CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36420
Docket No. SG-36624
03-3-01-3-85

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

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Company, Inc.

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of R. P. Adkins for reinstatement to service with compensation for all time lost and benefits and for any reference to this matter to be removed from the Claimant's personal record. Account Carrier violated the current Signalmen's Agreement, particularly Rule 42, when it dismissed the Claimant without the benefit of a fair and impartial hearing. Carrier's File No. 8390-1-125. General Chairman's File No. 00-29-GTW. BRS File Case No. 11525-GTW."

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 in this case entered the Carrier's service on March 25, 1999. The Claimant was employed as an Assistant Signalman when by letter dated January 19, 2000, he was notified to attend a formal Investigation scheduled to be held at 9:00 A.M. on January 21, 2000. The Notice of Investigation was addressed via Certified Mail, Return Receipt Requested to the Claimant's home. The charges as set forth in the notice alleged a violation of Rule B of the General Operating Rules on January 6, 2000, for allegedly failing to perform the duties assigned, as well as a violation of Rule E of the General Operating Rules for allegedly failing ". . . to properly disclose that you were on probation on your application for employment. . . ."

On January 21, 2000, the formal Hearing was commenced at 9:05 A.M. and concluded at 9:58 A.M. The Claimant was neither present nor represented at the Hearing. After an initial 15 minute recess, the Hearing was conducted "in absentia" by the Supervisor of Signals. Testimony at the Hearing was taken from the Signal Foreman and three Assistant Signalmen, all of whom were members of the Signal Gang to which the Claimant was assigned on January 6, 2000.

Following completion of the Hearing on January 21, 2000, the Claimant was ultimately notified by letter dated March 20, 2000, that he was adjudged guilty as charged and his employment was terminated.

An appeal was initiated on the Claimant's behalf by the Organization. The appeal was handled at all appropriate levels on the property. Failing to reach a satisfactory resolution of the dispute on the property, the case came to the Board for final and binding adjudication.

The Organization approached this case from several directions. It argues that the Notice of Investigation was improper and not timely served on the Claimant; that the Hearing was totally unfair; that the time limits for issuing the notice of discipline were violated by the Carrier; and that there was no evidence presented by the Carrier to support the charges.

The Carrier insists that the Notice of Investigation was proper and timely; that there is no Agreement requirement that obligates the Carrier to notify the Organization of a scheduled Hearing; that the time limits to render its decision following the Hearing were extended by mutual understanding between General Chairman S. R. Ellison and K. J. Bagby, Manager Signal Installation; that the Hearing transcript fully supported

the finding of guilt; and that the discipline assessed was commensurate with ". . . the seriousness of the offenses and Mr. Adkins' short service time of less than ten (10) months' employment."

The applicable Rules which are of concern in this case are:

"Rule 42 - Discipline

An employee who has been in service for more than ninety (90) days will not be disciplined or dismissed without a fair and impartial hearing, at which he may be assisted by a duly accredited representative. He may, however, be held out of service pending such hearing, which will be held within ten (10) calendar days of the date held from service. The hearing shall be held within twenty (20) calendar days of the date when charged with an offense when an employee is not held from service. No charge shall be made that involves any offense of which the company has had knowledge twenty (20) calendar days or more except where a civil action or criminal proceeding results from the offense, in which event the charge may be made within twenty (20) calendar days of the final judgment. Prior to the hearing the employee shall be apprized in writing of the charge sufficiently in advance of the time set for hearing to permit his having reasonable opportunity to secure the presence of necessary witnesses. A written decision will be rendered within twenty (20) calendar days after completion of hearing.

An employee dissatisfied with a decision will have the right to appeal in succession up to and including the highest official designated by the Management to handle such cases, and each official must render a decision within twenty (20) days after such appeal, provided notice of such appeal is given the next higher official with copy to the official rendering the decision, within twenty (20) days thereafter. The right of an employee to be assisted by the committee or a duly accredited representative is recognized.

An employee will be given a letter stating the cause of discipline. A written transcript of all statements taken at the hearing or on appeal will be furnished on request to the employee or his representative.

If the charge against the employee is not sustained, it will be stricken from the record. If, by reason of such unsustained charge, the employee has been removed from the position held, reinstatement will be made and he will be compensated for wage loss, if any suffered by him.

General Operating Rule B

Employees must be familiar with and obey all rules, regulations and instructions. If in doubt as to their meaning, they must ask their supervisor for an explanation.

Employees must follow instructions from proper authority and must perform all duties efficiently and safely. In case of doubt or uncertainty, the safe course must be taken.

General Operating Rule E

Employees must be courteous, orderly, of good moral character and must conduct themselves at all times, whether on or off company property, in such a manner as not to bring discredit upon the company."

The scope of the Board's review in discipline cases has been clearly and definitively set forth over the many years of the Board's existence. It is well established that the Board may not apply its own brand of industrial justice when reviewing a discipline case. The Board should not substitute its judgment for that of the Carrier on the issues of guilt or discipline. The Board's review in a discipline case is limited to an examination of the specific provisions of the negotiated Agreement as they relate to discipline matters and to the content of the on-property Hearing as developed by the Carrier.

Although the Board has the power to order the reinstatement of a dismissed employee, it historically has been very cautious in the exercise of this power. Such authority should not be exercised unless, from the record of the particular case, it is clearly evident that the Carrier violated some provisions of the Agreement or that it acted in an arbitrary and capricious manner or without producing substantial probative evidence to support the charges that led to the dismissal.

As the moving party in a discipline case, the Carrier has the initial obligation to follow and comply with the language and intent of the negotiated Rules that deal with discipline matters. The Carrier additionally has the obligation and responsibility to show in the Hearing transcript that there, in fact, exists substantial probative evidence to support the charges that have been made.

The term "substantial evidence" comes to the Board from the Supreme Court of the United States where it ruled:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Consol. Edison Co. vs. Labor Board 305 U.S., 197, 229)

In the Board's review of this case, we look first at the specific language of negotiated Rule 42. There we read:

> "Prior to the hearing the employee shall be apprized in writing of the charge sufficiently in advance of the time set for the hearing to permit his having reasonable opportunity to secure the presence of necessary witnesses."

Here we have a situation in which the Notice of Investigation was addressed to the Claimant at his home address with, at most, a two-day notice to appear. This was done in spite of the fact - as testified to by the Signal Foreman - that the Carrier knew the Claimant was being held in the County Justice Center at that time. The Signal Foreman candidly testified that he had been requested (by whom he does not say) to make an effort to deliver the piece of certified mail to the Claimant. He stated that he called the County Justice Center and requested the Claimant's "inmate number." However, he did not indicate in the Hearing record that he had, in fact, accomplished his effort to deliver the letter. Neither is there any evidence in the case record to show that the letter was ever actually placed within the U.S. Postal Service for delivery to the Claimant's address. There was no certified mail receipt! There was no signed return receipt from the Claimant! Nothing! In short, there is absolutely no evidence in this case record to show that the Claimant was ever notified of the charges and the scheduled Hearing.

Rule 42 is clearly written and is mandatory. It requires that a written notice of charge shall be given sufficiently in advance of the time set for Hearing to permit the

accused having reasonable opportunity to secure the presence of necessary witnesses. In this case, the Carrier did not come close to complying with the requirements of Rule 42 in this regard. There is no evidence or testimony found in the Hearing record to justify the Carrier's rush to judgment. The 15-minute "recess" at the beginning of the Hearing was nothing more than a sham. The Carrier knew that the Claimant had not been notified of the charges and the scheduled Hearing. The Carrier's argument relative to the presence of others at the Hearing begs the issue. Their presence is not proof that the Claimant had been properly notified to attend.

It is indeed proper to conduct a Hearing in absentia in situations where the accused is properly notified of the charges and the scheduled Hearing and such accused employee elects for whatever reason not to appear for the Hearing. Such a situation is not present in this case.

On the issue as raised by the Organization relative to an untimely discipline notice to the Claimant following the completion of the Hearing, the Board is convinced that the Carrier violated the 20-calendar day provision of Rule 42 for rendering a decision after completion of the Hearing. While the exchanges of correspondence that constitute a portion of the on-property handling of the case establish that there was, in fact, a verbal understanding between the parties relative to this issue, the Organization's interpretation of that understanding, i.e., that the 20-calendar day clock began ticking upon the Carrier's receipt of the Investigation transcript from the transcription service on February 17, 2000 is persuasive. Thus, the time limits would have expired on March 8 which made the March 20, 2000 discipline notice untimely. To rule as the Carrier argues would leave the time limits for rendering the discipline notice open ended. Its assertion is absurd and illogical to say the least.

On the issue of alleged violation of General Operating Rule B on January 6, 2000, the Hearing record - especially the testimony of the Signal Foreman and the three Assistant Signalmen - establishes, at most, a situation of "monkey see - monkey do." The Signal Foreman testified:

> "... if one man was not going to dig and stand and lean on his shovel, that they (the other Assistant Signalmen) thought that that would be fair for all the men and they would wait until that man returned digging, at which time they would all return digging [sic]."

* * *

"If he wasn't going to dig in the lack of supervision, the rest of the fellows didn't know why they should have to dig in the lack of supervision."

As for the three Assistant Signalmen, their testimony consisted of opinionated answers to the leading questions posed by the Hearing Officer such as:

"Q. . . . where would you rate him (Claimant) as far as his performance on that task?

A. At the bottom of the list.

* * *

Q. How did Mr. Adkins perform that day in relationship to the digging?

A. He didn't do his share.

* * *

Q. . . . would this be pretty consistently that he (Claimant) didn't carry his load? [sic].

A. Yes, it would."

From the totality of the testimony relative to this issue, it appears that all of the Assistant Signalmen, including the Claimant, failed to perform their duties efficiently on January 6, 2000. Such lack of performance does not justify the Claimant's dismissal.

The most serious charge as made in this case concerns the alleged falsification by the Claimant of his employment application. Such a charge, if proven, is clearly a dismissal offense. The record in this case, however, does not prove that such a falsification of the employment application has, in fact, occurred. The Signal Foreman admittedly knew for "several months" that the Claimant was on probation for some type of offense. He testified that the Claimant was unexplainedly absent from his job ten

percent of the time. He testified that he knew the Claimant was regularly looking for excuses to use for not attending his "AA" meetings. He testified that he knew the Claimant was looking for a reason to ". . . be released from jail on work release." In spite of all of this knowledge by the Signal Foreman, there was no probative evidence introduced at the Hearing with regard to the root cause or date of the probation, the jail release or the excessive absence from work.

There is not one iota of evidence in this case record to show when or what caused the Claimant to be on probation. There is not a scintilla of evidence to show that the situation that brought about the Claimant's probation occurred prior to the date he submitted his employment application. There is no evidence to show that any examination or investigation was made into the application information submitted by the Claimant. There is no evidence to show that any of the Signal Foreman's admitted knowledge relative to the Claimant was acted upon until the commencement of the unfortunate series of events that brought us to this case.

On the basis of the totality of evidence - or lack thereof - as found in this case record, the Board is compelled to find that the most serious charge against the Claimant cannot be upheld. There simply is no probative evidence to support the conclusion that the Claimant falsified his employment application. As the Board held in First Division Award 25168:

> "The Carrier bears the burden of proving the Claimant violated its Rules. It had a chance for a 'slam dunk' and missed. The transcript is void of any evidence. Therefore, the Carrier failed to meet its burden."

Rule 42 demands that in a situation in which the charge against the employee is not sustained, the employee must be reinstated to service and compensated for wage loss. This decision, while repugnant to the Board, is unavoidable due to the state of the record as it exists in this case. The Board, therefore, holds that the Claimant should be reinstated to service subject to the normal and customary examinations both medically and job related that are applicable to the Carrier's employees who are returned to service after extended absences. As for the wage loss issue, there is no entitlement due for any time during which the Claimant was unavailable because of his incarceration. (See Serial No. 326, Interpretation No. 1 to Third Division Award 24800, as well as Serial No. 81, Interpretation No. 1 to Second Division Award 7876.) In addition, the Carrier is entitled to include in its computation of wage loss not only a deduction for outside

earnings and unemployment compensation, if any, but also the same loss of work percentage demonstrated by the Claimant prior to his termination. The Claimant is required to provide the Carrier with all pertinent records relative thereto, such as but not limited to copies of his W-2 IRS forms, his income tax returns and an affidavit as to his earnings and unemployment compensation. If the Claimant wishes to recover the compensatory damages he has been awarded by this Board, he must provide the requisite information without which such damages cannot and need not be computed. (See Interpretation No. 1 to Award 8 of Public Law Board No. 1844.)

AWARD

Claim sustained in accordance with the Findings.

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 17th day of March 2003.