

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22770
Docket Number SG-22227

Rolf Valtin, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Chicago and North Western Transportation Company:

(a) On Sept. 9 and Sept. 13, 1976, the carrier violated the current Signalmen's Agreement, particularly rule 60 (revised) during the investigation of signal maintainer Mr. G. A. Porter, and subsequent discipline assessed to him.

(b) Carrier now be required to compensate Mr. Porter the actual time lost, which was ten (10) days actual suspension, of the alleged charge, and also clear his record of the discipline, copy of same furnished this office."

/Carrier's file: D-9-8-163/ /General Chairman's file: 5-188/

OPINION OF BOARD: Here under protest is a 10-working-days disciplinary suspension. The claimant is a Signal Maintainer. At the time in question, he had about three years of service with the Carrier. There had been no prior disciplinary action against him.

The following are the basic facts:

- On August 27, 1976, together with two fellow employes, the claimant was on assignment in Janesville, Wisconsin. The assignment required the use of a vehicle. The vehicle was a small truck (Company Vehicle No. 21-924). The claimant had been designated to do the driving.

- The vehicle was parked at a particular street location while the three employes had their lunch. Parked behind it was a city-owned vehicle. On returning from lunch to drive away, the claimant had awareness of the fact that the city-owned vehicle was parked behind the Carrier vehicle.

- To pull out, the claimant initially had to back up. In backing up, he failed to bring the vehicle to a halt in time to avoid a collision with the city-owned vehicle. The resulting damage to that vehicle required repairs amounting to about \$100.

- The investigation took place in timely fashion. It was conducted by a Signal Supervisor (Tomkins). The issuance of the Discipline Notice also took place in timely fashion. It was signed and sent by an Assistant Division Manager-Engineering (Kerbs).

The Organization is protesting the suspension both on the grounds of its severity and on the grounds that its assessing by the Assistant Division Manager-Engineering (rather than by the Signal Supervisor) marked a violation of the claimant's rights under Rule 60, titled "Investigation and Discipline". The Carrier opposes both contentions.

The first paragraph of Rule 60 reads as follows:

"An employee who has been in service more than thirty days will not be disciplined or dismissed without investigation, at which investigation he may be assisted by an officer of the Brotherhood of Railroad Signalmen of America, or a fellow Signal Department employee of his choice. Such investigation will be conducted by a supervising officer of the Signal Department. Prior to the investigation he will be notified as to the nature thereof or charges against him, if any. He may, however, be held out of service pending such investigation. The investigation will be held within seven days from date of alleged offense or after information of the alleged offense has reached the supervisor, except that where an employee is held out of service pending investigation same will be held within three working days from date taken out of service. The employee will be advised of supervisor's decision, in writing, within seven days after completion of investigation, with copy to local chairman."
(Emphasis supplied.)

We believe that the suspension is beset by both substantive and procedural difficulties. Proceeding on the basis of their joint impact, we have concluded that the suspension in its entirety should be overruled for the reasons which follow.

Our holding is best developed by first dealing with two prior Awards involving these two parties and their Rule 60. The Awards are these: No. 21230, issued September 14, 1976 (Referee Bailer), and No. 22277, issued January 12, 1979 (Referee Lipson). Award 21230, though issued subsequent to the imposition of the instant suspension, was in the hands of the parties from the beginning of the processing on the property of the present case. Award 22277 was issued at a time at which the present case, though it had left the property, was under consideration at the Board level.

The case covered by Award 21230 involved a 60-day disciplinary suspension. The attendant investigation was conducted by an Assistant Division Manager-Engineering. The person who held the position was not the same person who signed and sent the Discipline Notice in the present case. But the position is precisely the same. The question in the prior case was whether the occupant of the position was properly viewable as "a supervising officer of the Signal Department" within the meaning of Rule 60. The holding in Award 21230 was in the negative, and the 60-day suspension was therewith set aside.

We have indicated that we do not view a procedural error of this sort as necessarily calling for the complete revocation of a disciplinary action. Also, we are not losing sight of the fact that the case covered by Award 21230 involved the conducting of the investigation by the Assistant Division Manager-Engineering and that no question on this score is raised in the present case -- i.e., that the investigation, here, was concededly conducted by an occupant of an appropriate position. But we agree with the finding respecting the position of Assistant Division Manager-Engineering in relation to "supervising officer of the Signal Department" under Rule 60. Award 21230 made the finding on this basis:

"The evidence establishes that the Assistant Division Manager-Engineering who conducted the investigation (J. L. Simons) has jurisdiction over the entire Engineering Department on Carrier's Wisconsin Division, on which this claim arose, and by virtue of this jurisdiction he has responsibility for the operation of the Signal Department on the Division. But this circumstance does not make him a supervising officer of the Signal Department, as plainly stated in Rule 60."

The case covered by Award 22277 involved a 15-day disciplinary suspension. It was accepted: a) that the claimant had been guilty of dereliction of duty, and b) that the two persons who conducted the investigation qualified as "supervising officer(s) of the Signal Department." One of two questions raised by the case concerned the timeliness of the issuance of the Discipline Notice. The Organization was overruled on the question.

The other question had to do with this: "The evidence is that a letter setting forth the decision [the equivalent of what we have here referred to as the Discipline Notice] was signed, not by either of the interrogating officers, but by another management official, who was not a supervising officer of the Signal Department." The Award's holding on this matter may be said to be in three parts: 1) that a supervising officer of the Signal Department not only must conduct the investigation but also must make the decision as to the disciplinary action (if any) to be taken -- i.e., that the "supervisor's decision" referred to in the last sentence of the first paragraph of Rule 60 must be the decision by the "supervising officer of the Signal Department" as given in the second sentence of that paragraph and cannot properly be a decision by someone else; 2) that there was no evidence which might support the conclusion that the person who had signed the Discipline Notice (or its equivalent) either had merely transmitted a decision made by the two investigating supervisors or had recorded a decision which reflected their assessment; and 3) that the procedural defect was properly curable, not by completely exonerating the claimant, but by reimbursing him for the wages lost while letting the disciplinary action remain on his record.

Award 22277 was accompanied by a rather stormy issuance. The Organization's representative concurred in the Award to produce the necessary majority but filed a statement of disagreement with the directive for the retention of the disciplinary action on the claimant's record. The Carrier filed a dissent registering its belief that the Award "erroneously unifies in one person the company official who decides upon the assessment of discipline (the investigation officer) and the company officer who notifies the employee of the discipline assessed." Significantly, however, the Carrier members did not argue that the "supervisor's decision" could be made by someone other than the investigation-conducting supervisor. They argued only that the transmitting of the "supervisor's decision" may be done by such other person -- and that the mere fact that such other person signs the Discipline Notice should not be taken as showing that that person has done the assessing of the discipline.

As we have indicated, we are not offended by letting procedural defect operate to produce a modification of a penalty, rather than either ignoring the procedural defect or setting the penalty aside altogether. Award 22277 does not constitute a holding that the signing of the Discipline Notice by a person other than the investigation-conducting supervisor automatically spells a violation of Rule 60. To the contrary, the Award plainly suggests that a violation of Rule 60 would not be found to have occurred where the evidence establishes that the disciplinary decision was that of the investigation-conducting supervisor and the signing of the Discipline Notice by another person amounts to no more than transmittal mechanics.* All that the Carrier could in reality take issue with is that the Award places the burden of proof for establishing that mere transmittal mechanics are presented on the Carrier. And as to this, one may legitimately wonder where the difficulty lies in having the investigation-conducting supervisor sign the Discipline Notice as the practical and easy means of demonstrating that the disciplinary decision is his.

* See the paragraph which has this: "The Carrier argues that the management official who executed the letter merely transmitted the decision of the investigating officer, but there is nothing in the record to support said assertion. It is possible that Mr. Yocum actually reflected the decision of one or both of the interrogating officers, but that was not established by any evidence."

The present case, however, does not require formal rejection of either the statement of disagreement by the Organization's representative or the dissent by the Carrier. On the one hand, for the reasons we have given, we are directing that the suspension in its entirety be rescinded. And, on the other hand, the Carrier is not here saying that the Assistant Division Manager-Engineering merely transmitted a disciplinary decision made by the investigation-conducting officer. The Carrier is saying, rather, that the occupant of the position of Assistant Division Manager-Engineering qualifies as "supervising officer" or "supervisor" under either of the two sentences of the first paragraph of Rule 60. We reject this stance. We agree with the Bailer holding respecting the application of "supervising officer of the Signal Department" in relation to the position of Assistant Division Manager-Engineering. And we agree with the Lipson holding to the effect that "supervisor" in "supervisor's decision" goes back to "supervising officer of the Signal Department." We have no choice but to conclude that contrary to what was true in the Lipson proceeding, the Carrier is not contending that the Assistant Division Manager-Engineering merely handled the transmitting mechanics.

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 violated.

A W A R D

Claim sustained per Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 29th day of February 1980.

