

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John M. Carmody, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BANGOR AND AROOSTOOK RAILROAD COMPANY

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

(1) That the Carrier unfairly and improperly demoted Section Foreman Owen Sweeney from his position as Foreman on the Glenburn Section on August 24, 1948;

(2) That Section Foreman Owen Sweeney be reinstated to his former position as Foreman at Glenburn, with seniority rights and vacation rights unimpaired, and that he be reimbursed for all monetary losses suffered by him on account of the Carrier's improper action.

OPINION OF BOARD: This is a discipline case. On May 26, 1948, Roadmaster Hodgman visited Section #110, Glenburn, of which Claimant Owen Sweeney was foreman. Mr. Sweeney was not at work. His wife was seriously ill. The record shows he took her to a hospital in Bangor that day. He had been absent from work several days, since May 20th. He had neither asked permission to be absent nor had he notified his superior officer, the Roadmaster. He was familiar with Carrier's rule requiring such request or notice. He merely had asked one of the trackmen to act as leader. The Roadmaster continued this trackman as acting foreman temporarily.

When the Roadmaster visited the section again on June 2nd, Mr. Sweeney had not yet returned to work. His wife was still in the hospital. He was at home. In the meantime reports required of the foreman had become delinquent and some essential track work had been neglected. Sweeney was unable to assist the Roadmaster to complete the reports or to say when he could return to work.

The Roadmaster, on the same day, confirmed his visit in writing, complained of Sweeney's shortcomings and advised him he was appointing an experienced man as acting foreman.

On June 7th, 1948, Chief Engineer Strout wrote to Sweeney, referred to the Roadmaster's letter and, after referring briefly to his previous work record, said, "I am as of today removing you from the service of Section Foreman with the intention of either dismissing you entirely from the service of the Company or demoting you from Section Foreman to Trackman." He suggested if Sweeney wished a hearing he should notify him, the Chief Engineer.

Mrs. Sweeney was discharged from the hospital in Bangor two days later, on June 9th. On July 17th, Chief Engineer Strout wrote General Chairman Pettengill, "Sweeney is never coming back as a section foreman as far as I am concerned . . ."

The hearing was held in Chief Engineer Strout's office on August 23, 1948. Mr. Strout presided for the Carrier. Roadmaster Hodgman was present. General Chairman Pettengill and Committeeman Drew, both section foremen, represented Sweeney. Sweeney was not present at the hearing although he had been invited. It was said for him that he was not physically able to participate. A local doctor had stated in writing on August 16th that Sweeney was still under his care and unable to work.

During the course of the hearing his record was reviewed by Chief Engineer Strout in considerable detail from his entry into the service as a trackman seventeen years earlier in 1929, including intermittent assignments as acting foreman, and one year as foreman at Monson and another year as foreman on his assignment at Glenburn. The review included work habits, absences from duty and criticisms of his work at various times by the Roadmaster, including a broken rail base and a broken switch point which were found on Sweeney's section on May 26th.

At the conclusion of the hearing, Chief Engineer Strout announced that Sweeney would be demoted to trackman. It is not disputed that Sweeney failed to notify his superior officer, either by telephone, telegram or letter, of his absence from work from May 20th to May 26th, when the Roadmaster learned about it during his visit. The Organization maintains that he left the job protected by assigning one of the trackmen as leader and that the serious illness and hospitalization of his wife weighed so heavily on his mind as to warrant mitigation of penalty during this period.

With respect to the quality of his work performance throughout the period under review, the Organization maintains he was a "run-of-the-mill" section foreman whose retention, as trackman and foreman, for seventeen years, during several of which there were more men available for jobs than there were jobs, refutes the Carrier's "lack of competency" argument. Whatever the quality of his work as foreman, it is not necessary for this Board at this time to pass judgment upon it except to say that there can be no doubt that it is the Carrier's responsibility to maintain safe service.

There is another aspect of this case, however, that the Board should concern itself with if the integrity of the Agreement is to be maintained. The Agreement provides that every employe covered by it has a right to a fair and impartial hearing in event of discipline.

Was Claimant here given an impartial hearing? Some of the essential requirements for a fair and impartial hearing were set forth by this Board in Award 232, "if the rule was not to be an empty gesture." This award is cited by the Carrier in support of its action here. Some of these conditions were met. The formalities of notice, hearing, representation and appeal were adhered to. Was the hearing officer impartial?

The decision to dismiss or demote Claimant Sweeney had been reached and announced to Claimant's representative several weeks before the hearing (Strout's letter to Pettengill, July 17, 1948) by the official who presided at the hearing. Was the hearing an "empty gesture" referred to in Award 232?

We do not question the propriety or the right of the Chief Engineer, responsible for service, to present any evidence in his possession with respect to the competency or reliability of employes under his supervision, direct or indirect, to a hearing officer.

We do question his right or the propriety of attempting to exercise it, under the terms of the Agreement that provides for a "fair and impartial" hearing, to serve in the dual capacity of advocate and judge as the record clearly indicates he did in this case. This is not merely a technical violation; it goes to the very heart and spirit of what constitutes a fair and impartial hearing.

What is the remedy? We believe the remedy lies in a new hearing under circumstances that will remove all reasonable doubt of its being "fair and impartial" as provided for in the Agreement. We do not here pass judgment

on the merits of the case or disturb the status quo; we leave that to the outcome of the new hearing.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the hearing on which the decision was based did not meet the requirements of the Agreement for "a fair and impartial hearing."

AWARD

Case is remanded to the Carrier for a new hearing, fair and impartial, as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of November, 1949.