

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37198
Docket No. SG-37270
04-3-02-3-202

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
(Canadian National/Illinois Central Railroad

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Illinois Central Railroad (IC):

Claim on behalf of M. J. Whitsell, for payment of all lost time and benefits, with all reference to the discipline imposed in connection with an investigation conducted on April 27, 2001, removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rules 11, 35, and 45, 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 the charges against the Claimant and then failed to provide proper notice of the investigation within the time limits. Carrier's File No. IC-135-01-05. General Chairman's File No. IC-007-01. BRS File Case No. 11895-IC.”

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 April 20, 2001, the Claimant was notified to attend a formal Investigation to "determine whether or not [he] improperly made use of the Railroad's credit when [he] obtained lodging at the Baymont Inn on various evenings in January, February, March and April 2001 and whether or not [he] improperly submitted requests for reimbursement of expenses for January, February, and March 2001." The Investigation was conducted on April 27, 2001. As a result of the Investigation, the Claimant was found guilty of the charge, and by letter dated May 7, 2001, the Carrier notified the Claimant that he was being assessed an eight-day suspension. The Organization filed a claim on the Claimant's behalf, challenging the Carrier's decision to suspend the Claimant. The Carrier denied the claim.

The Carrier initially contends that there is no doubt that the Claimant is guilty as charged. The Carrier points out that the record demonstrates that the residence address that the Claimant had on file with the Carrier was within 30 miles of the Baymont Inn, which is the designated headquarters point. The record clearly shows that the Claimant was in violation of the Rules relating to lodging and meal expenses.

As for the Organization's assertion that the Investigation was not fair and impartial because the Carrier did not provide the Claimant with a copy of the Agreement, the Carrier points out that it is apparent from the transcript that the Claimant was aware of the Rule governing lodging. The Carrier emphasizes that the issue here is whether or not the Claimant misused the Carrier's credit, and the Investigation clearly proved that he did. The Carrier maintains that the Claimant is guilty as charged, and the discipline should stand.

The Carrier then asserts that the discipline at issue resulted from the Claimant's failure when he opted to obtain Carrier-paid lodging when his residence was within the 30 miles prescribed in the Agreement. The Carrier is obligated to impose discipline when Rules are violated and due process has been maintained. The Claimant testified that he was aware of the Rule concerning lodging and meal reimbursement, and he obviously was aware of his responsibility to be familiar with the Agreement. The Carrier contends that there is no doubt that the Claimant is guilty as charged, and the discipline was warranted and proper.

The Carrier further maintains that the Organization did not offer anything to support its assertion that the Claimant did not receive a fair and impartial Hearing. The Carrier suggests that the Organization believes that the only fair and impartial Hearings are those where no discipline is imposed. The Carrier asserts that this is a standard argument with little foundation in fact and no evidence to support it. The

Carrier asserts that not stating specific Rule violations in a Notice of Investigation protects employees from prejudice; it does not constitute pre-judgment of an employee. The Carrier argues that so long as the notice advises an employee of the topics to be investigated, the notice is sufficient. The Carrier contends that the notice in question meets the Board's criteria, and the Claimant clearly was advised of the issues at hand. The Carrier asserts that the Organization's statements are completely irrelevant to the question of whether the Claimant received a fair and impartial Investigation. The Carrier emphasizes that there is no evidence of improper conduct or pre-judgment on the part of the Hearing Officer. The Hearing was fair and impartial, and the Organization has not provided any evidence to prove otherwise.

In connection with the Organization's contention that the Claimant committed a procedural error by failing to issue the discipline within the required time limits, the Carrier asserts that this statement simply is untrue. The Carrier points out that the Rule states that a decision will be rendered within ten days after the Investigation. The Carrier emphasizes that it concluded the instant Investigation on April 27, and sent a certified letter to the Claimant on May 7 within the ten days required by the Rules. Because the Rule specifically refers to when the decision should be rendered, and not to when the employee receives the decision, the Carrier maintains that the discipline was rendered within the prescribed time, and the Organization's protest has no merit.

The Organization contends that the Carrier violated the Agreement, particularly Rule 35, when it failed to prove its charges against the Claimant, and failed to comply with the time limit provisions of Rule 35, yet imposed an eight-day suspension. The Organization asserts that the Carrier's failure to comply with the procedural requirements nullified the April 27, 2001 Investigation and voided the Carrier's right to take disciplinary action against the Claimant in this matter. The Organization asserts that the Carrier failed to provide the Claimant with the exact charge or charges in the notice, as required. The Board has found that failure to provide notice of the exact charges irreparably impairs the Claimant's defense and nullifies any subsequent proceedings based on such charges. The Organization asserts that the Carrier's failure to follow the procedural requirements means that the Carrier forfeited its right to take disciplinary action in this matter.

The Organization then asserts that the Carrier failed to provide any evidence to support its charges against the Claimant. The Organization maintains that the evidence demonstrates that the Claimant's route to his designated headquarters was more than 40 miles, meaning that it met the criteria entitling the Claimant to lodging. The Organization contends that the Carrier failed to meet its burden of proof and

decided to punish the Claimant based on a total lack of evidence. The Organization emphasizes that the Carrier is obligated to make its case through established facts and substantiated evidence. The Carrier, however, failed to meet this burden.

The Organization maintains that there is no basis for concluding that the Claimant committed a punishable offense. The Organization asserts that the Carrier was arbitrary and unreasonable in finding the Claimant guilty, and this indicates that the Carrier deprived the Claimant of a fair and impartial Hearing. The Carrier did not prove that the Claimant was guilty of any misconduct, and there is no question that the Carrier denied the Claimant a fair and impartial Investigation when it found the Claimant guilty.

The Organization further argues that the penalty imposed against the Claimant demonstrates that the Carrier's sole intent was to punish the Claimant, rather than to guide him in the performance of his work. The Organization emphasizes that it is an abuse of the Carrier's discretion to impose discipline only to punish an employee, rather than to correct or guide an employee's conduct. The Carrier abused its managerial discretion with its arbitrary decision to discipline the Claimant.

The Board reviewed the procedural arguments raised by the Organization and finds them to be without merit.

The Board reviewed the evidence and testimony in this case and finds that the Carrier failed to meet its burden of proof that the Claimant was guilty of violating Rule R by staying in a hotel when his residence was less than 30 miles from his headquarters point. The record reveals that, in fact, the Claimant lived more than 30 miles from his headquarters. The Organization submitted several documents proving that the Carrier was wrong in its calculation of the distance and that the Claimant complied with the Rules when he stayed in the hotel at issue.

It is fundamental that the Carrier bears the burden of proof. In this case, the Carrier failed to meet that burden. The record reveals that the Claimant traveled more than 40 miles and, therefore, was justified in staying in a hotel. The Carrier had no basis to suspend the Claimant for eight days, which amounted to a \$1,765 penalty for his actions in this case. The Carrier should have used the rule of reason before it took action to discipline the Claimant. Discipline should be based on testimony that is corroborated. It is inappropriate to discipline employees based on surmise and speculation. Discipline must be supported by substantial evidence adduced during an Investigation. No such evidence was adduced in this case.

For all of the above reasons, the claim must be sustained.

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 28th day of September 2004.