Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33229
Docket No. MW-33503
99-3-96-3-1044

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Atlanta & West Point
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The sixty (60) day suspension assessed Trackman K. M. Smith for his alleged involvement with another employe occupying the main track on June 23, 1995 without first checking with proper authority was without just and sufficient cause, based on an unproven charge and in violation of the Agreement [System File 27(11)(95)/12(95-0995) AWP].

(2) Trackman K. M. Smith shall now have ". . . the charge letter and all matter relative therto (sic) be removed from Mr. Smith's personal file and he be made whole for all losses suffered, including but not limited to, regular pay, overtime pay, miscellaneous and milage (sic) expenses, as a result of this Carrier's actions."

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.

This case involves a 60 day suspension assessed Trackman K. M. Smith (Claimant) for failing to confer with Apprentice Foreman Silcox about the track authority before occupying the main track with a hi-rail vehicle.

On Friday, June 23, 1995, Claimant and Silcox were assigned to inspect the main track between Mile Posts 131.5 and 148.0. It is unrefuted that because the regular Foreman was on vacation, Claimant had been instructed to "assist" Apprentice Foreman Silcox and to ensure he handled the track authority procedures correctly.

Under Operating Rule 704, Claimant and Silcox were granted permission to proceed north where the pair put bolts in at MP 132.4. While Claimant went into the bushes to "relieve himself", Silcox contacted the Dispatcher to obtain permission to hi-rail north. Silcox was told not to get on the track because there was a train coming from Covington to Alton, and they were to "stay in the clear" until they heard from Foreman Duval. According to Duval, Silcox asked: "How 'bout I jump on it and run on through?" For a second time, Foreman Duval directed Silcox to "stay in the clear, and I will let you know when you can put on."

However, Silcox ignored Foreman Duval's 707 order, and when Claimant had returned from the nearby bushes, Silcox put their vehicle on the main track, directly ahead of the work train that was also traveling north. Shortly thereafter, Foreman Duval "noticed" Claimant's vehicle in his 707 territory, and immediately contacted Silcox instructing him to "clear the track."

As a result, Claimant was directed to attend a July 21, 1995 Investigation in connection with possible violation of CSX Operating Rules in that his hi-rail vehicle occupied the main track without permission from the holder of the 707 authority, and, he did not confer with Apprentice Foreman Silcox about said authority before entering the restricted track.

Subsequent to the Investigation, on August 3, 1995, Claimant telephoned the Vice Chairman and informed him that Carrier had removed him from service "without any

reason." When the Vice Chairman contacted Carrier, he was informed that both Claimant and Silcox were removed from service commencing August 4, 1995, as a result of the June 23, 1995 incident noted supra.

By letter dated August 8, 1995, Claimant was informed that he had been found guilty of the charges and was assessed a 60 day suspension. On that same day, the General Chairman requested individual Unjust Treatment Hearings because Claimant and Silcox had been removed from service with "no charges being filed and for no apparent good cause." The General Chairman went on to assert that Carrier had violated the Agreement by:

1. Improperly removing the Claimant from service;
2. Not rendering a timely decision;
3. Not furnishing the Organization with a copy of the transcript; and,
4. Failing to respond to the appeal within the time limit specified.

Carrier denied the appeal, maintaining that Claimant was afforded a fair and impartial Investigation and sufficient probative evidence was brought forth to prove Claimant guilty of the charge. The 60 day suspension was "appropriate considering the seriousness of the violation," according to Carrier. Carrier further maintained that the procedural arguments raised by the Organization were either "without substance or inconsequential," and do not require that the discipline be overturned.

Rule 39, Section 2 reads, in pertinent part, as follows:

> "A decision in writing will be rendered within ten (10) calendar days from the close of the hearing."

After mutually agreed to postponements, the Investigation was held on July 21, 1995 and the Hearing was closed that day. One of the clear and unambiguous requirements of Rule 39 Section 2 is that the written decision had to be rendered no more than ten days later. Instead, it was not until August 8, 1995, 18 days following the close of the Hearing and four days after removing Claimant from service, the Carrier rendered its decision. There can be no doubt that in these particular circumstances, Carrier violated the specified time limits as provided for in Rule 39 of the Agreement. Therefore, this claim will be sustained as presented without consideration of the merits of the dispute.

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 April 1999.