

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29881  
Docket No. CL-30011  
93-3-91-3-424

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

(Transportation Communications International  
(Union  
PARTIES TO DISPUTE: (  
(CSX Transportation, Inc. (former Chesapeake &  
(Ohio Railway)

STATEMENT OF CLAIM: "Claim of the System Committee of the  
Brotherhood (GL-10612) that:

The Carrier violated the Provision of the  
existing Clerks' Agreement and supplements  
thereto in the following particulars: A. On  
December 15, 1987, a Board of Inquiry was held  
on General Foreman Steve C. Lupton which  
Inquiry was improper, void and violative of  
said agreement in that (1) Employee Lupton was  
not apprised of the charges against him, said  
charges being indefinite, nebulous, not  
precise and insufficient and Lupton's right to  
be informed of said charges was not waived;  
(2) the time limit for preferring charges was  
not reasonable after the alleged offense; (3)  
the discipline mandated is excessive and  
disproportionate; and (4) the action of the  
carrier was arbitrary and capricious.

RELIEF SOUGHT

- A. That employee Lupton be reinstated to the position of General Foreman at the rate of \$2,454.32 per month, with rest days of Saturday and Sunday.
- B. That Lupton be fully compensated for all time and wages loss due to the decision of the Board of Inquiry.
- C. That in addition to his regular earnings he be compensated for an allowance for casual and unassigned overtime; and
- D. That the twenty (20) days overhead suspension be removed from his record."

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 waived right of appearance at hearing thereon.

Claimant in this case was assigned as a General Foreman in Carrier's Purchases and Materials Department at Raceland, KY. He had approximately 20 years of seniority, four years of which had been as a General Foreman. Claimant's General Foreman position was a partially excepted position. As such, it was exempt from the seniority and displacement provisions of the negotiated rules agreement. All other provisions of the rules agreement were applicable to the position.

On November 3, 1987, Claimant was instructed by his Supervisor to unload a railcar of box car roof sheets and store them in a designated area. Claimant began the performance of this assignment and continued with the other duties related to his General Foreman position. During the early afternoon hours of his first shift assignment, Claimant was in the process of moving a stack of roof sheets when, he alleges, he experienced operating difficulties with the forklift which he was using. The forklift, with the stack of roof sheets still on it, was left sitting across an active storeroom track. Claimant said he left the forklift and material in this position because he was required at that time to assist another employee in the performance of another job function and because he "was under the impression that the track was switch locked and blue flagged". Claimant concluded his tour of duty while assisting the other employee and departed from the property. He did not attempt to move the forklift and roof sheets from the active storeroom track on which they were sitting nor did he attempt to notify his Supervisor of the situation before he left the property. When the Supervisor later found the situation as described above, he assigned other employees to remove the forklift and roof sheets from the track which move was performed without incident or operating problem.

Subsequently, by letter dated November 23, 1987, Claimant was instructed to attend a Board of Inquiry on December 2, 1987, on the following charge:

"You are charged with responsibility in connection with leaving box car roof sheets and 80001b Clark forklift, which were your responsibility to store lying across #2 Storeroom track below the Shaw crane at 2:30 pm on November 3, 1987."

By consent of the parties, the Board of Inquiry was twice postponed and finally held on December 15, 1987, at which time Claimant was present, represented and testified on his own behalf. Following completion of the Board of Inquiry, Claimant was notified by letter dated December 18, 1987, that he was found at fault and was disciplined by removal from the position of General Foreman and by assessment of a 20-day overhead suspension. The removal from the General Foreman position was effective December 28, 1987. Appeals on behalf of Claimant were timely instituted and progressed thru the normal grievance procedures. Failing to reach a satisfactory resolution during the on-property handling of the dispute, it has come to this Board for final and binding adjudication.

The employees did not challenge the fact that Claimant left the equipment and material as described above. Rather, they raised several procedural arguments and contended that "discipline was not warranted even though the sense of a rule violation was present".

The procedural arguments advanced by the Organization involved:

- "(1) lack of specific charge;
- (2) violation of time limits for scheduling the hearing;
- (3) violation of time limits for assessing discipline following hearing;
- (4) multiple roles of the same supervisory officer;
- (5) violation of due process rights by assessing discipline by disqualification without a separate, specific charge re job performance."

On the merits, the Organization argued that the discipline as assessed was excessive, arbitrary and unreasonable and not commensurate with the charged offense.

The Carrier argued that the charge was both timely and specific, that the hearing was fairly conducted, that the offense was serious and that the discipline was commensurate with the proven offense.

The applicable agreement provision is Rule 27-Investigations, Representation, Appeals, Etc. which reads, in pertinent part, as follows:

"(a) \* \* \* \*

An employee will within a reasonable time prior to the investigation be apprised in writing of the specific charge or charges against him, with copy to the Local Chairman, and will have reasonable opportunity to secure the presence of necessary witnesses and duly accredited representatives. The investigation will be held within ten (10) days from date charged with the offense or held out of service (unless an extension of time is agreed to between the proper Officer and Local Chairman). The investigation and decision will be confined to the specific charge or charges, and the decision will be rendered within ten (10) days after completion of the investigation...."

From our examination of the Notice of Investigation, we conclude that it contained all of the prerequisites necessary for a "specific charge". The alleged event, along with the time, place and date of the alleged event were clearly set forth in the charge notice. Nothing more is required to meet the requirement of specificity. Neither Claimant nor his representative were surprised by any of the testimony or the events which were developed during the hearing. In the judgment of this Board, the charge notice was specific and met the requirements of the Rule.

As for contention (2), the Organization argued that the hearing should have been scheduled to begin "within ten (10) days after the alleged offense". Carrier, on the other hand, said that the notice of charge "must be issued within a reasonable time after the offense". Unfortunately both parties are wrong in this respect. There is no language to be found in Rule 27 which refers to making a charge within either ten days or within a reasonable time after an alleged offense. The language of Rule 27 is clear and concise. It refers to making a specific charge "within a reasonable time prior to the investigation". It requires that the Investigation

"will be held within ten (10) days from the date charged with the offense...." In this case, the specific charge was given within a reasonable time prior to the Investigation and the Investigation was scheduled to be held within ten days from the date charged with the offense. Arguments to the contrary are without merit.

The hearing was held and concluded on December 15, 1987. The decision to assess discipline was rendered on December 18, 1987. The Organization argued that because the effective date of Claimant's disqualification as set forth in the December 18, 1987 notice of discipline was identified as December 28, 1987, the language of Rule 27 was somehow violated. The agreement language in question mandates that "the decision will be rendered within ten (10) days after completion of the investigation". The Organization's argument that a decision is rendered only when there exists both a finding and an imposition of discipline simply is not supported by the language of the negotiated rule here in question. The decision to discipline in this case was timely rendered. Arguments to the contrary are rejected.

There has been no showing in this record that the multiple roles of the same Supervisory officer, namely charging officer, disciplining officer and initial appeals officer, in any way denied Claimant any of his due process rights. The appeals process on the property assured the employee of a consideration of his appeal by a higher authority officer who was not involved in the initial disciplinary process. Therefore, the contention in regard to the multiple roles of the same supervisory officer is without merit.

As for the argument relative to the need for a separate charge, etc. prior to assessing discipline by disqualification, that contention too has no basis in either the rules agreement in particular or in industrial disciplinary procedures in general unless it is so specified in the particular negotiated agreement. The position from which Claimant was disqualified was, by contract, specifically exempt from the seniority and displacement rules. Inasmuch as Carrier had the prerogative to assign employees to such positions, they retained the prerogative to remove such employees for proven infractions. In addition, if the Carrier can suspend the Claimant for disciplinary reasons, it logically follows that the Carrier has the right to suspend the employee from his General Foreman position and require him to take a lower rated position for disciplinary reasons.

Having said that, however, this Board must decide on the basis of the evidence contained in this case record whether or not permanent disqualification is justified. While this Board does not, and should not, substitute its judgment for that of the Carrier in the assessment of discipline, the Board does have

responsibility and jurisdiction to determine if the assessment of discipline in a particular case is excessive. In this case, there is no evidence or record of any prior dereliction of duty on the part of the Claimant. His proven dereliction in this case was a serious offense which clearly deserved discipline. However, like a suspension, demotion or disqualification from a position should be an act of corrective discipline rather than mere punishment. It is the judgment of this Board, on the basis of the record and evidence found in this case, that permanent disqualification for this single offense is an excessive application of discipline. Therefore, Claimant should be returned to the General Foreman status if a position in that category remains at the facility for which Claimant is otherwise qualified. There will be no Foreman's compensation for the period of time during which Claimant has been in the lower grade. All claims for compensation are denied.

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 26th day of October 1993.