

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36042
Docket No. SG-35853
02-3-99-3-769**

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
(Grand Trunk Western Railroad

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of R.D. Schneider, for payment of all time lost and benefits and restoration of his seniority, 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 42, 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 October 6, 1998. Carrier’s File No. 8390-1-117. General Chairman’s File No. 98-75-GTW. BRS File Case No. 19052-GTW.”

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 in this case was working as a Signaller at Flint, Michigan, when on September 23, 1998, he became involved in a physical altercation with his Foreman at which time the Claimant struck the Foreman in the face. The Claimant was thereupon withheld from service by the Carrier. By notice dated September 25, 1998, the Claimant was notified to attend a formal Investigation scheduled to be held on October 6, 1998. The Claimant appeared at the Hearing as instructed. He was ably represented by the Organization at the Hearing. He stated, "I believe I have," when asked if he had been properly notified of the Investigation, and replied, "Yes," when asked if he was ready to proceed with the Hearing. Following completion of the investigatory Hearing, the Claimant was notified by letter dated October 21, 1998, that he was dismissed from service. Appeals on the Claimant's behalf were handled by the Organization in the usual manner on the property. Failing to reach a satisfactory resolution of the dispute during the on-property handling, the case has come to the Board for final and binding adjudication.

Rule 42 reads, in pertinent part, as follows:

"Rule 42 - Discipline.

An employee who has been in the service more than ninety (90) days will not be disciplined or dismissed without a fair and impartial hearing, at which he may be assisted by a duly accredited representative. He may, however, be held out of service pending such hearing, which will be held within ten (10) days from the date when charged with the offense or held from service. Prior to the investigation the employee shall be apprised in writing of the charge sufficiently in advance of the time set for the investigation to permit his having reasonable opportunity to secure the presence of necessary witnesses.

* * *

If the charge against the employee is not sustained, it shall be stricken from the record. If by reason of such unsustained charge, the employee has been removed from the position held, reinstatement will be made and he will be compensated for wage loss, if any suffered by him."

It is the Organization's initial position that there was a violation of the provisions of Rule 42 by the Carrier in that the Hearing which was held on October 6, 1998 was beyond the allowable time limits specified in Rule 42. Therefore, it contends, the dismissal from service was a violation of the Claimant's rights and he should be reinstated to service with full pay for time lost. The Organization further argues that the altercation in which

the Claimant was involved could have been avoided if the Carrier had given serious consideration to the underlying serious problems that apparently existed between the Claimant and his Foreman. It contends that the employer has a responsibility to make an effort to avert known potential problems before they become major issues.

During the on-property handling of this dispute, the Carrier acknowledged that the Hearing was, in fact, held on the 13th day from the date on which the Claimant was withheld from service. Accordingly, the Carrier compensated the Claimant for the three-day delay. On the merits, it is the Carrier's position that the testimony in the Hearing record, including the Claimant's own admissions, fully supports the charges as made and that the actions of the Claimant justify dismissal from service. The Carrier contends that the three-day delay in holding the Hearing did not prejudice the Claimant's right to a fair and impartial Hearing and cannot be the sole basis for overturning discipline for an otherwise proven offense.

On the issue of the alleged time limits violation, the Board has the benefit of considerable historical precedent. When reviewing similar circumstances, the Board has said:

Second Division Award 2466

"Agreements of this kind regulating the employer-employee relationship must be given a reasonable, workable construction and not construed so narrowly as to defeat justice."

Third Division Award 20423

"At the outset we must point out that the disciplinary process in this industry does not follow the careful technical procedures required in criminal trials"

Third Division Award 11775

"We hold to the general view that procedural requirements of the agreement are to be complied with but we are unable to agree that Carrier's failure in this regard, under these circumstances, was a fatal error which justifies setting aside the discipline ultimately imposed."

Second Division Award 11978

“This Board has held on several occasions in the past that technical violations in the initial scheduling of an investigation will not necessarily result in the reinstatement of the terminated employee”

See also Third Division Awards 26309, 29471 and 30045.

Therefore, it is our conclusion in this case that the three-day delay in holding the Investigation did not prejudice the Claimant’s presentation of the facts or testimony relevant to his position in connection with the altercation that occurred.

Our review of the testimony found in the Hearing record, including the Claimant’s own recounting of the series and sequence of events that culminated in the Claimant striking the Foreman in the face, is significant in our consideration. Assuming without conceding that there might have been some underlying, unresolved history between the Claimant and his Foreman, there is no credible evidence to suggest that this event was anything other than an unprovoked attack by the Signalman on the Foreman. It was not an act of self-defense. The Claimant’s cavalier testimony that he followed the Foreman into the shop after the Foreman walked away from the initial encounter and then removed his glasses and moved toward the Foreman “as a form of posturing, as a dog shows his teeth to let you know to back off” is clearly indicative of the Claimant’s intentions. The totality of the Claimant’s testimony supports the conclusion that he was indeed guilty of using violence in his workplace. Dismissal from service for such proven actions is neither arbitrary, capricious, nor excessive. Therefore, the claim is 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 21st day of May, 2002.