

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 27923
Docket No. MW-26971
89-3-85-3-762

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Chesapeake and Ohio Railway Company
(Southern Region)

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

(1) The disqualification of Mr. J. K. Mann as a track foreman on March 28, 1985 was improper, without just, sufficient or reasonable cause (System File C-M-2778/MG-5186).

(2) The Carrier shall return the claimant to the position of track foreman and he shall be allowed the difference between what he would have been paid at the track foreman's rate and what he was paid in a lower rated position for the period he has been withheld from the position of track foreman."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

At the time of the incident involved in this matter, Claimant, an employee with 42 years of service, held the position of rail gang foreman on the Carrier's Southern Region. As of March 28, 1985, Claimant held the foreman's position for 11 days and was still in the probationary period for that position.

According to the Carrier, its Supervisor noticed two employees sitting while other employees were working and instructed Claimant to put the two sitting employees to work. Further, according to the Carrier, Claimant became angry and stated that he did not have to take this kind of abuse and handed his radio to the Supervisor. On March 29, 1985, the Supervisor disqualified Claimant from the foreman's position.

The Organization offers a different version of the incident. According to the Organization and as substantiated by statements given by employee witnesses to the event, when the Supervisor pointed to the two sitting employees, he grabbed Claimant by the shoulders and physically spun Claimant around whereupon a heated discussion occurred. Subsequent interviews of certain employee witnesses by a Carrier officer showed that the Supervisor turned Claimant around in a "violent" or "rough" manner.

The Organization argues that Claimant's disqualification was disciplinary in nature and therefore Claimant was entitled to a hearing under Rule 21(a)(1) and that, in any event, since Claimant was used in the past as a foreman without complaint, the Carrier cannot now question his qualifications. The Organization seeks Claimant's reinstatement to the foreman's position with compensation for the rate differential. The Carrier argues that Claimant was not properly performing his duties as a foreman by allowing two employees to sit idle near the tracks and not perform work; by giving up his radio, Claimant voluntarily gave up his rights as a foreman; and relying upon Rule 17, since Claimant's disqualification was within 30 days of the date Claimant was promoted to the foreman's position, no hearing was required under Rule 21.

We agree with the Carrier that Claimant's disqualification as a foreman by the Supervisor was an act within the Carrier's prerogatives in light of the evidence that Claimant was not adequately performing his duties by allowing two employees to sit without working. The fact that Claimant may have been used as a foreman for some unspecified period in the past is insufficient in this matter to prevent Claimant's disqualification which occurred within the 30 day probationary period. As such, we are not satisfied that the act of disqualification was disciplinary in nature entitling Claimant to a hearing under Rule 21.

However, we are satisfied that the record sufficiently demonstrates that the Supervisor placed his hands on Claimant's shoulders and forcibly and improperly spun Claimant around as he pointed to the two idle employees. The question raised by the Carrier that certain employee statements alluded to by the Organization were not properly presented on the property does not alter this finding since the assertions contained in those statements were referred to on the property and further since the Carrier's investigation was in part corroborative of some of those assertions. We must therefore find that the Supervisor's actions took place as alleged by the Organization. Such an unprovoked act by the Supervisor has absolutely no place in the employer-employee relationship and cannot be condoned. While the facts in this matter do not permit us to award the affirmative relief requested by the Organization, in light of the Supervisor's actions towards Claimant, should Claimant desire to qualify in the future as a foreman, he shall be free to do so and the disqualification involved in this matter shall in no way be considered by the Carrier in determining whether Claimant qualifies for the foreman's position.

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Claim disposed of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 6th day of June 1989.