

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32102
Docket No. SG-32530
97-3-95-3-436**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(The Atchison, Topeka and Santa Fe Railway Company**

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Claim on behalf of T.F. Swoyer for payment of all time lost from February 11, 1994 through March 28, 1994, and for removal of the associated letter of discipline from his record, account Carrier violated the current Signalmen's Agreement, particularly Rules 40 and 41, when it denied the Claimant the opportunity to contact his representative prior to signing a letter of discipline on February 10, 1994 and then failed to resolve this matter following discussion in a conference held in accordance with Rule 40. Carrier also violated Rule 42 when it failed to notify the Local Chairman of the disallowance of the claim within 60 days of the date it was filed. Carrier's File No. 94-14-25. General Chairman's File No. 41-1222. BRS File Case No. 9673-ATSF."

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 were given due notice of hearing thereon.

Claimant is employed by the Carrier as a Signal Maintainer with assigned headquarters at Kiowa, Kansas.

By letter dated February 10, 1994, Carrier advised Claimant that it was suspending him from service for 45 days and imposing an additional 30 day deferred suspension account violation of "track and time limits at M. P. 307.2 on the Waynoka Subdivision on Friday, February 7, 1994." Claimant was advised to acknowledge receipt of the letter with his signature in the space provided accepting the suspension and waiving his right to formal Investigation. Claimant inquired of the Supervisor about Carrier having to give him an Investigation with union representation before assessing discipline, and was told that if he asked for an Investigation, they would go ahead and fire him instead of giving him the suspension. Claimant signed the February 10, 1994 letter of suspension.

On February 27, 1994, the Organization on behalf of Claimant, requested an Unjust Treatment conference as provided for in Rule 40 with the advice that the conference was necessary due to "the discipline issued Mr. Swoyer on February 10, 1994." Conference was held with Carrier's Division Superintendent on March 21, 1994.

The Organization confirmed the conference by letter dated March 30, 1994, calling the Superintendent's attention to four items he agreed to investigate and advise on, one of which reads in pertinent part:

"3.) It was also indicated that you would investigate Mr. Swoyer's complaints of the improper actions of Signal Supervisors Lehman and Ferguson in handing down discipline, i.e., not being allowed to contact his Union Representative."

Under date of April 6, 1994, Carrier's Superintendent advised the Organization that he had talked to Signal Supervisor Ferguson regarding the proper way in which to handle discipline, but made no statement concerning Claimant's complaint of being denied access to his Union representative. Failing to obtain satisfactory resolution of the issue through the Unjust Treatment conference, the Organization proceeded to file a formal claim by letter dated May 16, 1994, with the Director Signals System as per that part of Rule 40 - Unjust Treatment, reading:

"If the complaint is left unresolved, it may be handled as a claim or grievance under Rule 42 of the current Signalman's Agreement."

Receiving no response to its claim, the Organization directed a letter to the Director Signals System under date of August 6, 1994, and called upon Carrier to allow the claim as presented as per Rule 42 account Carrier's failure to respond or disallow the claim within 60 days.

Carrier responded by letter dated September 1, 1994, disallowing the claim on the basis that 1) the Organization's claim was not filed within 60 days of the date of occurrence on which the claim or grievance is based (February 10, 1994); 2) Rule 40 - Unjust Treatment, has no bearing on the propriety of the discipline involved in the claim of May 16, 1994, and Rule 40 was improperly cited; and 3) claims or appeals involving discipline are subject to Rule 42 - Time Limit Rules on Claims and Grievances, and not subject to Rule 40 - Unjust Treatment.

The Organization responded that the Unjust Treatment Hearing was requested account Carrier's failure to afford Claimant his contractual rights under Rule 41 - Discipline/Investigations. Further, that it was for the purpose of disposing of the complaint based upon the facts and argument presented at the Hearing regarding Claimant being coerced or otherwise intimidated to sign a discipline letter.

The threshold question to be dealt with by this Board is the Organization's contention that Carrier failed to timely respond to its claim filed May 16, 1994. The record reveals that Carrier attempted to defend its untimely response on the grounds that 1) the claim was improperly filed with the Director Signals System in place of its Manager Labor Relations; and 2) the claim was not filed within 60 days of the occurrence of discipline assessed February 10, 1994.

The Board concludes that the claim was properly filed with the Director Signals System for the reason that the Organization was appealing from the Unjust Treatment conference, and the Assistant Vice President-Labor Relation's letter of April 5, 1993 setting forth procedures to be followed in the initiation and progression of claims clearly states that appeals of Unjust Treatment claims will be directed to the Director Signals System. Clearly the claim is bottomed on the unjust denial of Claimant to contact his Organization representative.

Carrier's argument that the claim was not timely filed in the first instance may have had merit if it had timely denied the claim and raised the issue then. It did not. It waited 107 days to respond to the claim, and then asserted that it was not timely filed. It cannot sit on its hands and expect to exonerate itself from the specific provisions of Time Limit Rule 42, which for ready reference reads in pertinent part:

"(1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances." (Emphasis added)

We subscribe to the findings of Fourth Division Award 4590:

"The Carrier should take strong note that the time limits issue raised by the Organization is a serious issue for this Board. As stated by the Board in Third Division Award 25856:

'The Carrier is cautioned...that under the time limit Rules it is required to respond to Claims within the time limits specified even though it may consider the Claims involved as barred or otherwise defective.'"

**The claim will be allowed as presented as per the clear mandate of Rule 42(1).
We take no position on the merits.**

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 9th day of July 1997.