

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39868
Docket No. SG-38803
08-3-NRAB-00003-050196
(05-3-196)**

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of T. L. Somera, for reinstatement to his former position with payment for all time lost, including overtime and holidays, with all seniority and benefits restored and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued the harsh and excessive discipline of dismissal against the Claimant without meeting its burden of proving the charges that the Claimant failed to follow instructions and did not report for duty in an investigation held on April 16, 2004. Carrier compounded its violation by failing to respond to the Organization’s appeal within the time limits prescribed in Rule 68, and Carrier also unilaterally combined this case with another that was handled separately without the concurrence of the Organization. Carrier’s File No. 220-68. General Chairman’s File No. W-68-403. BRS File Case No. 13110-UP.”

FINDINGS:

The Third 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 were given due notice of hearing thereon.

At the time of this dispute, the Claimant was assigned as a Signaller on Signal Gang 5837. The Claimant was scheduled to work on March 17, 2004, yet did not report to work on that date. The Carrier investigated the matter to determine if the Claimant violated Union Pacific Rules 1.13 Reporting and Complying with Instructions and 1.15 Duty – Reporting or Absence. The Carrier found that the Claimant violated both Rules and assessed a Level 5 discipline dismissing the Claimant from the service of the Carrier on or about April 28, 2004.

Before addressing the merits of this claim, the Organization raises three procedural issues. The Organization contends that the Carrier violated Rule 68 of the amended Agreement in effect between the parties effective February 1, 2000. First, it alleges that the Carrier failed to meet its burden demonstrating that the Claimant violated any Rule and that, therefore, the discipline imposed was harsh and excessive. It also claims the Carrier violated Rule 68 by not responding to the Claimant's claim or grievance in a timely manner. Finally, it contends that the Carrier improperly combined the Claimant's claims in its handling on the property. In any event, it is the Organization's position that the Carrier's failure to timely respond is fatal whereby it cannot discipline the Claimant at all. For the reasons discussed below, we disagree.

The Carrier claims that the Organization did not present a valid claim or grievance in the on-property handling and ex-parte Submission on the Claimant's behalf; therefore, the Carrier had no duty to respond to correspondence it received. The Carrier contends that, nevertheless, if the Organization's correspondence on the Claimant's behalf qualifies as a claim, then National Disputes Committee (NDC) Decision No. 16 and supporting precedent support the upholding of otherwise sound decisions notwithstanding the Carrier's untimely response to a claim. NDC Decision No. 16 defines the proper measure of damages for the Carrier's liability in such cases to be damages for the period of time between when the decision was due until the

decision was rendered. In this case, it would be when the Carrier responded to the Claimant's original correspondence.

The Board reaches the following findings: On May 17, 2004, the Organization forwarded a letter to the Carrier by certified mail rejecting the Carrier's decision to dismiss the Claimant for failing to comply with previous instructions as sustained in the Investigation held on April 16, 2004. The Organization cited that the Carrier did not meet its burden of proof to substantiate the charge and that the Carrier's policy for laying off is not written and universally applied to all Carrier employees or Signal Department employees. The letter concludes with the statement that the charge against the Claimant "must be stricken" from the Claimant's record and that the Claimant receive all lost wages, including overtime and holidays, in full. The Organization followed up to this letter on September 16, 2004 noting a discussion with a Carrier representative on August 20, 2004 regarding this matter and the violation of the 60-day time limit and attempted to mutually extend the time limits for both the Carrier and the Organization. The Organization subsequently notified the Carrier for the fourth time, by letter on October 19, 2004 that it had not received any response to its appeal on behalf of the Claimant.

The Carrier never disputed that it did not respond to the Organization's appeal on behalf of the Claimant until November 12, 2004. The Carrier's subsequent letter dated November 12, 2004 indicated that the letters had been logged and filed as something other than a claim or grievance. The Board finds Carrier's "defense" incredible that the May 17, 2004 letter did not present as a claim or grievance. Even if the May 17, 2004 correspondence did not present to the Carrier as a "claim," at some point, it would have been prudent to look at the letter and respond, as requested, to avoid claims such as this. More importantly, the Carrier provided no Rule, Awards or other credible evidence to suggest that the Claimant's letter dated May 17, 2004 did not clearly qualify as a claim or could not have reasonably been considered as such when it was received. In fact, Rule 69 A and B of the Agreement appear to only require that appeals be in writing within 60 days from notice of the Carrier's decision and/or that an appeal reject the Carrier's decision. The Carrier's perspective and interpretation of very basic language in the letter that "quacks, walks, and talks" like a claim is novel. We disagree that this claim was "too vague" or could not be understood, particularly given the discussions between the parties during this time. The facts of this case do not appear to be anything similar to the matter addressed in Third Division Awards 20166 and 36845 as the Carrier implies.

We find the Carrier's failure to respond in a timely manner (more than three months after the expiration of the 60-day time limit) a violation of Rules 68 and 69 and find no merit in its claim contention that the Claimant's letter of May 17, 2004 did not suffice as a proper claim. The letter clearly identified the Claimant as the affected employee and that the Organization sought the removal of the dismissal decision; therefore, the Board is perplexed by the Carrier's confusion. We find procedural error and sustain this aspect of his claim. We find no merit in the Organization's other procedural arguments.

Turning to the merits, in discipline cases, the Carrier bears the burden of proving that the misconduct that forms the basis of the Carrier's charge against the Claimant occurred. The evidence revealed in the Hearing transcript substantially demonstrates that the Claimant was very familiar with and received instructions on the proper way to report his absences. Yet, on March 17, 2004, he failed to report and properly report his absence. The evidence further revealed that the Claimant had two previous Investigations concerning a violation of Rule 1.13. The evidence reveals that the Claimant was well aware of the requirements of Rules 1.13 and 1.15 as demonstrated by his previous disciplinary proceedings dating back to 2000. The Claimant's absenteeism on March 17, 2004 was his third violation of the same Rule within 36 months, and as such, warranted Level 5 discipline in Carrier's estimation, and in accordance with the Carrier's formal disciplinary program (UPGRADE).

Notwithstanding the Claimant's personal problems that were alluded to in the Investigation transcript, it is not the role of the Board to substitute its judgment for that of the Carrier. The Investigation transcript revealed that the Claimant's Supervisor and Foreman considered the Claimant's circumstances and attempted to assist the Claimant as much as possible in the past and in this instance. Clearly, the Carrier exhausted its ability to accommodate the Claimant's absenteeism. This determination was based upon sufficient evidence and information and the Board does not find that the Carrier's discipline was excessive, arbitrary, or capricious. Although there was a procedural violation in responding to the Claimant's appeal, the Claimant's Agreement due process rights were not violated in that a timely response to his appeal would not have changed the results of the initial determination. We agree with the principle articulated in Third Division Awards 36305 and 13692 where the Board found that the tardiness of the Carrier's response did not invalidate an otherwise sound decision.

The long settled rule is that the late denial of a claim tolls the Carrier's liability for the procedural violation as of that date. This principle is utterly inconsistent with the Organization's proposition that the Board not reach the merits of this claim because time limits are sacrosanct. The Board finds that the Claimant benefits from the penalty imposed on the Carrier for its failure to timely respond to the Claimant's appeal pursuant to the parties' Agreement. Such a finding is fair and fitting to encourage prompt response by the Carrier in the future; yet, does not permit the inappropriate benefit of reinstatement to the Claimant had the procedural violation not have occurred. The facts of this case do not suggest that the Claimant lost any benefits or his ability to bring his appeal further. Accordingly, the measure of damages for the Carrier's violation of Rule 68 is compensation to the Claimant at his straight time rate from the due date of the Carrier's response of July 16, 2004 to the actual response date of November 12, 2004.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 Third Division**

Dated at Chicago, Illinois, this 31st day of July 2009.