

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36327
Docket No. MW-36404
02-3-00-3-657**

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(New Orleans Public Belt Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [forty-five (45) day suspension with thirty (30) day actual suspension beginning June 12, 1999 through and including July 11, 1999 and fifteen (15) days held in overhead suspension] imposed upon Mr. C. Wilkerson, Jr. on July 9, 1999 for the alleged violation of the NOPB Safety and General Rules for All Employees 1.1, 1.6 and 1.15 while working as a flagman on June 9, 1999 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MW-99-10-NOPB).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Wilkerson, Jr. shall now have the aforesaid charges and discipline removed from his record, reinstated to his former position with all rights and benefits restored and he shall be compensated for all lost wages.”

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.

The Claimant had been employed by the Carrier for approximately 19 years, and was working as a Flagman under the supervision of B&B Foreman J. Estay, when this dispute arose.

On June 11, 1999, the Carrier sent the Claimant the following correspondence:

"On June 9, 1999, you were assigned to perform flagging duties on US Highway 90 under the Huey P. Long Bridge in New Orleans. These duties require you to flag automobile traffic in this area to protect such traffic from the possibility of harm as the result of the work being performed by the NOPB Bridge and Building Forces.

It has been reported that at approximately 9:45 a.m., without obtaining authorization, you left your post on Highway 90 at which you were assigned to flag traffic and proceeded to the shop under the pretense of securing someone to relieve you from your duties. By leaving your post, you left Highway 90 vehicular traffic without protection from the work being performed overhead at this location.

Due to the fact that you had communications in the form of a Company radio which you could have contacted your supervisor, there was no reason to warrant or justify you leaving your assigned post and leaving the identified traffic unprotected. You are being charged with violation of the NOPB Safety and General Rules 1.1, 1.6 and 1.15.

In view of the above, you are hereby withheld from service effective immediately, until such time as you, your Organization and the NOPB can establish a date and time for an investigation on the above charges."

On June 17, 1999, the Carrier notified the Organization, and the Claimant, that the formal Investigation had been scheduled for June 23, 1999. By letter dated June 22, 1999, the District Chairman wrote the Carrier requesting that two witnesses, J. Estay and R. Jemison, be present at the June 23 Investigation, at the Carrier's expense. The Carrier denied the request, relying upon the language set forth in Rule 16, wherein it states: "Employees shall have the right to have present, at their expense, such witnesses as they desire."

The Investigation commenced as scheduled, and by letter dated July 9, 1999, the Carrier informed the Claimant that he had been found guilty as charged, and further informed the Claimant:

"You are hereby disciplined in the form of a forty-five (45) days' suspension from the service of the NOPB Railway. You are assessed an immediate suspension of thirty (30) days from the service of the NOPB.

This discipline of thirty (30) days will commence on June 12, 1999, and run through and including July 11, 1999. The remaining fifteen (15) days' suspension will be held in overhead suspension pending any further rules violation(s) by you within the next twelve months or until July 11, 2000. Should you violate any rule during this period of time, you will be required to serve these fifteen (15) days in addition to any discipline you might receive for the additional rule violation(s).

As you will remember, you currently have a five (5) days overhead suspension held in abeyance from an incident on March 10, 1999, wherein you admitted to rule violations in connection with operating the Kershaw Tie Crane that resulted in the destruction of the signal box and stand of eastbound Signal J3.0. As a result of the discipline issued in connection with the incident on June 9, 1999, you are hereby required to serve these five (5) days held in abeyance. This five (5) days' suspension will commence on July 12, 1999, and run through and including July 16, 1999."

The Organization submitted a claim, dated July 21, 1999, in which it alleged that the Claimant was not "properly" charged. Specifically, the General Chairman noted that the charge letter indicated that the Huey P. Long Bridge was located in New Orleans, Louisiana, when, in fact, it is located in Metairie, Louisiana.

With respect to the procedural aspects of the case, the General Chairman alleged that the charge letter was not precise because it did not satisfy "where, when and why." The General Chairman further alleged that the conducting officer "allowed hearsay to be entered into the Investigation, used leading questions to question the Carrier witnesses, and, harassed and intimidated the Claimant's representatives."

On October 8, 1999, the Carrier notified the General Chairman that the Notice of Appeal, dated July 21, 1999, did not comply with the time limit provisions of Rule 16(g), and was considered expired under the time limits. According to the Carrier, the appeal had to be received on or before July 29, 1999, and although the letter was dated July 21, 1999, the Carrier did not receive same until August 28, 1999, some 30 days subsequent to the expiration of the time limit for such notice.

Notwithstanding the above, the Carrier maintained that the Claimant was guilty of violating Carrier Rules when he absented himself from his assigned duties without permission, and left the vehicular traffic on Highway 90 at the Huey P. Long Bridge unprotected while work was being performed on the railroad tracks overhead.

In a December 2, 1999 letter, the General Chairman informed the Carrier that it was his "intent" to send the notice of appeal in a timely manner, but did not dispute the late arrival of same. Rather, the General Chairman blamed the delay on an "insufficient address" and a "problem with the mail."

Rule 16 - DISCIPLINE AND INVESTIGATION states, in pertinent part:

“(g) An employee’s right to appeal is hereby established, if notice of the appeal is given the official rendering the decision within twenty (20) calendar days. The employee or his representative will have the right to appeal in succession up to and including the highest official designated by the management to handle such cases.”

District Chairman McCall notified the Carrier by letter dated July 21 that he did not agree with the Carrier’s July 9, 1999 decision to discipline the Claimant and indicated that a claim and/or appeal would be presented on the Claimant’s behalf. Although the Notice was dated July 21, 1999, the Carrier did not receive same until August 28, 1999. This is 50 days after the July 9, 1999 decision rendered by the Carrier, and 30 days past the time limits set forth in Rule 16(g) of the Agreement. The District Chairman admitted that he improperly addressed the Notice of Appeal to the Carrier, and argued that he “intended” to send the Notice in a timely manner. Regardless, it is not disputed that the Carrier did not receive the appeal until August 28, 1999.

Rule 16 is clear and unambiguous in its meaning, and in these circumstances, the Organization’s Notice of Appeal was not submitted/received within the time parameters set forth in Rule 16. Therefore, this claim must be dismissed.

AWARD

Claim dismissed.

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 December 2002.