Award No. 11775
Docket No. SG-11392

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Texas and Pacific Railway Company that:

(a) The Carrier violated the current Signalmen's Agreement, particularly Article X, Rule 50, when it assessed discipline against Signal Maintainer E. R. Mask with assigned headquarters at Monahans, Texas, following an investigation held on July 7, 1958, in connection with an accident which occurred on June 24, 1958, when a motor car in his charge was struck by Extra 1525 West near M.P. 591.

(b) The Carrier shall therefore be required to clear Mr. Mask's personal record of any responsibility for the accident and pay him for all actual time lost as a result of the unwarranted discipline rendered. [Carrier's File No. T-31479]

OPINION OF BOARD: Claimant E. R. Mask was working as a Signal Maintainer with assigned headquarters at Monahans, Texas, on June 24, 1958, on which date a motor car being operated by him was struck by Train Extra 1525 West at about 10:30 A. M. near Mile Post 591. Thereafter Claimant was charged by Carrier with permitting a motor car in his charge to be struck by Extra 1525 West and was notified on June 25, 1958, by the Superintendent to appear for a formal investigation of the charges in the office of the Superintendent on June 28, 1958. The investigation was postponed by mutual agreement between the Claimant and the Superintendent until July 7, 1958. Claimant conceded he had been properly notified in writing of the investigation and announced that the General Chairman and the Local Chairman of the Organization would represent him at the hearing. The hearing on the charges preferred was held on July 7, 1958. Following the investigation the General Chairman requested that copies of the transcripts be furnished to the Claimant, the Local Chairman and himself.

On July 11, 1958, the Superintendent wrote Claimant that he was guilty of the charge made against him — that he was responsible for permitting the motor car he was operating to be struck by Extra 1525 West resulting in personal injury to himself and damage to the motor car. On that same date, the Carrier forwarded to the General and Local Chairman copies of the transcript of the hearing but neglected to comply with Article X, Rule 50, of the Working Agreement in not sending a copy to them of the decision and notice of dismissal from service of the Claimant, they having assisted Claimant at the investigation.

Article X, Rule 50 (d) of the Working Agreement reads, as follows:

> "Decision to the employe, **with copy thereof to representative who assisted him at the investigation,** will be rendered in writing within ten days after completion of investigation." (Emphasis supplied.)

The General Chairman wrote the Superintendent eleven days after the hearing advising him that he had received no notice of the decision and asked that the charges against Claimant, Mask, be dismissed on account of the violation of the Rule. Carrier, however, contended this was an inadvertence and had been overlooked when sending him, the General Chairman, copies of the transcript but that in any event it had nothing to do with the merits of the Claim and he would not agree that the decision should be withdrawn.

Claimant further claimed that the proceedings at the hearing were irregular and the evidence adduced did not justify a sustaining of the charges nor the ultimate discipline that was invoked. This, the Carrier denied.

In a consideration of this matter, we will first discuss the merits. Nothing would be gained by a complete review of all the testimony contained in the transcript. There is nothing in the Record to indicate there was anything irregular in the manner in which the hearing was conducted. Claimant was represented by those of his own choosing and given an opportunity to cross examine witnesses called by the Carrier. Claimant knew he was charged with the responsibility of causing a collision between a motor car in his charge and the engine of a train. He was charged generally with failure to follow safety rules. In Award 1310 (Wolfe) it was said:

> "In these matters of discipline for infractions of rules made for the safety of the public and fellow employes, the action of the railroad management cannot be lightly interfered with. It has the obligation and responsibility for the safe operation of its road."

At the hearing Claimant admitted he knew of the presence of this train somewhere in the area where he was working and the risks involved if he proceeded. He was required to exercise care in the performance of his duties and it was within the province of the Carrier to determine whether he did so under all the circumstances. We cannot substitute our judgment for that of the Carrier and if there is any evidence which would justify Carrier in concluding that Claimant was not using the best judgment in conducting himself safely, it is not for us to disturb it. It does seem that the punishment first imposed was harsh and excessive but when the appeal of Claimant reached a higher echelon in management, the Assistant Chief Engineer advised Claimant he was agreeable to reinstating him to his former position on September

15, 1958, with seniority unimpaired but with no pay for actual wage loss as the result of the discipline rendered.

Secondly, we come to a consideration of the procedural question that Petitioner has raised. From a reading of Article X, Rule 50 it will be observed that the relationship of principal and agent existed in this discipline case. The employe, Mask, being the principal and the Chairmen, in a representative capacity, were his agents. The procedure up to and including the notice of the decision and discipline to the principal, employe Mask, was perfectly regular. Now the question is — "Did the failure to send the General Chairman a copy of the decision, as employe's representative, within ten days as required by the Rule render void all that had occurred regularly prior to that time?" We think not. In the absence of any evidence to the contrary we have the right to presume that when Mask, the principal, received the decision of the Carrier on July 11, 1958, four days after the hearing, his representative, or agent, had knowledge of the decision and its contents whether such representative had received a **copy of the decision** at that time or not. There is nothing to indicate that Mask was in any way prejudiced by the failure, inadvertently, to send a copy of the decision to the General Chairman and, in the absence of any specific showing, is there anything indicating that the Organization was affected adversely by the failure of Carrier to send a copy of the decision to the General Chairman. We hold to the general view that procedural requirements of the agreement are to be complied with but we are unable to agree that Carrier's failure in this regard, under these circumstances, was a fatal error which justifies setting aside the discipline ultimately imposed. See Award 8807 (Bailer).

Awards cited by Claimant are not in point as they involve a failure to give proper notice of a hearing or a failure to hold a proper hearing in discipline cases.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employe 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

There has been no violation of the Agreement other than the failure of the Carrier to send a copy of the decision to the employe's representative within ten days as provided for by the Agreement.

AWARD

Claim denied in accordance with views expressed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1963.

DISSENT TO AWARD 11775, DOCKET SG-11392

While these remarks are directed only to the majority's decision relative to the procedural question in the claim, our failure to comment on the balance of the "Opinion of Board" is not to be construed as concurrence therewith.

The majority has committed palpable error in its rejection of the employes' claim that the discipline accessed the Claimant should be set aside because of the Carrier's failure to comply with an agreement provision. The majority states:

> "* * * Now the question is — 'Did the failure to send the General Chairman a copy of the decision, as employe's representative, within ten days as required by the Rule rendered void all that had occurred regularly prior to that time?' We think not. In the absence of any evidence to the contrary we have the right to presume that when Mask, the principal, received the decision of the Carrier on July 11, 1958, four days after the hearing, his representative, or agent, had knowledge of the decision and its contents whether such representative had received a ***copy of the decision*** at that time or not. * * *"

The Agreement provides:

> "Decision to the employe, with copy thereof to representative who assisted him at the investigation, will be rendered in writing within ten days after completion of investigation."

The question, as framed by the majority, is correct; their conclusion, however, leaves much to be desired, for it is patently obvious, and the majoirity's **Findings** state, that the Carrier has violated an agreement provision. Award 11775 sanctions that violation and places the Board in the position of modifying an agreement rather than interpreting it as provided in the Railway Labor Act. In this respect Award 11775 is also contrary to awards too numerous to necessitate citing, holding that the purpose of this Board is to apply agreements as made by the parties and not to modify them or grant relief to one of the parties.

Award 11775 is in error; therefore, I dissent.

/s/ **W. W. Altus**
Labor Member