

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25142

Docket Number CL-23992

Wesley A. Wildman, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, **Express** and Station **Employees**  
PARTIES TO DISPUTE: (  
(Louisville and Nashville Railroad Company

STATEMENT OF CLAIM: Claim of the Committee of the Brotherhood (CL-93771 that:

1. Carrier acted in an arbitrary and unjust manner and violated Rule 43 of the Agreement between the parties when it assessed Clerk R. K. Brooks twenty five (25) days actual suspension to begin at 12:01 a.m., May 15, 1980 and be allowed to report after **11:59 p.m.**, June 8, 1980.

2. Carrier shall, as a result of the arbitrary and unjust action of the Carrier, be required to:

(a) Clear Mr. Brooks' record of any reference thereto and allow compensation (wages) for all time lost as result of this improper charge.

(b) Reimburse Mr. Brooks for any and all expense incurred in connection with the charges.

OPINION OF BOARD: Claimant in this case is a Clerk assessed twenty-five working days suspension without pay for improper way-billing of a freight car to Fulco, **Georgia**, rather than to Charlotte, North Carolina, its proper destination.

The first issue to be considered is the assertion of the Organization representing Claimant that the Carrier official who conducted the usual investigatory hearing "on the property" was biased and had prejudged the case against Claimant. There is indeed a statement on the record made at the outset of the proceeding which established that the hearing officer questioned the validity of an essentially procedural (time limits) objection raised by the Organization to the imposition of discipline in this case. The multiplicity of roles played by the hearing officer in a typical disciplinary hearing in the railroad industry results frequently in that official having been previously privy to, and often having formed judgments about, matters which are the subject of the hearing he is conducting. However, the central issue is whether this inevitability results in any prejudicial impairment of a Claimant's defense on the record or precludes a fair and just hearing which adequately explores all relevant issues. We find **that** no denial of due process whatsoever occurred in this case. The brief and simple arguments and testimony of the parties enjoy quite clear and adequate elaboration on the record and there is no indication of taint or prejudice with regard to the developments of facts on the issue before us.

Rule 43(a) in the Agreement between the parties provides that an accused in a disciplinary case be apprised in writing of the charge brought against him "within ten days after knowledge of the occurrence' of the event giving rise to the charge (~~the~~ reference here is, of course, to "**knowledge**" by Carrier). As the faulty waybill was issued by Claimant on April 23 and he did not receive notice of discipline until May 5, the Organization claims a violation by Carrier of Rule 43/a) which invalidates any subsequent action against Claimant in this case. The Organization argues that from the time of issuance (April 23) the erroneous waybill was at least "available to' Claimant's supervisors. The simple and, we find, adequate response of Carrier is that the officials of Carrier did not become aware of Claimant's error until May 2, when they were informed that the freight car which was the subject of the erroneous waybill was in Georgia rather than North Carolina. There was no evidentiary showing **or**, indeed, even assertion by the Organization that Claimant's supervisors had any responsibility whatsoever to compare Claimant's waybills at the time of issuance with the relevant shipping orders to assure that no error was ever made.

As Claimant's responsibility for the error in the way-bill has never been disputed, it remains only for us to consider the final argument of the Organization representing Claimant to the effect that imposition of a **twenty-five** working day penalty for a simple, non-willful clerical error is arbitrary, capricious and unnecessarily harsh. Additionally, Organization correctly points out that assertions in Carrier's **ex parte** submission concerning Claimant's past record cannot be considered by this Board in judging the appropriateness of penalty, as Claimant's disciplinary history was not put in evidence at the hearing or at any other time during the processing of this case "**on the property**".

We might agree with the Organization that the quantum of discipline in this case appears excessive were it not for the fact that the record discloses that Claimant, upon discovering his own error on May 1 and issuing a corrected waybill, did not disclose this costly and embarrassing incident to his superiors. We think that Claimant, whose carelessness caused considerable expense and inconvenience had a responsibility, on discovering his error, to immediately apprise his superiors in an effort to mitigate, insofar as possible, subsequent monetary loss and damage to the reputation of Carrier.

Accordingly, we decline to substitute our judgment on the disciplinary penalty for the judgment of Carrier and find that the discipline is not, under all the circumstances, arbitrary or capricious.

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 Employes 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

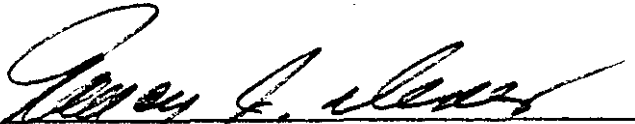
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.