

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37671
Docket No. MW-38159
05-3-04-3-67

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline imposed upon Mr. J. M. Garrett [thirty (30) days suspension served March 17, 2003, through April 15, 2003] for alleged insubordination, failure to comply with the instructions of supervisor and alleged unauthorized use of and modifications to private property in connection with grading an access road to the bridge project at Mile Post QS 24.08 on January 22, 2003 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [Carrier’s File 12(03-0272) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall be removed from Mr. J. M. Garrett’s record and he shall be compensated for all lost time.”

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.

At the time of the incident on January 22, 2003, Claimant J. M. Garrett held seniority as a Foreman within the Bridge and Building Sub-Department of the Maintenance of Way Department and was working as such. It appears that the Claimant had no prior discipline on his service record.

On January 13, 2003, the Carrier began repair work on Bridge M.P. QS 24.08. In order to reach the work site it was determined that an access road would be needed. On January 16, 2003, Supervisor Harness began cutting trees on the Carrier's property, which was clearly marked with a fence. On the same date, Supervisor Harness advised the Claimant that permission to create an access road on the privately owned property adjacent to the Carrier's right-of-way had not been obtained. It appears that the Claimant and his work gang only had authorization to work on the Carrier's right-of-way.

On January 22, 2003, a dozer was sent to the work site. Supervisor Harness advised the Claimant to continue making a roadway on the Carrier's property, because permission to cut an access road on the privately owned property had not been secured. Nevertheless, it appears that the Claimant entered the private property with the dozer, knocked down trees and created an access road to the bridge work site. The property owner took exception to the roadway and damage to his property, which resulted in a property damage claim against the Carrier.

By letter dated February 7, the Claimant was given notice that a formal Investigation would be held on February 19, 2003 to determine the facts in connection with charges of "insubordination, failure to comply with the instructions of your supervisor, as well as unauthorized use of and modifications to private property."

After one postponement at the request of the Organization, the Hearing convened on March 11, 2003. The Claimant's representative was in attendance, however, the Claimant was not. On the evening of March 10, 2003, the Claimant's representative discovered that the Claimant was on an approved vacation in Florida and would be unable to attend the Investigation. Several hours prior to the Investigation, the Claimant's representative contacted Carrier representatives via telephone and requested that the Hearing be postponed until the Claimant returned from vacation. He was subsequently informed that the Investigation would continue in the absence of the Claimant. In spite of the Organization's objections, the Investigation was held on March 11, 2003.

By letter dated March 27, 2003, the Claimant was notified that he was found guilty of "insubordination, failure to comply with the instructions of your supervisor, as well as unauthorized use of and modifications to private property." He was assessed a 30-day suspension.

The Organization claims that the discipline was unwarranted. It claims that the burden of proof in a discipline matter such as this is on the Carrier and that burden of proof has not been met. The Organization makes a number of procedural arguments. First, it contends that the Claimant was unfairly denied a fair and impartial investigation into the matter. The Organization representative's request for a continuance was unfairly denied. In addition, the Organization claims that the Carrier unfairly prejudged the Claimant because he was suspended prior to the completion of the transcript of the investigation. Based on this inequity, the Organization contends that the Carrier should now be required to exonerate the Claimant's record and make him whole.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the investigation transcript reveals that the Claimant was familiar with and required to comply with the Rules at issue. In addition, the Carrier contends that because no conference took place in this matter, the Board does not have jurisdiction over this matter.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence *de novo*. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

After a review of the evidence, the Board cannot find substantial evidence in the record to uphold the Carrier's position. First, as to the contention that no conference was held, there is evidence in the record that although the Organization requested a conference, none was held. Thus, the Carrier's jurisdictional objection is rejected. See Third Division Awards 12853, 13023, 13120 and 19738.

In addition, the Board finds that the Carrier prejudged the Claimant. It is clear that although the transcript was not prepared until March 24, the Claimant was informed of his suspension on March 16, which was eight days earlier. It would have been impossible for the Carrier representative to have adequately reviewed the transcript prior to imposing the discipline in the instant case. Therefore, it appears to the Board that the Claimant was prejudged. Therefore, the suspension was improper. See First Division Awards 24874, 24935 and 25043.

The Claimant's record shall be expunged of this suspension and he shall be made whole.

AWARD

Claim sustained.

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 21st day of December 2005.