

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21102
Docket Number Z-21179

Frederick R. Blackwell, Referee

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE:

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(Erie Lackawanna Railway Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Erie Lackawanna Railway Company.

On behalf of Mr. A. J. Gioiello, Signal Maintainer, "DB" Interlocking New York Division, who was disciplined as a result of an investigation held on March 4, 1974, for five days' pay plus all overtime lost, and that his record be cleared of the charge. /General Chairman file: 514-A.J. Gioiello, New York Division. Carrier file: 228-Sig./

OPINION OF BOARD: The Charge and Disciplinary Decision

Under date of February 27, 1974, the Claimant, Signal Maintainer Gioiello, was given the following notice of investigation:

'You are instructed to report to the Conference Room, Hoboken, N.J. 1000 hours (10:00 A.M.) Monday, March 4, 1974 for investigation in connection with delay to eleven (11) trains at DB Interlocking, morning of February 26, 1974, at which location you were both assigned on duty, such delays occurring due to your alleged failure to properly operate and maintain DB Interlocking appliances.

Mr. Gioiello is charged with alleged violation of General Notice, Rules B, B-1, 618 and 619, Rules of the Operating Department, and in accordance with Rule 33 may have a representative and witnesses present."

Following a March 4, 1974 hearing, the Carrier issued its disciplinary decision under date of March 14, 1974 as follows:

"Five (5) days actual suspension account your violation of General Notice, Rule B, B-1, 618 and 619, as contained in the Rules of the Operating Department effective October 25, 1964."

Parties' Position and Procedural Issues

The Employees seek to have the discipline set aside on the grounds that the Carrier violated two procedural requirements and that the Carrier's evidence failed to prove the charges against the claimant. The Carrier asserts that neither of these grounds is supported by the record.

The **Employees'** procedural arguments are (1) that the Claimant received notice of the investigation **only two working days prior** to the hearing, whereas **Rule 33** of the Agreement requires notice of three working days and (2) that the hearing was conducted by an official other than the **one** prescribed by the prior practice concerning hearings. The Carrier does not dispute the facts underlying these objections, but **asserts** that the **objections were** not raised at the hearing **even** though the hearing officer asked at the hearing whether there **was** "any reason why this **investigation should** not continue." **With regard** to procedural objections of the kind here **presented**, prior **authorities** have held **that** objections not timely made at the hearing are "deemed to have been **waived**." Award No. 16121. The instant record does not establish the requisite timeliness of the objections and thus the objections **cannot** be considered in this appeal.

Facts on The Merits

As regards the merits, the herein incident arose during the Claimant Signal Maintainer's extra work at the **"DB"** Interlocking Plant, Greenwood Lake Junction, New York Division, from **10:30 P.M.**, February 25 to **2:30 P.M.** February 26, 1974. The extra work was required because of snow conditions and the Claimant's **duty was** to help keep the switches in proper working order. At about **11:30 P.M.** on February 25 and at **2:30 A.M.** or **3:00 A.M.** on February 26, the Claimant made a visual inspection of the plant. Pursuant to the Claimant's request, the **towerman** threw the interlocking switches during each of these two inspections and the switches were found to be in **order** in each instance. The snow stopped at about **2:30 A.M.** on the 26th. Later, at about **7:00 A.M.** on the **26th**, after being notified by the **towerman** of a switch malfunction, the Claimant found that the switch at the east end of the **"DB"** Interlocking was aligned for a freight **track and could** not be aligned to permit a main track movement because snow had adhered to the switch points. The Claimant testified that the switch heaters were operating but that they had not prevented the build-up of snow, **because** the wind was blowing the heat in the opposite direction from the switch. He **also** testified that he discovered upon inspecting the switch that **cement** and other foreign material had dropped into the ties and around **the points** and that such materials probably caused the snow to **accumulate** faster than **normal**.

The Claimant took action to make the east end switch operative for a main track **movement**, but a delay to at least one train, possibly more, resulted while the switch was inoperative. The conductor of Train No. 1000, Dover to **Hoboken**, testified, **that** the inoperative east switch at the **"DB"** plant delayed his train twenty-six (26) minutes. A tally sheet from the **Trainmaster's** office lists delays to ten trains, including Train No. 1000, caused **on** the date in question by **problems** at the **"DB"** plant and two other locations.

Rules 618 and 619, Rules of the **Operating** Department, cited in the charge and read into the hearing record, read as follows:

Rule 618

"During cold weather the levers must be moved as often as may be necessary to keep **connections** from freezing."

Rule 619

"During storm or while snow or sand **is** drifting, special **care must** be used in operating switches. If the force where duty it is to keep **switches clear is not** on hand promptly when required, the fact must be reported to the Superintendent."

Discussion and Findings

The **Employee** submit that the discipline should be vacated because the charges referred to the Claimant's responsibility for delays to eleven (11) trains whereas the hearing evidence shows delay to **one** train only, and because the rule violations cited in the charges are not **supported** by the evidence. The **Trainmaster's** tally **sheet listed** delays to eleven **trains** caused by problems at three different locations, but the sheet does not show which delay occurred at which location. Thus, the delay to **Train** No. 1000 at the "DB" plant, established by the Conductor of that train, **is** the only train delay clearly **established** by the hearing record. It is also noted **that** the Carrier's correspondence on the property makes reference to the fact that the **investigation** established that "Claimant was guilty as charged." **However**, these facts do not tend to invalidate the discipline in view of the Carrier's March 14, 1974 written decision which was rendered following the hearing. Since this decision **states** that discipline was dispensed because of the Claimant's violation of specified operating rules, without **any** reference at **all** to train delays, it cannot be said that the decision found the claimant responsible for the delays to eleven (11) trains. As for the Claimant's actions on the night in question, his own testimony establishes that he made no inspections of 'the **switches** after his 3:00 A.M. **inspection** until he was notified at 7:00 A.M. that a malfunction of the east end switch had occurred. The fact that everything **was** in regular order at the **3:00** A.M. inspection does not justify his failure to make further inspections. As the facts that the heaters were not effective and that the cement **was** causing a problem might have been discovered by a pre-7:00 A.M. inspection, the Carrier decided that the Claimant was derelict in his duty to help protect the plant by his failure to make such an inspection. The Carrier's decision in this regard and the disciplinary action is supported by **substantial** evidence in the record as a whole and there is accordingly no basis for disturbing the discipline. The claim will be denied.

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:

A. W. Pauls
Executive Secretary

Dated ~~at~~ Chicago, Illinois, this 29th ~~day of~~ June 1976.