

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30720
Docket No. TD-30937
95-3-92-3-828

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(National Railroad Passenger Corporation
(AMTRAK)

STATEMENT OF CLAIM:

"In accordance with Agreement Rule 19-Discipline - Investigation-Appeal, Paragraph (c), we appeal the decision of G. A. Toadvine, Transportation Superintendent, dated December 9, 1991; in connection with the investigation of Thomas M. Olsen, Train Dispatcher, on November 29, 1991. Mr. Olsen was assessed a discipline of: Disqualification as a Train Dispatcher.

We respectfully request that the investigation be declared null and void; that the discipline be vacated; that Mr. Olsen be compensated for time lost as a result of attending the investigation, and the difference in pay as a result of the improper disqualification."

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 waived right of appearance at hearing thereon.

By letter of November 5, 1991, Claimant was directed to appear for an Investigation concerning the following charge:

"Violation of Rule 902, first paragraph, of the NORAC Operating Rules which reads in part 'they will issue authorities for movement and such other instructions...for the safe...movement of trains....' in that on October 22, 1991, while assigned as Train Dispatcher Section A from 7:59 a.m. to 3:59 p.m. you failed to issue instructions for the safe movement of trains to protect a 30 MPH speed restriction thru [sic] Holmes Interlocking in particular to train No. 640."

Following an Investigation held on November 29, 1991, Claimant was notified that he had been found guilty of the charges and was assessed the discipline of disqualification as a Train Dispatcher. The discipline was appealed in the usual manner, including conference on the property, after which it remained unresolved.

At the outset, the Organization raised a procedural objection regarding the timeliness of the Notice of Hearing. The notice dated November 5, was mailed on November 6, (Wednesday), and was not received by the General Chairman until November 12, 1991, the originally scheduled date for the Hearing. Moreover, it was apparently not received by Claimant until November 16, four days after the original Hearing date. In Third Division Award 30248 we noted that the clear language of Rule 19 (b) of the Agreement between the Parties requires Carrier to give Claimant five days' notice prior to the scheduled Hearing. In light of the fact that Carrier was aware of Claimant's alleged misconduct several days prior to November 5, 1991, there can be no excuse for Carrier's continued practice of issuing Hearing notices "under the wire." In this particular case, it was not impossible for Claimant to receive a letter mailed on November 6, 1991 by November 7, 1991, but in light of the state of mail service in metropolitan areas, it was an assumption bespeaking outrageous optimism on Carrier's part. It is apparent from the remainder of the record that Claimant had ample opportunity to formulate an adequate defense to the charges against him. Accordingly, while not in any way condoning what appears to be a pattern of lassitude by Carrier in this regard, we do not find that in this instance the delay constitutes a fatal procedural flaw.

With respect to the merits of the case, Carrier failed to carry its burden of persuasion. It is unrefuted on the record before the Board that Train 640 was never known to travel on the Track No. 2 -- the track under restriction. Rather, testimony at the Hearing established that Train 640 always travels on Track No. 1. Claimant testified without contradiction that he checked with the Operator at Shore to confirm that Train 640 was running on Track No. 1. Claimant also stated that, he "already knew [640] was

going out 1 at Holmes. There was no point in telling [the engineer on 640] that there was a 30 m.p.h. restriction on a track he wasn't operating on." Finally, it is uncontroverted on the record that Claimant did, in fact, notify all trains within his responsibility coming on Track No. 2 of the 30 m.p.h. restriction. In light of the foregoing the Board must conclude that Carrier failed to show the Claimant guilty of negligence. Accordingly, the present claim is sustained, with the exception of the request for payment for attending the Investigation. There is no Rule support for granting such a request.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 31st day of January 1995.