

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29831
Docket No. MW-29977
93-3-91-3-368

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

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

- (1) The disqualification of Mr. A. S. Alessi, Jr., as a welding foreman for alleged violation of Rules F-2, L and O between 10:00 P.M. on September 28, 1989 and 4:00 A.M. on September 29, 1989 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-2676D AMT).
- (2) The Claimant shall have his record cleared of the charges leveled against him, he shall be restored to his position as welding foreman with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered as a result of the Carrier's actions."

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 employe 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 were given due notice of hearing thereon.

At the time of the incident precipitating this dispute, Claimant was regularly assigned as a Welding Foreman on Gang H182, with headquarters at Penn Coach Station, Philadelphia, Pennsylvania. Claimant was also serving as Local Chairman for the Organization at that time.

The basic facts of this case are not in dispute. On September 28, 1989, Claimant arrived at the Track Office at Penn Coach Yard at approximately 10:00 P.M. for his regular tour of duty. Shortly after his arrival, Claimant informed the Track Supervisor that he was too ill to work, and requested a replacement to work on his shift for that evening. Claimant remained in the Track Office and proceeded to fill out timecards for his gang.

At approximately 11:15 P.M., the Track Supervisor advised Claimant that he was locking up the Track Office. Claimant remained on the property until approximately 12:15 A.M., at which time the Assistant Track Supervisor directed Claimant to leave the property. Claimant responded that he was engaged in union business, to which the Assistant Track Supervisor responded in words or substance, "You need permission of the Supervisor to conduct union business on the property." Then the Assistant Track Supervisor again directed Claimant to leave the property, and Claimant got into his personal vehicle and drove off the property.

The remaining events of that night are in dispute. The Organization maintains that a short distance from the property Claimant became too ill to drive, so he parked his car in a parking lot approximately three blocks from the Penn Coach Yard. He next arranged by telephone for a friend to come get him with someone who could drive Claimant's vehicle to his home in Lindenwald, New Jersey. While waiting in his vehicle, Claimant noticed a Carrier van from Gang H182 and went over to speak with two Gang members for a short time. He returned to his personal vehicle and turned on his radio. Upon hearing that an Amtrak train had derailed in Virginia earlier that evening, he again approached the two Gang members to inform them of the derailment.

According to the Organization, while Claimant was talking to the Gang members, at approximately 3:00 A.M., the Assistant Track Supervisor approached Claimant and "began screaming at the Claimant in an uncivil, annoying and obnoxious manner." The Organization maintains that the Assistant Track Supervisor then directed Claimant to leave the property, even though he was not on Carrier property. In addition, the Organization asserts that at no time did Claimant defy or challenge the threats and instructions issued by the Assistant Track Supervisor. Instead, he waited inside his personal vehicle until his friend arrived at 3:30 A.M.

The Carrier maintains that Claimant remained in the vicinity of the Gang H182 vehicle to "continue a ruse" he had begun on the premises; to wit, he marked off sick because he felt there was too much work assigned to his gang and because he did not wish to work with the Assistant Track Supervisor. Further, Carrier asserts that Claimant falsely claimed to be on union business to disguise his insubordination. According to the Carrier, it was precisely by persisting in his alleged union business that Claimant interfered with the gang's ability to perform its assigned task on the night in question. Under Claimant's influence, the gang did not start a job that they did not want to finish, and believed that they could avoid.

On October 12, 1989, Claimant was notified to attend an Investigation in connection with the following charges:

"...Violation of the National Railroad Passenger Corporation Rules of Conduct, Rule 'F-2' that part which states: '...Employees, whether on or off duty, will not disrupt or interfere with other employees in the performance of their duties.'

Violation of the National Railroad Passenger Corporation Rules of Conduct, Rule 'L', that part which states: 'Employees must obey instructions, directions, and orders from Amtrak supervisory personnel and officers except when confronted by a clear and immediate danger to themselves, property, or the public. Insubordinate conduct will not be tolerated.'

Violation of the National Railroad Passenger Corporation Rules of Conduct, Rule 'O', that part which states: 'Employees must...attend to their duties during assigned working hours. Employees may not be absent from their assigned duty or engage in other than Amtrak business while on duty or on Amtrak property without the permission of their supervisor.'

SPECIFICATION Between 10:00 p.m. on September 18, 1989, and 4:00 a.m. on September 29, 1989, you are alleged to have refused to perform your duties using sickness as an excuse, yet claiming to be fine if you were allowed to perform other work. During this time, after you had refused your assignment, you allegedly

failed to comply with requests and orders from Assistant Supervisor C. Patterson to remove yourself from company property and interfered with other employees in the performance of their duties."

The Hearing commenced October 12, 1989, and continued over three separate days, concluding on February 8, 1990. Following the final day of Hearing, the Carrier notified Claimant of his permanent disqualification as [Welder] Foreman.¹ The discipline was appealed by the Organization on behalf of Claimant and processed through the usual channels up to and including the highest Carrier officer empowered to handle such matters.

The transcript in this case comprises 216 pages and involves three days of investigative hearing. The Organization made a procedural objection concerning the quantity of errors found in the transcript. Carrier did not dispute the Organization's correction of those errors, and the transcript submitted to the Board is a completely corrected transcript. Accordingly, the uneven quality of the original transcript does not constitute a fatal procedural flaw.

With respect to the merits of the claim, a thorough review of the testimony in this voluminous record supports Carrier's charge that Claimant used his illness as a pretext for avoiding a task he felt was impossible to complete in the time allowed. While it is apparent that neither the Track Supervisor nor the Assistant Track Supervisor questioned Claimant's marking off, his subsequent lingering on the property calls into question his motivation for doing so. Moreover, the testimony of the Track Foreman is unrefuted that Claimant admitted that he had:

"...marked off because they want[ed] him to put in a 60 foot stock rail and switch point and he felt that the time limit they had was not enough time to get out there and finish up with [in] the time they were going to allow them to do it."

To that extent, therefore, Carrier has proven that Claimant violated Rule "L."

¹ The actual notice of discipline reads "Track Foreman", but both Parties acknowledge that it should say "Welder Foreman," and the Organization's Statement of Claim reflects that understanding.

The remainder of Carrier's charges are not supported, however. It is unrefuted that Claimant remained on the property after marking off sick and proceeded to fill in gang member timecards while waiting for his replacement to arrive. It is also apparent that he remained on the property, allegedly in his capacity as Local Chairman, after leaving the Track Office. There is no support for Carrier's contention, however, that he refused to leave the property when told to do so. On the contrary, the record indicates that when told to leave, he got into his personal vehicle and drove off the property.

Moreover, there is not a scintilla of evidence on the record before the Board to support Carrier's charge that Claimant "interfered with other employees in the performance of their duties." To the contrary, the two gang members testified without contradiction that the fact that Gang H182 failed to accomplish its tasks on September 28-29, 1989, had nothing to do with any actions by Claimant. Rather, extensive testimony on the record established that a combined lack of equipment and supervision resulted in the Gang's inability to perform their duties that night.

There can be no question that, in his capacity as Track Foreman and Local Chairman, Claimant had an enhanced responsibility to set an example of propriety and good judgment for his fellow gang members. Marking off sick to avoid work would be a serious infraction for any employee; in Claimant's case it is an even more troublesome Rule violation. Accordingly, disqualification as Welder Foreman for an extended period of time was an appropriate penalty. However, since Carrier's other charges against Claimant were not supported on this record, the penalty of permanent disqualification by Carrier must be deemed excessive. Thus, it is the finding of this Board that the period of disqualification already served is sufficient penalty for the single proven charge.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 29th day of September 1993.