BEFORE
PUBLIC BOARD No. 6993
Case No. 5

AMERICAN TRAIN DISPATCHERS ASSOCIATION	)	
	)	
vs.	)	**PARTIES TO DISPUTE**
	)	
CSX TRANSPORTATION, INC.	)	

Carrier file: 76216
Claimant A. R. Klainsek

C.R. Mundy, Member designated by ATDA
J. Klimtzak, Member designated by CSX
L.S. Kohn, Esq., Neutral Member and Chair appointed by National Mediation Board

STATEMENT OF CLAIM:

"The Organization requests that the claimant be exonerated of all charges, compensated for any time lost, as well as for any overtime [to which] he may have been entitled, and his personal record be cleared of any and all entries regarding this investigation."

BACKGROUND:

The Claimant was hired as a Train Dispatcher on August 26, 1996. By letter dated May 26, 2005, the Claimant was notified of a formal investigation into charges that, as stated in the letter:

> You are charged with failure to properly protect signal man D. A. Chin in the Stepehnsport (sic) block at or about 1128 hours. Wednesday, May 25, 2005 and any and all circumstances related thereto.

The investigation was conducted on June 2, 2005. By letter dated June 13, 2005, the Carrier notified the Claimant that he was assessed a thirty-day actual suspension based upon the following determination:

> Company witnesses, your own testimony and evidence presented supported the charges that you failed to provide proper protection for signalman D. A. Chin when you issued and protected him in a block he did not request. Fortunately, no incident resulted from your actions, but that does not reduce the severity of the violations or the potential catastrophic results. The rules violated by you in this action are Operating Rules 420 (step 5), 424, and 526.

The Organization appealed. When the parties were unable to resolve the matter, the dispute was presented to this Board on April 20, 2007 at the offices of the National Railroad Adjustment Board, Chicago, Illinois. The Claimant did not attend the appeal hearing.

The events of May 25, 2005 are not in dispute: At 11:28 a.m., the Claimant issued track protection to Signalman D. A. Chin on the Skillman/Lewisport blocks of the LH&STL Subdivision of the Louisville Division, as he had on the two previous days. However, on May 25, Chin had requested track protection for the Skillman/Stephensport blocks, and Chin repeated back to the Claimant and worked under assumed protection for the Skillman/Stephensport blocks. In fact, Chin was not under protection in the Stephensport block that day. There was no accident or injury as a result of the Claimant's error. Upon having the error pointed out, the Claimant immediately acknowledged the error and accepted responsibility for it.

The Organization objects to the discipline on both procedural and substantive grounds. The Claimant's due process rights were violated and his ability to prepare a defense impermissibly impaired, the Organization contends, because the Carrier failed to identify any Operating Rules that the Claimant allegedly violated either in the notice of investigation, or during the investigation hearing on the property. For this reason alone the appeal should be sustained. On the merits, the Organization asserts that the discipline violates the 1998 Individual Development & Personal Accountability Policy ("IDPAP"), the parties' governing collaborative document, and that the Carrier erred in relying instead on either its 2001 Life-Critical Rules policy, or its 2005 IDPAP, both unilaterally adopted in conflict with the 1998 IDPAP. The Organization also asserts that the 30-day actual suspension was excessive. The Claimant has an otherwise clear record. Because the Claimant's alleged offense was at most a Minor Offense under the 1998 IDPAP, the appropriate corrective action should have been determined in consultation with the Organization's General Chairman or designee to determine corrective action. Even if it were a Serious Offense under the 1998 IDPAP, the Claimant should have been allowed to elect between Option A and Option B of that policy. The discipline violates the principles of fair, appropriate and progressive discipline, and was an arbitrary and capricious penalty for a first offense, the Organization concludes.

The Carrier raises its own procedural objection, that the appeal to this Board must be dismissed because it was not instituted within nine months from the date of the appellate decision of its highest designated officer, as required by Article 13 (c) of the Collective Bargaining Agreement. The Organization's original request within the nine-month deadline was to refer the dispute to a different Public Law Board, but that Board was closed within a few months without the addition of this case and without any request for an extension of time. In response to the Organization's objection to the lack of mention of the Rules in the charge and discipline letters, the Carrier contends that the charge letter sufficiently informed the Claimant and his representatives of the charges against him to enable them to defend himself at the investigation. Concerning the Organization's protest of inclusion of Rules not cited in the charge letter or reviewed in the investigation, safety issues require no citation of rules because they involve basic employee obligations, the Carrier contends. The measure of discipline was just and consistent with the 2005 IDPAP, which properly superceded the 1998 IDPAP and incorporated the 2001 Life-Critical Rules policy. The Claimant committed a Major Offense for which he was subject to discipline up to and including "dismissal from service for a single occurrence," according to the Carrier.

FINDINGS AND DECISION:

This Board upon the whole record and all the evidence, finds that the Carrier and employees involved in this dispute are respectively a Carrier and employees within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction of the dispute here involved.

The Board finds that the Carrier's procedural objection is without merit. Although the Organization's referral to this Board (PLB 6993) did not occur within nine months of the highest designated officer's decision, the Carrier was not prejudiced, because the Organization's referral to the now-closed PLB 6813 was made in a timely fashion. Section 13 (c) provides that the decision of the HDO shall be final and binding

> . . .unless within nine months from the date said officer's decision is mailed to the employee or his representative such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the employee o[r] his duly authorized representative before a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved and such officer is so notified.

The HDO was notified of the referral to now-defunct PLB 6813 within nine months as required by Section 13(c), putting the Carrier on notice of the Organization's intention to proceed. There was no prejudice to the Carrier. Under these circumstances there is no procedural reason to dismiss the claim.

Nor is there merit to the Organization's objection to the late delivery of the charge letter. Although the Claimant did not receive the charge letter until after the investigation, it was mailed and delivery was attempted in a timely fashion. It was the Claimant's apparent delay in claiming the letter, rather than dereliction on the Carrier's part, that prevented actual receipt of the letter until after the hearing. In addition, the delayed receipt of the letter did not prevent the Claimant's attendance nor his self-defense at the hearing. For these reasons the delayed receipt of the charge letter does not warrant granting the appeal.

However, the Claimant was denied his due process rights because he was not advised of the Operating Rules in issue until he received the determination letter citing those Rules. In PLB 6993, Case No. 3, this Board found that a charge letter was sufficient to put the claimant and her representative on notice of the charges against her (overlapping blocks) and to enable them to prepare a defense. However, in that case, the Carrier did not cite any Rules after the fact in the determination letter. In this case, however, the Carrier determined that the Claimant had violated specific Operating Rules that were not cited or provided to the Claimant either in the charge letter or at the investigation.

One essential element of "just cause" is proof by substantial evidence that the employee violated the Carrier's rule or rules as determined by the Carrier. As was explained in NRAB First Division Award No. 26295,

> It stands to reason that a violation cannot be proven if the existence of a rule has not been proven. That proof must be presented at the Investigation. To find such proof, we must look to the transcript. Just as the Organization may not defend an employee with evidence not proffered at the Investigation, so may not the Carrier discipline an employee on the basis of something other than what is contained in the record. . . .
>
> In our review of the record before the Board, we find that the Rules relied upon by the Carrier were neither quoted in the Investigation nor attached to the transcript. . . .A mere citation of the Rule by number is not sufficient. . . .

The First Division in Award No. 26295 concluded that without the text of the rules in the investigative record before it, it could not determine if the rules had been violated. That Board found that the Carrier had failed to establish the Claimant's guilt, and rescinded the discipline.

We reach the same conclusion here. Operating Rules 420 (step 5), 424, and 526 are listed by number in the determination letter, but the Rules were not specifically cited at any time during the investigation, nor was the substance of any of the Rules made a part of the record of investigation itself. As we observed in PLB 6993, Case No. 3, Train Dispatchers must be prepared in an investigation of a safety-related incident to show that they have ensured the safe passage of trains and employees in their jurisdiction as a basic element of their job, even without citation of a particular Rule. However, if the Carrier relies on particular Rules to determine an employee's guilt and assess discipline, then the employee should also have the opportunity at some point during that investigation to address the application of those Rules. That is impossible when the applicable Rules are not identified until after the investigation record has been closed. More important, without the Rules themselves in the record, we as a Board cannot determine whether they have been violated. Like the First Division in Award No. 26295, we must find that the Carrier has failed to establish the Claimant's guilt, and rescind the discipline. In light of this finding, it is unnecessary to address the Organization's other arguments.

AWARD

The claim is sustained. The claimant is to be exonerated of all charges, compensated for any time lost, as well as for any overtime to which he may have been entitled, and his personal record shall be cleared of any and all entries regarding this investigation.

Lisa Salkovitz Kohn
Neutral Member

James T. Klimtzak
Carrier Member
7-18-07

Charles Mundy
Organization Member
7-18-07