

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company

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

(1) The thirty (30) day suspension imposed upon Mr. M. D. Heath in Roadmaster P. A. Torres' letter dated October 31, 1986 was arbitrary, capricious and in violation of the Agreement.

(2) The Agreement was further violated when Mr. M. D. Heath was disqualified as an operator on the TMT (Tamper Corp. Mark III) within a letter dated November 20, 1986 (System File D-95/870279G).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. M. D. Heath's record shall be cleared of the charges in connection with the thirty (30) day suspension, he shall be compensated for all wage loss suffered and his qualification as an operator on the TMT (Tamper Corp. Mark III) shall be restored."

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.

On October 29, 1986, Claimant was a Track Machine Operator assigned to operate a Tamper TMT-197-TPS (hereinafter Tamper). While performing that assignment he had a collision with a Ballast Regulator BR-138 causing damage to his machine. On October 30, 1986, he waived his right to an investigation and signed a letter accepting 45 demerits. However, this letter was not signed by his Supervisor.

Sometime during October 30 or 31, the Supervisor reviewed Claimant's record, which shows another accident with the Tamper on September 29, 1986, for which Claimant was assigned 30 demerits. Claimant had waived Investigation and accepted the 30 demerits. The Supervisor changed his mind regarding the penalty for the October 29, 1986, accident and on October 31, 1986, offered Claimant another waiver letter proposing a 30 day suspension instead of the 45 demerits. Claimant waived Investigation and signed this letter also.

On November 6 and 7, 1986, Carrier's officials inspected the Tamper and discovered that, in addition to damage caused by the accidents, the machine was dirty and had not been properly serviced. In addition, Carrier alleges that the travel, work and lifting pressure had been tampered with. Therefore, on November 20, 1986, Carrier sent a letter to Claimant disqualifying him as an operator on the Tamper "as you have failed to demonstrate fitness and ability in your efforts to qualify."

The above facts are agreed to by the Parties.

On November 28, 1986, the Organization wrote to the Carrier filing a Claim and requesting a conference. Its letter refers to the 45 demerit letter of October 30, 1986, as having been signed by the Supervisors. In view of this, the Organization deems the 30 day suspension improper. In addition, it contends that the disqualification is, in effect, additional discipline and therefore unfair.

In its submission, the Organization defends its request for a conference as in accordance with a June 19, 1985 Letter of Agreement which states in part:

"If a disqualified employee feels he has been unjustly treated, he may request a conference pursuant to Rule 48(n) in order to attempt to prove his qualifications, the proceeding shall be recorded, and a copy of the transcript furnished the disqualified employee and his representative. A decision shall be rendered, in writing, within twenty (20) days following the date of conference."

Rule 48(n) requires that a request for a conference must be made within 20 calendar days of "the cause of complaint."

The Carrier replied on January 19, 1987, refusing to change its decision on the 30 day suspension and stating that the request for a conference was untimely because it was dated "November 28 when the incident occurred on October 31, 1986, which makes your request eight days past the agreed to limit."

Further discussions failed to resolve either of the issues and on February 12, 1987, the Organization notified the Carrier that it intended to file an Ex Parte Submission before this Board.

The Organization states the issues as follows:

- "(1) Whether the Claimant was arbitrarily and capriciously disciplined when, on October 31, 1986, he was persuaded by the Carrier into signing a waiver to an investigation and accepting a thirty (30) day suspension in addition to the forty-five (45) demerits which had already been placed in his personnel record as a result of his signing a waiver on the previous day, October 30, 1986 for the same alleged offense; and
- (2) Whether the Carrier violated the Agreement when it disqualified the Claimant as a TMT (Tamper Corp. Mark III) operator and refused to grant him a conference in connection therewith."

The Carrier, on the other hand, finds the issues to be:

- "(1) The Organization has, in its statement of claim, attempted to reframe this dispute into something other than what it was on the property.
- (2) This claim is improperly before this Board since Claimant accepted discipline and waived his right to a hearing.
- (3) Claimant's disqualification as a Track Machine Operator cannot be considered discipline."

Both Parties agree that, if the Organization is correct under its first issue, the 45 demerits would supplant the 30 day suspension. The Organization contends that, in forcing the Claimant to accept the latter in place of the former the Carrier was subjecting him to double jeopardy, i.e., that he was disciplined twice for the same offense.

As to the first issue raised by the Carrier, it is not necessary to go into all the nuances of whether the Claim, as presently submitted, attempts to reframe the issue so as to submit for our consideration a matter not handled on the property. The Organization is incorrect in its contention that the Claimant was disciplined twice for the same offense. Clearly, the 30 day suspension was intended to replace the 45 demerits.

Although the Supervisor should have reviewed Claimant's record and thought through his penalty determination before asking Claimant to sign the waiver, we cannot say that the Carrier is prohibited from changing its mind, albeit at the last moment. Rule 48 (j) requires a signed waiver and this means signed by both parties.

In the absence of a waiver signed by both parties, the 45 demerit offer could be withdrawn and superseded by the 30 day suspension. There is nothing in the record to support the contention that the Claimant was coerced into signing a waiver and accepting the 30 days. Clearly, he had a right to reject it in favor of an Investigation if the withdrawal of the first offer was unacceptable to him.

Since he waived Investigation and accepted the 30 day suspension, that issue is closed and the Carrier is upheld on its statement of issue (2). (The Board assumes from the record that the 30 day suspension is the only disciplinary action placed in Claimant's personnel record as a result of the October 29, 1986, accident and the 45 demerit letter is null and void.)

As to the issue of Claimant's disqualification, the Organization's statement of the issue is accepted and answered in the affirmative; the Agreement was violated when the Claimant was refused a conference as requested on his disqualification. The first paragraph of the Organization's request for conference, dated November 28, 1986, embraces its objection to the disqualification as well as to the disciplinary action.

The issue is not whether the disqualification is tantamount to additional discipline. The Letter of Agreement dated June 19, 1985, regarding disqualification is controlling and provides that an employee suffering disqualification has the right to request a conference, a request that was made and not granted in the present case. The third paragraph of that letter states that such conference may be requested "pursuant to Rule 48(n)." This reference clearly brings such requests within the ambit of the appeal procedure of Rule 48.

As to the contention that the request for a conference was untimely because it was dated November 28, 1986, and the accident occurred on October 31, 1986, this objection did not find its way specifically into Carrier's statement of the issues; possibly because the disqualification was discussed in a conference on September 3, 1987. In any event, the 20 days provided in Rule 48(n) could not begin to run until Claimant was notified of his disqualification on November 20, 1986.

This Board is not deciding Claimant's fitness to operate the tamper. We hold only that the disqualification must be overturned because of the denial of a conference and the procedure afforded under the letter of June 25, 1985. In summary, the contention that Claimant was improperly disciplined by the imposition of a 30 day suspension is denied. The Claim that the Claimant's disqualification to operate a tamper was improper is sustained.

A W A R D

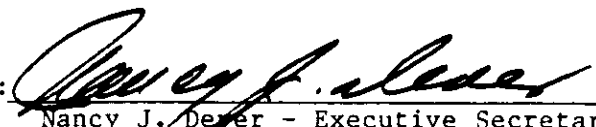
Claims sustained in accordance with the Findings.

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Award No. 28046
Docket No. MW-28288
89-3-88-3-65

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 10th day of August 1989.