

**NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION****Award No. 4990
Docket No. 4981
96-4-95-4-11**

The Fourth Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(United Transportation Union
(Yardmasters Department)

PARTIES TO DISPUTE: (

(CSX Transportation, Inc. (former
(Baltimore and Ohio Railroad Company)

STATEMENT OF CLAIM:

“Claim and request that Yardmaster D. L. Drespling be paid for all time lost including any and all overtime and/or holiday pay he would have made, because of being assessed discipline of forty-five (45) days actual suspension as the result of an investigation held February 11, 1994, it is also requested that Yardmaster Drespling’s record be cleared of all mention of this matter.”

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 waived right of appearance at hearing thereon.

Claimant was charged with an alleged physical altercation. An Investigation was held by the Carrier on February 11, 1994. Subsequently, the Claimant was notified by certified mail dated March 2, 1994 that he had been found guilty as charged and assessed a 45 days suspension.

In the Organization's first appeal on the property, it alleged that the Claimant received an untimely notification of discipline on March 5, 1994. The Organization further alleged that as of April 11, 1994, the Regional Chairman had received neither the Notice of Discipline nor the Investigation transcript in violation of the Agreement. Additionally, the Organization raised several other alleged procedural violations. On merits, it argued that the Claimant protected himself with minimal necessary force.

The Carrier has denied procedural violations. The Carrier argues that in each procedural argument, that Awards have considered these issues and denied their applicability. Further, it is the Carrier's position that the Claimant received a fair and impartial Hearing where the facts were presented. Those facts demonstrated convincingly that the Claimant was involved in shoving a Clerk out the door and onto the ground.

The central procedural issue is the applicability of Article 22(b) which states:

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

Although this Board continues its reluctance to resolve any discipline issue on procedural grounds, it must uphold the negotiated Agreement. Herein, the Carrier does not deny its failure to timely comply with Article 22(b). Instead the Carrier makes several arguments. First, that Fourth Division Award 4712 found that Rule 22(b) did not specifically mandate a time requirement for providing a transcript. Second, that until the Investigation is transcribed, it is not complete. Third, that any delay to the Claimant in obtaining either the decision or transcript did not prejudice the appeal of discipline. Finally, that Fourth Division Award 4786 held that although the Regional Chairman should have received the notice, the violation was not sufficient to overturn discipline where, as here, the General Chairman received notice.

This issue has unfortunately been visited previously. This Board reviewed all Awards submitted by the parties (including First Division Award 15579, 13845 and Second Division Award 2466). The Carrier erred in relying on Fourth Division Award 4712 which does not refer to Article 22(b) but Rule 12(b). In this instance, Article 22(b) supra, is clear. At the end of the Investigation, the Carrier was directly put on notice by the General Chairman that the transcript and decision were to be sent to the Regional Chairman as per Article 22. This was not done.

The time limits of the Agreement are set by the negotiating parties and this Board lacks authority to put them aside. We have held that repeatedly (Public Law Board No. 3975, Award 1; Fourth Division Awards 4211, 4278). As stated In Fourth Division Award 4662:

“In its brief and before this Board Carrier has argued that Claimant’s right to appeal was not in any manner prejudiced by the delay in the assessment of discipline. The language of the time constraints provided within paragraph (b), supra, as well as those in paragraph (c), under which an employee taking an appeal must do so within 15 days, are not conditioned on whether decisions or appeals made out of time would be prejudicial. The parties that drafted the Rule did not see fit to excuse each other in non-prejudicial circumstances. We cannot do it for them.”

The claim will be sustained without consideration of the merits of the discipline.

As these Awards are between the same parties and as we find no reason to find fault with their logic, the Board applies the doctrine of res judicata.

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 29th day of August 1996.