

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32805
Docket No. SG-33784
98-3-97-3-261**

The Third Division consisted of the regular members and in addition Referee James E. Yost when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Louisville &
(Nashville Railroad Company)**

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Louisville & Nashville Railroad:

Claim on behalf of J.P. Warner and C.A. Bennett to be made whole for all time lost as a result of the discipline imposed against them in connection with an investigation conducted on March 25, 1996, and to have their records cleared of any reference to this matter, account Carrier violated the current Signalmen's Agreement, particularly Rule 55, when it failed to provide the Claimants with proper notice of the investigation and then failed to provide them with a fair and impartial investigation. Carrier's File No. 15(96-134). General Chairman's File No. 96-176-Discipline-1. BRS File Case No. 10064-L&N."

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.

Signal Foreman J. P. Warner and Lead Signalman C. A. Bennett were assigned to Signal Gang 7C70 on March 13, 1996.

Carrier's Signal Supervisor addressed a letter dated March 19, 1996 to Claimants reading:

"Gentlemen:

You are instructed to attend a formal investigation on March 25, 1996, at the office of Signal Supervisor Jim P. Snodgrass, Lynn Avenue, Corbin, Kentucky, at 1000 hours, to determine the facts and place responsibility in connection with the grade crossing activation failure which occurred at Certainteed Road, Corbin, Kentucky, on the CC Subdivision, MP C-169-8, on March 13, 1996, at approximately 2043 hours.

You are charged with violation of CSX Transportation Signal Rules and Instructions #1.209, 1.304, 1.305, 1.405, and failure to properly perform your duties. You may have present, representation as provided in your current working agreement, and you may arrange to have present, witnesses who have knowledge of the matter under investigation.

You are being withheld from service pending results of this investigation."

The Investigation was held as scheduled, and on April 13, 1996 Carrier advised Claimant Bennett that he had been found innocent of the charges and reinstated him to his position with compensation for lost wages. Carrier did not clear his record of the charge as required by Rule 55.

By letter dated April 13, 1996 Claimant Warner was advised that he had been found guilty of the charges and was assessed a 45 calendar day suspension (March 19 through May 5, 1996).

The Organization appealed the discipline to Carrier's Director Employee Relations on May 3, 1996 on the grounds that the Investigation was improper because Claimants were not provided 48 hours notice of the charges as required by Rule 55; that the discipline assessed Claimant Warner was excessive; and that Carrier failed to clear Claimant Bennett's record of the charge.

Carrier denied the appeal on July 2, 1996 stating it disagreed with the Organization's contention that the Investigation was improper, and that considering the gravity of the proven charges, discipline was warranted.

The appeal was conferenced by the parties on August 19, 1996, but they were unable to resolve the matter. The claim is now properly before the Board for final resolution.

Before proceeding to the question of guilt, the Board must first consider the time limit issue raised by the Organization, i.e., Carrier's failure to provide Claimants with 48 hours notice of the charges prior to the Investigation.

The transcript of the Investigation reveals that notice of the charges were handed to Claimants on the date of the Hearing, March 25, 1996. Rule 55 provides:

"An employee who has been in service more than thirty days will not be demerited, disciplined or dismissed without investigation, at which investigation he may be represented by an employee of his choice or representative of the class or craft of employees within the meaning of the Railway Labor Act. He may, however, be held out of service pending such investigation. The investigation shall be held within ten days of the date charged with the offense or held from service, unless postponement is arranged for. He will be advised in writing, not less than forty-eight hours prior to investigation, of the charge or charges which have been made against him. The charge will be made in writing within ten days of knowledge of the offense." (Emphasis added)

The Rule clearly provides that Claimants will be advised in writing not less than 48 hours prior to the Investigation of the charges against them. Carrier did not comply with the time limit set forth in the Rule. Neither did it give any reason for its failure to comply. Further, at the Investigation the Organization's General Chairman protested

the Investigation going forward account failure to comply with the requirement of 48 hours notice of charges prior to the Investigation, and stated the charged employees were not ready to proceed. Nevertheless, the Hearing Officer stated that the objection was duly noted and made a part of the record, but the Investigation would continue.

It is the opinion of the Board that the Hearing Officer was presented with the opportunity to correct the deficiency in the notice of the charges by postponing the Investigation for two days. Under the circumstances of record, the Hearing Officer's failure to postpone must be considered unreasonable, arbitrary and capricious. Accordingly, the Board is compelled to find Carrier in violation of Rule 55 and concur with the Organization's position that the Investigation transcript made subject of this dispute is void ab initio. Time limits pertaining to charges and Investigations which could lead to discipline of an employee must be strictly enforced.

In arriving at our decision, we are not unmindful of Carrier's contentions that Claimant Warner, by his own admission of guilt to the charges, was not prejudiced in any way by not receiving the notice of charges 48 hours prior to the Investigation and its citation of Public Law Board No. 4724, Award 6, lending comfort to its contentions.

We are not impressed for the reason that the question before the Board is not whether Claimant was prejudiced by Carrier proceeding with the Investigation, but whether the provisions of Rule 55 requiring 48 hours notice of the charges prior to the Investigation can be ignored. We think not. Rule 55 was negotiated for the employees' protection, and we are not at liberty to dilute that protection to accommodate Carrier's errors.

Our finding in this dispute is supported by Third Division Award 22748, wherein the Board held:

"While we find some language in Award 20238 that could be cited for the proposition that a failure to give the 5 days notice required by rule 40-C is not fatal unless shown to be prejudicial, we believe that the awards of this Board which hold the parties to their agreements with respect to time limits should be followed. The wording of the rule is clear; 5 days written notice is required. That is a bargained for right of an employee subject to discipline. In the instant case the employee being subject to discipline lay claim to that right at the outset of the hearing. While

holding the parties to the time limits set out in their agreements may from time to time work an injustice for either a carrier or claimant, we must apply the agreements as written and not by case law create exceptions which have not been agreed on by the parties."

Likewise, Third Division Award 29987 involving this Carrier held:

"Where the parties negotiate an Agreement incorporating procedural safeguards, the toleration of procedural irregularities undermines their express intent. Unless strict adherence to the time requirements is reinforced as expected behavior, minor deviations could become substantial breaches and thus reduce these procedural strictures to a nullity. The fact of the Claimant's admission does not detract from the finding that absent procedural due process, substantive due process cannot be attained."

See also Third Division Awards 18354 and 18352.

AWARD

Claim sustained.

ORDER

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 23rd day of September 1998.