

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.

(American Train Dispatchers Department/International  
( Brotherhood of Locomotive Engineers

**PARTIES TO DISPUTE:** (

(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 persuaded 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.