

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32963
Docket No. MW-33636
98-3-97-3-105**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Seaboard Coastline
(Railroad)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The twenty (20) day suspension assessed Foreman L. A. Blanton for his alleged conduct unbecoming an employe when, on March 22, 1995, he allegedly used a racial slur was without just and sufficient cause, based on an unproven charge and in violation of the Agreement [System File 29(19) (95)/12(95-0958) SSY].**
- (2) The claim referenced in Part (1) above, as presented by General Chairman Simpson on September 28, 1995 to J. H. Wilson, Director Employee Relations shall be allowed as presented because said claim was not disallowed by him in accordance with Rule 40 (a).**
- (3) The Agreement was further violated when the Carrier failed to provide the Organization a copy of the investigation transcript as required by Rule 39.**
- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Foreman L. A. Blanton shall now have the charge letters and all matters relative thereto removed from his personal record and he shall be made whole for all 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.

As noted in the Statement of Claim, the Organization raised procedural objections that must be dealt with as a threshold matter.

The Organization asserted, in its initial claim document on the property, that Carrier failed to provide a copy of the transcript of Investigation as required by Rule 39. In its May 31, 1996 final correspondence, Carrier asserted the transcript was forwarded as required by the Agreement. Both parties steadfastly maintained those positions before the Board.

Careful examination of Carrier's letter of August 2, 1995, which imposed the disciplinary suspension, does not reveal any indication that the transcript was sent to the Organization as an enclosure. Moreover, no other correspondence has been found in the on-property record to show if, or when, or under what circumstances the transcript was sent to the Organization as the Carrier contends. We are left, therefore, with Carrier's unsupported assertion that it was.

The text of Rule 39 imposes the obligation to furnish a copy of the investigative transcript upon the Carrier. As a result, the burden of proof is likewise upon the Carrier to show compliance with that portion of Rule 39. Whether the transcript was furnished is a question of fact that is material to Carrier's compliance with this Agreement due process requirement. On the record before us, we have, at best, an irreconcilable dispute of material fact. Given this state of affairs, we are compelled to

conclude that Carrier did not prove the transcript was provided to the Organization as required.

It is well settled that the Board may not consider any evidence that was not exchanged between the parties during their handling of the claim on the property. Given our finding that the transcript was not provided on the property, we may not consider its contents in our review. Lacking a proper transcript, there is insufficient evidence to support the misconduct charged. The claim must, therefore, be sustained as presented.

Because of the foregoing finding, it is not necessary to address the other procedural matters raised by the Organization, let alone the merits of the dispute.

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 23rd day of November 1998.