PUBLIC LAW BOARD NO. 4901

AWARD NO. 157
CASE NO. 157

PARTIES TO THE DISPUTE: United Transportation Union
vs.
Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings

DATE: April 7, 2001

STATEMENT OF CLAIM:

"Request in behalf of Valley Division Yardman T. J. Panos for the removal of the alleged violations of the Rules 1.15 of the General Code of Operating Rules, effective April 10, 1994, removal of Terminal Manager C. E. Keeler's letter dated January 31, 1997, notifying the Claimant thereof and that he be reinstated to the service of the Burlington Northern Santa Fe Railway Company, Coast Lines, with seniority and all other rights unimpaired and pay for all time lost including the payment of Health and Welfare Benefits beginning on January 30, 1997, and continuing until returned to service as a result of the Formal Investigation held on January 29, 1997."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

It is undisputed that Claimant failed to report at the designated time and place with the necessary equipment to perform his duties as required by Rule 1.15. By his own admission, he did not report, properly dressed for work, until 7:17 a.m. on January 14th. Carrier witnesses placed his appearance at 7:25 a.m. Although Claimant had prior railroad experience, he had some three years of service with the Carrier in January 1997.

Due to his work record up to that time, Claimant was initially dismissed from all service. A later review of the overall circumstances disclosed the fact that, despite having had several previous disciplinary infractions, Claimant had never been suspended without pay. Accordingly, on June 10, 1997, Carrier unilaterally reduced Claimant's dismissal to a suspension without pay for time already served. This resulted in a suspension of some four months and ten days.

In addition to challenging the discipline as being extremely harsh and unusual, the Organization has advanced a number of procedural objections. After careful review of the Agreement language and the evidentiary record, we must reject all of the procedural objections. Rule 24 of the parties' Agreement explicitly establishes very few procedural requirements. In the absence of such negotiated obligations, it is well settled that it is permissible for a single Carrier official to play multiple roles in the disciplinary process. Indeed, Rule 24(b) requires that the investigation be conducted by a Carrier official but it imposes no other restrictions on his or her involvement.

Given the text of Rule 24, it was not procedural error to fail to call Claimant's other crew

members to testify. He did not raise any objection to their absence during the investigation. As a result, any potential objection is considered waived. In addition, however, there is no showing how or in what manner their testimony was relevant. In light of Claimant's own admission of his tardiness, one must ask what material information they might add?

To establish Claimant's tardiness, it was not necessary for the Carrier to establish that the other crew members were not also tardy. The Organization provided no Agreement authority or past award precedent to show otherwise.

Likewise, it was not necessary for the Carrier to establish how it came to learn Claimant's cell phone number. We fail to see how this issue has any bearing whatsoever on Claimant's failure to comply with Rule 1.15.

Rule 24(c) does not explicitly require that Carrier cite any or all of the rules potentially violated in the notice of investigation. By its terms, the rule requires only that the yardmen involved "... will be notified of the charges *or the case to be investigated* ..." (Italics supplied).

Absent Agreement language or award precedent to the contrary, the testimony regarding prior conversations between Claimant and the hearing officer does not, by itself, demonstrate any procedural irregularities. From the transcript, it appears that the content of their advance conversation was entirely benign and did not adversely influence later testimony.

It is also not inherently impermissible, absent Agreement language or award precedent to the contrary, to introduce an employee's past work and disciplinary record into the transcript. It is well settled that the employee's past record should always be taken into consideration before deciding upon disciplinary action.

The cited language of Article 7, regarding the designation of a point for going on and off duty does not appear to have any relevance. There is no dispute about <u>where</u> Claimant was to report.

Given the foregoing discussion and the clearly established fact that Claimant did not report as required by Rule 1.15, Carrier was justified in taking appropriate disciplinary action. It is also well settled that we will not disturb the Carrier's disciplinary decisions unless the penalty it imposes is shown by all of the relevant circumstances to have been arbitrary to the extent that it amounts to an abuse of discretion.

As noted previously, the Organization has also objected to the magnitude of the penalty. On this point, we find the Organization's challenge does have merit. While Claimant's record shows several prior instances of discipline, Carrier did not choose to impose an actual suspension without pay prior to dismissing Claimant for the instant infraction. Thus, Carrier violated its own Policy for Employee Performance Accountability (PEPA).

The well known doctrine of progressive discipline requires that employers take progressively escalating levels of discipline in an attempt to correct misbehavior that is not serious enough by itself to warrant immediate discharge. Carrier's PEPA guidelines implement the doctrine of progressive discipline over a rolling three-year period of time. PEPA mandates that a 20-day suspension be imposed as the third step of discipline prior to dismissal. This is the prescribed means of "Standard Handling" for non-aggravated types of misconduct.

The Carrier's own decision to reduce Claimant's dismissal to a suspension for its own non-compliance with PEPA recognizes that his tardiness was of the non-aggravated type of misconduct that warranted a 20-day suspension.

When viewed from the PEPA perspective, Carrier's suspension of four months and ten days,

as Claimant's initial suspension without pay, takes on an impermissible degree of arbitrariness that bears no apparent rational relationship to Claimant's misconduct. Rather, the magnitude of Claimant's suspension was determined by the length of time it took the Carrier to undertake a review of pending dismissals and not by the PEPA standards as it should have been.

Under the circumstances, Claimant's suspension cannot stand as is. We find the relevant circumstances to warrant, at most, a suspension of twenty days duration. Therefore, Claimant must be compensated for all time lost in excess of twenty days. In addition, his work record must be modified to reflect only a twenty-day Level 3 disciplinary suspension for just cause.

AWARD:

The Claim is sustained in accordance with the Findings.

Gerald E. Wallin, Chairman
and Neutral Member

P. L. Patsouras,
Organization Member

Gene L. Shire,
Carrier Member