

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40945
Docket No. SG-41210
11-3-NRAB-00003-100062**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 Canadian National (formerly Grand Trunk Western):

Claim on behalf of T. L. Stewart, for immediate reinstatement to service with reimbursement for all time lost, including overtime, with his seniority restored and unimpaired, account Carrier violated the current Signalmen’s Agreement, particularly, Rule 42, when it failed to provide the Claimant with a fair and impartial investigation evident when Carrier issued the harsh and excessive discipline of dismissal against the Claimant without proving its charges in connection with an investigation held on October 22, 2008, and concluded on October 23, 2008. Carrier compounded this violation by failing to charge the Claimant within the time limit provisions of Rule 42. Carrier’s File No. GTW-BRS-2008-0005. General Chairman’s File No. 08-4-GTW. BRS File Case No. 14310-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 instant dispute confronts us with a procedural issue that must be addressed as a threshold matter before the merits of the claim can be reached. The Organization advanced two time-limit objections to the Carrier's disciplinary action. Both of the time limits are found in Rule 42. The Rule reads, in pertinent part, as follows:

“An employee who has been in service for 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) calendar days of the date held from service. The hearing shall be held within twenty (20) calendar days of the date when charged with an offense when an employee is not held from service. No charge shall be made that involves any offense of which the company has had knowledge twenty (20) calendar days or more except where a civil action or criminal proceeding results from the offense. . . .” (Emphasis added)

The Claimant was charged with several kinds of misconduct based upon discoveries initially made by his supervisor on August 25, 2008. Upon entering the office area the Claimant used, his supervisor found a book and DVD that had shotgun pellet and .22 caliber bullet holes in them. The supervisor learned at approximately 5:45 P.M. that same day, during a speaker-phone call to the Claimant's home, that the Claimant admitted to shooting the two items off of the Carrier's property. It is undisputed that the supervisor informed the Claimant that he was being withheld from service with pay at the time of that phone call. A bottle with a methadone label on it was found in the same office on August 26. Allegations about the possession of a controlled substance formed another kind of alleged misconduct. Finally, some cartoons were found in a desk drawer the following week. They led to yet another kind of misconduct charge. All of the charges were combined into one notice of charges.

The Carrier issued its notice of charges by letter dated September 22, 2008. This notice set the Hearing for October 6, 2008.

The Organization asserted that the Carrier's action violated Rule 42 in two respects. First, the Hearing was not held within ten days of the date that the Claimant was withheld from service. Second, no charges should have been issued against the Claimant because the Carrier had 20 or more calendar days advance knowledge of at least two of the alleged offenses before it issued the notice of charges.

Although the Carrier attempted to contend that the Claimant was withheld from service on an unrelated matter having to do with a confederate license plate, a careful reading of the testimony and exhibits makes it crystal clear that the Claimant was not withheld from service because of the license plate matter and was withheld from service immediately after he had been asked about and had admitted to the book and DVD shooting. The Carrier also noted that the Claimant was only withheld from service with pay. However, Rule 42 does not distinguish between being withheld with or without pay. As written, the Rule applies to both forms of withholding from service. It is also noted that the Rule makes copious use of the words "will" and "shall." These words traditionally are interpreted to establish mandatory requirements. Finally, the Carrier cited several prior Awards to exonerate its timing of the originally scheduled Hearing. All but one of them involved other parties, other Rule language, or significantly different facts. As such, they are not on point. Only one, Third Division Award 36042, involved these same parties and Rule. However, that case involved only a three-day delay in holding the Hearing. The Award does not persuasively explain how the meaning of the word "will" could be disregarded. Although the Award effectively excused a three-day delay for which the claimant was compensated, it does not provide any reasoning that could extend its application from a three-day delay to the lengthy delay now before the Board. The Claimant was withheld from service on August 25 and the Hearing was not scheduled to begin before October 6, 2008.

It is also undisputed that the Claimant's supervisor gained significant knowledge about the shooting offense on August 25, 2008, and knowledge about the bottle the following day. The notice of charges was not issued until September 22, 2008, which is a time span well in excess of 20 calendar days. In this case, the Rule is clear that "No charge shall be made . . ." when there is such a delay. The Carrier noted that its own internal preliminary investigation was not reported out until

September 2, 2008. In its view, the notice of charges was properly issued within 20 days of that date. As written, however, this portion of the Rule does not suspend the running of the 20-day time limit while the Carrier conducts a preliminary investigation. Moreover, the Rule does not permit issuance of charges within 20 days of first knowledge. Even if the time limit did not begin running until September 2, the Rule, as written, rather explicitly prohibits waiting until September 22, which was the 20th day after gaining knowledge, to issue the notice of charges. Once the Carrier waits until the 20th day, it has effectively deprived itself of the ability to make charges.

Given the state of the record before the Board, we are compelled to find that both of the Organization's procedural objections have merit. As a result, we must sustain the claim.

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 24th day of March 2011.