Brotherhood of Locomotive Engineers

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C. V. MONIN
International President

November 16, 1998

ALL U.S. GENERAL CHAIRMEN
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

AWARDS CIRCULAR LETTER NO. 106

Dear Sirs and Brothers:

Enclosed for your information and reference are copies of various awards rendered by the Second, Third, and/or Fourth Divisions of the National Railroad Adjustment Board as well as selected Public Law Boards and/or Special Boards of Adjustment. Please note that some of the awards may involve other Organizations and/or crafts.

The awards selected for this circular address topics including At-Will Employees, Disciplined for Other than Enumerated Charge; Deferral of Discipline; Letter of Reprimand; Prejudgment; Transcripts; Waivers and Improperly Withheld from Service Pending an Investigation.

An index referencing the awards by citation and topical heading(s) , with a brief synopsis of each award, is also enclosed for your reference.

Fraternally yours,

C. V. Monin
President

Enclosure

cc: Advisory Board, w/ enc.

CORRECTION

Please refer to previously issued Awards Circular Letter No. 106, November 16, 1998, Index of Awards, page 4. The second item referring to Awards Nos. 503, 547 and 598 of PLB 5383 should read Awards Nos. 503, **548** and 598. Please discard the first page of Award No. 547 and replace with the enclosed first page of Award No. 548. The second and final page of Award No. 548 followed the first page of Award No. 547 and should remain in your copy.

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Third Division	Award No. 32297 "*There is no real room for doubt that such partisan editing did take place. The numerous 'inaudibles' and turning off of the tape recorder by the Hearing Officer were apparently purposeful and the undisputed fact that there were several otherwise unexplained gaps in the recorded transcript is sufficient evidence to support the Organization's contentions regarding that portion of the claim. The Hearing Officer's conduct sufficiently tainted the investigation to require an intervention to modify the discipline.*" PREJUDGMENT	ATDD/BLE v. CNW
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Third Division	Award No. 31435 *"...We note that the function of the union representative in cases of employees waiving hearings and accepting discipline is not merely a pro forma one. Aside from playing a role in advising the effected employee concerning the consequences or advisability of accepting proposed discipline, the union representative also serves the interests of other employees by policing the Agreement to assure that other employees' contractual rights are not effected by any such waiver. The employee is obviously free to decline union representation and negotiate his own settlement. But, the bottom line here is that the parties agreed as a matter of contract that the Organization must also agree to any waiver of hearing. That was not done in this case. Rule 27, Section 2 was violated."* WAIVER RIGHT OF ORGANIZATION TO CONCUR	BMWE v CR
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PUBLIC LAW BOARD NO. 6030

Case No. 1 Award No. 1

PARTIES to DISPUTE: Brotherhood of Locomotive Engineers and Eastern Idaho Railroad Company

STATEMENT OF CLAIM

The Organization requests the expungement of all discipline and reinstatment of Conductor P. D. Bates with pay for all time lost and seniority and vacation rights restored unimpaired.

FINDINGS: This case must be viewed within the context of the Claimant's employment status on November 9, 1995 when he was discharged from the Carrier's service and his rights, if any, conveyed by the Agreement between Eastern Idaho Railroad, Inc. and the Brotherhood of Locomotive Engineers that became effective on April 3, 1996. Accordingly, a review of the significant events and facts as developed on the property are key to resolution of the claim.

The Claimant was employed by the Carrier on May 8, 1995. He was discharged from service on November 9, 1995. Following his dismissal, the on-the-property record shows:

> November 14, 1995. A hand written letter from the Claimant to the Carrier in which he requested a fair and impartial hearing and that he be given a reason for his termination.
>
> November 27, 1995. The Trainmaster, Mr. Jack Lisle ("Lisle"), responded to the Claimant. Lisle stated that the Claimant on November 9, 1995 had been sent to relieve another crew. Lisle further stated that the Claimant was told that five handbrakes had been applied to the train. However, according to Lisle, the Claimant moved the train about eight miles and failed to release the handbrakes. This caused considerable damage to the wheels of five cars. Lisle further claims in the letter that "these facts" were discussed with the Claimant at the Claimant's request on November 9, that three other Carrier employees were present during that discussion and that his "past reprimand record was discussed." This record shows discipline was administered on October 4 and 18, 1995.

February 27, 1997. On this date, the Organization's former General Chairman filed a detailed appeal on behalf of the Claimant. The appeal focuses on the following major points:

1. The Claimant was dismissed without an investigation.

2. The Claimant had not been provided sufficient training by the Carrier.

3. The two prior incidents, that led to reprimand or a warning notice to the Claimant had mitigating elements that were not given proper weight by the Carrier.

4. The Carrier erred in not holding an investigation concerning the incident of November 9, 1995. Had it done so, the facts would show that the Claimant was not at fault to the degree suggested by the Carrier.

May 1, 1997. Counsel for the Carrier denied the Organization's appeal of February 27, 1997 mainly for the following reasons:

1. The Claimant was not represented by the Organization at the time he was discharged and, indeed, was an "at will" employee who could be dismissed without cause by the Carrier.

2. Without prejudice to its basic position, the Carrier provided its substantive reasons in detail that the Claimant's failure to properly perform his duties was a major violation of the Carrier's Operating Rules. Therefore, a proper basis to separate the Claimant had been established.

The Board finds that the claim must be denied. The Claimant was an "at will" employee. The Carrier's Personnel Policy Manual, applicable at the time of the Claimant's employment in pertinent part provided.

> The purpose of this Manual is to outline the current policies of Eastern Idaho Railroad. This Manual is not an employment contract, and Eastern Idaho Railroad reserves the absolute right to change or modify any or all of its policies without notice to any employee. Notwithstanding anything to the contrary in this Manual, Eastern Idaho Railroad shall have the right to terminate any employee at the will of Eastern Idaho Railroad, with or without cause.

The language noted above is clear and unambiguous. Moreover, because of the Claimant's "at will" status, the Carrier's actions here is also supported by a holding of the Supreme Court of the State of Idaho, in Michell v. Zilog, Inc., 129 Idaho 709, 874P.2d 520 (1994) when it held:

> It is settled law in Idaho that, unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party. Either party may terminate the relationship at any time for any reason without incurring liability.

Therefore, the only remaining question before the Board is what rights the Claimant has pursuant to the Parties' April 3, 1996 Agreement. This Agreement was not retroactive. The former General Chairman, during the on-the-property handling of the case, provided no evidence that the Agreement provided retroactive rights to the Claimant at the time when he was dismissed.

For all of the foregoing, the claim is denied without addressing the merits.

AWARD

The claim is denied.

G. A. DeRocher
Carrier Member

Eckehard Muessig
Neutral Member

Jim McCoy I Dissent
Organization Member

Dated: APRIL 6, 1998

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32448
Docket No. MW-31700
98-3-93-3-734

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard Air Lines
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier withheld Mr. G. A. Black from service beginning October 20, 1992 and changed the effective date of the thirty (30) days of suspension imposed upon him from April 6, 1992 to October 23, 1992 [System File GAB-92-79/12(93-108) SSY].

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. A. Black shall be compensated at his Group A, Class 1 Machine Operator's pro rata rate of pay for all wage loss suffered beginning October 20, 1992 and continuing until he is allowed to return to service."

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.

Following an Investigation concerning the Claimant's operation of a Burro Crane and a consequent injury to himself, the Carrier issued a disciplinary letter reading in pertinent part as follows:

> "As a result of your violation of CSX Safety Rule 366 as proven in the investigation, you will serve thirty (30) days actual suspension starting April 6, 1992 and will not bid or work on any boomed equipment for six (6) months from the end of your suspension. During the 6 month suspension from working the boomed equipment, you will attend a Safety Skill Seminar class on the Atlanta Division to improve your knowledge on boomed equipment."

A claim was initiated concerning this discipline. On September 8, 1992, Special Board of Adjustment No. 1037, Award 30 denied the claim. This Award referred to the Claimant as having been "assessed discipline of a thirty-day actual suspension starting April 6, 1992."

At the time of the investigative Hearing and extending beyond the date of the issuance of SBA No. 1037, Award 30, the Claimant was disabled from working based on his injury which had been the subject of the discipline. He was found physically qualified to return to duty on October 20, 1992. The Claimant was then advised that he would be required to serve the originally imposed 30-day suspension commencing October 23.

The Organization argues that this action improperly changed the terms of the disciplinary action which stated the Claimant would be subject to a suspension "starting April 6, 1992." In response, the Carrier states that the purpose of a "suspension" would be ineffective if it were not served at a time when the employee was available for work.

As a preliminary matter, the Carrier finds the claim defective in that at no time during the on-property claim handling procedure did the Organization cite any Agreement provision allegedly violated by the Carrier. In its Submission, the Organization relies on Rule 39. Because this Rule was not mentioned in the on-property handling, the Carrier contends the Board may not give it consideration.

The Board agrees with the Carrier that citation of Rule 39 comes too late. This, however, does not invalidate the claim. The claim is simply that the Claimant was withheld from work for 30 days commencing October 23, 1992 without any reason and in direct rejection of the terms of the disciplinary action.

As argued by the Organization, the Carrier was fully aware that the Claimant was disabled at the time the discipline was imposed, following the investigative Hearing. The Carrier relies on the use of the word "actual" in reference to the suspension, but this cannot erase the inclusion of the April 6 date. The Carrier's discipline notice could well have imposed a suspension to be served commencing with the Claimant's recovery and physical qualification for work. It did not do so. The suspension was imposed "starting April 6, 1992." In the absence of any possible ambiguity in this instruction, the Board has no basis to speculate on the reason for the selection of the April 6 date.

The claim will be sustained. For clarity, however, the imposition of a 30-day disciplinary suspension remains on the Claimant's record.

AWARD

Claim sustained in accordance with the Findings.

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 21st day of January 1998.

CARRIER FILE NO. 9402539
ORGANIZATION FILE NO. 08264D

PUBLIC LAW BOARD NO. 5719

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
)
VS) NMB CASE NO. 56
) AWARD NO. 56
UNION PACIFIC RAILROAD COMPANY)

STATEMENT OF CLAIM:

Appealing the Letter of Reprimand assessed Engineer D. A. Hall and request the expungement of discipline assessed and pay for all lost time with all seniority and vacation rights restored unimpaired. This action is taken as a result of the investigation held on June 24, 1994.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

Claimant was summoned for formal investigation "to develop the facts and determine responsibility, if any, concerning your alleged improper conduct being discourteous and quarrelsome while performing service as Engineer on YRNP-20, on duty at 10:30 p.m., June 19th, 1994, Yermo, California." Following the investigation Carrier found claimant to be in violation of Rule 1.29 which reads as follows:

> "1.29 Avoiding Delays
> "Crew members must operate trains and engines safely and efficiently. All employees must avoid unnecessary delays.
>
> "When possible, train or engine crews wanting to stop the train to eat must ask the train dispatcher at least one hour and thirty minutes before the desired stop."

The Board would here note that claimant was not charged with violation of Rule 1.29 or with delaying the train, therefore, she could not be found guilty thereof and Carrier erred in so doing.

While the record before this Board does reveal there was a confrontation between claimant and her conductor, the evidence is clear that following the disagreement between them, claimant properly sought assistance from a Carrier officer. After the officer discussed the matter with both parties, he offered them the opportunity to continue operating their train to its final destination. Both claimant and her conductor stated they could so operate the train, however, the officer elected to remove them from service pending the investigation. Claimant was out of service for 17 days before she was assessed Level 1 discipline (Letter of Reprimand) under Carrier's UPGRADE Discipline Policy.

Based on the record in its entirety it is the opinion of this board that Carrier acted improperly in removing claimant from service, failed to prove with substantial evidence that claimant was responsible for the verbal confrontation with her conductor, and improperly found her to be guilty of violation of Rule 1.29.

AWARD

Claim sustained. Carrier is instructed to comply with this award within 30 days of the date hereof.

F. T. Lynch, Neutral Chairman

D. J. Gonzales, Carrier Member

J. L. McCoy, Organization Member

Award date Sept. 14, 1998

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32313
Docket No. SG-32253
97-3-95-3-61

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Chicago and Northwestern Transportation Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Chicago & North Western Transportation Co. (CNW):

Claim on behalf of D.E. Beck for removal of a December 3, 1993 letter of reprimand from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 51, when it imposed discipline in the form of a reprimand without providing the Claimant with a fair and impartial investigation. Carrier's File No. 79-94-16. General Chairman's File No. S-AV-186. BRS File Case No. 9546-CNW."

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 dispute in this case centers around the action of a C&S Supervisor who, in a letter dated December 3, 1993, addressed to Claimant, informed him that his actions during a conference call telephone meeting were "in violation of Rule 607 in the Safety Rules and General Rules book" and that he (the Supervisor) was "issuing you this letter of reprimand." The December 3rd letter also indicated that the letter of reprimand "will be kept in your personal file."

The Organization argued that the actions of the Supervisor constituted an assessment of discipline and that such assessment of discipline without the benefit of a formal hearing was a violation of Rule 51 - INVESTIGATION AND DISCIPLINE. The Organization cited with favor the decisions set forth in Second Division Awards Nos. 11249 and 11846, as well as Third Division Award 29583, in support of their contention that the letter of reprimand as found in this case was, in fact, an assessment of discipline and not merely a letter of caution or warning or counseling.

The Carrier argued that their clearly stated DISCIPLINE POLICY is the vehicle which is applicable in this case and that the letter as written by the Supervisor was in consonance with that policy and did not constitute formal discipline nor did it violate any of the provisions of Rule 51. Carrier cited with favor Award 1 of Public Law Board No. 4817 which examined Carrier's discipline policy and found that, under the policy, "discussions and reviews, whether issued verbally or in writing, are not discipline." Carrier further called attention to Third Division Award Nos. 19713 and 20087 each of which involved these same parties but which predated the current discipline policy referenced above. The awards held that the placement of a letter of caution in the employee's personnel record was not, per se, an assessment of discipline. Carrier additionally pointed with favor to Third Division Award 24955 which also concluded that a letter of warning did not constitute formal discipline.

There is no serious disagreement relative to the basic fact situation in this case. Neither is there any serious challenge to the efficacy or intent of Carrier's DISCIPLINE POLICY. It is a clearly stated, forward-thinking statement of policy in regard to the assessment of discipline. It does not purport to supersede or negate the provisions of the negotiated Discipline Rule 51. Among other things, it contains provisions for not only the issuance of written warnings of possible future discipline, but also for an annual review of letters of warning which are issued. It generally reserves formal discipline for serious offenses or "frequent or continued minor offenses." It is a good policy and deserves

serious consideration. Award 1 of Public Law Board No. 4817 made a scholarly review of the policy and, in pertinent part, held as follows:

> "Under the current system, discussions and reviews, whether issued verbally or in writing, are not considered discipline. Under this new discipline system, an employee is formally notified that he is being placed on the system only when he has repeatedly failed to follow Carrier rules and regulations and supervisors' counseling. Once he has been counseled and warned of his placement on this discipline system, and if he continues to violate rules, such violations and/or infractions are handled in accordance with the applicable schedule rules regarding discipline."

This Board subscribes to the logic expressed in that award and upholds Carrier's right under the policy to issue letters of warning and caution even to the extent of mentioning specific rules on which the warnings and/or cautions are based.

In this case, Carrier asks that the December 3rd letter be viewed solely as a "letter of review" issued in compliance with the stated policy and did not constitute formal discipline. The Board's problem with that reasoning is found in the particular and peculiar language which was used by the Supervisor who composed and issued that letter. Not only did the Supervisor cite the rule which he felt the Claimant had violated, but also he clearly stated that Claimant had, in fact, violated that rule and issued not a letter of warning or caution that future derelictions might result in formal discipline, but rather he issued a "letter of reprimand" which he said "will be kept in your personal file" (underscore ours). He did not indicate or imply that the letter or reprimand would serve as a caution against future infractions or that it would be subject to the annual review which is clearly and carefully set forth in the policy statement. Interestingly, Second Division Award 11846 had the following to say in this regard:

> "This Board has held that where such letters contain content which is primarily accusatory, with findings of fact that the employee is guilty of certain conduct, then they are in fact reprimands or discipline (Second Division Awards 7588, 9412, 10694, 11249). However, where such letters are in fact warnings for the purpose of counseling employees, they are personnel actions, rather than discipline (Second Division Awards 8062, 8531, 9522, 10836, 11683); Third Division Awards 24953, 27807, 27805)."

That logic applies equally to this fact situation.

In this case, the Board is convinced that the "letter of reprimand" was not merely a cautionary letter or a letter of warning as contemplated in the well-founded discipline policy, but rather was, in fact, an assessment of discipline which should have been handled under the requirements of Rule 51. Therefore, the claim as presented here is 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 13th day of November 1997.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13311
Docket No. 13138
98-2-96-2-38

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Sheet Metal Workers' International Association
(
(CSX Transportation, Inc. (former Chesapeake and
(Ohio Railway)

STATEMENT OF CLAIM:

"1. That under the current agreement, Sheet Metal Worker Robert Cecil was unjustly issued discipline of a written reprimand nature when he was given a letter of Workmanship Error on Unit 8395 dated January 5, 1995, without the benefit of a fair hearing.

2. That accordingly, CSX Transportation, Inc., be required to expunge Mr. Cecil's record of any and all mention of this matter."

FINDINGS:

The Second 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 January 5, 1995 Claimant, a long-term Sheet Metal Worker at Carrier's Huntington Locomotive Facility in Huntington, West Virginia, and then Local Chairman, was issued the following letter which was placed in his personal file:

"Subject: Record of Coaching/Counseling Session - Workmanship Error on Unit 8395

This letter will confirm conference to discuss a workmanship error in connection with a load test failure on Unit 8395 on December 16, 1994.

During load test and dispatch procedures on Unit 8395, it was found that the bell line fittings for the event recorder were crossed at the tee. This poor workmanship created a delay in the processing of this locomotive. The work packet shows that you signed for this modification work.

Having brought this to your attention, I am sure that you are aware that poor workmanship such as this will not be tolerated at Huntington Shop.

I trust that this conference will serve as a reminder of the importance of doing the job right the first time, every time."

By letter dated February 19, 1995, Claimant provided his explanation of the events in question, including his assertion that the tees to the various pipe lines had been applied by employees on a prior shift who had not signed off for them on the modification sheet, and that he and Sheet Metal Worker Bias only cut and fitted plastic lines from the tees to the event recorder and signed off the job as "finished." Claimant requested removal of the letter from his personnel file.

The Organization contends that this letter of reprimand is disciplinary in nature and the admitted first step of Carrier's progressive disciplinary procedure, and that its issuance without a Hearing is a violation of Rule 37. It relies upon Second Division Awards 12514, 12513, 12338, 11249, 10694, 10676, 9412 and 7588 in arguing that it should be expunged from Claimant's file.

Carrier asserts that the memorandum was a letter of coaching/counseling which is not a form of discipline, and that Carrier has the right as well as the obligation to remind employees of their responsibility to perform work in a safe, quality and cost effective manner, citing Public Law Board No. 5933, Award 21; Public Law Board No. 5016, Award 5 and Third Division Award 2987. In its declination letter of April 11,

1995 Carrier states that "although such letters are the first step of CSX discipline policy, they are not part of the discipline process." Carrier contends that the letter in question is not a formal reprimand and does not find Claimant guilty of violating a Rule, and is not converted into discipline merely by its being placed into a formal file, relying upon Second Division Awards 12923, 12699, 9522, 8531 and 8062.

A review of the record reveals that the Mechanical Department's Policy on Unsafe Acts/Workmanship Errors/Vehicle Accidents was implemented on March 1, 1994. It lists the progressive disciplinary steps as follows:

"First Incident	-	Counsel by Supervisor. Complete appropriate training. Letter to employee.
Second Incident	-	Disciplinary Hearing. If guilty: up to five (5) days actual suspension.
Third Incident	-	Disciplinary Hearing. If guilty: up to thirty (30) days actual suspension.
Fourth Incident	-	Disciplinary Hearing. If guilty: the discipline administered should be dismissal."

This dispute raises more than the classic issue of whether the content of the January 5, 1995 letter requires a finding that it is a legitimate non-disciplinary warning for the purpose of counseling alone, see Second Division Award 11846, or an accusatory reprimand with findings of guilt of wrongdoing on Claimant's part, as in Second Division Award 11249. Review of the language used in the letter alone could arguably support either position. However, when considering the language concerning "a workmanship error" and "poor workmanship" in conjunction with Carrier's written policy on workmanship errors outlined above, it is clear that the January 5, 1995 letter is the first step in Carrier's progressive disciplinary procedure, which will be relied upon by Carrier in the future in imposing up to a five day suspension upon Claimant if he is found guilty of a workmanship error within the next five years. The other Awards on the property cited by Carrier dealt with letters placed in employees' files prior to the March 1, 1994 effective date of this policy.

The Board's reliance upon the wording of Carrier's progressive disciplinary policy in concluding that the letter in issue, in effect, finds that Claimant committed a workmanship error on Unit 8395, is in no way intended to undermine Carrier's efforts to place employees on notice of its expectations and its responsibility to counsel employees concerning any perceived inadequacies prior to placing them into the formal progressive disciplinary procedure. Any counseling letters of such import would certainly be proper, even if placed in an employee's file, so long as it was clear that such letter did not constitute the first incident under its progressive disciplinary policy. Carrier should consider modifying its written policy to provide for a disciplinary Hearing for all incidents which fall within its stated progressive disciplinary steps, and for permitting the issuance of counseling letters prior to entering into the formal disciplinary procedure.

As in Second Division Award 12338 dealing with an allegation of poor work performance on a particular unit, we find that the January 5, 1995 letter made a finding of fact adverse to Claimant without the holding of a Hearing under Rule 37, and direct that it be removed from his file.

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 Second Division

Dated at Chicago, Illinois, this 6th day of August 1998.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13312
Docket No. 13139
98-2-96-2-45

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Sheet Metal Workers' International Association
(
(CSX Transportation, Inc. (former Chesapeake and
(Ohio Railway)

STATEMENT OF CLAIM:

"1. That under the current agreement, Sheet Metal Worker L.E. Bias was unjustly issued discipline of written reprimand nature when he was given a letter of Workmanship Error of Unit dated January 5, 1995 without benefit of a fair hearing.

2. That accordingly, CSX Transportation, Inc., be required to expunge Mr. Bias's record of any and all mention of this matter."

FINDINGS:

The Second 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 January 5, 1995 Claimant, a long-term Sheet Metal Worker at Carrier's Huntington Locomotive Facility in Huntington, West Virginia, was issued the following letter which was placed in his personal file:

> "Subject: Record of Coaching/Counseling Session - Workmanship Error on Unit 8395
>
> This letter will confirm conference to discuss a workmanship error in connection with a load test failure on Unit 8395 on December 16, 1994.
>
> During load test and dispatch procedures on Unit 8395, it was found that the bell line fittings for the event recorder were crossed at the tee. This poor workmanship created a delay in the processing of this locomotive. The work packet shows that you signed for this modification work.
>
> Having brought this to your attention, I am sure that you are aware that poor workmanship such as this will not be tolerated at Huntington Shop.
>
> I trust that this conference will serve as a reminder of the importance of doing the job right the first time, every time."

By letter dated February 19, 1995, the Organization filed a claim requesting removal of the letter from Claimant's personnel file and provided an explanation of the events in question, including the assertion that the tees to the various pipe lines had been applied by employees on a prior shift who had not signed off for them on the modification sheet, and that he and Sheet Metal Worker Cecil only cut and fitted plastic lines from the tees to the event recorder and signed off the job as "finished."

The Organization contends that this letter of reprimand is disciplinary in nature and the admitted first step of Carrier's progressive disciplinary procedure, and that its issuance without a Hearing is a violation of Rule 37. It relies upon Second Division Awards 12514, 12513, 12338, 11249, 10694, 10676, 9412 and 7588 in arguing that it should be expunged from Claimant's file.

Carrier asserts that the memorandum was a letter of coaching/counseling which is not a form of discipline, and that Carrier has the right as well as the obligation to remind employees of their responsibility to perform work in a safe, quality and cost effective manner, citing Public Law Board No. 5933, Award 21; Public Law Board No. 5016, Award 5 and Third Division Award 2987. In its declination letter of April 11, 1995 Carrier states that "although such letters are the first step of CSX discipline policy, they are not part of the discipline process." Carrier contends that the letter in question is not a formal reprimand and does not find Claimant guilty of violating a Rule, and is not converted into discipline merely by its being placed into a formal file, relying upon Second Division Awards 12923, 12699, 9522, 8531 and 8062.

A review of the record reveals that the Mechanical Department's Policy on Unsafe Acts/Workmanship Errors/Vehicle Accidents was implemented on March 1, 1994. It lists the progressive disciplinary steps as follows:

"First Incident	-	Counsel by Supervisor. Complete appropriate training. Letter to employee.
Second Incident	-	Disciplinary Hearing. If guilty: up to five (5) days actual suspension.
Third Incident	-	Disciplinary Hearing. If guilty: up to thirty (30) days actual suspension.
Fourth Incident	-	Disciplinary Hearing. If guilty: the discipline administered should be dismissal."

This dispute raises more than the classic issue of whether the content of the January 5, 1995 letter requires a finding that it is a legitimate non-disciplinary warning for the purpose of counseling alone, see Second Division Award 11846, or an accusatory reprimand with findings of guilt of wrongdoing on Claimant's part, as in Second Division Award 11249. Review of the language used in the letter alone could arguably support either position. However, when considering the language concerning "a workmanship error" and "poor workmanship" in conjunction with Carrier's written

policy on workmanship errors outlined above, it is clear that the January 5, 1995 letter is the first step in Carrier's progressive disciplinary procedure, which will be relied upon by Carrier in the future in imposing up to a five day suspension upon Claimant if he is found guilty of a workmanship error within the next five years. The other Awards on the property cited by Carrier dealt with letters placed in employees' files prior to the March 1, 1994 effective date of this policy.

The Board's reliance upon the wording of Carrier's progressive disciplinary policy in concluding that the letter in issue, in effect, finds that Claimant committed a workmanship error on Unit 8395, is in no way intended to undermine Carrier's efforts to place employees on notice of its expectations and its responsibility to counsel employees concerning any perceived inadequacies prior to placing them into the formal progressive disciplinary procedure. Any counseling letters of such import would certainly be proper, even if placed in an employee's file, so long as it was clear that such letter did not constitute the first incident under its progressive disciplinary policy. As noted in a companion case decided by the Board, Second Division Award 13311, Carrier should consider modifying its written policy to provide for a disciplinary Hearing for all incidents which fall within its stated progressive disciplinary steps, and for permitting the issuance of counseling letters prior to entering into the formal disciplinary procedure.

As in Second Division Award 12338 dealing with an allegation of poor work performance on a particular unit, we find that the January 5, 1995 letter made a finding of fact adverse to Claimant without the holding of a Hearing under Rule 37, and direct that it be removed from his file.

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 Second Division

Dated at Chicago, Illinois, this 6th day of August 1998.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32383
Docket No. MW-32948
97-3-96-3-333

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The ten (10) day suspension assessed Bridge Tender G. D. Crain for his alleged late reporting of a personal injury that occurred on January 10, 1995 at the Rigolets Drawbridge on the NO&M Subdivision was without just and sufficient cause and based on an unproven charge [System File 4(29)(95)/12 (95-0693) LNR].

(2) The claim*, in connection with the ten (10) day suspension referred to in Part (1) above, as presented by General Chairman F. N. Simpson on July 17, 1995 to AVP Employee Relations R. H. Cockerham shall be allowed as presented because said claim was not disallowed by Mr. Cockerham in accordance with Rule 26.

(3) The dismissal of Bridge Tender G. D. Crain for alleged violation of Operating Rule 501 in that he allegedly gave inconsistent testimony at an investigation held on May 31, 1995 was without just and sufficient cause, based on an unproven charge and in violation of Rule 27 of the Agreement [System File 4(35)(95)/12(95-0940)]

(4) As a consequence of the violations referred to in Parts (1) and/or (2) above, Bridge Tender G. D. Crain shall be compensated for all wage loss suffered as a result of the ten (10) day suspension and his record shall be cleared of the charge leveled against him.

(5) As a consequence of the violation referred to in Part (3) above, Bridge Tender G. D. Crain shall be reinstated to service with seniority and all other rights unimpaired, he shall be compensated for all wage loss suffered and his record shall be cleared of the charge leveled against him."

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.

By letter dated February 13, 1995, Bridge Supervisor R. F. Garrett advised Claimant that on January 13 Claimant called and requested a leave of absence due to neck problems, and that on January 16 Claimant claimed a personal injury in connection with his neck problems and attributed the injury to work performed on January 10 as a Bridgetender at Rigolets Drawbridge on the NO&M Subdivision near New Orleans, Louisiana. Carrier's letter states that on January 17 Claimant was taken to a doctor and all applicable injury reports were completed.

The letter advised Claimant of a formal Investigation to be held on February 22, 1995 in the Division Office at Mobile, Alabama.

Following the formal Investigation which was ultimately held on May 31, 1995, Carrier stated in a letter dated June 30 that the facts revealed that at the very least, Claimant failed to report an injury in a timely manner as mandated by CSX Transportation Safety Rule 1.(I) which states:

> "We have the right and the responsibility to make decisions based on experience, personal judgment and training. We must make certain that: oral and written reports of accidents and injuries are made as soon as possible to the supervisor or employee in charge."

Carrier's letter further stated:

> "... [W]hile there is still uncertainty how and when your condition developed, at the very least you failed to report your physical condition as an on duty job related incident when (you claimed) the incident occurred.
>
> Account of this late reporting, you are hereby issued a 10 day actual suspension. As you are currently out of service due to medical conditions, the suspension will be effective the date you are eligible to return to active service."

The Organization contends that the Carrier failed to deny the July 17, 1995 appeal within 60 days as required by Rule 26, including the provision in Rule 26(a) which provides that if the Carrier does not so notify the employee or representative in writing, the claim or grievance shall be allowed as presented.

Carrier maintains that it did make timely notification of declination of the appeal via its letter dated September 9, 1995.

By letter dated July 10, 1995 Carrier notified Claimant of a second Investigation in connection with charges made with reference to the formal Investigation of May 31, 1995 and stating:

> "During your testimony, there were several instances where your statements were not consistent with the facts revealed.
>
> Account of these inconsistencies, you are hereby charged with an alleged violation of CSX Transportation Operating Rule 501 which stated in part:

> 'Employees must not be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless or incompetent. They must not willfully neglect their duty, endanger life or property. Employees must not make any false statements or conceal facts concerning matters under investigation.'"

Following the Investigation which took place on August 9 and by letter dated September 9, 1995 Carrier notified Claimant of his dismissal.

In addition to its contention about Carrier's declination, the Organization maintains that contrary to the parties' February 5, 1986 Letter of Understanding, Carrier failed to furnish it with a copy of the August 9, 1995 Investigation transcript with its Letter of Decision within 30 days from the close of the Investigation.

The Organization argues that Claimant was working alone when he sustained the injury and when he received medical treatment from his personal physician, that Claimant was suspended and subsequently dismissed because he sustained a personal injury while performing his assignment, that Claimant did not receive a fair and impartial Investigation, that Carrier did not present substantial evidence to prove its charge(s), and that the discipline was arbitrary and unjust.

The Organization maintains that Carrier leveled no formal charge against Claimant as to the first Investigation and argues that Carrier did not charge Claimant with an alleged violation of its Safety Rule and that it found him guilty of an offense with which he was not charged. The Organization states that this Board and similar tribunals have consistently sustained claims involving discipline resulting from a Carrier's failure to specify [even] a single charge within its letter instructing a charged employee to appear for a Hearing. It cites Fourth Division Award 2270, Second and Third Division Awards and Award 419 of Special Board of Adjustment No. 279.

According to Carrier, as to both suspension and discharge, Claimant was afforded fair and impartial Hearings in accordance with the Agreement, and Carrier sustained its burden of producing substantial evidence of Claimant's guilt in both Investigations, the discipline was fully justified, and the procedural errors alleged by the Organization did not occur.

Carrier maintains that it properly suspended Claimant for delay in making an injury report and cites decisions in support of that position. Carrier disputes the Organization's argument concerning a Letter of Understanding establishing a deadline for furnishing a copy of the transcript and maintains that even if there were a failure to timely provide the transcript, that has been held not to be a fatal error. Carrier maintains that it timely responded to the Organization's appeal of the 10-day suspension.

During the Investigation the Organization timely raised the contention that the Carrier did not provide notice of the charge or charges against Claimant and that the vagueness of the charge letter made it "impossible" to prepare a defense. Fourth Division Award 2270 states that timely and adequate notice of the charge or charges against the accused is a part of due process of law. We are unable to find in Carrier's February 13, 1995 letter to Claimant any allegation of a violation of Rule or Agreement or of any requirement imposed upon employees by Carrier.

In Third Division Award 32082, with this Referee participating, the Board stated:

> "Our review failed to indicate how the language of the Carrier's March 13, 1995 letters places the Claimants on notice of the alleged violations of which the Carrier found them guilty. It merely states that Claimant Johnson sustained an on-duty injury from making repairs to a bolt machine ...
>
> > 'But because of the Carrier's failure to give Claimants proper notice of the charges against them, their claims must be sustained rather than directing a modification of the disciplinary actions taken against them.'"

In this instance, we find that because of Carrier's failure to give Claimant notice of any particular charge(s) being made against him, this claim must be sustained on the basis of a violation of the due process notice to which Claimant was entitled under the applicable precedents. The failure to specify a charge deprived Claimant of knowledge of the misconduct of which he was being accused. See Third Division Award 19642. Claimant was entitled to that notice in order to prepare his defense.

We do not attempt to determine the validity of the Organization's argument that Carrier lacked substantial evidence to sustain the disciplinary action, or of the Organization's other procedural objections. The Organization's claim of lack of a fair and impartial Hearing focused upon the alleged lack of a specific charge.

Carrier's September 9, 1995 letter to Claimant refers to the formal Investigation held on August 9, cites CSX Transportation Operating Rule 501, and contends that statements made by Claimant at the Investigation held on May 31, 1995 were not consistent with the facts revealed regarding incidents during the period January 10-17, 1995 and Claimant's alleged personal injury, and that Carrier's review of the transcript revealed that Claimant falsified his statement of the facts under investigation.

The Organization raises its objection about failure to timely furnish the typewritten transcript and argues that Carrier failed to afford Claimant a fair and impartial Investigation on August 9, 1995. The Organization points out that Carrier declined to permit Claimant's wife, a witness at the first Investigation, to testify at the second Investigation.

The Organization asserts that Conducting Officer K. L. Johnson, Jr. did not act as an impartial fact-finder and demonstrated prejudice against Claimant during the Investigation, denying Claimant his contractual right to a fair and impartial Hearing. The Organization also maintains that Carrier failed to prove the charge and that Carrier's dismissal of Claimant was arbitrary and without just and sufficient cause.

We carefully reviewed the August 9, 1995 transcript of Investigation. In summary, our review indicates that in important respects, Conducting Officer Johnson did fail to afford Claimant a fair and impartial Hearing. The Organization objected to the Conducting Officer's failure to allow Claimant's wife to testify. Carrier's July 10, 1995 letter to Claimant provided that Claimant [might] bring any witness who may give testimony. Conducting Officer Johnson responded to Organization Representative E. R. Brassell:

> "Again, Mr. Brassel (sic), prior to coming on formal record with the investigation, I made it clear to you that Mrs. Crain was not present on the normal operating procedures and any testimony that Mr. Crain may have given to Mr. Cumbea [Charging Officer]. Therefore, her knowledge of the subject

> has to be minimal. Therefore, your objection is over ruled (sic) and she will not be allowed in the investigation.
>
> Brassel: Mr. Garrett, Mr. Wall and Mr. Henry, none of those folks were present either, when Mr. Cumbea questioned Mr. Crain so therefore we request that you also disallow them as witnesses.
>
> Johnson: Request denied. The investigation will continue. Your objection is noted and stand for whatever it may in the record."

In the opinion of the Board, the above quotation shows a prejudgment of the potential testimony of Mrs. Crain on the part of Conducting Officer Johnson. The Conducting Officer was not in a position to state what Mrs. Crain would have testified to, or the weight, if any, to be accorded that testimony, prior to hearing it. There is no indication that the testimony would have been irrelevant to the issue under investigation. In addition, the above interchange suggests that Carrier was selective as to the witnesses who would be presented, and is contrary to the well-recognized principle that Carrier is to conduct a fair and impartial Investigation.

The Organization attempted to enter into the transcript a copy of a July 14, 1995 letter from Brassell to Cumbea requesting specific charges against Claimant. Conducting Officer Johnson, after reviewing the letter, stated that it contained discrepancies. Upon Brassell's statement that the Organization was attempting to put the letter into evidence and requesting that Johnson make it an exhibit prior to quoting from it, Johnson stated as pertinent:

> "I'm not going to enter it as an exhibit due to the fact that it has inconsistencies that certainly are not as you stated in that letter. Therefore I will deny it being presented as an exhibit.
>
> Brassel: We will make it part of this appeal, Mr. Johnson."

In so ruling, the Conducting Officer prejudged the weight, if any, to be given to the exhibit and failed to permit the Organization to make a complete record on a

material issue, that is, that the Organization requested specific charges against Claimant.

Upon Cumbea's explanation of his declination to provide [further] specific information at Brassell's request, Conducting Officer Johnson stated:

> "So it's your opinion as a charging officer you don't have the responsibility to answer any questions of the Organization that's trying to represent. A person that's been charged been the Carrier (sic)."

Conducting Officer Johnson appeared to be taking the part of the Carrier in a manner inconsistent with Carrier's obligation to proceed impartially.

With respect to the testimony of Witness Hale, the Organization stated that it did not wish to call Hale at a particular point in the Investigation and wished to call another witness; the Conducting Officer stated that he would not allow that. When asked by Brassell whether he was telling Brassell that he was going to dictate the order in which the Organization called its witnesses, Johnson responded:

> "The witnesses are called, the witnesses that will be called, Mr. Brassel, as you are well aware and have been through many times in many proceedings, that if a witness has no pertinent information which is determined in most cases in the proceeding then information bears no relevance on the outcome of the investigation. Now if you want to cloud that issue in some respect, certainly that is your right but I'll continue my questioning of Mr. Hale since you have none at this time."

Although Conducting Officer Johnson stated that he would permit the Organization to call Hale, his comments indicate an adversarial attitude in his statement about "cloud[ing] that issue" to the Organization's representative. The Conducting Officer called Hale as a witness later in the Investigation.

Brassell for the Organization entered an objection on the basis that the Organization had not had an opportunity to review all of the evidence that had been

available for some time, stating that it had "just been pushed on us" and that the Organization would like a postponement of the Hearing to give it an opportunity to review all of the material and prepare an adequate defense. Johnson responded that the objection was noted, but that the Carrier would continue with the Investigation.

When Organization Representative F. N. Simpson was questioning Carrier Witness Garrett, Conducting Officer Johnson interjected to make an observation that Witness Henry was there; the question pertained to Garrett's furnishing a statement from Witness Henry. In response to Brassell's objection to Johnson's answering the question for Garrett, Johnson stated that Henry was present and could be questioned and that "To pursue that line of questioning [of Garrett] is irrelevant to the facts at hand," indicating a prejudgment as to where the questioning might lead.

When Simpson asked that a handwritten note by Garrett be put in the record, Johnson responded:

> "Yes, again if it is consistent with the other documents, again the document goes back to having a witness here. You're more than willing to cross-examine and ask him any question you would like but I'm not going to enter this document into the transcript."

That occurred at a point where Simpson was questioning Garrett about the dates in Garrett's notes. Johnson then interposed an answer for Garrett. Simpson objected to his doing so.

While questioning Claimant, upon a response that Johnson's question was not the question that was asked [of Claimant], Johnson responded:

> "That is the question you were asked and I'm not interested in your interpretation of my question, Mr. Crain. If you don't like ..."

With respect to Claimant's testimony about returning to the drawbridge and the weather conditions at the time, Conducting Officer Johnson stated:

> "Let me interrupt right there. Mr. Crain, your (sic) attempting to illustrate that you are an expert on weather predictions and I can assure you you are not. The testimony that you've indicated [that that was the time of calmest weather typically throughout the year and the safest time to go to the drawbridge in a boat] cannot be validated and it's going to be stricken from the record."

Claimant was then permitted to testify that the weather was "very calm" at the time in question.

In response to testimony about Claimant's ability to conduct work activities, Johnson stated that Claimant said that he could not perform work activities, but could go hunting and fishing and [engage in] those types of activities; Brassell objected that Johnson was putting words in Claimant's mouth, that the testimony was the opposite, and accused Johnson of being "very biased."

In summary, we cannot come away from our review of the transcript of testimony without the view that Conducting Officer Johnson conducted himself at times as though he were a part of the Carrier's determination that Claimant was not a credible witness as charged in the second Investigation. That constitutes a prejudgment of the issues, an improper entanglement of the Conducting Officer with the Carrier's position on the merits of the case, and, overall, a failure to accord the Claimant a fair and impartial Investigation. These conclusions call for sustaining the claim. See First Division Award 20094, Second Division Award 6795, Award 119 of Special Board of Adjustment No. 279.

We need not rule on the admissibility of two post-Hearing depositions proffered by the Organization.

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 30th day of December 1997.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32297
Docket No. TD-32558
97-3-95-3-477

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
(
(Chicago and Northwestern Transportation Company

STATEMENT OF CLAIM:

"Pursuant to Rule 24(b), this is to appeal the October 31, 1994 decision of General Manager-Transportation, T.F. Murphy wherein he advised Train Dispatcher D.W. Urwin that he was assessed a five day suspension as a result of an investigation held on October 25, 1994."

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.

D. W. Urwin (Claimant) has a seniority date of May 4, 1978. Claimant was assigned an East Iowa Train Dispatcher position, and was working out of Chicago, Illinois, when this dispute arose. On the morning of October 19, 1994, Claimant was informed by Maintenance Crew EM2120 that work needed to be performed on an eastbound frog. The Crew requested that Claimant issue a 10 MPH slow order for all

eastbound traffic on Main Track No. 2. However, Claimant erroneously issued Track Bulletin No. 22948 indicating a 10 MPH slow order for all Westbound traffic on Main Track No. 1, instead of Track No. 2.

When this error was discovered, General Manager Transportation M. F. Murphy issued Claimant a Notice of Investigation, charging him with failure to properly perform his duties. The investigation was held on October 25, 1994, with the name and position of the conducting officer listed as follows in the transcript of hearing: "P. E. Brandt (representing Mr. T. F. Murphy, General Manager-Transportation Center)" [Emphasis added). By letter of October 31, 1994, General Manager Transportation Murphy advised Mr. Urwin that he had been found guilty as charged and assessed a five (5) day suspension for his "failing to properly perform" his duties.

On December 1, 1994, the Organization submitted an appeal on behalf of Claimant alleging that Carrier had violated Rule 24(b) of the Agreement. In pertinent part, that Rule states:

> "Dispatcher shall have reasonable opportunity to secure the presence of representatives and/or necessary witnesses. Forty-eight hours will, under ordinary circumstances, be considered reasonable time."

In addition, the General Chairman noted that there were "other odd things" regarding the investigation. Specifically, the General Chairman cited a number of procedural irregularities, including:

1. Claimant was given less than twenty-four (24) hours notice of the investigation.

2. Carrier refused to allow Office Chairman Stowe to speak, thereby disallowing Claimant his right to be represented by "one or more train dispatchers of his choice and/or officers or committeemen of the American Train Dispatchers association."

3. Carrier "manipulated" the recording device to prevent the Organization from making a closing statement. Further, Carrier "selectively edited" certain portions of the transcript.

4. General Manager Transportation Murphy was the charging officer, in addition to reviewing the investigation and after determining Claimant's guilt, also assessed the discipline.

Regarding the merits of the case, the Organization asserted that the Carrier failed in its burden of proof, and that the assessed discipline of a five (5) day suspension was "excessive."

For its part, Carrier maintained that:

1. Claimant was properly notified of the Investigation which was held within seven (7) days of the alleged offense as provided in Rule 24(a). The investigation was also held at the Claimant's point of employment.

2. The Claimant was present at the investigation and represented by two representatives of the Organization. Claimant and his representatives were allowed to cross-examine witnesses.

3. The Organization's contention of Carrier's editing of the Transcript of Hearing presents a "convenient and self-serving procedural objection which has no basis in fact."

4. While Mr. Murphy did function in multiple roles in this matter in that he issued both the Notice of Investigation and the Notice of Discipline, he was not involved in any capacity with the Investigation nor was he involved in the appeal process. Further, the Organization failed to point to any language in the Agreement which would prohibit Mr. Murphy from functioning in the various roles he assumed in this matter.

Regarding the merits of the issue, Carrier pointed to the following testimony regarding Claimant's assertion that he had informed by Maintenance Crew 2120 that they would have to protect the track:

"Q. Track Bulletin 22948 in part puts a 10 MPH slow order on MP 77 on main track 1, the westbound. You told 2120 to protect himself.

Then why did you put out a Track Bulletin putting a slow order on the other main line?

A. I don't have an answer or (sic) that. I don't know...

Q. But you did in fact put one...

A. I put up a 10 MPH on track 1 according to piece of paper here, yes, I did."

Carrier further stated that the discipline assessed was both "warranted and commensurate with the seriousness of the offense."

At the outset, the Organization premised its claim upon numerous procedural errors, each of which, according to the Organization, were fatal to Carrier's case. There is no dispute that the Claimant did not receive forty-eight (48) hours notice of the pending investigation. However, although Claimant stated that he did not feel he had been "properly" notified regarding said investigation, when asked if he was ready to proceed with the investigation, Claimant replied: "Yes." Nor are we persuade that Claimant was deprived of his right to have more than one representative at the investigation.

The other procedural defects proven by the Organization are serious and require modification of the discipline. The issue of multiple roles by one officer in discipline proceedings in this industry has been the subject of numerous Board Awards over the years. While these Awards generally caution Carriers against this practice because of the obvious due process risks involved, the majority of these Awards also provide that in the absence of any Agreement language specifically prohibiting one officer from serving in multiple roles, the circumstances of each case must be reviewed to determine if the employee's due process rights were actually compromised or prejudiced in any way by the multiple roles of one officer. We are persuaded that the multiple roles played by General Manager Murphy in this matter (accuser, appointer of a stand-in hearing officer, assessor of guilt and penalty) did result in actual prejudice to Claimant sufficient to compromise his right to a "fair and impartial hearing."

Whether the long shadow cast by the General Manager over the proceedings motivated Hearing Officer Brandt, his self-described "representative", to manipulate

the tape-recorded records not provable, but the circumstances are highly suspicious. There is no real room for doubt that such partisan editing did take place. The numerous "inaudibles" and turning off of the tape recorder by the Hearing Officer were apparently purposeful and the undisputed fact that there were several otherwise unexplained gaps in the recorded transcript is sufficient evidence to support the Organization's contentions regarding that portion of the claim. The Hearing Officer's conduct sufficiently tainted the investigation to require our intervention to modify the discipline.

Because Claimant admitted his error on the record, we shall not set aside the finding of culpability. Due to Carrier's serious violations of Claimant's rights to a fair and impartial investigation, however, we shall reduce the discipline to a letter of reprimand. Carrier is directed to reimburse Claimant for the five (5) days of lost pay.

AWARD

Claim sustained in accordance with the Findings.

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 13th day of November 1997.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award No. 5029
Docket No. 5031
97-4-96-4-9

The Fourth Division consisted of the regular members and in addition Referee John M. Livingood when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Lake Superior & Ishpeming Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

Carrier acted in an arbitrary and capricious manner when it failed to issue and prove specific charges, allowed the Hearing Officer to act in a multiplicity of roles and failed to provide Robert Larabee with a fair and impartial hearing on September 14, 1994.

Carrier shall now expunge any record of this hearing from Mr. Larabee's record and compensate him for all lost time during the nine (9) days he was suspended from work as a result of the discipline assessed."

FINDINGS:

The Fourth 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.

Claimant, an employee of the Carrier for approximately 11 years and a "boat loader" for six years, was suspended for nine calendar days, which included five working days, for violating Carrier's Safety Rules Book Basic Rules 1 and 2, in effect, failing to report a personal injury in a timely manner.

On Friday, August 19, 1994, the Claimant was working the night shift loading ore. The following day, the Claimant called his immediate supervisor, a Dock Agent, and informed him that his neck hurt when he woke and that he wanted to take a sick day. The Claimant called again the next day, and explained that he hurt his neck, but he was not sure when and where because he did not have any pain until he awoke. The Claimant worked Monday and Tuesday, August 22 and 23. On Wednesday, August 24, the Claimant's rest day, he called the Dock Agent at 11:00 A.M. to get the day off, stating he wanted to allow his neck to heal. During the conversation he explained he thought the neck injury was from his shift on August 19 and asked whether he should file an accident report. The Dock Agent advised him that due to it being five days after the incident the Claimant should speak to the Transportation Superintendent and that he did not want to advise him. The Claimant was told he could have the day off at 1:00 P.M. At 2:00 P.M., the Claimant presented the Dock Agent with the accident report, five days after the stated injury.

In explanation of the delay in filing the accident report, the Claimant puts forth the period he was unaware of his injury and, after he realized he was hurt, the period he was unsure where and when the cause of the injury occurred. Additionally, the Claimant introduced a note from the Carrier's doctor concerning the Claimant, stating "It is possible for injuries to be delayed in onset."

The Organization presented several Awards specifically dealing with the delay in filing accident reports, Second Division Award 12228, Third Division Award 22201, and Public Law Board No. 2971, Award 92. In Third Division Award 22201, the Claimant did not file an accident report for more than 15 days until the Claimant's surgeon advised her that the discomfort in the Claimant's legs was due to a pinched nerve as a result of a back injury and the Claimant associated a mishap at work with the back injury. In Second Division Award 12228, the period between the incident and the filing of an accident report was more than three months.

The Investigation failed to determine when the Claimant specifically first realized he suspected his operation of Chute 265 on August 19 to be the cause of his injury. On

August 21, he seemed not to have made the association. However, his statements regarding his failure to file the reports on August 22 indicate that at the time he believed the injury to be work related:

> "Because I wasn't going to file one. My neck started to feel better, so it's like many injuries up there that, if there's slight little injury, you don't report it."

The Organization established in the transcript that it was not standard Carrier policy to have an Investigation for every employee that failed to comply with the subject Rules and asserts on appeal that the Carrier does not enforce Rules 1 and 2 on an even and consistent basis, stating that singling out the Claimant would be unfair. The Carrier did not respond on these points.

The Carrier relied, in part, on the facts established in the record: an accident report was filed August 24, five calendar days after the stated injury on August 19 and three days after the Claimant returned to work on August 22. The Carrier established that the Claimant knew of the applicable Rules and had prior instances of violating the subject Rules, once in 1991 when a formal Investigation resulted in a warning and once in 1993 which did not result in a formal Investigation. The Carrier did not attempt to address the Claimant's reasons for delay but did, through the words of the Hearing Officer, attempt to ascribe a motive and rationale for the delay:

> "I submit, Mr. Larabee, that you were getting forced to work on Wednesday, your assigned day off. August 24th. You did not want to, and furthermore, that is when you produced the injury report . . . I'm submitting that that's how you got out of working on Wednesday, August 24th."

The September 22, 1994 letter assessing discipline relied on the establishment of the Claimant's ulterior motive for filing the accident report as to why the report was filed late: ". . . only after you were going to be forced to work on your assigned day off did you decide to fill out an accident report."

The Organization appealed this case on both procedural grounds and on the merits. At both the Hearing and during the appeal on the property it objected to the "multiplicity" of roles/functions played by the Transportation Superintendent: charging

officer, hearing officer, assessor of discipline, and witness. The Organization offers a number of Awards in support of its position. These Awards deal with the potential prejudicial nature of combining certain roles/functions. Several of the cited Awards involved combining the role of first appeals officer with the role of assessor of discipline; this was avoided in the case at hand. Certain of the Organization's cited Awards specifically address the combining of the roles of Hearing Officer and witness, stating that the Board must "look askance" or with suspicion on the resulting Hearing.

The Carrier must provide the Claimant with a fair Hearing. This Hearing must be carefully reviewed in light of the potentially conflicting roles. Prejudice and impartiality may be evidenced in actions even though they are not consciously intended.

The digression of the focus of the Investigation to the past availability of the Claimant to work on rest days was objected to at the Hearing as not relevant to the charge and prejudicial. It seems this course of inquiry was specifically set to establish a suspected reason/motive for the Claimant's submission of the accident report. The motive was not established. However, alleged actions and conduct of the Claimant regarding rest day work were the clear focus of the Hearing Officer's attention and concern.

In addition to his roles/functions of Charging Officer, Hearing Officer and assessor of discipline, the Transportation Superintendent presented certain evidence. He freely offered testimony in exchanges with the Claimant. He unnecessarily and repeatedly asked leading questions.

During the Hearing, the Hearing Officer accused the Claimant of producing the accident report only to get out of working on August 24, stating that was how he got out of working that day. The September 22, 1994 letter assessing discipline relied on the establishment of the Claimant's ulterior motive for filing the accident report as to why the report was filed late: ". . . only after you were going to be forced to work on your assigned day off did you decide to fill out an accident report." However, this theory/ulterior motive is not established in the transcript and was specifically contradicted by the Claimant and the Dock Agent to whom the Claimant spoke regarding the matter. Evidently, the Hearing Officer/Assessor of Discipline disregarded the specific testimony of the Claimant and the Dock Agent, both of whom testified that the Claimant was given time off on August 24, prior to his presenting the accident report.

The statement of nonrelevant suspicions in the letter of discipline further supports the prejudicial nature of the Hearing and the decision process.

The principles of fairness and impartiality require the Board to find procedural errors to be sufficient to 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 Fourth Division

Dated at Chicago, Illinois, this 13th day of November 1997.

Award No. 516
Case No. 516

PUBLIC LAW BOARD NO. 5383

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
)
vs.) Parties to Dispute
)
UNION PACIFIC RAILROAD COMPANY)

STATEMENT OF CLAIM:

Claim in behalf of Engineer M. L. Moore, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all time lost including time spent at the investigation and this incident be removed from Claimant's personal record when he was investigated on the following charge:

> "Your responsibility in connection with your failure to be available for call at approximately 1:00 a.m. Sunday, April 17, 1988, for Train DMKAA, on duty at 3:30 a.m. while you were assigned to the Engineers' South Pool at Des Moines, Iowa."

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that the

Board is duly constitued by agreement and has jurisdiction of the parties and of the subject matter.

Claimant Engineer was found responsible for failure to be available for call from the inactive list. He was disciplined with five (5) days suspension.

The transcript of investigation shows that a call rule for not less than two (2) hours was in effect. Claimant was not available when called fifteen (15) minutes before the two (2) hour limit.

The record indicates sufficient effort was made to call Claimant although it is controversial as to whether the last attempt was as near to two (2) hours as it should have been. Of greater concern to the Board is the uncontested statement by the Employees that a witness, who was a supervisory employee, told Claimant at the end of the investigation that he would get five (5) days suspension. A witness should have one

function only and not perform duties of a judge and jury. The discipline here must be set aside.

AWARD

Claim is sustained.

ORDER

The Carrier is ordered to make this Award effective within thirty (30) days from the date shown below.

B. L. MacArthur
Employee Member

W. G. Gonzales
Carrier Member

D. T. Reed
Chairman and Neutral Member

Dated: Feb 20, 1998

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13288
Docket No. 13009
98-2-95-2-28

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(International Brotherhood of Electrical Workers,
(System Council No. 14
PARTIES TO DISPUTE: (
(Southern Pacific Lines (Denver & Rio Grande Western
(Railroad Company)

STATEMENT OF CLAIM:

"1. That the Southern Pacific Transportation Company (former Denver and Rio Grande Western Railroad Company) violated the controlling agreement, in particular, Rule 32, but not limited thereto, when they unreasonably, unjustly and arbitrarily dismissed from service Electrician A. G. Parker, effective February 9th, 1994, following an investigation held on February 1st, 1994.

2. Accordingly, the Southern Pacific Transportation Company (former Denver and Rio Grande Western Railroad Company) should be ordered to compensate Electrician Parker as follows:

(a) Compensate him for all lost wages, eight (8) hours each day at the prevailing rate of pay of electrician, commencing February 1st, 1994 -- until returned to service, and all applicable overtime;

(b) Make him whole for all vacation rights;

(c) Make him whole for all health and welfare, and insurance benefits;

(d) Make him whole for all pension benefits including Railroad Retirement and Unemployment Insurance;

(e) Make him whole for any and all other benefits that he would have earned during the time withheld from service, and;

(f) Any record of this arbitrarily and unjust disciplinary action be expunged from his personal record."

FINDINGS:

The Second 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.

While working on his assigned task of "troubleshooting" a locomotive, the Claimant, a Journeyman Electrician, became seriously ill, left his work station, sought assistance at the Planner Office, and was taken by ambulance to a hospital for treatment. As far as can be determined from the record, the cause of his distress was the use of a special cleaning fluid; while there may be some possible doubt as to the certainty of this cause, such does not require determination by the Board.

Because the cause of the Claimant's condition was undetermined at the time, the Supervisor accompanying the Claimant to the hospital was instructed to have the Claimant subject to a toxicological test by urinalysis. It is the Carrier's contention that the Claimant refused to undergo the test. On this basis, the Claimant was subject to an investigative Hearing under the following charge:

"... to develop facts and place responsibility, if any, in connection with your alleged refusal to take a toxicological test on January 23, 1994, after being directed to do so by a company official."

The Claimant was further charged with possible violation of Safety and General Rule 1007, which reads in part:

> "Employees will not be retained in the service who are . . . insubordinate. . . ."

Following the Hearing, the Claimant was dismissed from service

The Carrier states in its Submission as follows:

> "Every time there is an accident or injury in which proximate cause cannot be established to rule out an employee's impaired judgement, Carrier will exercise its right to rule out drug or alcohol use with a urinalysis. Every time an employee refuses to submit to a drug test when said probable cause has been established, he must be sure that he will always be pulled out of service for insubordination." (Emphasis in original)

In support of this contention, the Carrier did not provide any specific reference to a written "policy", much less the policy itself, either at the investigative Hearing or for the Board's review. The Board, nevertheless, need not question that in the circumstances here under review, because a "probable cause" urinalysis initially may have appeared to be warranted. At the time of the incident, Carrier supervision had no clear explanation for the Claimant's condition, and the decision to require a drug/alcohol test was arguably justified.

The Board further has no difficulty following a long line of Awards in which an employee's refusal to take such a test may be determined to be insubordination.

The investigative Hearing was held nine days after the incident. Its purpose was not simply to confirm the Claimant's refusal, thus supporting a charge of insubordination and his consequent dismissal from service. Rather, the purpose of the Investigation, as stated by the Carrier itself, was to "develop facts and responsibility."

Following the Hearing, the Director, Mechanical Operations concluded the Claimant was in violation of Rule 1007, and the Claimant was dismissed from service.

The Board finds this conclusion with little or no support from the Hearing record. Among the reasons the Board so determines are the following:

1. There was considerable discussion concerning a "form" and whether it required the Claimant's signature. The "form" in question was merely a request and authorization by the Carrier to the hospital to perform a drug/alcohol test. This clearly misses the point. Any standard toxicological test by urinalysis must involve the employee's participation, including witnessing of the handling of the urine, a signature verifying the sealing of the sample, etc. There is no evidence that the Claimant was advised of this procedure or even given the opportunity to participate.

2. Whatever the cause of the Claimant's temporary impairment, the record makes it obvious that he may not have sufficiently recovered to understand the procedure.

3. The record leaves considerable uncertainty as to whether the Claimant was flatly refusing to take a urinalysis or simply, in his possible confusion, asking to read and sign a consent form.

3. On the following day, the Claimant, now sufficiently or fully recovered, spoke with the Director, Mechanical Operations and offered to take a drug/alcohol test immediately. This opportunity was refused. The Board is fully aware of the purpose of testing at the time directed, since with any delay positive showing of drug or alcohol use may no longer be found. Nevertheless, given the Claimant's serious condition while being treated in the hospital, the Carrier's refusal to test the Claimant within 16 hours of the incident must be considered inappropriate.

4. Was there "probable cause" to believe the Claimant was under the influence of alcohol or drugs? Perhaps there was, at the time of the incident. Testimony of the Carrier's own witness, however, offers convincing evidence to the contrary. There follows an interchange between the Hearing Officer and the Diesel House Foreman who accompanied the Claimant to the hospital and who was trained in drug identification:

"Q Now in this case here, this would have been a reasonable cause, wouldn't it?

A It was an unusual case. Something we've never seen on him [the Claimant] before.

Q Well, a reasonable cause versus you had personal knowledge that he had taken some drugs or heard he had taken drugs.

A No, no, nothing like that.

Q I mean the two choices are he had to take the test. I believe you had personal knowledge or he had been accused or that you had reasonable cause to suspect and this would have been the latter—the reasonable cause? Is that correct?

A Yes.

Q Were the symptoms that [Claimant] demonstrated compatible to your drug identification training?

A No.

Q He was having a hard time breathing?

A Yes.

Q Would that be a symptom of a drug overdose?

A Not to my recall. . . .

Q Redness of the eyes a symptom of drug --

A I didn't notice redness of the eyes. His eyes were swollen.

Q Were swollen?

A Yes. Actually his whole face was swollen.

Q Isn't that an indication of a drug overdose?

A No, not the training that I've had." (Emphasis added)

Further, as argued by the Organization, the Board finds the Hearing was not conducted in a fair and unbiased manner. The Board recognizes that Hearing Officers are not experts in legal niceties, given that their principal occupation, as here, is entirely unrelated to conducting hearings. However, in this instance, the preconception of the Claimant's guilt is obvious. The portion quoted above is an example. Others are the unnecessary defense of Carrier officials' actions at the time of the incident (Record, pp. 38-9); his unwarranted attempt to read, erroneously, a "positive" finding in the drug/alcohol test taken by the Claimant on his own initiative (Record, pp. 46-7); and the following exchange which appears to be seeking a stronger response from a subordinate official:

"Q By [the Claimant's] failure to take the test, was he in violation of Rule 1007, Conduct, 'employees will not be retained in service who are insubordinate'?

A I guess so.

Q Would you repeat that.

A Yes." (Record, p. 18).

The Board specifically does not intend to suggest any general limitation on the Carrier's right to require testing for "probable cause" or the general principle that refusal to be tested is insubordination. The Hearing testimony in this case, however, suggests, or demands, that the Carrier should have realized that exceptional, possibly unique, circumstances required a different conclusion.

While the Award sustains the claim, the Board notes that the Claimant was reinstated by Carrier action after nine months. For the nine-month period, the remedy is properly limited to that provided in Rule 32(f).

AWARD

Claim sustained in accordance with the Findings.

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 Second Division

Dated at Chicago, Illinois, this 15th day of June 1998.

Award No. 503
Case No. 503

PUBLIC LAW BOARD NO. 5383

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
)
vs.) Parties to Dispute
)
UNION PACIFIC RAILROAD COMPANY)

STATEMENT OF CLAIM:

Claim in behalf of Engineer D. F. Freier, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all lost time including time spent at the investigation and that this incident be removed from Claimant's personal record when he was investigated on the following charge:

"Your responsibility for failure to comply with applicable rules of the Consolidated Code of Operating Rules resulting in derailment of CNW 132516 and BN 247688 in No. 488's train at Burlington Northern Westminster Street Manual Interlocking at approximately 7:25 p.m., Thursday, October 15, 1981 while you were crew members of No. 488's train."

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that the Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

Claimant Engineer was found responsible in connection with derailment of two (2) cars at a BN interlocking plant. The discipline assessed was ten (10) days suspension.

The essential facts are that Claimant was proceeding on a lunar signal approaching the plant when he observed that they were on the wrong track. He stopped the train and secured permission through the operator to back up a short distance to get pointed in the right direction. His crew then threw a power switch (with power off) and proceeded. After pulling the two (2) engines and eleven (11) cars over a split track/derail, two (2) cars were derailed.

The Board has studied the record in this case and we conclude that there is not sufficient evidence to conclude that Claimant had responsibility for the accident. First, the crew was authorized to throw the switch and move as they did. Second, the engines and eleven (11) cars passed over the derail before it gapped. There is no satisfactory explanation of what the crew did or did not do to cause this. In correspondence a Carrier officer alleged that:

> "....the crew lined the switch off the BN onto the C&NW tracks and overlooked the derail device and the train was forced through until the derailment occurred."

A picture of the derail device shows that it was merely a split track. The move was to the trailing point and no forcing was possible. If it had been gapped at the start of the move, Claimant's engine would have derailed and not the twelfth (12) car.

In addition, the transcript contains a number of omissions. We cannot determine relevance of what was not recorded.

In view of the above, the discipline must be set aside.

AWARD

Claim is sustained.

ORDER

The Carrier is ordered to make this Award effective within thirty (30) days from the date shown below.

B. D. Ivan Carter
Employee Member

R. G. Thomas
Carrier Member

D. Deely
Chairman and Neutral Member

Dated: Feb 20, 1992

Award No. 547
Case No. 547

PUBLIC LAW BOARD NO. 5363

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
)
vs.) Parties to Dispute
)
UNION PACIFIC RAILROAD COMPANY)

STATEMENT OF CLAIM:

Claim in behalf of Engineer D. W. McMullen, Union Pacific former Chicago and North Western Transportation Company, for compensation for all lost time including time spent at the investigation and that this incident be removed from Claimant's personal record when he was investigated on the following charge:

"Your responsibility for your failure to properly protect your assignment when you reported late for Job 7308, on duty West Chicago at 7:35 A.M., Tuesday, October 2, 1984 while you were employed as a Fireman on crew #8."

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that the Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

Claimant Fireman was found responsible for failure to protect assignment when he reported late at an away from

Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

Claimant Engineer was found responsible for failure to make a proper air brake test on a pick up at Queens Siding. He was disciplined with five (5) days suspension.

The transcript indicates that two (2) supervisory employees observed how the crew performed during the pick up in question. While it appears that the crew might have been taking short cuts not provided by the rules, some of the critical testimony of the Engineer was unclear since "inaudible" was transcribed. On this basis we find that the case against Claimant was not firmly established. The suspension will be set aside.

AWARD

Claim is sustained.

ORDER

The Carrier is ordered to make this Award effective within thirty (30) days from the date shown below.

B. D. MacArthur
Employee Member

Carrier Member

Chairman and Neutral Member

Dated: 3-20-98

Award No. 598
Case No. 598

PUBLIC LAW BOARD NO. 5383

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
)
vs.) Parties to Dispute
)
UNION PACIFIC RAILROAD COMPANY)

STATEMENT OF CLAIM:

The Brotherhood of Locomotive Engineers Union Pacific, former Chicago and North Western request the Division compensate Engineer J. H. Ness for all time lost including time spent at the investigation and that this incident be removed from Claimant's personal file when he was investigated on June 26, 1989 regarding the following charge:

"Your responsibility for delay to your train; specifically, for stopping your train at Little Lake, Michigan from 10:41 p.m. until 10:45 p.m., May 24, 1989, while employed as crew members of EPESS commencing duty at 2:00 p.m., May 24, 1989, CDT."

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that the Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

Claimant Engineer was found responsible for delay to his train and he was disciplined with five (5) days suspension.

The transcript of investigation indicates that the train was stopped at White Lake for more than an hour whereas the charge letter indicates the period was only a few minutes. Regardless of this discrepancy, the Board finds that the evidence developed is too nebulous to support the Carrier's decision. It is noted that a Trainmaster at White Lake said he did not take exception to the time the train was stopped for the crew's lunch. Also, certain answers to important questions are shown as "inaudible".

The claim will be sustained on the premise that insufficient evidence was developed to support the charge.

AWARD

Claim is sustained.

ORDER

The Carrier is ordered to make this Award effective within thirty (30) days from the date shown below.

B. D. Vaughn
Employee Member

Carrier Member

Chairman and Neutral Member

Dated: 5-22-98

CARRIER FILE NO. 9203978
ORGANIZATION FILE NO. PR-KP Taylor

PUBLIC LAW BOARD NO. 5719

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
VS)
UNION PACIFIC RAILROAD COMPANY) NMB CASE NO. 45
AWARD NO. 45

STATEMENT OF CLAIM:

Request the letter of reprimand of Engineer K. P. Taylor be expunged from his personal record.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

This dispute involves a question of whether or not claimant voluntarily accepted a Letter of Reprimand when he failed to promptly report an injury. The record before us indicates there is a dispute between claimant and his supervisor, with claimant stating he never accepted the discipline and the supervisor stating it was hand delivered to claimant and he verbally accepted.

Rule 136(b) provides that when a hearing is waived "the employee will sign a waiver to that effect and acknowledge receipt of the written notification." There is nothing in the record to show that the rule was followed in that claimant did not sign a waiver. Accordingly it must be our decision that assessment of the Letter of Reprimand was not in compliance with the rule and must be removed from claimant's record.

AWARD

Claim sustained. Carrier is instructed to comply with this award within 30 days of the date hereof.

D. J. Gonzales, Carrier Member

J. L. McCoy Organization Member

F. T. Lynch, Neutral Chairman

Award date March 26, 1998

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31435
Docket No. MW-30593
96-3-92-3-356

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier removed Mr. F. Greco, Jr. from service from September 25 through October 1, 1990 and extracted a waiver from him without notice, knowledge or participation of his representative (System Docket MW-1760).

(2) The Claimant shall "... be paid ten (10) hours straight time all overtime pay for days listed, credit for the months and to be made whole."

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 waived right of appearance at hearing thereon.

On October 1, 1990 Carrier charged Claimant, a Class 2 Machine Operator, with violation of Safety Rule 3302 stemming from a September 24, 1990 collision between Claimant's ballast regulator and a tamper at MP 315.5 near Latrobe, Pennsylvania.

On October 2, 1990, and without participation by the Organization, Claimant signed a waiver concerning the proposed discipline which waiver stated that "I waive any right I may have

to an (sic) hearing by the Consolidated Rail Corporation ...." Claimant then accepted a five day suspension. According to a statement from Production Engineer McCurdy, Claimant "was given the right to union representation before excepting [sic] the term of the waiver. However, he waived the union representation and sign[ed] the waiver of his own free will."

Rule 27, Section 2 states:

"Section 2. Alternative to hearings.

(a) An employee may be disciplined by reprimand or suspension without a hearing when the involved employee, his union representative and the authorized official of the Company agree, in writing, to the responsibility of the employee and the discipline to be imposed.

(b) Discipline imposed in accordance with paragraph (a) of this Section is final with no right of appeal."

Therefore, Claimant voluntarily waived a Hearing and accepted the discipline. Notwithstanding the voluntary nature of Claimant's actions, nevertheless, the Carrier violated the plain language of Rule 27, Section 2(a). In order for such waivers to be legitimate, the parties agreed that "the involved employee, his union representative and the authorized official of the Company" must agree to the waiver [emphasis added]. Here the Organization was not given an opportunity to agree to the waiver. Therefore, the Rule was violated.

Aside from the fact that the language of Rule 27, Section 2(a) is clear requiring the employee, the Carrier and the Organization to agree to a waiver, along with the fact that this Board has no authority to change that language, we note that the function of the union representative in cases of employees waiving hearings and accepting discipline is not merely a pro forma one. Aside from playing a role in advising the affected employee concerning the consequences or advisability of accepting proposed discipline, the union representative also serves the interests of other employees by policing the Agreement to assure that other employees' contractual rights are not affected by any such waiver. The employee is obviously free to decline union representation and negotiate his own settlement. But, the bottom line here is that the parties agreed as a matter of contract that the Organization must also agree to any waiver of hearing. That was not done in this case. Rule 27, Section 2 was violated.

The real issue here is the remedy. The Organization seeks compensation for Claimant not only for the time Claimant did not work as a result of accepting the discipline, but also for overtime

that Claimant's job was worked on Claimant's rest days a remedy the Carrier views as excessive.

For a remedy, we find that Claimant is entitled to no monetary relief. The status of the evidence before us is that Claimant voluntarily declined representation by the Organization, voluntarily waived the hearing and voluntarily accepted the discipline without any coercion from the Carrier. To award Claimant any compensation would be wholly inconsistent with the voluntary actions taken by Claimant. Because of Claimant's voluntary actions, Claimant is estopped from receiving any benefit from the Organization's efforts in this case. Finding a violation of Rule 27, Section 2(a) but not permitting Claimant affirmative relief strikes the appropriate balance between the Carrier's obligations under Rule 27, Section 2(a) and the ability of an individual employee to settle his own claims and grievances. See Second Division Award 9875 and authority cited therein.

However, from a remedy standpoint, the Organization's institutional concerns must still be addressed. The Carrier violated Rule 27, Section 2(a) which required the Organization also to agree to the type of waiver involved in this case. To maintain that Rule's meaning, as a remedy, the Carrier shall be directed to comply with the plain terms of that Rule. In the future, the Organization must be permitted, as the parties agreed in Rule 27, Section 2(a) the opportunity to "agree, in writing" to any similar proposed waivers before those waivers are implemented. Failure of the Carrier in the future to follow the plain language of Rule 27, Section 2(a) will not preclude this Board from implementing more direct affirmative relief as the circumstances require.

The Carrier's argument that an earlier claim was filed and withdrawn over the disciplinary aspects of this case bars this matter is not persuasive. This claim, timely filed, addresses the Organization's institutional concerns concerning the Carrier's taking the waiver without the Organization's agreement. While the matters certainly overlap, we view the claims as sufficiently distinct.

We have also considered the Carrier's cited authority for the proposition that employee waivers are well-accepted bars to further processing of claims. The cited Awards, however (see e.g., Third Division Award 21183; Second Division Award 12175; First Division Award 24252) do not address the narrow issue in this case in light of the specific language of Rule 27, Section 2(a)'s requirement that the Organization also agree to any employee waiver taken under that section. Those Awards are therefore distinguishable from the instant matter, particularly because of the language of Rule 27, Section 2(a).

AWARD

Claim sustained in accordance with the Findings.

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 25th day of April 1996.

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13218
Docket No. 13090
98-2-95-2-116

The Second Division consisted of the regular members and in addition Referee Robert Richter when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(System Council No. 9
(
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)

STATEMENT OF CLAIM:

"1. That at Waycross, Georgia, May 28, 1994, CSX Transportation violated the controlling agreement, particularly Rule 32, when electrician D.E. Nichols, ID 140091 was directed to attend formal investigation to determine the facts in connection with his reporting of a personal injury that occurred while on duty at approximately 10:30 a.m., May 26, 1994. CSX Transportation adduced that this was approximately three hours after being counseled concerning failure to perform his duties in a timely manner and delaying locomotive repairs. Mr. Nichols was charged (1) with falsely reporting the alleged personal injury; (2) with insubordination by his failure to follow instructions from Plant Manager D.C. Minix not to attempt to aggravate the alleged injury by rubbing his eye; and (3) with possible retaliation for the counseling given him. Mr. Nichols was suspended from service pending the outcome of the investigation. Formal investigation was held on June 8, 1994, and CSX Transportation concluded that Mr. Nichols was guilty as charged of (1) falsely reporting of personal injury on May 26, 1994, supported by the testimony of the Industrial Nurse and Doctors' reports indicating they could find nothing in his eye and no injury to the eye, only minor irritation; (2) insubordination by your failure to follow instructions from Plant Manager D.C. Minix not to attempt to aggravate the alleged injury by rubbing his eye; (3) reporting a personal injury in retaliation for the counseling given him on May

26, 1994, prior to the alleged injury. Discipline assessed was dismissal from all services of CSX Transportation, Inc.

2. That electrician D.E. Nichols be compensated for eight (8) hours at the pro rata rate, commencing May 26, 1994, by reason CSX Transportation unjustly suspended and subsequently dismissed Mr. Nichols from service on July 6, 1994, and compensation be paid for all lost wages until such time Mr. Nichols is returned to service with seniority rights unimpaired, be made whole for all vacation rights, for all health and welfare and insurance, for pension benefits including Railroad Retirement and Unemployment Insurance, and for any other benefits that he would have earned as said benefits are part of the wages lost while being unjustly suspended and dismissed from service and his personal record be cleared of all matters referred to herein."

FINDINGS:

The Second 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.

Claimant was dismissed from the service of the Carrier on July 6, 1994 after a formal Investigation held on June 8, 1994. Claimant was suspended from May 26, 1994 pending the Investigation.

Claimant was found guilty of falsely reporting a personal injury on May 26, 1994, insubordination for not complying with the instructions of the Carrier's Plant Manager by rubbing his eye, and reporting a personal injury in retaliation for being counseled prior to the alleged injury.

The transcript reveals that at approximately 10:30 A.M. on May 26, 1994 Claimant was working on Spot No. 3 when he got sand in his eye. The Carrier's Supervisor testified:

> "When I came down to spot 3, as a matter of fact, right before the accident happened, I was on my way down to see Mr. Nichols and Mr. Nichols came out from under the unit and explained to me that he had received sand in his eye. Well, fans was blowing and the sand was in circulation, so I hollered out immediately to persons on top that if you have sand on, that you have people down here working. Then I assisted Mr. Nichols straight on to the planning room to get the keys to carry him to the nurse."

A member of Shop Safety Committee testified as follows:

> "Well, to start, what happened I was in the Safety Director's Office taking his place while he was gone, and was off the property. And about 10:30-10:35 I got a call from the Office to come take Mr. Nichols to the nurse, that he'd gotten sand blown in his eye. When I got to the office, they said that Supervisor Sturdivant had already taken him, but they wanted me to go look at the locomotive and see if there was sand or whatever. And, as soon as I went down to the locomotive 1159, I went downstairs where David works and I talked to the machinist downstairs, and he said he didn't see where it happened and they were getting ready to change out some air equipment. And I checked the area out and there was sand on the wheels, fresh sand on the wheel, and there was a fan downstairs at No. 1 truck that was for ventilation. I went upstairs and I talked to machinist up there and pipefitters and they said that pipefitters had put air on the locomotive to recharge the main reservoir and the machinist were getting ready to change out some air equipment - not air equipment, but do the dirt collectors, and to do the dirt collectors, if you have air on the locomotive, you have to turn it off down at the main reservoir, and the only thing we could figure out that when they cut the air off, that it threw the locomotive into emergency, and the sand was . . . went into emergency, sand blew down on the track."

While in the Planning Room before going to see the shop nurse the Carrier's Plant Manager saw the Claimant rubbing his eyes and told him to stop doing so. Depending on whose testimony is believable, this occurred from one to three times.

When the Claimant finally was taken to the Shop Nurse, his eyes were flushed two times. After the flushing, the Nurse could not find anything in Claimant's eye. The Claimant returned to work and completed the day. That night Claimant's eye was painful and he went to the emergency room where a patch was put over his eye.

On May 27 Claimant went to work wearing the patch. The Carrier took Claimant to an ophthalmologist who found Claimant's eye to be red, but no foreign particles. When the Claimant returned to work, the Carrier pulled him out of service pending the Investigation.

The Organization filed this claim for several reasons. It argues that the Claimant should not have been pulled out of service pending the Investigation. It further argues that the Carrier acted unfairly and was arbitrary and capricious in dismissing the Claimant.

Claimant had 26 years of service at the time of the incident with one lost time discipline of one day in 1972.

The Carrier argues that the charges were proven and the seriousness of the charges warrants dismissal.

The Board should not presume to substitute its judgement for that of a carrier and reverse or modify a carrier's disciplinary decision unless it is shown that it acted in an unreasonable, arbitrary, capricious or discriminatory manner, amounting to an abuse of its discretion.

This case is a gross misuse of the Carrier's discretion. First, the Carrier had no basis for suspending the Claimant from service pending the Investigation. There was no evidence produced to indicate that the Claimant was a safety hazard to himself or other employees, nor had the Claimant violated a Carrier Rule that by its nature requires an employee being pulled out of service.

Second, there is no question that Claimant had sand blown in his eye. The fact that the Shop Nurse could not find anything in the Claimant's eye after flushing it out twice does not mean that the Claimant falsified an injury. The insubordination charge is ludicrous, and there was no evidence presented that the counseling session was anything more than a production meeting. The testimony does not reveal that there were harsh words spoken at the meeting.

The Carrier failed to show that the Claimant warranted any discipline, let alone dismissal. Claimant is to be reinstated with seniority unimpaired, and pay for all time lost except for the 30-day time limit extension granted the Organization to submit the case to the Board.

The Organization's request that the Claimant be made whole for all vacation rights, health and welfare benefits, etc., is unfounded and not supported by the Agreement. Rule 32 reads in part, "If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority unimpaired and compensated the wage lost, if any, resulting from said suspension or dismissal."

AWARD

Claim sustained in accordance with the Findings.

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 Second Division

Dated at Chicago, Illinois, this 26th day of February 1998.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant was dismissed from the service of the Carrier on October 24, 1994 as a result of an Investigation held on October 5, 1994. Claimant was withheld from service beginning September 17, 1994, pending the Investigation. Claimant was found by the Carrier to have falsified an injury report on September 17, 1994.

The Organization filed this claim on the basis the Investigation was neither fair nor impartial, the charge was not precise, Carrier failed to prove Claimant's guilt, and the Carrier misused its managerial discretion.

A review of the record dictates that the position of the Organization should be sustained.

On June 28, 1994, Claimant notified his Supervisor that at approximately 2:00 P.M. he sustained an injury to the middle finger of his right hand while closing a locomotive cabinet door. At the time, the Carrier's Foreman did not ask the Claimant to fill out an injury report. The Foreman stated he could not see any obvious signs of an injury.

Over the next couple of months there was discussion between the Claimant and various Carrier supervisors, yet none requested the Claimant fill out an injury report.

On September 15, 1994, Claimant saw his doctor because of the swelling in his finger. An X-ray revealed a healed fracture. On September 17, 1994, Claimant reported this to the Carrier's General Foreman. At that time Claimant was requested to fill out an injury report.

On September 17, 1994, Claimant was charged with falsifying an injury report. To this date the Carrier failed to state how the injury report was falsified.

Claimant had 17 years of seniority at the time of the incident with no apparent previous discipline assessed against him.

The Carrier also erred when it suspended the Claimant pending the Investigation. The Carrier did not offer a valid reason for doing so.

The Board will sustain the claim for reinstatement with seniority unimpaired and with pay for all time lost beginning September 17, 1994. However, that portion of the claim requesting that Claimant be made "whole for all fringe benefits including but not limited to, vacation rights and credits, insurance coverage, retirement credits, and all other rights and privileges." is denied. The Schedule Agreement provides:

> ". . . If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for his net wage loss, if any, resulting from said suspension or dismissal."

AWARD

Claim sustained in accordance with the Findings.

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 Second Division

Dated at Chicago, Illinois, this 26th day of February 1998.