state:

"The claim before us is that of a Yardmaster. The claim decided before Public Law Board No. 5035 was that of a Trainman."

is a distinction without purpose. What both Award 4969 and Award 157 of PLB 5035 have in common is the employment status of the same Claimant.

This central fact leads us to the second flaw in this Interpretation; and that is that this Board, the Fourth Division of the National Railroad Adjustment Board, cannot under the guise of an Interpretation invalidate the disposition made in Award 157 of PLB 5035.

At the time this matter was being argued in December 1994, it was, "known by the parties" particularly the UTU who represents BOTH the Yardmasters and the Trainmen, that Claimant HAD BEEN DISMISSED AS AN EMPLOYEE in October 1993. This Interpretation acknowledged that such fact would have had a 'material impact' on the disposition which would have been made in Award 4969. To then conclude that the determination of PLB 5035 is of no consequence makes the proper disposition and validity of Award 157 of PLB 5035 a nullity. THAT DISPOSITION HAS CEASED TO EXIST! This Board, the Fourth Division of the National Railroad Adjustment Board, cannot obliterate the proper disposition made in another arbitral forum of concurrent jurisdiction.

Third Division Award 22736, decided without a referee, dismissed the claim because it had already been adjudicated by PLB 2203. When the matter was reviewed by the Sixth Circuit

Court of Appeals it was noted that:

> "The RLA provides for judicial review of PLB and NRAB decisions. In contrast, there is no provision in the RLA for review of a PLB award by the NRAB... We decline the opportunity to frustrate Congress' primary goal by conferring upon employees the right to challenge the award of one board before the other."

There the Court recognized and acknowledged that the disposition made in one arbitral forum could not be overturned in another. That is exactly what this Interpretation has done here. To ignore that Claimant was dismissed as an employee and that dismissal was upheld by an arbitration board prior to any argument being made in this Fourth Division docket results in the eradication of Award 157 of PLB 5035. That is clearly beyond the jurisdiction of this Board!! One cannot admit the existence of Award 157 of PLB 5035; that it would have a "material impact" and then render a decision that completely ignores it.

In Second Division Award 12148 the Court was not aware that the matter submitted to it had already been adjudicated by a PLB. There, as here, there is no legitimate explanation why such a pertinent piece of information was not provided by the Court's counsel. However, in reviewing the matter directed to it, the Award noted:

> "Since Award 15 of PLB 3618 disposed of the matter, this Board has no jurisdiction to re-try the same matter... Nor may this Board be used as a vehicle in which to challenge the decision of PLB 3618 (Third Division Awards 20455, 22736; Second Division Award 7859)." (Emphasis added)

In Second Division Award 9579 it was pointed out:

> "By date of April 5, 1981, Award 8682 was adopted by this Board on the basis of the record presented in Docket 8636 involving the dismissal of the Claimant, K. P. Blount, from service on May 16, 1979. This Board ordered the return to duty of the Claimant to the position of Radio Equipment Installer; a make-whole order was included. Unavailable to the Board at the time of its decision in this case was the results of a prior award (8550) by this Board involving the same Claimant, same Carrier and an important aspect of what this Board considered part and parcel of the case before it -- the question of the Claimant's qualification to fill the Radio Equipment Installer position. It is important to note that this Board concluded that the Claimant was qualified to fill such position generally... Faced with the obviously contradictory positions presented in Award 8682 and Award 8550 regarding Claimant's qualification for the Installer position, the Carrier moved to reinstate the Claimant in the position of 'Lineman' -- an offer the Claimant refused then and continues to refuse. The dispute made its way into the court of proper jurisdiction. The deliberative body refused the Carrier's move to vacate this Board's decision but remanded this matter back to this Board '...so

that it may resolve inconsistencies' with Award 8550; we do so via the remainder of this document.

We are compelled to note, at the outset, that the fact that related aspects of the same incident can be grieved and progressed independently to differently comprised Boards of Adjustment contributes considerably to the potential that different results may issue which conflict with each other. This is particularly true where, as here, the results of one such Board are not available to Boards subsequently convened to hear such related ones. Having so stated, however, we look to the Court's Order for guidance here. By its directive to this Board to 'resolve inconsistencies,' with Award 8550, the Court clearly instructs this Board that the decision in 8550, insofar as the Claimant's qualifications as Radio Equipment Installer, is controlling...."

The Court remanded Award 4969 to this Board to consider the amount of compensation due Mr. Birton. It was to consider the entirety of both the proceedings before this Board and the consequences of the determination of PLB 5035 in disposing of the matter. Judge Shadur again noted:

"...what's interesting... is that neither award actually quantifies the amount to which the Claimant is entitled... I am remanding it to the Adjustment Board for purposes of determining what consequences that has for the parties..." (Emphasis added)

The Court did not say that this Board was to IGNORE what PLB 5035 had done but, in light of that decision, which would have been material to this Board's consideration, to fashion a remedy that was consistent with those determinations concerning Mr. Birton. That is, what is the correct disposition concerning Mr. Birton's railroad employment? The observation here that these were different claims under different contracts involving different crafts completely ignores the very simple fact that BOTH DECISIONS APPLY TO THE EMPLOYMENT STATUS OF MR. BIRTON WITH HIS EMPLOYER!!

As if the foregoing were not enough to require this Board to give deference to the disposition of Award 157 of PLB 5035, Interpretation No. 1 to Second Division Award 9264 (Serial 93) had this to say on the matter of considering what to allow a dismissed employee:

"It is easy to say that absolutely no new evidence can be considered. However, this ignores the practical realities involved in determining the appropriate damages due a dismissed employe. In many instances it is impossible in the handling of a case to bring up each and every factor that may bear on such a question. Questions of lost time can get incredibly complex, especially where an employe may be considered an extra employee or subject to frequent layoffs during dismissal. Moreover, to embrace the Dorsey view would put such

questions in the helpless equilibrium. This is because, technically, if the Board cannot consider the Carrier's viewpoint on the appropriate damages, it cannot consider the Organization's either. Referee Blackwell, when considering the new evidence issue, stated it this way in the interpretation to Award 25 of PLB 1315:

> 'Coming now to the method of computation of 'time lost,' which is the major issue in this case, it is noteworthy that the parties' Submissions on the request for Interpretation advance conflicting methods for making the time lost computation. Neither of these methods was raised in the proceedings which led to Award No. 25 and in fact, except for the subject of outside earnings, nothing was said in the prior proceedings in respect to the method of computation. Accordingly, if the Board now declines to consider the Carrier's method of computation on the ground that the method has not been timely raised, the Board would be compelled to consider the Organization's method of computation on the same ground. Obviously, such a 'non-decision' (i.e., a declination to consider both parties' method of computation) would leave the parties in limbo on the application of Award No. 25, and in consequence the Board concludes that it is appropriate to make findings on the method of computation in the consideration of the instant request for Interpretation.'

To illustrate Referee Blackwell's point one step further, the Union might agree that a deduction is proper but might disagree over the precise method. The Dorsey view would preclude consideration of this issue if it had not been raised during the handling of the claim. It may not have been raised during the handling of the claim because neither party anticipated it being a problem. Thus, the Dorsey view would be absurd because the Board would have no mechanism to consider the problem. It would be argued that a new grievance over the problem could be filed and progressed, however, the end result is the same. The problem must be considered at some point in time.

Second, the Organization's basic view of an interpretation is too narrow. There is no reason to believe that the framers of the Railway Labor Act or the framers of the Board's rules, sought to exclude the Board from considering common law principles relating to questions about damages. The Railway Labor Act and rules of the Board are vehicles to interpret and apply contracts, and these contracts, insofar as the law is concerned, do not exist in a vacuum. Just as we have to rely on common law principles of contract interpretation, when determining whether a contract has been violated, we also have to rely on certain common law principles relating to damages when assessing remedies for contracts we find to be violated."

Claimant, in this matter, was disqualified in his position on August 12, 1992. Claimant exercised seniority to a trainman position. On November 24, 1992 Claimant was involved in a situation that led to his dismissal as an employee. Award 119 of PLB 5035 on September 15, 1993 upheld his guilt, but restored Claimant as an employee with no compensation allowed. Less than one month later on October 7,1993 Claimant was again disciplined by dismissal which was upheld in Award 157 of PLB 5035. These events were MORE THAN A YEAR prior to docket 4947 being argued to this Board. To now conclude, as this Interpretation does, that none of this matters because that was while Claimant was working in a different craft simply ignores the fundamentals of the employer-employee relationship.

While the Interpretation concludes at page 3 that none of the Awards cited to it is on point with the fact of this case, we must note that they are not only relevant, but dispose of the issue that was before this Division. The question posed was what compensation was due Claimant. The answer, given all the facts, including the disposition of PLB 5035, which, "is not a bar to Interpretation" is that Award 157 of PLB 5035 established the end point of Claimant's employment in fashioning the amount due Claimant. In the time that has involved this matter beginning August 19, 1992, Claimant was dismissed as an employee between November 24, 1992 and September 15, 1993 and from October 15, 1993 forward. To ignore those valid dispositions and to award compensation, "from the time of Yardmaster disqualification to reinstatement as Yardmaster" (emphasis added) not only ignores reality, but the vast precedent involving the jurisdiction of this Board.

We most vigorously dissent.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik