Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32887
Docket No. MW-33638
98-3-97-3-108

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. W. M. Davis for alleged violation of Rule G and CSX Safe Way Rule 21, in connection with an alleged positive drug test on March 19, 1996, was arbitrary, capricious and in violation of the Agreement (System File Davis96 CSX).

(2) The claim as presented by General Chairman P. K. Geller, Sr. on July 15, 1996 to Director Employee Relations J. H. Wilson shall be allowed as presented because said claim was not disallowed by Director Employee Relations J. H. Wilson in accordance with Rule 40 of the Agreement.

(3) As a consequence of the violations referred to in Parts (1)and/or (2) above, Claimant W. M. Davis shall be reinstated to service, with seniority and all other benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

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.

In March 1996 Claimant was recalled to work and underwent a return from furlough physical examination. This included a drug screen. Claimant worked a few days after completing the initial return-to-work process. He was removed from service shortly thereafter when his drug screen results were returned positive.

Rather than charge Claimant with misconduct, Carrier deemed him to have become a participant in a Rule G bypass option administered through the Employee Assistance Program. This meant that the charges of Rule violation were held in abeyance. Notwithstanding this status, Carrier issued a charge letter dated April 8 requiring Claimant to appear for Investigation four days later on April 12, 1996. In its Submission, the Carrier asserted the charge letter was issued in error. The Organization and Claimant did not receive the charge letter until the day of the Investigation and could not respond. Claimant remained out of service with no charges pending even though he did not sign the requisite form accepting the Rule G bypass option.

On April 15, the Organization wrote to Carrier raising objections about the propriety of the April 8, 1996 charge letter. On May 6, 1996 the Organization wrote Carrier's Director of Employee Relations alleging that Claimant was being unjustly withheld from service. The letter requested that Claimant be restored to service immediately and be compensated for losses from March 19, 1996. The Organization renewed this demand by a letter to the same Director dated May 13, 1996.

By letter dated May 23, 1996, Carrier reinstituted charges against Claimant for the alleged violations of Rule G and CSX Safe Way Rule 21. Investigation was ultimately held on June 10 and Carrier issued its dismissal decision on June 28, 1996.

On July 15, 1996, Claimant and the Organization appealed from Carrier's dismissal decision. The first paragraph asked the Carrier to consider the letter as an appeal on behalf of Claimant. The letter went on to raise several contentions about the merits of the dismissal decision based on the transcript of the June 10, 1996 Investigation. It concluded by requesting Claimant's return to service with compensation for all losses from March 19, 1996. Carrier never responded to this letter. On October 10, the Organization wrote again noting Carrier's failure to respond to the July 15, 1996 letter. Carrier did not respond to this letter.

On December 10, 1996, the Organization wrote again. This time it confirmed the contents of a conference held on December 9, 1996. Apparently the Carrier contended at the conference that it had replied on July 2 to the Organization's letter of May 6 and that its July 2, 1996 reply satisfied all response obligations. The Organization asserted that Carrier's July 2 letter was a reply to a different claim and could not operate as the requisite reply to the dismissal appeal filed on July 15, 1996.

Rule 40, regarding time limits on claims and grievances, reads in pertinent part as follows:

> "(Section 1 (a)) 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."

From the record on the property, the Board must conclude that the Carrier failed to properly disallow the July 15, 1996 claim within the 60 days provided by Rule 40. The Board finds no logical basis for accepting Carrier's contention that its July 2 reply to the Organization's May 6, 1996 letter satisfied its obligation under Rule 40.

Carrier's July 2 letter specifically references the Organization's May 6, 1996 letter as an appeal from Claimant's dismissal. This characterization simply cannot be

correct. As of May 6, Claimant had no charges pending against him. Charges were not lodged against him until May 23, 1996. The Investigation was not held until June 10, and Carrier did not issue its dismissal decision until June 28, 1996. By no stretch of logic, therefore, can the Organization's May 6, 1996 letter be considered as the appeal from Claimant's dismissal.

The Organization's letter of July 15, 1996 asks that it be considered the appeal from Carrier's dismissal decision. It does so in plain language. Nothing in the letter appears to be deliberately or even inadvertently misleading or confusing on this point. Moreover, it is the only Organization document, which was authored after Carrier's June 28, 1996 dismissal decision, that looks like an appeal. Because it was not disallowed within the applicable time limits we must apply Rule 40 as the parties wrote it in their Agreement. The claim must be allowed as presented.

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 21st day of October 1998.