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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37135
Docket No. SG-37756
04-3-03-3-101**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood that:

Claim on behalf of D. J. LaMortte, for removal of any reference to the discipline issued on May 15, 2001, from the Claimant's personal record, account Carrier violated the current Signalmen's Agreement, particularly Rules 6 and 7, when it imposed discipline against the Claimant in connection with an investigation held on May 2, 2001, without providing a fair and impartial hearing and without meeting its burden of proving the charges. Carrier's File No. S-01-001. General Chairman's File No. 01-49-IHB. BRS File Case No. 12384-IHB."

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.

On February 2, 2001, the Claimant was directed to attend a formal Investigation and Hearing on charges that he allegedly violated the Roadway Worker Safety Rules when he allegedly failed to give full attention to detecting the approach of a train. After several postponements, the Investigation was conducted on May 2, 2001. As a result of this Investigation, the Claimant was found guilty as charged and was assessed a suspension of 15 working days, to be held in abeyance for six months. The Organization filed a claim on the Claimant's behalf, asserting that the Investigation was not fair and impartial, and challenging the assessment of discipline. The Carrier denied the claim.

The Carrier contends that the record demonstrates that the Claimant was guilty of violating the Roadway Worker Safety Rules, as evidenced by the DOT/FRA citation for failure to give full attention to detecting the approach of a train. The Carrier points to the Claimant's testimony that his co-worker that day was responsible for watchman duty, while the Claimant was working. The Carrier maintains, however, that the Claimant's description of one of the pictures taken that day includes an admission that he was performing duties as a watchman, but had left his post to assist his co-worker.

The Carrier emphasizes that the Roadway Worker Safety Rules specifically state that a watchman is not to perform any work or be distracted while he is performing the duties of a watchman. The Claimant, however, readily admitted that he assisted a co-worker while the Claimant was performing the duties of a watchman. The Claimant clearly identified himself as violating the Roadway Worker Safety Rules.

As for the Organization's assertion that the Carrier failed to have the FRA Inspector present at the Hearing, the Carrier emphasizes that it has no authority to instruct or order an individual who is not a Carrier employee to appear for an Investigation. Moreover, the FRA Inspector advised the Carrier that FRA policy does not allow for its representatives to appear as witnesses at Carrier Investigations. The Carrier argues that the FRA Inspector's photographs were properly submitted as evidence, and the Claimant's own admission confirmed the FRA Inspector's report to the Carrier. The Carrier contends that the pictures and

the FRA report tell a conclusive story, so the Hearing Officer was correct in continuing the Investigation without the presence of the FRA Inspector.

The Carrier further asserts that there was nothing improper in its request to postpone the Investigation from February 28, 2001. The Carrier maintains that the Organization was not required to consent to this postponement. The Carrier maintains that the Investigation was fair and impartial, the record demonstrates that the Claimant violated the Roadway Worker Safety Rules, the discipline assessed was not arbitrary, capricious, or discriminatory, and it was warranted under the circumstances. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization contends that the Carrier violated the parties' Agreement, particularly Rules 6 and 7, when it imposed the discipline at issue upon the Claimant without providing a fair and impartial Investigation and without meeting its burden of proof. Rule 6 prohibits the Carrier from imposing any discipline without affording the employee a fair and impartial Investigation, and the Organization maintains that several procedural issues seriously flawed this whole matter. The Organization points out that the testimony of the FRA Inspector was critical in that he was the only person at the scene of the alleged incident. The Organization maintains that despite the fact that the FRA Inspector was a Carrier witness and the person who initiated the incident under investigation, the Carrier failed to have him present at the Hearing to answer the Organization's questions and to explain the photographs and the brief FRA report. The Carrier's failure to have the FRA Inspector present at the Hearing seriously hampered the Claimant's right to a fair and impartial Hearing. The statements from Carrier witness Buckingham on behalf of the FRA Inspector are nothing more than hearsay testimony and should not be allowed to stand. The Organization maintains that it is a fundamental error and a fatal defect not to have all material witnesses in attendance at an Investigation.

The Organization then argues that the Carrier failed to provide any support for its assertion that it could not order a non-employee to appear for an Investigation. The Organization asserts that because of the Carrier's failures, the Claimant and his representative were unable to develop crucial facts for his defense. This represents a flagrant violation of due process.

The Organization goes on to assert that the Carrier committed another procedural error when it arbitrarily postponed the Investigation that had been rescheduled for February 28, 2001. The Organization points out that the Claimant and his representative were present and ready to proceed on February 28, when the Carrier arbitrarily postponed the Investigation. The Organization argues that the Carrier cannot, at its every whim, postpone Investigations.

The Organization further contends that the Carrier developed its case solely on second-hand information. The Carrier's only witness, Buckingham, provided only hearsay testimony regarding the pictures and report submitted by the FRA Inspector. The Organization maintains that the pictures are of such poor quality that it is not possible to distinguish who, if anyone, is fouling the track. Moreover, the still-frame pictures depict tenths of a second in time, so it is not possible to conclude from these photos that either the Claimant or the other employee involved in the incident were not doing their duty as watchman. The Organization additionally points out that the other employee, and not the Claimant, was in charge, and that he and the Claimant were trading the duties of watchman during the day in question. The Claimant testified that at the time of the incident shown in the photos, the other employee was the watchman. Because this other employee waived his right to an Investigation does not mean that the Claimant was in any way negligent or violated any Rule. The Organization asserts that the Carrier failed to meet its burden of proof, and it is outrageous to issue discipline in such a case. There is no evidence that the discipline imposed upon the Claimant was warranted. Instead, the record indicates that the Carrier improperly imposed the discipline at issue to punish the Claimant, rather than to guide him in his work.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the procedural arguments raised by the Organization and we find them to be without merit. There is significant Board precedent that holds that it is not an error for the Carrier to fail to produce a non-employee such as an FRA Inspector. With respect to the Carrier's decision to postpone the

Investigation, Rule 6 allows any of the parties to postpone an Investigation for a valid reason. The Carrier had a valid reason in that it was attempting to dispose of this matter without an Investigation if the Claimant would accept a waiver of the Investigation. The Board finds that there were no procedural violations and the Claimant was guaranteed all of his Agreement due process rights throughout the Investigation.

With respect to the merits, the Board reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was not giving his full attention to detecting the approach of trains and warning employees to clear the tracks as required by Rule 3907(a). Rule 3907(b) prohibits employees from performing other duties, even momentarily. There are photographs in the record that show that the Claimant was performing duties other than his responsibility as watchman in violation of Carrier Rules.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was issued a 15-day suspension to be held in abeyance for a period of six months. Given the seriousness of the wrongdoing and the relatively lenient disciplinary action assessed the Claimant, the Board cannot find that the discipline issued to the Claimant in this case was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD

Claim denied.

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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 August 2004.