

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Duluth, Missabe and Iron Range Railway Company

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

(1) The discipline of disqualification as roadway equipment repair foreman imposed on Mr. J. Myers for alleged violation of Rules 12 and 24 of the General Rules and Code of Conduct, Rules of the Engineering Department on March 27, 28 and 29, 1989 was arbitrary, capricious and in violation of the Agreement (Claim No. 22-89).

(2) Mr. J. Myers' personal record shall be cleared of the charges leveled against him, he shall be reinstated as a roadway equipment repair foreman with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered plus any other expense accrued to him due to travel."

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.

Prior to his disciplinary disqualification, the Claimant had established 18 years of seniority in the Track Subdepartment. He was regularly assigned to the position of roadway equipment repair foreman, and he was working under the supervision of a General Supervisor when this incident occurred. As a roadway equipment repair foreman, the Claimant was responsible to guide the equipment repairmen assigned in performing the repairs and maintenance to a variety of track maintenance machinery.

On the afternoon of March 27, 1989, a General Supervisor informed the Claimant that yard cleaner YC-2 was needed at Two Harbors, and he instructed the Claimant to prepare and send the yard cleaner to Two Harbors. The Claimant did not assign a mechanic to the task until March 30, 1989. The yard cleaner did not leave Proctor until April 6, 1989, and it reached Two Harbors on April 10, 1989.

Under date of March 31, 1989, the Claimant was instructed to attend a Hearing. The Claimant was charged with:

"...failure in your duties as Roadway Equipment Repair Foreman by not following the instructions of your supervisor concerning the preparation of Yard Cleaner 2 on March 27, 1989 and by not properly directing and monitoring the activities of your assigned forces on March 27, 28, and 29, 1989. Applicable rules are but not limited to, Rules 11, 12, and 24 of the General Rules and Code of Conduct, Rules of the Engineering Department."

Rule #12 of the Engineering Department provides "Employees must comply with instructions from their foreman, supervisor or an identified official of the Company." Rule #24 of the Engineering Department provides in relevant part: "All foremen or others in charge of work must know that the employees under their supervision...fully understand and properly perform their duties."

As a result of the Hearing, the Engineer-Maintenance of Way notified the Claimant that he was disqualified from the position of roadway equipment repair foreman, and his name was removed from the applicable seniority roster effective April 21, 1989.

The Organization argued the Carrier failed to present any evidence whatsoever to support its actions. The Carrier has the burden of proof. (Third Division Award 14120). The Organization claims the General Supervisor never gave the Claimant clear or specific instructions to permit the Claimant to know exactly what day the yard cleaner YC-2 was to be serviced and/or ready to be moved to Two Harbors. (First Division Award 20426, Fourth Division Award 3706). The evidence surrounding the alleged insubordination was not sufficient to deduce a finding of guilt. (Third Division Awards 21455, 14479, 17347).

The Organization alleges the Claimant was disciplined in violation of the Agreement. The Organization claims the Claimant's alleged failure to talk with his men and/or his alleged attitude was not cited in the notice of charges/hearing, and an employee cannot be tried on one charge and convicted of another. (Fourth Division Award 1983, Third Division Awards 19357, 20686).

In support of its position the Carrier relies heavily on the testimony of the General Supervisor. The Carrier addressed the Organization's arguments presented in letters dated April 27, 1989, May 19, 1989, and September 11, 1989. The physical condition of the yard cleaner was irrelevant because the Claimant failed to give the General Supervisor any reports of progress or problems. Although the yard cleaner ultimately reached its destination, the delay was unjustified. Any assumptions the Claimant made about the lack of urgency are unsupported and inconsistent with the testimony of the General Supervisor. No justification for the Claimant's behavior. By letter dated May 26, 1989, the General Supervisor counseled the Claimant concerning communications.

The Carrier maintained the disqualification of the Claimant from the Foreman position was reasonable and warranted on the basis of the offense. The Carrier relies solely on Third Division Award 27903. In that case, a Mechanic-In-Charge was assigned to install corrugated panels over a conveyor. But due to a equipment failure, three employees were unable to complete the assignment during the course of a work day. The Mechanic-In-Charge was suspended and disqualified because his actions demonstrate a lack of ability to handle the added responsibility of the position.

Award 27903 relied upon by the Carrier can be distinguished from the case at bar. In Award 27903, the Supervisor directed the Mechanic-In-Charge to perform a specific task, and the Carrier proved the reasonable time required to perform the task. In this case, the General Supervisor never specifically directed the Claimant that the repairs to the yard cleaner must be completed by a certain date. The alleged personality conflict among the employees and the Foreman and the Foreman and the Supervisor failed to mitigate the Supervisor's failure to provide the Foreman with specific time constraints for repairing the yard cleaner.

With respect to the substantive charge, this Board finds that there is sufficient probative evidence in the record to establish that the Claimant is guilty of the charge against him.

With respect to the disciplinary action, the Board will not set aside discipline imposed by a Carrier unless it is unreasonable, arbitrary, or capricious. Third Division Award 26160. In this case, the disqualification was too harsh because the Claimant ultimately complied with the Supervisor's instructions and completed the repairs to the yard cleaner. Therefore, the Claimant is to be reinstated with his seniority as a foreman but without backpay.

A W A R D

Claim sustained in accordance with the Findings.

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Award No. 29421
Docket No. MW-29379
92-3-90-3-289

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.