

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31327
Docket No. MW-30442
96-3-92-3-192

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad Company (former
(Chicago, Milwaukee, St. Paul and
(Pacific Railroad Company)

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

- (1) The disciplinary disqualification of Track Foreman B. J. Stewart, on September 10, 1990, by ADM-Engineering M.S. Hanson was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-01-91-D090-01/8-00030 CMP).
- (2) The Claimant shall have his foreman's seniority reinstated with all rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered while working in the lower classification of trackman and he shall be allowed 8.5% interest compounded annually for all lost earnings 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 employee or employees involved in this dispute are respectively carrier and employee 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.

The Carrier and the Organization individually determined to file this dispute with the Board. In each case, the other party completed Submissions. The two complete files (Dockets MW-30375 and MW-30442) are virtually identical. Obviously, the Board need rule on only one of the completed files. The Carrier letter indicating its intention to file the matter with the Board preceded that of the Organization by six weeks. However, the Carrier somehow adopted what was to be the Organization's Statement of Claim. On this basis, the Board finds it more reasonable to review that matter based on the Organization's initiative. In Third Division Award 31326 the Board dismissed the claim identified in Docket MW-30375.

Under date of September 20, 1990, the Claimant, a Foreman, received a letter which included reference to two earlier letters of criticism and listed seven incidents of unsatisfactory job performance. The letter concluded:

"For these reasons, it is obvious that you have continually failed to perform your duties as a Foreman in a safe and responsible manner and you are, therefore, disqualified as a Foreman and Assistant Foreman, effective immediately."

On September 18, 1990, the General Chairman wrote to the Carrier in pertinent part as follows:

"Consider this a request on behalf of employe, Boyd Stewart, for a hearing in accordance with Schedule Rule #18 to determine the facts surrounding employe Stewart's disqualification as a Foreman and Assistant Foreman effective September 10, 1990. . . ."

It should be noted that, effective August 27, 1990, the Claimant moved voluntarily from his Foreman position to a Track Laborer position. Thus, the disqualification came after the Claimant had left his Foreman's position.

The first question which must be resolved is the nature of the "hearing in accordance with Schedule Rule #18" which actually took place. Rule 18 includes the traditional procedure for an Investigation prior to the imposition of discipline. The Rule also contains a provision for an Unjust Treatment Hearing, which obviously applies after an action has been taken against an employee. The Organization's September 18, 1990 letter simply asks for a hearing "to determine the facts" and makes no mention of the absence of a pre-discipline hearing. The Hearing Officer simply repeated the Organization's request as introduction to the Hearing.

In its pre-hearing correspondence with the Organization, the Carrier referred to the "cause" of discipline and "amount of discipline." In its April 22, 1991 letter following the Hearing, the Organization contended that the Carrier had violated the Agreement and characterized its original September 18, 1990 letter, quoted above, as a request for a "formal disciplinary hearing."

On the other hand, the Carrier's highest designated officer, in her appeal response, stated as follows:

" . . . I do not consider the Claimant as being disciplined but rather disqualified for inability to perform required duties of the job and any hearing conducted was conducted as an unjust treatment hearing."

The Hearing was conducted as if it were a regular disciplinary Hearing rather than an Unjust Treatment Hearing. Carrier witnesses were called to give testimony as to the events covered in the September 10, 1990 letter, and the Claimant, as is normally the case in disciplinary hearings, was called as the final witness. In other words, the Hearing did not commence with the Claimant and the Organization being given the opportunity to state their case to justify that there had been "unfair treatment."

The Board concludes that the parties, deliberately or not, undertook the Hearing as if it were a disciplinary matter and not a matter of alleged unfair treatment. At this point, however, the Board notes that it recognizes the Carrier's authority in judging the fitness and ability of employees. Various Awards have dealt with the question as to whether, absent specific Agreement language, demotions of previously qualified employees are disciplinary in nature. This question need not be resolved here, as it is fully apparent to the Board that both parties treated the matter as disciplinary in nature.

The Organization offered extensive argument to support its view that the Claimant was either not guilty of the charges in the September 10, 1990 letter, or that in some instances there was no factual support for the charges. These need not be reviewed here in detail, because of the Organization's overall contention that the Hearing Officer did not conduct a "fair and impartial" Hearing (specifically required by Rule 18 in disciplinary matters, but presumably also true for an Unjust Treatment Hearing). After thorough review of the lengthy transcript, the Board reaches the conclusion that the Hearing was not "fair and impartial" in that the Hearing Officer made procedural misjudgments and clearly tended to assist Carrier witnesses while also trying to impede the Organization's defense. Here are some examples of this conduct:

1. The Hearing Officer refused the Organization's request for sequestration of the Carrier witnesses, all of whom were the Claimant's supervisors. While it is correct, as stated by the Hearing Officer, that there is no specific contractual requirement for sequestration, in this instance -- with the obvious possibility of overlapping testimony -- it was unreasonable to refuse the request. Nothing in the Carrier's case would have been impeded if the request had been granted.

2. The Hearing Officer refused to permit an Organization question to a Roadmaster (now supervising the Claimant) as to a time when the Roadmaster was working for the Claimant, with a view to examining possible current bias on the Roadmaster's part at the time the Claimant was disqualified.

3. Six pages of the transcript were required before the Hearing Officer permitted the Organization representative to inquire about a particular incident which, though not included in the September 10, 1990 letter, appeared to be relevant as to the establishment of possible hostility by one of the Roadmasters.

4. As an example of coaching Carrier witnesses, there was the following exchange between the Hearing Officer and a Roadmaster. This followed the Organization's attempt to elicit testimony from the Roadmaster as to a telephone conversation in August 1990 supposedly stating that the Claimant was doing a "good job." The Roadmaster had testified that he did not recall such a conversation. The exchange follows:

"Hearing Officer: I guess the only thing I can ask Mr. Milewsky [the witness] is given - given Mr. Stewart's testimony as to his phone conversation and Mr. Wimmer's assertion that the letter of September 10th says he was not doing a good job, would there - could there have been an instance during the time that Mr. Stewart was working on the Dubuque Line, outside from those instances cited in the September 10th letter, that he very well have done a good job?"

A Certainly.

Q And could you have at sometime commented on that fact too.

A Yes I could have."

With these as examples, the Board finds that the Claimant did not receive a "fair and impartial hearing," whether it be considered a disciplinary or an Unjust Treatment Hearing. However, it should be noted that the Board finds no fault with the Hearing Officer's refusal to admit a tape recording in which one of the parties was unaware he was being recorded. Also the Board finds nothing improper with the refusal to accept a notarized statement by a person not at the Hearing; the statement concerned a conversation in which the Claimant was relaying information to the General Chairman.

Whether the Hearing should have been treated as an Unjust Treatment Hearing, the fact is that both parties proceeded as if the matter were disciplinary in nature (until the highest designated officer argued otherwise). As protested by the Organization and as outlined above, the Hearing Officer was at best unartful. As a result, the Claimant did not receive a "fair and impartial hearing." Thus, the Claimant's disqualification must be set aside. This does not go to the merits of the Carrier's reasons for disqualification. As the Claimant himself stated at the Hearing:

"I would like to think it's just opinions and viewpoints that everybody has of any given situation. Two people look at a situation and you get two answers."

As to remedy, the Organization seeks the Claimant's reinstatement of seniority as Foreman and Assistant Foreman retroactive to September 10, 1990 and the expunging of any censure and/or reference to this incident. The Award will so provide.

The Organization also seeks a monetary remedy of the difference in pay between that of Foreman and Track Laborer. The Board finds this inappropriate because the Claimant had moved from his Foreman's position to that of Track Laborer prior to the September 10, 1990 notice. It is entirely speculative as to whether, when, or if he might have bid for and been awarded a higher paying position.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of January 1996.