NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26177

THIRD DIVISION Docket Number MW-26305

Edwin H. Benn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad Company

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

1. The dismissal of Foreman E. J. Quintana for alleged 'continual acts of insubordination and willful neglect of duty' was without just and sufficient cause, arbitrary, on the basis of unproven charges and in violation of the Agreement (System File D-19-84/MW-7-84).

2. The claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be paid for all wage loss suffered."

OPINION OF BOARD: On March 26, 1984, Claimant, a Section Foreman with ten years' overall service with the Carrier, was served with Notice of a Formal Investigation charging Claimant with:

> ". . . your alleged continual acts of insubordination and willful neglect of duty, the most recent being failure to spot and have tamped a low joint on the Belt Line, March 19, 1984."

At the Hearing, the Carrier introduced evidence concerning the March 19, 1984, incident involving Claimant's alleged failure to spot and have tamped a low joint. Additionally, the Carrier introduced detailed evidence not specifically referenced in the Notice of Investigation, either by date or general description, concerning incidents of misconduct it attributed to Claimant occurring on January 31 (changing a switch and not answering radio call), February 13 (changing a rail), February 21 (late start of assignment), March 5 (use of tamper machine), March 9 (timely completion of derailment work), and March 12 (repair of angle bar), 1984. At the Hearing, the Organization vigorously protested the consideration of the incidents not referenced in the Notice of Investigation and claimed an inability to properly present a case on Claimant's behalf.

On April 19, 1984, Claimant was dismissed from service.

On October 3, 1984, Carrier's Director of Personnel and Labor Relations, M. M. Kanderis, issued a memo to Carrier's System Superintendent, A. L. Marzano, with a copy to the Organization's General Chairman, that read as follows:

"Reference to Mr. E. J. Quintana, Payroll #218255, who was dismissed from the service as a Section Foreman at North Yard April 19, 1984 after being found responsible as charged for continual acts of insubordination and willful neglect of duty as a result of formal investigation held April 16, 1984.

It has been determined that effective October 8, 1984 Mr. Quintana is reinstated to service with seniority unimpaired as a Section Laborer only on Colorado Roadmaster District No. 1, without pay for time out of service, provided he passes required physical and rules examination.

Please so inform Mr. Quintana and instruct him as necessary."

By letter dated October 5, 1984, from Marzano to Claimant, with no copy to the Organization, Claimant was informed that:

"Effective Monday, October 8, 1984, you are reinstated to service on a leniency basis, seniority unimpaired as a Section Laborer only on Colorado Roadmaster District No. 1, without pay for time out for service provided you pass the necessary physical and rules examination.

Arrange to report to the division Engineer's office at North Yard for necessary processing [emphasis added]."

Claimant passed the required exams and was reinstated on October 15, 1984.

The Carrier argues that by virtue of Claimant's reinstatement without pay for time lost and with seniority, which the Carrier asserts was on a leniency basis, the instant Claim was adjusted by the parties on the property and/or was rendered moot, and therefore, this Board lacks jurisdiction to consider this matter.

We reject such an argument. A distinction must be drawn among instances where a negotiated settlement is reached between a Carrier and an Organization or an individual Claimant providing for less that the full remedy sought in a Claim (See e.g. Third Division Awards Nos. 20832; 19527; Fourth Division Award No. 4277; Second Division Award No. 9875), operation of a set

of facts or the passage of time which renders a dispute moot since the relief sought in the Claim was eventually achieved thereby leaving this Board with nothing to decide (see e.g., Third Division Awards Nos. 23557; 23218; 22132; Second Division Awards Nos. 9050; 8409; 7608), and one where a party takes a unilateral action providing for less than full relief and then attempts to call its unilateral action a binding settlement (see e.g., Third Division Award No. 9480). This Board will not decide a case that arises under the first two categories, i.e., a Claim that is settled on the property or rendered moot. We will, however, decide a dispute that falls under the third category, i.e., a unilateral action that is not a settlement or one which leaves us nothing to decide.

Under the circumstances of this case, we believe the Carrier's action of offering reinstatement falls into third category discussed above. We are not satisfied that a settlement was reached on the property between the Carrier and either the Claimant or the Organization. While it is true that Claimant was reinstated, there are no facts in this record to show that the reinstatement came about as a result of a settlement. Approximately one-half year after he was removed from service, Claimant was simply informed that he was to report to work. We note that while the word "leniency" was used by the Carrier in its October 5, 1984, letter to Claimant (which was not sent to the Organization), no such similar language was used in the previous October 3, 1984 letter that was sent to the Organization. Claimant had no choice. If Claimant refused to report to work under the reinstatement offer given by the Carrier, Claimant's back pay entitlement, if any, would have been effectively cut off. Unilaterally calling such an offer a "settlement" or "leniency" does not clothe that offer with the binding nature of such terms. We feel that the burden is upon the Carrier to demonstrate facts in this record that would show a settlement was reached providing for reinstatement on a leniency basis. The Carrier has not met that burden. Since we have found that no settlement existed, the Claim is obviously not moot since Claimant's rights, if any, to reinstatement to his former position and back pay entitlement remain in dispute. It is therefore necessary to address the merits of the remaining issues raised in the Claim and the parties' Submissions.

The Organization argues that the Carrier violated Rule 28 of the Controlling Agreement by the manner and method in which the Hearing was conducted. After a very careful review of the record before us, we find merit to the Organization's position.

Rule 28(a) provides that Claimant be "given a fair and impartial investigation . . . [and that he] be advised of the charges against him and shall have reasonable time to secure the presence of a Representative of his choice and necessary witnesses . . . " We are satisfied that those fundamental safeguards were not afforded Claimant in this case.

First, the Notice of Investigation made reference to a specific incident involving Claimant's alleged failure to spot and have tamped a low joint on March 19, 1984. Clearly, Claimant was on notice of that particular incident. However, the Notice also referred to Claimant's alleged and general "continual acts of insubordination and willful neglect of duty."

Second, at the Hearing, the Hearing Officer read the charges and stated:

> ". . . should it develop during the investigation that additional principals and/or witnesses are required, this investigation will be recessed and their presence secured."

The Organization took issue with the Notice stating:

> "We are going to take exception to the notice as written, in that we can not properly defend the principal in the way the notice is written up, quote, '. . . his responsibility, if any, with alleged continual acts of insubordination and willful neglect of duty, the most recent being failure to spot and have tamped a low joint on the Belt, Line March 19, 1984.' We are ready to proceed on that one instance of low joint on March 19, but the other, continual acts is real vague to say the least and we take strong exception to that part of it."

Testimony was taken from Carrier's Roadmaster J. Vialpando concerning the March 19, 1984, incident. Vialpando further testified about other dates and incidents of misconduct that he attributed to Claimant during the period January through March, 1984. After each date and incident was revealed, the Organization took strong exception to the consideration of such testimony claiming an inability to properly present a case on Claimant's behalf. The broad based nature of the inquiry by the Hearing Officer even included the following question:

> "Q. Mr. Vialpando, has there been many other instances over the last couple three years of problems that you had with Mr. Quintana beside what was brought out here today?
>
> A. Yes, sir, there has."

The Organization's protests concerning the conduct of the Hearing were typified by the following exchange between the Organization's Representative and the Hearing Officer:

"MR. OCHOA: Mr. Dean Pope, I have to protest this thing again. It seems to me like there is absolutely no way we can counter any of this hearsay evidence as brought up by Mr. Vialpando. If these days and times and violations were evident I'm sure these dates could have been entered in the notice of investigation and at this time we could have brought the necessary, the Carrier should have brought the necessary witnesses in here to show up, and also the principal, here, is without any way to properly defend himself. I strongly protest this type of procedures.

MR. POPE: Your objection will be entered, Mr. Ochoa and we will continue at this time."

After the incidents and dates were identified through testimony of the Carrier's witnesses, the following exchange occurred:

"MR. OCHOA: I want to bring to the attention of this committee here that if the Carrier is on a fishing expedition bringing in witnesses related to charges that are not a part of this investigation notice, that we request that it bring all witnesses having any bearing in regard to anything that is being placed under investigation that is not a part of the notice of investigation. We feel that there has been charges made here that we have no way of disproving. . . . "

MR. POPE: Your statement will be entered and we will continue with the investigation.

* * *

MR. OCHOA: I am asking that all witness on both sections that have bearing in this case including management officials that Mr. Quintana has contacted during the past years regarding his problem with Mr. Vialpando to develop the facts to show who is a fault here.

MR. POPE: We will continue with the investigation at this time, Mr. Ochoa. Mr. Quintana requested 1 witness which was notified to attend this investigation which we will get to as soon as we get done with Mr. Cordova.

MR. OCHOA: That is the basis of the specified charge, the tamping of the low joint. We were not made aware of all the added charges that you have since brought forth at this investigation.

MR. POPE: We will continue at this time."

Rather than permitting other witnesses to be called or postponing the Hearing to permit the Claimant and the Organization to prepare a defense to the charges raised for the first time at the Hearing, the Hearing Officer, contrary to his opening statement that such procedures would be followed, closed the Investigation with the following:

"MR. POPE: Gentlemen, it is the opinion of the Investigation Board that all of the pertinent facts have been developed concerning the incident referred to in the notice of investigation. Unless there are further questions from the representative, I would like to ask the principal and his representative if, in their opinion, this investigation has been held in accordance with the provisions of their current working Agreement.

MR. OCHOA: No, sir."

Thus, the record clearly demonstrates a situation where general allegations were made in the Notice of Investigation, those allegations were then raised at the Hearing for the first time with specificity and requests to permit the Organization on behalf of the Claimant to obtain witnesses concerning those additional allegations were denied. Considering the general allegations in the Notice and the conduct of the Hearing, we cannot say that Claimant was "given a fair and impartial investigation" within the requirements of Rule 28(a). Claimant was not given the opportunity to properly defend himself against the broad charges made. Claimant's efforts to take steps to defend himself through the calling of other witnesses upon learning the specifics of the additional charges were, for all purposes, thwarted by the Hearing Officer notwithstanding the fact that the Hearing Officer stated at the outset of the Hearing, and consistent with the language in Rule 28(a), that such procedures would be followed.

Fundamental concepts of fair play and due process require more than what was given to the Claimant in this Hearing. This Board has long held that charges against an employee are not required to have the precision of finely honed legal pleadings. However, those charges must reasonably apprise the employee of the set of facts and circumstance under inquiry so that he will

not be surprised and can prepare a defense that will assure protection of his rights - all of which guarantee the right to a "fair and impartial" Hearing. See Third Division Award No. 22910. Considering the wording of the charges and the Hearing Officer's preclusion of Claimant's efforts to obtain evidence and witnesses to rebut those allegations, a fair and impartial Hearing was not given in this case.

Therefore, we shall not consider the incidents raised for the first time at the Hearing, i.e, the incidents other than the events of March 19, 1984. Since the Carrier based its decision to discharge Claimant upon incidents other than March 19, 1984, we find that the record does not demonstrate substantial evidence to justify the termination decision.

With respect to the incident of March 19, 1984, the record demonstrates that Claimant was instructed by Roadmaster Vialpando to fix a low spot at Mile Post 1.1. Vialpando later checked the spot he was referring to only to find that it was not repaired. Claimant testified that on March 19, 1984, he was instructed by Vialpando to fix a low spot and that, in fact, he did make the repair. It appears from this record that Vialpando may well have been referring to one spot and Claimant fixed another. Therefore, at most, the record demonstrates a misunderstanding. We cannot say on the basis of this record that discipline could be imposed for such a misunderstanding.

The Claim is therefore sustained. Claimant's back pay entitlement shall be mitigated by the amounts of wages earned subsequent to his October 1984 reinstatement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of November 1986.