AWARD NO. 10
CASE NO. 10

PUBLIC LAW BOARD NO. 5439

PARTIES TO DISPUTE) TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION
) NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION (A PUBLIC CORPORATION)

STATEMENT OF CLAIM

1. Carrier violated the terms of the Agreement between the Parties when on December 16, 1992, it assessed Clerk Jerome Wells forty (40) days actual suspension from service to begin December 17, 1992 and end January 26, 1993.

2. Carrier shall now be required to compensate Clerk Wells for all time lost beginning December 17, 1992 and ending January 26, 1993

Carrier File No. 03-13-671

Organization File No. 321-METRA

OPINION OF BOARD

After investigation held on December 11, 1992 and by letter dated December 16, 1992 (Car. Exh. B), the Carrier issued Claimant a 40 day suspension stating:

* * *

> Upon review of the formal transcript of the investigation, it has been determined that you were in violation of General Rules "B" and "Q" on the day of Monday, December 7, 1992 when you were assigned to work as Gate Attendant, VanBuren Street, from 10:00 A.M. to 6:30 P.M
>
> For these violations you are assessed Forty (40) days actual suspension. This suspension will begin at 7:00 A.M., Thursday, December 17, 1992 and end at 7:00 A.M. on Tuesday, January 26, 1993.

* * *

By letter dated December 18, 1992 (Org. Exh. 2), the Organization's District Chairman notified the Carrier that he was sending the matter to the Organization's General Chairman for further appeal. By letter dated January 22, 1993 (Car. Exh. C), the Organization's General Chairman appealed the suspension. In that letter, the Organization stated the following:

* * *

> The Organization can not make proper appeal on this claim, due to the fact that the Carrier failed to provide a transcript of the investigation. This leaves the Organization to wonder if the transcript of the investigation was adequately prepared as required by the Agreement between the Parties. Without such investigation and transcript of the investigation, the Organization can not determine how any discipline was assessed to the Claimant.

By letter dated February 17, 1993 (Car. Exh. D), the Carrier denied the

Organization's appeal on the merits as well as on the procedural question concerning the providing of the transcript of the investigation. With respect to providing the transcript, the Carrier stated:

* * *

> On December 16, 1992 the notice of discipline was sent via U.S. Mail and on December 17, 1992 a copy was hand delivered and signed for by Claimant Wells. A copy of this letter was forwarded to Mr. E. Vandevyvere District Chairman, TCU. It is at this point that a copy of the transcript is provided to both Claimant and to the representative in accordance with Rule 56(D) ...
>
> * * *
>
> If the transcript was not furnished to Mr. Vandevyvere the "duly accredited representative" or the Claimant, which the Corporation denies, it was then each of their responsibility to bring it to Corporations [sic] attention. Both the Claimant and the Organization's representative knew of the notice of discipline dated December 16, 1992, and to now claim in your letter of January 22, 1993, that you are unable to make proper appeal on this claim because of not receiving a copy of the transcript is without merit. The Corporation on December 17, 1992, provided all concerned with the required copy's [sic] of the notice of discipline and the transcript. If this transcript had been misplaced by the Claimant or lost in the mail for the Representative, a simple request would have brought an immediate response from the Corporation to provide another copy of the transcript as outlined in Rule 56(D). The Agreement does not provide a penalty for not supplying a transcript, if it should occur, nor does it overturn the decision of the Hearing Officer. It is the responsibility for the Corporation to furnish a transcript to both the Claimant and the Representative (which it did provide) and a tacit responsibility of the Claimant and the Representative to make known if inadvertently the transcript was not attached to the notice of discipline.

* * *

With respect to the procedural question concerning the alleged failure of the Carrier to provide a copy of the transcript to the Organization, we are first faced with a question of fact which needs to be resolved. The Organization asserts that no transcript was provided and the Carrier contends the opposite. For purposes of analysis, the Organization's statement that no transcript was received as set forth in the General Chairman's letter of January 22, 1993 is a sufficient *prima facie* showing that no transcript was provided. That showing shifts the burden to the Carrier to demonstrate that the transcript was provided as the Carrier asserts. We find that the Carrier has not made that demonstration.

First, the Carrier need not prove that the transcript was *received*. To rebut the Organization's *prima facie* showing, the Carrier only need produce *some* evidence beyond the plain assertion that it sent or otherwise timely provided the Organization with a copy of the transcript. However, there is no statement or other evidence provided by the Carrier showing that the transcript was transmitted to the Organization as the Carrier alleges. No clerical employee or Carrier official with direct knowledge has demonstrated that, in fact, on the date in

question a copy of the transcript was at least sent or otherwise provided to the Organization. Beyond the conclusion-type assertions made by the Carrier, no such affirmative evidence has been brought forth.

Second, and giving the Carrier the benefit of the doubt, ordinarily contrary factual assertions of the type facing us might well require a finding of fact adverse to the Organization's position. That is, the Organization has made a factual assertion and the Carrier has denied that assertion. Under ordinary circumstances, the conflicting assertions may well require the Organization's position to be found not substantiated because the burden is on the Organization to prove all the elements of the facts forming the basis of its procedural objection.

However, there is more here. The status of the analysis at this point is that the Carrier asserts that it provided the transcript. But the Carrier's letter of December 16, 1992 (Car. Exh. B) informing Claimant of the results of the investigation (with copy to the Organization's District Chairman) contains no reference to an enclosure of the transcript. That omission tends to support the Organization's position that no transcript was provided.[1] Further, this Board currently has two other discipline cases pending before it for resolution—Case Nos. 6 and 9. In both of those case where discipline was imposed after investigation, the letter to the employee made specific reference to the fact that the investigation transcript was enclosed. *See* Case No. 6, Car. Exh. B at 2 ("cc: ... w/copy of investigation"); Case No. 9, Car. Exh. B at 2 ("Enclosures: Copy of Investigation held ...."). Thus, it appears that when the Carrier provides a copy of the transcript of the investigation it duly notes that fact on the letter imposing discipline. In this case, that fact is *not* found in the Carrier's letter of December 16, 1992.

Therefore, given the Organization's assertion that it did not receive the transcript coupled with the lack of specific evidence from the Carrier that the transcript was sent or otherwise provided; the omission of any reference to forwarding the transcript to the Organization in the Carrier's December 16, 1992 letter and the fact that in the past the Carrier has made such notations in similar letters, we are sufficiently satisfied that the evidence sufficiently shows that the Carrier did not provide the Organization with a copy of the investigation transcript.

Rule 56(D) states:

> Except where no discipline is administered, a copy of all transcripts and statements made a matter of record at an investigation shall be furnished to the

[1] It is ordinary business practice to make reference in a letter to any enclosures that might be provided along with a letter.

employe and if he is represented to his "duly accredited representative."

That provision is mandatory. ". . [A] copy of all transcripts and statements made a matter of record at an investigation *shall* be furnished ...." [emphasis added]. The evidence shows that the Carrier did not do so. A violation of Rule 56(D) has been shown.

The Carrier's failure to provide the transcript in violation of Rule 56(D) requires a sustaining of the claim. *See e.g., Third Division Award 3736; First Division Award 23930.* By failing to provide the transcript as required by the Rule 56(D), the Organization was effectively precluded from preparing a proper appeal. By use of the word "shall" the parties made compliance with Rule 56(D) mandatory. We do not have the authority to change the provisions of that rule.

The Carrier's argument that it was incumbent upon the Organization to notify the Carrier that the transcript was not received (Car. Submission at 6) does not change the result. By its plain terms Rule 56(D) obligates the Carrier to provide the transcript. The rule does not provide for the Organization to ask for it.

We therefore cannot reach the merits. The claim will be sustained as presented. The suspension shall be rescinded and Claimant shall be made whole

AWARD

Claim sustained.

Edwin H. Benn
Neutral Member

R. L. Henry
Carrier Member

W. R. Miller
Organization Member

Chicago, Illinois

Dated: 4-4-94