

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31773
Docket No. MS-31524
96-3-93-3-494

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

(A. Y. Fuller

PARTIES TO DISPUTE: (

(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of A. Y. Fuller for compensation including all straight time pay lost, overtime pay lost and all guarantee pay lost, \$20,000.00 for damages and expenses, reversal of the decision of guilt, and reinstatement. This claim is based on the fact that the Carrier violated the 'Agreement', 45 USC Section 441, and the tenets established by past arbitration hearings, when the Carrier:

- 1. Illegally retaliated against me because I caused the FRA to become aware that the Carrier was in violation [of] FRA safety regulations and/or because I raised the issue to the Carrier's officers that the Carrier was in violation of FRA safety regulations.**
- 2. Breached specific terms contained in Rule 55 of the 'Agreement'.**
- 3. Denied my right to a fair hearing in numerous ways.”**

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 is an appeal of the discipline assessed to a former Signal Maintainer for allegedly failing to maintain his territory up to FRA and CSXT rules and regulations. On February 10, 1992, Claimant was advised of the following:

"You are hereby directed to attend a formal investigation to be conducted in the Conference Room, 1590 Marietta Blvd., Atlanta, GA. commencing at 0900 hours on February 20, 1992.

The purpose of this investigation is to develop the facts, discover the cause and place responsibility in connection to the recent Code 1 violation and the discrepancies found by FRA inspectors on February 1, 4, 5 and 6, 1992.

You are hereby charged with possible violation of S. R. & I Rules 1.223, 1.225, and 1.236 in the CSX Transportation Signal Rules & Instructions Manual.

You are hereby directed to attend with full rest under the Federal Hours of Service Law. You may have such witnesses to attend that have knowledge of the matters under investigation. You may also have representation if you so desire in accordance with the provisions of your working agreement."

At the request of the Organization, the Hearing was postponed on two occasions, and was ultimately held on March 18, 19 and 20, 1992. Claimant admitted that all violations cited by the FRA were under his jurisdiction and his responsibility. In fact, certain evidence showed that Claimant had recently inspected the locations where the defects were found and reported "no problem." Other evidence indicated that some of the defects had existed for extended periods of time.

The Carrier determined that Claimant, and fellow Signal Maintainers Brooks, Burnam, Collins, Stonecipher, Anderson and Bass, were culpable, and advised Claimant of these findings and of the discipline imposed in the following:

“Ample and convincing evidence clearly reveals that you did fail to reasonably maintain the equipment assigned to you. The facts adduced at the investigation proved conclusively that you were guilty as charged.

Your personal record reveals that the current unsatisfactory performance and lack of willingness to properly perform duties falling within the area of your responsibility is a continuation of your less than satisfactory work history. Your disregard for the Rules and the numerous suspensions assessed to you as a result have not served to effectuate a change for the better.

As stated above, testimony given during the investigation reveals that you are guilty as charged. This testimony and your past record reveal that you have ignored all efforts by Carrier to have you improve in your work habits and performance. You are therefore dismissed from service effective end of workday, Monday, April 13, 1992. Please turn in all keys, rule books and other Company property in your possession to Signal Supervisor Griffis.”

The discipline of the other employees was appealed by the Organization, resulting in denial Third Division Award 31772. Claimant chose to appeal his discipline without the assistance of the Organization. Claimant's lengthy appeal was denied up to and including Carrier's highest designated officer. Without conferencing the matter, however, Claimant filed his Notice of Intent with the Third Division, dated August 26, 1993. The Carrier responded with a letter taking exceptions to alleged de novo evidence in Claimant's Submission and asserting jurisdictional objections to alleged improper appeal to arbitration:

“In regard to your belated contention that the Carrier retaliated against you in violation of some provision of 45 USC Section 441, you maintain that Mr. B.M. Wilson had previously informed the Carrier of this same law, therefore, it can only be assumed that you are now claiming that you blew the whistle on the Carrier, and as a result, are protected in some way.

You also infer that this was brought to the Carrier's attention in your letters of June 9 and October 6, 1992, however, such simply is not the case. Your inclusion of this unclear argument in your August 8, 1993 letter comes for the first time some 17 months after the hearing. There has been no discipline assessed in this case based on any information other than the documented evidence which clearly demonstrates that you were fully responsible for the citations issued by the FRA because you were aware of those violations and did nothing to correct those violations, a responsibility for which you were compensated.

The FRSA only prohibits discrimination against employees because such employees file complaints, institutes or causes to be instituted any proceeding, or testifies in any proceedings under the FRSA. That is, this protection is specific to the individual who engages in the protected activity. There is no cause of action under the statute whereby an employee can claim protection because of another employee engaged in protected activity.

* * * *

As for your filing notice with Third Division Executive Secretary Nancy J. Dever, please be advised that your election to present this dispute to the appropriate Division of the National Railroad Adjustment Board violates the mandates of Section 3, First (I) of the Railway Labor Act, 45 USC Section 153, First (I) that a conference be held on the property with respect to the claim. Circular No. 1 of the Third Division of the Railroad Adjustment Board clearly states that the Board lacks jurisdiction to consider any claims which have not been subject to a conference on the property."

By letter dated September 12, 1993 Claimant expressed willingness to discuss the dispute in conference. The Carrier responded that Claimant was free to request a conference at any time prior to petitioning the Board for adjudication; but since he had chosen to advance the dispute to the Board without the mandated conference, the issue was rendered moot.

Without commenting further on the issues of culpability and disciplinary penalty already discussed in Third Division Award 31772, the Board must dismiss this claim for lack of jurisdiction. Claimant's failure to conference his claim on the property prior to advancing the dispute to the Board is fatal to his appeal. Circular No. 1 and 45 USC Section 3, First (I) are unrelenting in their requirements of procedural propriety in appeals to this Board and failure to abide by their strictures leaves the Board without jurisdiction or authority to decide the merits of this claim.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 20th day of November 1996.