Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4211
Docket Number 4085

Referee Martin F. Scheinman

PARTIES TO DISPUTE: Railroad Yardmasters of America

Baltimore & Ohio Railroad Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Yardmaster H. E. Smith be allowed pay for all time lost to include all overtime that Mr. Smith would have earned commencing with July 12, 1981 and ending with the time Mr. Smith was restored to service as result of being assessed and servicing thirty (30) days actual suspension. Also that his record be cleared of any reference to this assessed discipline.

OPINION OF BOARD: At the time this dispute arose, Claimant H. E. Smith was stationed as Yardmaster at Carrier's K. C. Junction, Covington, Kentucky.

On June 17, 1981, Amtrak Train No. 51 was proceeding westbound from CS Cabin towards KC Junction. From Milepost 652 to 652.2 the speed limit had been lowered to ten miles per hour account of poor track conditions. When the train was approximately one-half mile past the slow order area, Claimant attempted to advise the Amtrak engineer to slow down. However, he was unable to do so account of poor radio communications. As a result, the train went through the area at thirty miles per hour, instead of the ten miles per hour limit required by the slow down order.

As a result of this incident, Claimant was ordered to attend a formal investigation. That investigation was held on July 3, 1981. Thereafter, Claimant was advised that he was assessed thirty days actual suspension, beginning on July 12, 1981.

The Organization timely appealed Carrier's assessment of discipline. Carrier rejected the Organization's claim. The dispute was subsequently handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization maintains that Carrier's handling of the investigation violates Article 22(b) of the Agreement. That Rule reads:

"ARTICLE 22
DISCIPLINE

(b) A decision shall be rendered within twenty (20) days after completion of investigation, with copy to the Regional Chairman."

*The Organization asserts that Regional Chairman L. Bargo never received a copy of the notice of discipline. Thus, the Organization concludes that Article 22 was clearly violated here.*

*As to the merits of the claim, the Organization argues that Claimant did attempt to make radio contact with Train No. 51 before it entered the slow area. In the Organization's view, such contact would have been made but for Carrier's faulty radio system. Therefore, the Organization insists that the failure of the train to reduce speed to ten miles per hour was caused by inadequate equipment, rather than Claimant's wrongdoing. Accordingly, the Organization asks that the claim be sustained on its merits, as well as on procedural grounds.*

*Carrier maintains that it did not violate the Agreement here. Carrier argues that the Regional Chairman was sent a copy of the notice of discipline mailed to Claimant. Moreover, Carrier asserts that the Organization has failed to prove that the Local Chairman did not receive such copy.*

*In addition, Carrier suggests that Claimant's rights were not adversely affected, even if the Regional Chairman did not receive a copy of the notice of discipline. Thus, Carrier concludes that any procedural violation, if proven, should not result in a sustaining award.*

*As to the merits of the claim, Carrier contends that Claimant was properly found guilty of negligence. Claimant knew of a ten mile per hour slow order between Mile Point 652 and Mile Point 652.2 some two days before the incident in question. However, Carrier points out, Claimant did not have the Dispatcher issue appropriate written train orders to crews entering that area.*

*In addition, Carrier asserts that Claimant did not attempt to make radio contact with the crew of No. 51 until the train was very near the slow area. As Carrier sees it, such attempt was "too little and too late". Thus, Carrier contends that Claimant's actions on June 17, 1981 clearly warrant its imposition of a thirty-day actual suspension.*

*After careful review of the record evidence and cited awards, we are convinced that the claim must be sustained on procedural grounds alone. This is so for a number of reasons.*

*First, the Organization timely raised the allegation that its Regional Chairman had not received a copy of the discipline notice. In so doing, the Organization shifted the burden to Carrier to prove that the notice was timely sent (see this Board's Award 4124). Normally such proof consists of a copy of a registered mail receipt. Here, no such proof exists. Thus, we must conclude that a copy of the discipline notice was not mailed to the Regional Chairman, as required by Article 22(b) of the Agreement.*

*Our finding on this issue is consistent with a long line of precedent which far outweighs cases cited by Carrier (see for example, this Board's Award Nos. 3234 and 3097). In addition we have carefully read the Dissent in Award No. 3850. The issues contained in that Dissent are not present in the instant dispute. There, the Local Chairman had been verbally advised as to the date a hearing would be scheduled. In addition, in that case, Claimant elected to waive his right to representation. Here no such verbal advice or waiver exists. Thus, we do not believe that the Dissent in Award No. 3850 is applicable to the facts of this claim.*

*Second, we note that this issue is concerned with the Organization's receipt of a copy of the notice of discipline. We believe that the Organization has as much right to learn of Carrier's decision <u>after</u> the investigation as to the holding of the investigation itself. The Organization must be given all documents upon which it can frame a proper appeal. Clearly, one such document is the notice of discipline. Thus, Carrier's failure to provide the Organization with such notice represents a significant procedural error. Moreover, it clearly violates Article 22(b) of the Agreement. Thus, we find that the claim must be sustained on this ground alone.*

*One final comment is appropriate. We are constrained to remind the Organization that personal attacks against Carrier officials and Referees simply have no place in the adjudication of claims. They serve only to create labor relations problems, while the goal of this Board is to solve them. Nonetheless, and for the reasons set forth above, the claim is sustained.*

*FINDINGS:*

*The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:*

*The Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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.*

*The parties to said dispute were given due notice of hearing thereon.*

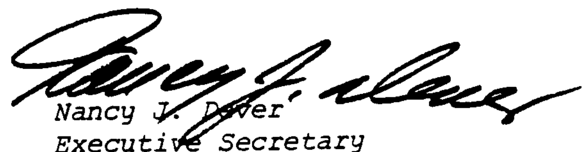
*The parties to said dispute waived right of appearance at hearing thereon.*

## *A W A R D*

*Claim sustained.*

*NATIONAL RAILROAD ADJUSTMENT BOARD*
*By Order of Fourth Division*

*ATTEST:*



*Nancy J. Dever*
*Executive Secretary*

*Dated at Chicago, Illinois, this 17th day of January 1985.*