

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19763
Docket Number CL-19764

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: ((Norfolk and Western Railway Company
((Involving employees on lines formerly
(operated by the Wabash Railroad Company)

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (CL-7143)
that:

(1) Carrier violated the provisions of the Schedule for Clerks, effective May 1, 1953, specifically Rule 28, paragraphs (a), (b) and (d) when on December 2, 1971, it arbitrarily, capriciously and unjustly assessed a five (5) day penalty against Messenger W. J. Crist.

(2) Claimant shall now be paid for time lost as a result of Carrier's unjust action.

(3) Carrier will now be required to pay interest on all time lost at the rate of one percent compounded monthly.

OPINION OF BOARD: Following hearing the claimant was assessed a five (5) day suspension for his responsibility regarding damage to a company vehicle which occurred while he was operating the vehicle.

Petitioner contends the discipline was arbitrary, capricious, and unjust in that: 1) one of the appellate officials prejudged **claimant's** appeal; 2) Carrier violated the time limits and hearing **provisions** in Rule 28 (b) and the "prompt" hearing and decision requirements on an appeal under Rule 28 (d); and 3) the hearing evidence does not support the findings of responsibility on the part of claimant.

The facts underlying Petitioner's first contention are that the Assistant Superintendent conducted the investigation, but the **Superintendent** issued the letter advising claimant of the findings of responsibility and of the discipline. The Superintendent was also the next proper official to consider an appeal from the decision resulting from the initial investigation and hearing. It is therefore argued that, in rejecting the claimant's appeal and "By giving his written approval to the initial decision", the Superintendent prejudged claimant's right to appeal to him. Essentially this same argument was considered and rejected in Award 16347, wherein this Board stated that: "The fact that the Superintendent rendered the decision did not preclude his acting as the appeals officer..." We perceive no basis in the record before us for making a departure from this Award and, accordingly, we shall also reject the argument here.

Petitioner's second procedural contention is **predicated** upon **Carrier's** alleged violation of Rule 28 (b) and Rule 28 (d). Rule 28 (b) provides that, upon written request, a hearing before the next proper official will be given an employee who is dissatisfied with the decision resulting from the initial investigative hearing. (Emphasis supplied) The Rule also provides time limits. The Organization letter on which this argument is based stated that the claim should be paid, "or set a time and place to discuss same." This does not amount to a written request for a hearing under Rule 28 (b) and we must therefore reject the **argument** as lacking any substantive basis. The contention concerning Rule 28 (d) also lacks any substantive basis and is likewise rejected. This rule provides that a hearing and a decision on an appeal shall be given and rendered as "promptly as possible." The hearing herein was given in 41 days and the decision was rendered 15 days after the hearing. We cannot on the record here say that these time periods were unreasonably long, especially since the claimant was not out of service pending appeal.

We come now to the merits of the dispute. It is not disputed that the damage to Carrier's vehicle occurred during the course of a trip which claimant made more than once each day. Thus, claimant was familiar with the area. He **was** also **familiar** with the vehicle because he had driven it since it **was** purchased approximately one year before the occurrence of the incident under consideration here. The incident occurred in cloudy, raining weather at approximately 11 sm.

Claimant provided the only eye-witness testimony on the events leading up to the damage to Carrier's vehicle. He said that, after driving the vehicle over a rough railroad crossing, he turned the vehicle onto a **concrete** slab, whereupon the right front wheel dropped into a depression in the dirt. The vehicle then proceeded west and hit a steel fence post on the right side of the road. Claimant **gave** 30 feet **as** the distance from the point after making the left turn to the point of impact with the steel post. Claimant testified that, in his opinion, the snow tires on the front wheels of the vehicle resulted in loss of steering ability and traction, and that these conditions **caused** the vehicle to go out of control when the right wheel **went** into the depression. **However**, he also testified **that, although traveling** at 5 miles an hour when at a distance of 30 feet from the steel post, and although he applied the brakes which functioned properly, he hit the steel post "at approximately **between 5 and 10 miles per hour.**" Obviously the claimant gave both exculpatory and **incriminating** testimony. Apparently Carrier gave credence to the latter and concluded that claimant was driving too fast for the conditions. Consequently, on the whole record, there is substantial evidence to support Carrier's findings of responsibility by claimant and **assessment** of discipline **therefor** and, accordingly, we shall not disturb Carrier's **action.**

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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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May, 1973.