

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35024  
Docket No. SG-35769  
00-3-99-3-776**

**The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.**

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(CSX Transportation, Inc. (former Louisville and Nashville  
( Railroad Company)**

**STATEMENT OF CLAIM:**

***“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation Co. (former Louisville & Nashville Railroad):***

**Claim on behalf of T. J. Asher for reinstatement to service with compensation for all lost time, including overtime commencing on December 17, 1998 and continuing until this claim is settled or he is returned to work; and with his seniority unimpaired and his personal record cleared of any reference to this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 55, when it failed to provide the Claimant with a fair and impartial investigation and imposed harsh and excessive discipline against him in connection with an investigation conducted on December 28, 1998. Carrier’s File No. 15(99-34). General Chairman’s File No. 99-137-01. BRS File Case No. 11059-L&N.”**

**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.**

**At the time of the instant dispute, the Claimant was a Signal Maintainer at New Orleans, Louisiana. The record of the Investigation shows that, on December 10 and 11, 1998, the Federal Railroad Administration (FRA) conducted an inspection over the Claimant's territory. The Claimant and Signal Supervisor T. G. Watson were present during the FRA inspection. Supervisor Watson testified that he was informed by FRA officials conducting the inspection that a formal written report would be forthcoming citing the Carrier for a number of violations. Watson informed the Claimant's direct supervisor at the conclusion of the FRA inspection that there appeared to be numerous instances in which the Claimant had failed to properly maintain his signal territory.**

**According to the record, the Carrier received the FRA report on December 15, 1998. As expected, the report cited the Carrier for violations and exceptions of FRA regulations governing signal systems. The Claimant was thereafter notified by letter dated December 18, 1998 to attend an Investigation on December 28, 1998 in connection with "three FRA regulatory violations and numerous code 2 exceptions cited on reports received by CSXT on December 15 as a result of FRA inspections on your assigned territory in New Orleans on December 10 and 11." A revised letter of charges dated December 22, 1998 subsequently was sent to the Claimant, correcting the number of alleged violations to four, and also informing the Claimant that his personal file would be reviewed at the conclusion of the Hearing. Following the Hearing, the Claimant was notified of his termination.**

**The Organization raised a number of objections to the handling of this case. Before addressing them each in turn, we note at the outset that the Organization argued that the Board is precluded from considering new or additional argument by the Carrier which refutes the Organization's timeliness objections. As a general proposition, the Organization is correct. The Board is constrained from considering arguments not advanced by the parties during the processing of the matter on the property. The scope of our review is limited, and accordingly we cannot rule upon new arguments offered for the first time in written submission or oral argument.**

However, it is also true that the parties' correspondence need not reach the level of specificity required in a court of law. Argument which conveys to the other party the sum and substance of the position taken is sufficient. Based on our review of the record, we find that the Carrier sufficiently apprised the Organization of its position on the property with regard to the procedural issues in this case. Accordingly, we reject the Organization's assertion that the Board must sustain this claim on procedural grounds based on waiver.

With regard to the alleged procedural defects, the Organization contends, first, that the Carrier did not adhere to the time lines set forth in Rule 55. That Rule provides in pertinent part as follows:

**"(a) . . . The investigation shall be held within ten days of the date charged with the offense or held from service, unless postponement is arranged for. He will be advised in writing, not less than forty-eight hours prior to investigation, of the charge or charges which have been made against him. The charge will be made in writing within ten days of knowledge of the offense . . . ."**

It is the Organization's position that the Claimant was not charged in a timely manner in accordance with Rule 55(a). In support thereof, it argues that Supervisor Watson acknowledged in his testimony that he knew on December 10 and 11, 1998 that the FRA would be issuing violations against the Carrier, and therefore the charge letter dated December 22, 1998 was beyond the ten-day period from the time the Carrier first had knowledge of the offense.

The Board is not persuaded that this argument has merit. The test to determine when the Carrier has "knowledge" of an alleged offense cannot be speculative or anticipatory in nature; it must be based on a reasonable certainty that charges are warranted. Although Supervisor Watson was present when the FRA conducted its inspection, and he anticipated that the Carrier would be cited based on the inspection tour, the record shows that it was not until December 15, 1998 that the Carrier received formal notification of the violations cited by the FRA. That is the date when the Carrier had "first knowledge" of the violations and exceptions noted by FRA inspectors and could make a determination as to whether charges should be assessed against the Claimant. Until then, any charges leveled against the Claimant would have been premature.

The Organization next contends that the Carrier failed to render its decision within the prescribed time limits. On the property, the parties addressed this issue as though the Carrier had 30 days to render a written decision. Because the Organization conceded in its correspondence on the property that the letter of discipline was hand-delivered to the Claimant on January 27, 1999, and the Hearing took place on December 28, 1999, it is clear by simple calculation that the decision was delivered to the Claimant on the 30th day.

As we read the pertinent provision of Rule 55, however, “a decision will be rendered within ten days after completion of the investigation and the accused or his representative will be advised in writing of the decision.” (Emphasis added) Although the decision was not issued within ten days, previous decisions of the Board have affirmed the principle that technical violations are insufficient to nullify the discipline imposed in the absence of a showing of harm or prejudice to the Claimant. In Third Division Award 31299 the Board stated:

“In balancing the reasonable expectations of the parties that the terms of the Agreement will be strictly enforced, including the due process protections afforded Claimants, with the practical administration of the labor relations process, the Board has consistently interpreted the purpose of the ten day rule as avoiding unnecessary delay while, at the same time, upholding disciplinary proceedings which contained harmless procedural errors.”

We find that the same reasoning holds true in this case and therefore conclude that the issuance of the Carrier’s decision beyond the ten day limit did not nullify the results of the proceedings.

The other principle contention advanced by the Organization is that the Claimant was denied a fair and impartial Hearing. Specifically, the Organization contends that it was not afforded adequate time to prepare a defense; that a complete and accurate transcript of the December 28, 1998 Hearing was not provided; that the Carrier failed to furnish witnesses who had knowledge that would have been beneficial to the Claimant’s case; and that the Carrier Officer conducting the Investigation also had the responsibility to render a finding of guilt and determine the level of discipline to be imposed.

After careful consideration, the Board does not concur with the Organization's position. The Organization's contention that it was not afforded adequate time to prepare a defense is based on the fact that the initial charge letter failed to state that the Claimant's personal file would be reviewed at the conclusion of the Hearing. However, the revised charge letter dated December 22, 1998 advised the Claimant that his record would be considered. The Claimant acknowledged that he received the revised charge letter on December 24, 1998, well within the time lines set forth in Rule 55.

Moreover, the Organization has not shown how this sequence of events compromised the Claimant's right to a fair and impartial Hearing or impeded the Organizations' ability to defend.

The claim regarding the accuracy of the transcript similarly fails to provide a basis for concluding that the Claimant's due process rights were violated. The Carrier conceded that, through oversight, the transcript provided to the Organization may not have included copies of several exhibits introduced by the Organization during the Investigation. But since these were exhibits originally furnished by the Organization, it is unclear how the Claimant was harmed or prejudiced by their omission from the transcript provided to the Organization.

By the same token, we reject as unpersuasive the Organization's assertion that the discipline should be set aside because the Carrier failed to present witnesses that the Organization deemed necessary. No provision in the Agreement has been cited by the Organization charging the Carrier with the sole responsibility to anticipate all of the witnesses that might be summoned by the defense, nor does the record disclose any request by the Organization for the presence of witnesses it considered material to the Claimant's defense. Under these circumstances, the Organization failed to establish that the Investigation was unfair or less than impartial.

The Organization also argued that the Hearing Officer wore several hats. Not only did he conduct the Investigation, the Organization points out, but he also assessed the Claimant's guilt and determined the penalty to be meted out. However, the failure by the Organization to raise that particular argument during the handling of this case on the property constitutes a waiver of its objection. In any event, the parties' Agreement does not prohibit such conduct.

Turning to the merits, we note that the charges directed against the Claimant consist of failing to maintain a switch shunt; fouling the circuit, switch circuit controller and point detector adjustment; failing to maintain grade crossing warning systems in proper operation; and failing to secure signal apparatus and take timely action to provide for safe train movement in connection with grade crossing warning systems on the Claimant's assigned territory.

As the Carrier correctly points out, these are serious charges. At the Investigation the Claimant did not deny that the violations occurred. Instead, the Claimant contended that he should not bear the responsibility for the FRA citations or for the failure to maintain the signal system in good working order. He stated that his workload was extremely heavy, making it difficult for him to promptly spot trouble and make necessary repairs. In addition, the Claimant opined that the violations on his territory could be attributed to vandalism. He noted that on several occasions, he had issued "stop and flag orders" only to find out later that they had been removed. This could have occurred with respect to the instant case as well, he testified. The Claimant also stated that when he attempted to purchase parts at a local hardware store, he was informed that the Carrier had been denied credit. All these circumstances, according to the Claimant, demonstrate that the FRA violations occurred for reasons other than the Claimant's negligence.

The Claimant's contentions were in the nature of an affirmative defense and, as such, the burden of proof was on the Organization. In the present case, the necessary proof was not forthcoming. The Claimant's uncorroborated assertions were not tied to the specific violations cited. Although the Claimant maintained that there were other explanations for the violations, it must be remembered that speculation and conjecture are not evidence. Absent specific probative proof that events or circumstances other than the Claimant's dereliction of duty accounted for the failure to maintain the signal system, we find that the responsibility must rest on the Claimant's shoulders.

The Claimant's role as a Signal Maintainer was a crucial one in the safe movement of trains. The core of the Claimant's responsibilities required that he make routine and timely inspections of his assigned territory in accordance with the Carrier's instructions and FRA requirements. If a defect or faulty mechanism was discovered, it was the Claimant's job to make the necessary repairs. The record is abundantly clear that the Claimant had not performed those necessary job functions.

**We therefore find substantial evidence to support the Carrier's conclusion that the Claimant was guilty of violating both FRA and Carrier Rules and Regulations.**

**The remaining issue is whether the penalty of discharge was excessive, as urged by the Organization. It must be remembered that the determination of the level of discipline to be imposed is properly a function of the Carrier. The Board does not overturn that judgment in the absence of evidence that there has been an abuse of discretion. On this record, no abuse of discretion has been proven. The Claimant's misconduct was viewed very seriously by the Carrier, and justifiably so. Moreover, the Claimant's personal record was far from exemplary, and in fact he had been suspended previously for failing to repair a signal. Accordingly, we cannot say that the penalty imposed here should be disturbed or that any mitigating circumstances exist which would warrant a lesser penalty.**

**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 25th day of October, 2000.**

Labor Members Scathing Dissent  
to  
Third Division Award 35024  
Docket No. SG – 35769  
Referee A. Kenis

As noted in the record, the Claimant was dismissed for allegedly failing to properly maintain his territory. The majority in this case went beyond the bounds of reasonableness and totally ignored the basic principles of due process. This was not a case where the Organization was hanging its hat on a minuscule procedural defect that should have been disregarded. Quite to the contrary, this case was replete with enough procedural defects to fill a Texas Ten-Gallon Hat.

**Procedural Issues:**

1. Carrier failed to file the charges within the prescribed time limits. The Carrier had knowledge that this incident occurred on December 10, 1998. The Agreement mandates that charges must be filed within 10 days. Carrier charged the Claimant on December 23, 1998. Carrier's only response to this procedural defect during the handling on the property occurred during the formal investigation wherein they stated, "your objection is duly noted and will be made a part of the permanent record."
2. Following the investigation, the Carrier failed to render its decision within the prescribed time limits. The Agreement states that, **"A decision will be rendered within ten days after completion of the investigation and the accused or his representative will be advised in writing of the decision."** (bold emphasis added) The record indicates that the investigation was closed on December 28, 1998 and Carrier rendered its decision on January 27, 1999.

Carrier never rebutted the Organization's contentions during the investigation nor during the handling of the case on the property. Carrier's only response to these allegations occurred during the appeal process, wherein it stated, **"I could address each and every one of your numerous assertions, although the record does that itself, but I feel that it will suffice to say that resorting to counting hours in the month in relation to time limits is a clear indication that your arguments in that regard are in serious need of help."** (bold emphasis added)



3. As noted at the onset of the formal investigation the Organization took exception to the second revised notice of charges and stated that additional charges had been preferred and also noted that Claimant's personal record would be introduced at the hearing. The Organization took exception to the continuation of the hearing and stated, in part: "...without proper time for the Organization to prepare for the hearing by not knowing these things would be included." (bold emphasis added)

The Conducting Officer's response was, "Your objection is duly noted and will be made part of the permanent record, but at this time we will review Mr. Asher's personal file. Mr. Wilson (General Chairman), do you have a copy of this. Answer: "No, I don't." Because of this belated information the Organization again raised a protest, "Objection again from the BRS is that we didn't have proper time because we were not aware of this prior to getting here." Notwithstanding the Organization's objection, the Claimant's Representative noted that several of the notations in Claimant's personal file were incorrect and should have been expunged.

4. The Organization, upon receiving a copy of the investigation transcript, advised the Carrier that it had failed to reproduce copies of 7 exhibits introduced by the Organization during the investigation.

Carrier, for the first time in its submission, argued that failure to reproduce the exhibits presented at the hearing cannot be considered fatal to its position. Contrary to Carrier's belated arguments, the purpose of presenting documentation and evidence at the hearing is to assure that whomever reviewed the transcript and rendered the decision had a complete record. Since Carrier never responded to the Organization's contentions, one can only assume that the decision to terminate the Claimant was made without all of the evidence.

Historically the Investigation Officer is charged with the responsibility of reviewing the record and determining innocence or guilt. The Board has upheld this practice as complying with the principle of "Due Process Rights." However, in this instant case the Carrier Officer that preferred the charges was also the individual who determined guilt and assessed the discipline. For obvious reasons the impartiality of this Carrier Officer is highly suspect.

While the foregoing can only be considered an insult to Claimant's due process rights - there is more to this story.

The transcript of the investigation indicates, without rebuttal, that the Claimant was working a considerable amount of overtime due to recent hurricane damage. The Claimant testified that he had previously advised his supervisors that he needed assistance to make proper repairs to the signal system: *(Question)* "... And the help that they promised, was that ever forthcoming? *(Answer)* " No, not until the FRA wrote them up." (bold emphasis added)

The Claimant testified that he had advised his supervisor that he needed materials and was told to get the material from the hardware store. *(Question)* "Mr. Asher, let me ask you one question. Have you notified Mr. Patterson, your supervisor, that you needed material? *(Answer)* Yes, sir. *(Question)* And what has been Mr. Patterson's reply to you? *(Answer)* Go get it. But I also notified him that I couldn't go get it any more because of the past due balances at the hardware store." (bold emphasis added)

Obviously Claimant's pleading fell on deaf ears. Claimant testified that he had advised Mr. Patterson that he needed material and supplies and that the hardware store had refused to extend the Carrier further credit because of non payment. It must be noted that Mr. Patterson was present at the investigation, however, he was sequestered at the beginning of the formal investigation and was never called to provide any testimony.

If the foregoing is not enough to question Carrier's motives and the majority's judgment – there is even more to this story.

The record indicated that Supervisor Broadway requested to attend the Investigation to provide testimony that could have supported Claimants contentions, however, he was told to stay away. The Organization noted during the investigation that Carrier Officer, Mr. Broadway, was present during the on-the-property inspections and had volunteered to be a witness for the Claimant, however, he was not allowed to attend. *(Question)* "...was the Carrier informed or have you been made aware that the Carrier was informed that Mr. Broadway would have volunteered to be a witness for yourself and the Organization if allowed to by the Carrier?" *(Answer)* "Yes." The Organization raised this as an objection and stated: "... Carrier was informed that he wanted to be a witness and refused to allow him to attend this investigation. We would like to make that part of the record." "...It is my understanding that Mr. Broadway asked Mr. Mabe if he could attend and present facts pertinent to my defense and was told 'no'." The Conducting Officer's only response was, "I understand." (bold emphasis added)

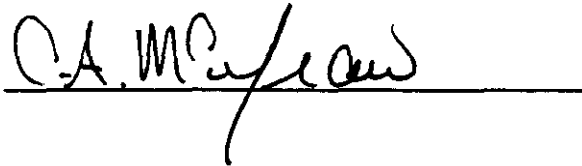
It is obvious that Carrier did not want all of the facts to come out, then made a concerted effort to conceal evidence and testimony. What is equally obvious is that the majority fashioned an award that defies the time honored principle of "Due Process Rights."

Based on the foregoing it is the Organization's position that Carrier failed to provide a fair and impartial investigation.

This Award should only be relied upon as a pinnacle of injustice. The majority had the opportunity and responsibility to recognize and take exception to the reprehensible actions of the Carrier, however, it failed to do so. The Organization's Claim should have been sustained.

Therefore, a Dissenting opinion is appropriate.

*C.A. McGraw, Labor Member*

A handwritten signature in cursive script, appearing to read "C.A. McGraw", is written over a horizontal line.