

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33956
Docket No. MW-34376
00-3-98-3-2

The Third Division consisted of the regular members and in addition Referee Stephen B. Rubin 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 Carrier's actions of withholding Roadway Equipment Operator C. M. Gossage from service and imposing Level 2 discipline for alleged violation of Union Pacific Rule 1.13 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement. (System File D-256/1039326D)
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's personal record shall be cleared of the Level 2 discipline and the charges leveled against him.”

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 were given due notice of hearing thereon.

The Organization appeared and argued orally. The Carrier waived right of appearance.

As of the date of discipline under review the Claimant had approximately 21 years of service.

On July 8, 1996 the Claimant was working as a Equipment Operator assigned to steam cleaning a crane. At the end of his workday the steam cleaning had not been completed. The doors to the storage areas on the crane remained open. In his opinion the tools and equipment could not be properly secured at the job site. Accordingly, the Claimant loaded certain tools and equipment belonging to the Carrier in his truck, took them home and stored them in a shed. He had no specific supervisory authority to do so.

Thereafter the Claimant was assigned to work on different cranes at different locations where the tools that he had stored at home were not needed. The tools needed on those cranes were properly secured and stored at the crane involved.

Rule 1.13 requires employees to comply with instructions applicable to their duties. Rule 1.19 makes employees responsible for the proper use and care of equipment, provides that employees must return railroad property when so requested and forbids the personal use of such property.

On May 29, 1996 S. J. McLaughlin, the Carrier's Vice-President for Engineering Services wrote to "fellow employees" about the storage of Carrier property at home. He wrote in pertinent part:

"It is the policy of the Union Pacific Railroad and Engineering Services not to allow company-owned material, tools and equipment to be stored off of company property. These items may be stored in your company vehicle when the vehicle is parked at your residence, provided the vehicle is locked and the employee has advance authority to take the vehicle home overnight for the prevention of theft. Any exception to this policy needs to be documented and approved by your immediate supervisor."

At the Hearing other employees stated that they had received the letter, but the Claimant stated that he had no recollection of ever having seen it before.

Between July 8, 1996 and early August of that year, divorce proceedings were initiated between the Claimant and his wife. On August 5, 1996 the Claimant's wife secured a Restraining Order against the Claimant's coming to the home, among other elements. The tools and equipment in question apparently remained in the shed at the family residence.

On August 15, 1996 the Claimant met with his attorney in the divorce proceedings and asked for assistance in recovering both personal items and the Carrier's property. A Stipulation and Order were entered by the Court pertaining to the return of those items among other things. In letters dated August 29 and September 3, 1996 the Claimant's attorney sought the return of those items pursuant to the Court Order.

On August 30, 1996 the Claimant's estranged wife telephoned a security officer of the Carrier and left a voice message informing him that there was property that she thought belonged to the Carrier in the shed. She said that she was contemplating the sale of the home and wanted to make sure that the property was returned. In visits to the wife on September 3 and 4, 1996, the security officer took possession of certain items, which he believed belonged to the Carrier. In a statement dated September 5, 1996 the Claimant admitted to the officer that he had kept certain items belonging to the Carrier in the shed without prior permission. Commencing on September 6, 1996 the Claimant was withheld from service.

On September 20, 1996 the Hearing was conducted and concluded. On October 11, 1996 the Carrier issued its certified letter constituting its decision in this matter. In that letter the Carrier imposed Level 2 discipline, resulting in a one-day suspension from duty with no loss of pay. Although the letter cited several Rules, including Rules 1.5, 1.6 and 43.3, which were possibly implicated, the discipline was based solely on substantial evidence of a violation of Rule 1.13. In pertinent part, the letter stated: "I have found more than a substantial degree of evidence was presented to warrant sustaining charges brought against you for failure to comply with instructions on getting authority to place Company material and tools on your personal property" The discipline appears to have taken into account the cooperation of the Claimant in the Investigation and his successful passing a polygraph examination inquiring into whether he had any intent to convert the equipment to his own use.

Rule 48(e) requires that a decision based on evidence adduced in the Investigation "shall be rendered in writing within 20 calendar days following" the conclusion of the Hearing.

The Organization contends that the Carrier improperly included Rule 1.5 in its charges although not in the discipline, that the discipline was issued on the 21st day after the Hearing in violation of Rule 48(e) and that the discipline should be removed on the merits. The Organization emphasizes that there was a practice, condoned by the Carrier of securing tools and equipment on employees' property and that the letter rescinding that practice was not received by the Claimant. It cites substantial precedent to the effect that a past practice which is open and notorious is condoned unless expressly rescinded.

The Carrier responds that the inclusion of Rule 1.5 is meaningless because the discipline was not based on that Rule, that the discipline was issued "within 20 days following" the conclusion of the Hearing and that discipline was properly imposed for a violation of Rule 1.13. Under the circumstances, Level 2 discipline, which involved only the loss of a single day of work with pay, was an act of charity. The Carrier cites an equally impressive line of authority approving discipline, including Level 2 discipline, under like circumstances.

The Organization notes that the Level 2 discipline remains on the Claimant's record and could be used against him in assessing subsequent discipline. In its view the discipline should be removed in its entirety.

The inclusion of Rule 1.5, and other Rules not relied upon in the discipline was, at most, harmless error. The discipline was issued on the 20th day "following" the conclusion of the Hearing. The date of the event from which the time limit runs is not counted. Accordingly, it was timely.

It is evidently true that the Claimant's wife was attempting to "burn" him because of marital problems between them. Similarly, there is no evidence that the Claimant had actual notice of the May 29 letter. Nonetheless, by August 15, 1996 he was aware that the Restraining Order prevented him from returning the Carrier's property directly. Instead of calling the Carrier and informing it of the problem, he attempted to secure the return of the property to him, not to the Carrier. It is also evident that, regardless of receipt of the May 29 letter, the Claimant was aware of the Rule requiring

him to return company property upon request. While there is no evidence that the Carrier made such a demand before it recovered the property from the Claimant's wife, the Claimant knew that he would not have been able to do so. He should have notified the Carrier of the problem promptly and not have waited for his wife to take matters into her hands.

Although the discipline was based on "failure to comply with instructions on getting authority to place" Carrier equipment on the Claimant's property and he may not have had actual notice of the change of practice, what is important is his general obligation to care for Carrier property under Rule 1.19. The "placement" of the equipment on his property appears innocent, but keeping it there for over a month without notifying the Carrier was at best a considerable error in judgment and showed a disregard for that property. There is substantial evidence supporting the imposition of discipline under the circumstances. The discipline, which involved no loss of pay, was not arbitrary or capricious.

The claim will be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February, 2000.