

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 34046
Docket No. SG-35368
00-3-99-3-248

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Burlington Northern Santa Fe Railroad Company (former
(Santa Fe Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Claim on behalf of J. F. Avery, for payment of all time lost plus skill differential pay and benefits and reimbursement for all out of pocket expenses incurred, including but not limited to, travel time, meal expense and mileage, as a result of his dismissal and for any reference to this matter to be removed from his record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 41, 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 its charges in connection with an investigation conducted on January 22, 1998. Carrier’s File No. SIB 98-03-02AA. General Chairman’s File No. 988441. BRS File Case No. 10967-ATSF.”

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.

The Claimant was employed by the Carrier as a Student Signalman on July 13, 1994. He was dismissed from the Carrier's service on February 9, 1998, following a Hearing on the following charge:

"You are hereby notified to attend formal investigation in Division Conference Room, 1776 W. March Lane, Suite 140, Stockton, CA, at 1:00pm on December 30, 1997, in connection with report alleging your failure to comply with various written instructions (the most recent contained in letter from Superintendent G.D. Allen dated November 18, 1997); failure to provide information pertaining to your allegation of personal injury; and your unexcused absence from your assignment; so as to determine facts and place responsibility, if any, involving your possible violation of Rules 1.2.5, 1.13, and 1.15 of the Maintenance of Way Operating Rules effective August 1, 1996; and Rules S-26.8, S-28.2.5-A, S-28.2.5-C, S-28.13, and S-28.14 of the Safety Rules and General Responsibilities for all Employees, effective March 1, 1997 (and as revised April 15, 1997)."

The discipline was appealed through the normal grievance procedures and, failing to reach a satisfactory settlement, has come to the Board for final adjudication.

During the on-property handling of the dispute, the Organization took the position that the time limits for holding the Hearing had not been complied with. It is noted that no such contention is included in the Statement of Claim, supra. The Organization further argued that the Carrier had not carried its burden of proof to support the conclusion of dismissal.

The Carrier's position is that the Hearing record fully supports both the charge and the action of dismissal. The Carrier argues that it fully complied with the time limits as set forth in Rule 41 - Discipline/Investigation, which reads in pertinent part as follows:

(a)-1 An employee who has been in service covered by this Agreement more than 90 calendar days, or whose application has been formally approved, shall not be dismissed or otherwise disciplined without a formal investigation, except as otherwise provided in this Agreement. Formal investigation, when required hereunder, shall be held within 30 calendar days from date of the occurrence to be investigated or from the date the company has knowledge of the occurrence to be investigated. An employee may, however, accept discipline by record in writing and waive formal investigation. The record (waiver of formal investigation) will show the precise nature of the charge or charges and the discipline assessed.

*** * ***

(g) If the discipline assessed against the employee is not sustained on appeal, the record shall be cleared thereof, and if suspended or dismissed he will be returned to his former position and compensated for the actual wage loss, if any, suffered by him."

The case record shows that on or about July 9, 1997, the Claimant advised his Supervisor that he would not be able to work on July 10, 1997, because he had an appointment with a Medical Doctor. That was the last time that the Claimant performed service for the Carrier. The Claimant's action of marking off on July 10, 1997 spawned an ongoing series of letters, telephone calls, attempted meeting and the like. The culmination of the various attempts to contact and be contacted is found in a letter dated November 18, 1997 from the Division Superintendent to the Claimant in which certain medical records and verifications were requested. The letter concluded as follows:

"Failure to provide these reports on or before December 1, 1997, could be considered a failure to comply with instructions of a Company officer, and may result in disciplinary action."

When nothing of substance was heard from the Claimant, he was, by letter dated December 19, 1997, charged as outlined above and a Hearing was scheduled for December 30, 1997. Following two postponements, one by the Carrier and one at the request of the Organization representative, the Hearing was ultimately held on January

22, 1998, at which time the Claimant was present, represented and testified on his own behalf.

From the Board's review of this record, there is no basis found to support the argument of a time limit violation. The situation here involved was ongoing and active to and including the Carrier's letter of November 18, 1997. When the Claimant failed to comply with the instructions outlined in that letter by the stipulated date of December 1, 1997, the situation became ripe for a Rule 41 formal charge and Investigation. The charges were made and the Investigation scheduled to be held within the time limits prescribed in the Rule. The Organization's contention to the contrary is, therefore, rejected.

On the merits, the Hearing record contains more than substantial evidence, including the Claimant's own candid admissions, that he did, in fact, understand the Rules set in the Notice of Charge and that he had, in fact, not complied with the operative provisions of the Rules. There is no evidence to be found in the Hearing record to mitigate the Claimant's failure to comply with the Carrier's requests for proper and timely documentation of his alleged injury that was first indicated as being an off-duty injury and later changed by him to be an alleged on-duty injury.

On the basis of the totality of the evidence as found in this case record, the Board has no basis on which to change the discipline as assessed. The claim of the Organization is, therefore, 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 25th day of May, 2000.