

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31009
Docket No. SG-31341
95-3-93-3-373

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Southern Pacific Transportation Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Southern Pacific Transportation Co. (SP):

Claim on behalf of W. H. Owens, Jr., to be made whole for all wages and benefits lost during a disciplinary suspension from January 11 to January 26, 1992, and for removal of discipline from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rules 13 and 53, when it failed to provide the Claimant with a fair and impartial hearing, failed to substantiate its charges against the Claimant and imposed unreasonable, arbitrary and capricious discipline. Carrier's File No. SIG-D-SHV-91-OWENS. General Chairman's File No. SWGC-394. BRS File Case No. 9074-SP."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was notified by Carrier to appear for a formal Investigation "to develop the facts and place responsibility, if any, in connection with your alleged failure to maintain the batteries on the Forrest City Maintenance District when on December 6, 1991, it was discovered at Highway 147, Arkalite, Memphis to Brinkley Line that the batteries with the power off would not operate the warning system and all warning lights were dark." The Investigation was held as scheduled at which time Claimant was present, represented and testified on his own behalf. Following completion of the investigatory hearing, Claimant was disciplined by suspension for a period of sixteen (16) calendar days. The reason given by Carrier for the suspension was word-for-word the same as the charge as found in the hearing notice quoted, supra.

On appeal, the Organization argued that Claimant's Agreement due process rights had been violated because the officer who had issued the notice of discipline also acted as the initial appeals officer. It further contended that Claimant had not received a "fair and impartial investigation" as required by Rule 53 of the negotiated agreement and that Carrier had failed to meet its burden of proving the charge as made against the Claimant. Additionally, the Organization insisted that the testimony of Carrier's witness as entered into the hearing record went beyond the scope of charge as made in the hearing notice and was, at best, speculative and not supported by probative evidence.

The Carrier argued that, even though the Claimant had bid off of the Forrest City signal district prior to the December 6, 1991 battery failure, the hearing record supports the conclusion that it was Claimant's negligence while he was assigned to the Forrest City signal district that was the proximate cause of the battery failure at Highway 147. Carrier continued its argument that the Highway 147 failure prompted the Supervisor to make further inspections on the Forrest City signal district and discovered additional instances of Claimant's negligent handling of the signal batteries which was his primary responsibility until he bid off the district on November 27, 1991.

The Board's attention is first directed to the procedural contention raised by the Organization relative to the two roles of the same Carrier officer, namely, the issuer of the notice of discipline and the first level appeals officer. The Board is aware of a divergence of arbitral opinion in this regard. The Organization has cited with favor the decision of Second Division Award 11722 in which the majority held as follows:

"It is not in accordance with due process rights when the same Hearing Officer also serves as a witness or when the first step grievance Appeals Officer is the same person who assessed the discipline."

The Board has no problem with the first half of the conclusion reached in Award 11722. It is patently erroneous when a hearing officer also testifies as a witness. However, the second half of the conclusion reached in Award 11722 is totally at variance with a number of well-reasoned Awards which have reached a contrary opinion.

First of all, Agreement due process rights exist primarily in the negotiated rules Agreement (Third Division Awards 15676 and 21228). Secondly, an appeal in a discipline case must be made to the officer designated by Carrier as the proper officer in the appeals procedures. In this case, Rule 53 of the negotiated Agreement reads in pertinent part, as follows:

"(d) An employee disciplined and who is dissatisfied with the decision rendered in his case may, within fifteen (15) calendar days from the date of the decision following the investigation present an appeal in writing personally, or through his representative, to the officer of the Carrier authorized to receive claims and grievances. The decision on such appeal shall be rendered within fifteen (15) calendar days from date appeal letter is postmarked. Should the employee not be satisfied with that officer's decision, he or the General Chairman will have the right of appealing to the highest officer designated by the Management to handle such matters within thirty (30) calendar days from date declination of the preceding appeal was postmarked... ."

On this property, the Superintendent was "the officer of the Carrier authorized to receive claims and grievances." To grant the Organization's wishes in this case would be tantamount to the Board revising a rule which the parties freely negotiated. Clearly the Board has no such powers. In the absence of some provision in the negotiated Agreement prohibiting it, Carrier is free to have the first level appeal officer take part in the initial assessment of discipline. In Third Division Award 16347 the Board ruled as follows:

The fact that the Superintendent rendered the decision did not preclude his acting as the appeals officer (Award 15714). Further, the record indicates that this is the established practice for handling discipline cases on this Carrier."

Here the appeals procedures are more than an "established practice." Here the appeals procedures are required by the negotiated Agreement. Agreement due process rights cannot be violated by compliance with the negotiated rules Agreement.

This same issue was again expertly addressed in Third Division Award 27610 where it was determined:

"The Organization skillfully contends that Claimant was deprived of independent review of his case because the Carrier Officer who signed the discipline letter was also the same officer to whom the Organization was required to appeal under the discipline procedure. The Organization cites Third Division Award 24547 in support. We concur with the Board's views expressed in Third Division Award 24547, when the multiplicity of roles played by an appeals officer expressed the final decision on Claimant's case. Here, Claimant's appeal was carried to the next officer who presumably reviewed the matter de novo. See Third Division Award 25149."

Likewise in this case, Claimant's appeal was carried to the "highest officer designated by the Management" as provided for in negotiated Rule 53(d) quoted above.

Therefore, it is the Board's conclusion that Claimant's Agreement due process rights were not violated in this instance. That aspect of the Organization's argument is denied.

The Board has reviewed both the hearing notice and the transcript of the testimony developed at the hearing. While the hearing notice would not qualify as a textbook example of a clear notice, the Board is satisfied that the necessary fundamental requirements of a proper hearing notice are present in this case. Both Claimant and his representative were informed by the notice that the hearing was being scheduled to develop facts "in connection with your alleged failure to maintain the batteries on the Forrest City Maintenance District." The identification of the triggering event did not limit Carrier from developing information dealing with Claimant's overall maintenance of batteries on this district. The fact that Claimant had left the particular territory before the triggering event occurred does not absolve him of responsibility for that which he did or did not do when he was working in the territory and was responsible for the maintenance of batteries within the signal district.

The testimony which was developed at the hearing, including Claimant's own testimony, clearly established that he had been less than diligent in his attention to his responsibilities in connection with the signal batteries. His admitted failure to supply requested information to his Supervisor relative to battery conditions is probative evidence of negligent performance of duty. The ultimate total failure of the signal batteries on December 6th might well have been prevented had Claimant been more responsible in his attention to the condition of the batteries. Carrier's finding of negligent battery conditions at ten out of nineteen locations on the signal district is convincing evidence of Claimant's negligence. The discipline as assessed was neither arbitrary nor excessive. The Board finds no basis on which to sustain the Organization's request for removal thereof. The claim as presented is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.