

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22703

Docket Number SG-22537

Richard R. Kasher, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood
of Railroad Signalmen on the Missouri Pacific
Railroad Company:

On behalf of Signal Foreman R. R. Tucker, who was suspended for thirty days by discipline notice dated July 6, 1977, for pay for all time lost, including overtime worked by others on Mr. Tucker's Foreman position, during the period of suspension, July 6 to August 4, 1977." /Carrier file: B 225-745/

OPINION OF BOARD: As a Signal Foreman, Claimant's responsibilities on April 12, 1977 included making certain that signals along newly-installed tracks were connected and operating properly.

On May 31, 1977 it was discovered that signal 2627L (for which the Claimant had been responsible) was displaying an approach signal for a section of track that already had a train on it. The malfunction was found to have been caused by the incorrect connection of two track wires. The situation was remedied and the Carrier made its False Proceed Signal Report to the Federal Railroad Administration.

An investigation was scheduled for June 9, 1977 but was postponed (at the Organization's request and by mutual consent of the parties) until June 16, 1977. However, as a result of a seventy-car derailment on June 16, the Carrier moved the hearing forward a second time, to July 1, 1977.

The hearing was held and, on July 6, 1977, the Claimant was suspended for thirty days without pay. Claimant was furnished with a copy of the transcript and the discipline notice. The Local Chairman and the General Chairman only received copies of the transcript, even though the Local Chairman had requested, at the hearing, that he be furnished with a copy of the discipline notice. He did not receive the notice until he made a subsequent request, on July 25, 1977.

The Organization protests the discipline on both procedural and substantive grounds.

Procedurally, the Organization alleges that the investigation was not timely held; the discipline notice was not timely furnished; the Carrier improperly restricted questioning during the hearing; and, the Claimant was accused of one thing (improperly connecting the wires) but disciplined for another (failing to see that they were properly connected).

The Organization also contends that the Carrier failed to meet its burden of proving that the Claimant had acted irresponsibly. The Organization's position is that it is unlikely that a false proceed signal would go unnoticed for 49 days. The Organization claims that someone else must have subsequently tampered with the wires.

In claiming that the investigation was untimely, the Organization cites Rule 700(b) which provides that an investigation will be set for hearing within ten days following the date the employee is notified of the charge "except (the time limits may be extended) by mutual agreement between the Management and the employee or his duly accredited representative." The Organization claims that the postponement from June 16, 1977 to July 1, 1977 was not by mutual consent and that the Carrier failed to indicate what effect the June 16 derailment had on its ability to conduct the investigation.

In claiming that the discipline notice was not timely furnished, the Organization cites Rule 700(d) which provides that a copy of the transcript and notice of discipline assessed "will be furnished to the representative who assisted at the investigation within.....ten days, if requested." The Organization rejects the Carrier's defense that the delay was a clerical error which did not prejudice the employee's rights. It emphasizes that the "Board may not overlook the time limits, but must apply the agreement as negotiated."

The Carrier contends that the Claimant was responsible for the malfunction and that his rights were not prejudiced by reason of any alleged violation of Rule 700, Paragraphs (b) and (d).

The Carrier acknowledges that the second postponement of the hearing was made without the General Chairman's consent, but points out that the seventy-car derailment called on the services of most of the participants scheduled to appear at the hearing. The Carrier adds that the postponement was not a deliberate act and that the rights of the Claimant were not prejudiced.

The Carrier also acknowledges that a vacation-relief clerk did overlook furnishing the Local Chairman with a copy of the discipline notice. The Carrier argues, however, that the action was not deliberate; the Claimant's rights were not prejudiced; and that there is no rule requiring that the discipline be set aside should the representative fail to receive his copy of the notice. The Carrier cites several awards standing for the principle that clerical error is not sufficient cause to justify setting aside the discipline.

In arguing that the charge was established sufficiently in the record to justify the discipline, the Carrier notes that there was no evidence that any wires had been tampered with subsequent to April 12, 1977. The Carrier adds that there was no maintenance work done on the track since April 12, 1977 and discusses the grave potential hazard created by a malfunctioning signal.

It is the opinion of this Board that the Claimant was responsible for the malfunction. The Carrier demonstrated that it was unlikely that an employee or any other person switched the two track wires. Repairs were not scheduled for the track, no reason was given for employees to have sabotaged the wires, and it was likely that an individual unfamiliar with the complex wiring system would have caused more damage by such alleged tampering. We are inescapably led to the conclusion that the wires were misconnected while the new track was being installed and that, as Signal Foreman, the Claimant should have detected the error.

We find that the Claimant was charged with misconnecting the wires while he was disciplined for not detecting the error to be of no substantive consequence. Throughout the handling of this claim, Claimant and his representative were fully apprised of the events which gave rise to the charge. The slight difference in characterization between the charge and the finding of guilt is not significant. In either case Claimant's responsibility for signal maintenance on April 12, 1977 was the same. The principle that an employee should not be charged for one set of events and disciplined for another is not applicable in these circumstances.

The Carrier's failure to timely provide the Local Chairman with the discipline notice was improper. However, that failure did not impair the Claimant's rights to a fair hearing or prejudice his appeal in any subsequent handling of the dispute. Since the purpose of Rule 700(d) is to enable a claimant to perfect an appeal in normal fashion, we do not find that the Carrier's failure was a fatal error which justifies setting aside the discipline ultimately imposed.

Although the second postponement of the investigation was made without the General Chairman's consent, we find the delay was justified by the emergency nature of the seventy-car derailment. Importantly, the rights of the Claimant were not prejudiced by the postponement.

Finally, we note that the Carrier's Hearing Officer was somewhat restrictive regarding the Organization's questioning concerning a previous incident of an allegedly similar nature. The purpose of an investigation is to develop a full and complete record. We have concluded that the guilt of the Claimant was proven and that there was no indication that the Hearing Officer's action prejudiced this finding. However, we should note that in closer circumstances such actions by the Hearing Officer could prejudice the Claimant's rights to a full and fair hearing.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim is denied.



NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1980.