

Award No. 10612

Docket No. SG-9961

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Phillip G. Sheridan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

ATLANTIC COAST LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee on the Atlantic Coast Line Railroad Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 46, when it assessed discipline to Signal Maintainer W. A. Crocker following an investigation held to develop facts in connection with an accident that occurred near Mile Post 12 between Centralia and Chester, Va., in which motor car was struck by Local Freight north Extra 115 on October 23, 1956.

(b) The Carrier now pays Signal Maintainer W. A. Crocker respective Signal Maintainer's rate of pay for each day that he was held out of service as a result of the disciplinary action taken by the Carrier, specifically December 1, 1956, through December 15, 1956, inclusive.

OPINION OF BOARD: This is a discipline case. The questions involved are whether the claimant was properly informed as to the nature of the charge against him pursuant to the provisions of Rule 46(a) and whether his conduct and that of his representative should be considered a waiver of any defects for failure to comply with the provisions of Rule 46(a).

The merits of the case are not in issue.

Rule 46(a) is as follows:

"Rule 46. (a) An employee who has been in the service more than sixty (60) days will not be disciplined or dismissed without an investigation, at which investigation he may be assisted by an employee of his own choice or duly accredited representative. He may, however, be held out of service pending such investigation. He will be advised in writing at least forty-eight (48) hours prior to such investigation of the exact charge or charges which have been made against him. The employee may waive the forty-eight

(48) hour period of time herein provided, in which event the investigation may be immediately held. At such investigation he shall have right to call witnesses to testify in his behalf, and he or his representative shall have the right to question witnesses. The investigation shall be held within ten (10) days of the date when charged with the offense, and a decision will be rendered within ten (10) days after the completion of investigation. An employee disciplined will be advised in writing, stating the reason therefor. If a transcript of statements taken at investigation is made, a copy will be furnished the employee or his representative upon request."

The claimant together with Messrs. Webb and Byrd received the following letter:

"You are hereby notified to attend investigation to be held at Trainmaster's office Broad Street Station Richmond, Va., nine AM Oct. 29.

The object of this investigation is to develop all facts in connection with accident that occurred near mile post 12 between Centralia and Chester, Va., at 1:55-PM Oct. 23 in which you allowed motor car to be struck by Local Freight north Extra 115.

Please acknowledge receipt."

We are in accord with the principle announced in the many awards of various Divisions of the Railroad Adjustment Board that the allegations against an employee should not be couched in the same technical manner as one would use in pleadings prepared for a civil or criminal case. However, in the instant case we cannot so hold. Rule 46(a) has mandatory provisions that were adopted through collective bargaining.

The third sentence of this rule states as follows:

"He will be advised in writing at least forty-eight (48) hours prior to such investigation of the exact charge or charges which have been made against him."

The letter transmitted to the claimant cannot be considered an exact charge against the claimant. It is merely a notice of a fact finding investigation for the purpose of determining the facts of an accident, but not a hearing for the purpose of determining the guilt or innocence of the claimant and for violating the Carrier's operating rules.

We also find support in our contention in the opening statement made by Carrier's Supervisor who conducted the investigation, he stated as follows:

"The object of this investigation is to develop all facts in connection with accident that occurred near M.P. 12 between Centralia and Chester, Va. at 1:55 P.M. October 23, in which you allowed motor car to be struck by Local Freight North, Extra 115."

There is nothing in the notice or the above remarks to alert the claimant that a hearing was being held for the purpose of determining whether he was innocent or guilty of a rule violation.

Did the claimant and his representative waive the provisions of Rule 46(a) by proceeding with the investigation?

Our answer must be in the negative, and our position is supported by Third Division Award No. 2806 which states in part:

“Waiver is a matter of intention and we certainly cannot say that at an investigation held pursuant to a notice such as here involved, the claimant intended to waive the right to a hearing accorded him by the contract.”

This lack of waiver is most evident in light of Carrier's opening remarks at the investigation. Claimant believed he was at a fact finding investigation. Therefore, we are of the opinion that the claim should be sustained.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of May 1962.

DISSENT TO AWARD 10612, DOCKET SG-9961

Here, a Signal Maintainer was accorded 15 days' actual suspension for guilt of responsibility for collision of motor car in his charge with a freight train per charge:

“You are hereby notified to attend investigation to be held at Trainmaster's office Broad Street Station Richmond, Va., nine AM Oct. 29.

“The object of this investigation is to develop all facts in connection with accident that occurred near mile post 12 between Centralia and Chester, Va., at 1-55-PM Oct. 23 in which you allowed motor car to be struck by Local Freight north Extra 115.”

At the investigation the claimant signal maintainer, represented by his General Chairman testified that he had received the notice, considered it a proper one, and was ready to proceed.

The Claimant's suspension was appealed in accordance with Rule 46(b). However, the alleged violation of the "exact charge or charges" requirement of the investigation notice per Rule 46(a) was first introduced in the appeal to this Division.

The majority, without consideration of the claimant's apparent guilt of the charge, have erroneously recognized this extreme and out-of-time technicality, and rescinded the 15-day suspension and awarded claimant pay for time lost serving same. In so doing, the majority have ignored the governing principles established by this Board to which attention had been directed during this Division's proceedings:

- (1) That claimant to be afforded a proper hearing need only be made fully aware of that of which he is charged (Awards 2974, 3270, 10089; and First Division Award 14238);
- (2) That the investigation procedures are not conducted with the strictness and rigidity of court proceedings (Award 8503);
- (3) That an alleged defect in investigation can be waived (Award 10089, and First Division Award 14753);
- (4) That claimant may not willingly proceed with an investigation, and then protest upon receipt of an adverse decision (Award 2974, 3270 and First Division Award 18878);
- (5) That claimant may not mend his holds by progressing a claim to this Division on a basis not introduced in the handling of his case on the property (Awards 5077, 5469, 6557, 8484, among others);
- (6) That it was not the purpose of the rule to provide a technical loophole for escape from deserved discipline (Award 4781).

By reason of the foregoing, the undersigned dissent to the Opinion of the majority in this Award.

/s/ **R. A. DeRossett**

/s/ **O. B. Sayers**

/s/ **G. L. Naylor**

/s/ **R. E. Black**

/s/ **W. F. Euker**

**ANSWER TO CARRIER MEMBER'S DISSENT TO AWARD 10612 —
DOCKET SG-9961**

The Carrier Member's dissent to Award 10612 does nothing more than to rehash argument which was found to be without merit. The award is correct and in keeping with numerous earlier awards of this Board.

/s/ **W. W. Altus**

W. W. Altus