

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37134
Docket No. SG-37320
04-3-02-3-341**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Delaware and Hudson Railway Company)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood that:

Grievance on behalf of F. F. Schuler, for removal of the discipline assessed against the Claimant and all reference to this matter removed from his personal record as a result of an investigation held February 7, 2001, at Scranton, Pennsylvania, account Carrier violated the current Signalmen's Agreement, particularly Articles 12 and 13, when it imposed discipline against the Claimant without meeting its burden of proof. Carrier's File No. 9-00019. General Chairman's File No. WHK-75-001-0102. BRS File Case No. 12172-D&H."

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.

On February 1, 2001, the Claimant was directed to attend a formal Investigation on charges that he allegedly violated NORAC Rules when he allegedly failed to operate his train in accordance with Form D 810, Line 12, to protect the crossing at Spring Street. The Investigation was conducted, as scheduled, on February 7, 2001. As a result of this Investigation, the Claimant was found guilty as charged and was assessed 20 demerits. The Organization filed a claim on the Claimant's behalf, requesting that the demerits be dropped from the Claimant's record and all mention of the alleged violation be removed from his file. The Carrier denied the claim.

The Carrier initially contends that the Organization committed a procedural violation in handling this matter that is fatal to the Organization's position. The Carrier points out that the customary practice on the property is for the parties to hold a claims conference in a final attempt to resolve disputes before they are submitted to any Division of the Board or are listed for a Public Law Board. The Carrier emphasizes that this practice has been in place with all 14 bargaining units on the D&H for more than ten years. The Carrier maintains that the Organization failed to conference the instant matter on the property, but instead went directly to the Third Division. The Carrier argues that this procedural defect requires that the instant claim be denied without a consideration of the merits.

As for the merits of this dispute, the Carrier contends that there can be no dispute that the Claimant was qualified on the NORAC Operating Rules, that he was qualified on the physical characteristics, and that he was located on the leading engine. The Carrier points out that the Claimant testified that the sole purpose for his being there was to check signal aspects and crossing approaches, as well as the signals and the crossings. The Carrier asserts that there can be no justification for the Claimant's failure to watch out for the Spring Crossing, the crossing for which there was a Line 12 "protect crossing" on the Form D that the train in question was operating under. Moreover, the Claimant's own testimony establishes that he was aware of the "Line 12" restriction at the Spring Street crossing, but he did not discuss this at a point two miles from the temporary restriction, which clearly constitutes a violation of NORAC Rule 94(a).

The Carrier argues that the record also shows that the Claimant violated NORAC Rule 138(c) in that the train did not approach the crossing prepared to stop and the train was traveling in excess of 15 miles per hour. The Carrier emphasizes that the Claimant ignored his responsibilities under the NORAC Rules. The Carrier maintains that the outcome of this incident could have been catastrophic had it not been for the alertness of the employees working at the crossing and the fact that they had just restored power to the crossing protection. The Carrier asserts that the fact that there was no catastrophe does not reduce the seriousness of the incident. The Carrier argues that it clearly has shown that the Claimant is guilty of violating NORAC Operating Rules, and the 20 demerits assessed as a result are clearly justified. The Carrier points out that all members of the train crew involved in this incident were charged, found guilty, and assessed 30 demerits each.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization contends that the Carrier violated the parties' Agreement when it failed to provide the Claimant with a fair and impartial Investigation, as reflected in its decision to issue discipline of 20 demerits despite the Carrier's failure to prove that the Claimant was guilty of any of the alleged Rule violations. The Organization maintains that on the day in question, the Claimant's duty was to observe the signals from the engine of the train. The Organization emphasizes that the Claimant was not trained, qualified, or authorized to control the movements of any train from inside the cab of an engine. The Organization asserts that the duties of a Signal Maintainer do not include the operation of trains or engines. The Organization argues that the Carrier's charging of the Claimant with a violation relating to failure to operate a train is ludicrous. The Organization maintains that the Carrier disciplined the Claimant as part of a predisposed investigation against every occupant of the engine.

The Organization emphasizes that the Claimant was just an observer, and he was not in control of the operation of the train. There was no testimony from any witness that indicated that the Claimant was guilty of the charges. The Organization contends that Rule 94(a) refers to train and engine service employees; the Claimant was not part of the train crew, so there is no merit to the Carrier's

contention that the Claimant was responsible for the conditions of communication as outlined in Rule 94(a).

The Organization maintains that it is well established that there must be substantial evidence to support charges against an employee before the Carrier can impose discipline. In this case, the Carrier failed to prove any of the allegations against the Claimant. The Organization emphasizes that the Carrier failed to meet its burden of proof, and there was no basis for concluding that the Claimant was in violation of any Rule. The record shows that the Claimant had no field of vision, was not in control of the engine, and did not violate any Rules. The Organization argues that other than the Claimant's presence in the engine, the Carrier had no basis for taking any disciplinary action against the Claimant.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the jurisdictional argument raised by the Carrier, and we find that the Railway Labor Act requires that parties hold a conference on the property prior to the submission of a claim to the Third Division. A review of the record in this case demonstrates that this case was never conferenced on the property. Board precedent supports the dismissal of a claim without any consideration of the merits where the claim has not been conferenced on the property. Because there is no record of a conference in this case prior to the submission of the case to the Third Division, the Board has no choice other than to dismiss the claim.

It should be noted that despite the fact that the Board dismissed the claim on jurisdictional grounds, a review of the merits makes it clear that the Claimant acted in violation of the Rules and failed to perform his job properly on the date in question.

Form 1
Page 5

Award No. 37134
Docket No. SG-37320
04-3-02-3-341

AWARD

Claim dismissed.

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 August 2004.