

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37244
Docket No. SG-37274
04-3-02-3-215

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

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE: (

(Canadian National/Illinois Central Railroad

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Illinois Central Railroad (IC):

Claim on behalf of B. Q. Alexander, for payment of all lost time and benefits, with all reference to the discipline imposed in connection with an investigation conducted on March 29, 2001, removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 35, when it failed to provide the Claimant with a fair and impartial investigation and imposed harsh and excessive discipline without meeting the burden of proving the charges against the Claimant. Carrier's File No. IC-135-01-03. General Chairman's File No. IC-004-01. BRS File Case No. 11874-IC.”

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 27, 2001, the Claimant was notified to attend a formal Investigation to "ascertain the facts and/or determine your responsibility, if any, for your alleged failure to properly operate and/or maintain control of company vehicle which resulted in a collision with another vehicle at 7th Street in Reserve, La., on Monday February 19, 2001, at approximately 6:30 A.M." After a postponement, the Investigation was conducted on March 29, 2001. As a result of the Investigation, the Claimant was found guilty of the charge, and by letter dated April 6, 2001, the Carrier notified the Claimant that he was being issued a 25-day suspension. The Organization filed a claim on the Claimant's behalf, challenging the Carrier's decision to suspend the Claimant. The Carrier denied the claim.

The Carrier initially contends that there is no substantial evidence to support the Organization's assertions that the Claimant was not guilty and that the Investigation was flawed. The Carrier argues that the Organization apparently believes that the only fair and impartial Hearings are those where no discipline is imposed. The Carrier maintains that this is a standard argument made with little foundation in fact and no evidence to support it.

As for the Organization's specific assertions, the Carrier contends that not stating specific Rule violations in the Notice of Investigation does not constitute pre-judgment of an employee; instead, it protects the employee from prejudice. The Carrier emphasizes that the Notice of Investigation in this case met the Board's criteria, and the Claimant was clearly advised of the issues at hand. The Carrier then asserts that the Organization's allegation that the Notice of Investigation was not timely delivered simply is not true. The Carrier points out that it became aware of the offense on February 19, and the notice was dated February 22. The Carrier maintains that although the Claimant may have notified his supervisor of his change of address, the Claimant did not so notify the Division Office. The Carrier contends, however, that the Claimant nevertheless was hand-delivered a Notice of Postponement, so the Claimant clearly was aware of the Investigation. The Carrier further asserts that the Organization could have requested a postponement if the

Claimant was not prepared to continue, but the Organization agreed to proceed with the Hearing as scheduled. The Carrier therefore argues that the Organization's protest has no merit.

The Carrier then argues that the evidence supports the finding that the Claimant is guilty as charged. The Carrier maintains that the Claimant did not refute the fact that he failed to completely stop at the crossing, and that he did not see the motor vehicle he struck until the last second. The testimony from the Claimant and other witnesses demonstrates that the Claimant did not have proper control of the hi-rail vehicle. The Carrier contends that it does not employ people to overlook important details while working. The Carrier asserts that only a Hearing Officer may determine which story to believe, and the Hearing Officer in this case determined that the testimony of the other witnesses was more credible than that of the Claimant. The Carrier contends that the Board does not have the authority to substitute its judgment for that of the Hearing Officer.

The Carrier also argues that it is not relevant that the driver of the motor vehicle received a ticket; this does not prove that the Claimant is innocent. The Claimant is bound by the Rules of the railroad, and he admitted that he did not make a complete stop at the crossing. This admission establishes that the Claimant violated the Carrier's Rules.

The Carrier additionally contends that failure to perform one's duties is not acceptable. The Carrier is obligated to impose discipline in cases where Rules are violated and due process is maintained. The Carrier emphasizes that the Investigation was fair and impartial, the Rules were in fact violated, and the discipline was appropriate. Under the circumstances, the Board should not interfere with the discipline. The Carrier asserts that there is no evidence that the discipline was excessive or arbitrary.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier violated the parties' Agreement, particularly Rule 35, when it failed to prove the charges against the Claimant, yet imposed the suspension at issue. The Organization asserts that the

Carrier's failure to comply with the procedural requirements nullified the April 27, 2001 Investigation and voided the Carrier's right to take disciplinary action against the Claimant in this matter. The Organization asserts that the Carrier failed to provide the Claimant with proper notice of the Investigation, and the Carrier did not dispute this contention. The ensuing proceeding therefore was fatally flawed from the outset. Because the Carrier did not conduct the Investigation in accordance with Rule 35, it had no right to impose discipline in this matter. As the Board has found, failure to issue timely notice nullifies any subsequent proceeding.

The Organization argues that the Carrier failed to meet its burden of proving the charges through substantive evidence, but instead based its findings on speculation and conjecture. The Organization contends that in the absence of proof that the Claimant was operating the vehicle in an unsafe manner, it was arbitrary and capricious for the Carrier to discipline the Claimant on this charge. The Organization emphasizes that the Claimant's testimony makes clear that the driver of the other vehicle turned in front of the Claimant after he already had started through the crossing; the Claimant was unable to stop his vehicle before the collision. The Organization points out that after they investigated the accident, the police issued a ticket to the other driver for causing the accident by failing to yield.

The Organization asserts that the crux of this dispute is whether the Carrier proved that the Claimant was responsible for the accident as a result of failing to operate his on-track vehicle at a safe speed. The Carrier failed to meet the burden of proving this charge, and it violated the Claimant's right to a fair and impartial Investigation when it concluded that he was responsible for the collision and disciplined him. The Organization emphasizes that under the Carrier's Operating Rules, it may be held that an operator is driving a vehicle at an unsafe speed only when the driver is unable to stop within one-half the range of the driver's vision down the track. The Organization contends that had the other car not darted across the crossing, making an accident unavoidable, the Claimant clearly could have stopped within the requirements of the Rule. The Organization maintains that there is no evidence that the Claimant was traveling too fast to stop within that distance. Based upon the Carrier's own Investigation, there was no basis for the Carrier to determine that the Claimant violated the Rules or was responsible for the accident.

The Organization argues that the fact that two vehicles collided does not prove that the Claimant was responsible for the accident. The Organization maintains that the Carrier's finding that the Claimant was guilty on the simple basis that the Claimant was involved in an accident demonstrates the complete lack of evidence to support the Carrier's charges. The Carrier based its decision strictly on presumptions and conjecture, not substantive evidence of wrongdoing by the Claimant. The Organization emphasizes that the Carrier admittedly based the Claimant's discipline on the mere fact that an accident occurred. The Organization asserts that the disciplinary action against the Claimant cannot be allowed to stand, however, because an employee cannot be disciplined simply for being involved in an accident. The Organization contends that the record shows that the other driver caused the actions, and the Carrier's decision to suspend the Claimant on the basis of a charge that was disproved is arbitrary, capricious, and a violation of the Claimant's rights under Rule 35.

The Organization goes on to contend that the penalty imposed against the Claimant makes it evident that the Carrier's sole intent was to punish the Claimant, not guide him in the performance of his work. It is an abuse of the Carrier's discretion in disciplinary matters when discipline is imposed only to punish the employee and not to correct or guide an employee's conduct. The Carrier abused its managerial authority with the arbitrary decision to discipline the Claimant, despite the fact that the Carrier had established that there were no infractions.

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

The Board reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

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 guilty of violating Carrier Safety Rules when he was involved in a collision on February 19, 2001, in which he hit a motor vehicle that was crossing the tracks. The Claimant did not deny that he did not completely stop at the crossing and did not see the motor vehicle that he struck until the last second. It is clear from the record and the testimony of the parties that the Claimant did not have the required control

over his hi-rail vehicle. Consequently, it was not improper for the Carrier to find him somewhat responsible for the accident that took place.

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.

In this case, the Claimant was issued a 20-day suspension. That 20-day suspension triggered a five-day deferred suspension from a prior incident in which the Claimant was also involved in an accident.

Given the previous history of the Claimant and the seriousness of this offense, the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it issued the 20-day suspension to the Claimant for this second similar infraction. Therefore, the claim will be denied.

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 27th day of October 2004.