



Award Number 17535

Docket Number CL-17961

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS
AND STATION EMPLOYES**

THE MINNESOTA TRANSFER RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6507) that:

- (1) The Carrier violated, and continues to violate, the rules of the Clerks' Agreement when, on November 13, 1967, it disqualified C. E. Cayler from his regularly assigned position of Stockyard Foreman, thereby forcing him to the extra list.
- (2) The Carrier shall be required to clear C. E. Cayler's record by making a notation of exoneration.
- (3) The Carrier shall be required to restore C. E. Cayler to his former position of Stockyard Foreman and pay him for any and all compensation lost from the first date he was denied his position of Stockyard Foreman until date of restoration.

EMPLOYEES' STATEMENT OF FACTS: The Claimant, at the time of his disqualification, was a regularly assigned Stockyard Foreman with a work week of Tuesday through Saturday, Sunday and Monday as rest days, with assigned hours 4:00 P.M. to Midnight. Mr. Cayler became the regularly assigned incumbent of the Stockyard Foreman's position on March 10, 1967, on which date he displaced junior Stockyard Foreman Roger Reitmeier.

On Saturday and Sunday, October 21 and 22, 1967, Mr. Cayler was called to work as an extra on an overtime basis. For the three-day period, October 20-22, 1967, both dates inclusive, Mr. Cayler worked as follows:

October 20—4:00 P.M. to Midnight—regular hours;

October 21—8:00 A.M. to 4:00 P.M.—overtime hours; (Mr. Cayler was augmenting the forces as an extra employe and not filling an assigned position)

October 21—4:00 P.M. to Midnight—regular hours;

October 22—12:01 A.M. to 4:00 P.M.—16 hours straight as an extra employe augmenting forces on an overtime basis.

From 8:00 A.M. on October 21, to 4:00 P.M. on October 22, Mr. Cayler worked 32 straight hours without rest.

- (2) That the actions of the investigating officer were “arbitrary, discriminatory and capricious (Carrier’s Exhibit No. 2)
- (3) That the discipline assessed resulted from “arbitrary, capricious and discriminatory action on the part of the Carrier representatives and Mr. Cayler’s fellow employees” (Carrier’s Exhibit No. 4)
- (4) That Mr. Cayler’s fellow employees falsely testified at the investigation because of a family relationship in the stockyards (Carrier’s Exhibit No. 6)
- (5) That the discipline assessed was in violation of Rule 13 (Carrier’s Exhibit No. 6)
- (6) That there was personal animosity between one of his fellow employees (Mr. Jones) and Mr. Cayler as shown in another investigation held October 17, 1966 (Carrier’s Exhibit No. 7)

Summarized, the Organization’s position throughout the appeal appears to be founded on the premise that for some unstated reason, the Carrier’s vice president and general manager, its operating superintendent and its agent conspired with Mr. Cayler’s fellow employees in the proceedings here at issue in an effort to unjustly discipline the claimant who was completely innocent of the charge contained in the notice of October 27, 1967.

The Carrier flatly and emphatically denies such allegations. The record clearly shows that notwithstanding the difficult position the investigating officer was placed in by the claimant’s conduct during the course of such hearing, the investigating officer exercised restraint and patience in extending all possible latitude to the claimant and was extremely lenient in the measure of discipline assessed.

(Exhibits Not Reproduced)

OPINION OF BOARD: Claimant was charged by Carrier with being inefficient as Stockyard Foreman on October 21 and 22, 1967 in that he improperly fed livestock; yarded stock in pens not provided with feed in lieu of supplied pens; delayed unloading and loading for train connections by reason of taking excessive time to record car numbers and counting of livestock.

On said dates, Claimant worked overtime as an Extra Employe inasmuch as the two days in question would have been his rest days. Hearing was held and Carrier informed Claimant that he would not be permitted to work as a Stockyard Foreman but that he could exercise his seniority on less responsible positions. In effect, Claimant was given a “demotion” by Carrier.

Claimant alleges that Carrier disqualified him in violation of Rule 13(a) and other related rules inasmuch as he had worked as Stockyard Foreman satisfactorily for Carrier for approximately 7 months; that Claimant was not given a fair and unbiased hearing; that the charge made against Claimant was not precise so that he was deprived of an opportunity to develop information to adequately defend himself; that the evidence presented at the hearing failed to show that Claimant was responsible for the stock missing the train connection; that Carrier failed to summon witnesses as requested by Claimant; that the witnesses at the hearing and

Carrier conspired against Claimant for the purpose of displacing Claimant from his position as Stockyard Foreman.

Carrier has stated the issues to be:

- “1. Whether the demotion in this case was a disciplinary measure assessed under Rule 17 of the Agreement or whether it was a disqualification proceeding under Rule 13 of the Agreement; 2. Whether the record reveals procedural defects which are sufficiently prejudicial to find that substantial rights were denied the Claimant; 3. Whether there is sufficient evidence of record to warrant the disciplinary action taken by the Carrier; 4. Whether the Claimant is entitled to the monetary damages and/or relief sought herein by the Organization if this Board should determine that some rule or agreement has been violated by Carrier in this case.”

First, in regard to the question as to whether or not Claimant was “disciplined” or “disqualified”, the Organization contends that Rule 13(a) of the Agreement prohibits Claimant from being “disqualified” from said Stockyard Foreman position because of the restriction in said rule.

Rule 13(a) provides in part as follows:

“Employees awarded bulletined positions, or employees securing positions through exercise of seniority, will not be disqualified for lack of fitness and ability to do such work after a period of thirty (30) working days thereon. . . .”

It is undisputed that Claimant had more than thirty (30) working days on said Stockyard Foreman’s position. Therefore we must determine whether Claimant was “disqualified” from said position or whether he was “disciplined” by Carrier in this instance.

In aiding us to determine this issue, we find that Carrier throughout the investigation and thereafter treated the matter as a “disqualification” rather than a “discipline” case. This is readily seen by Carrier’s Agent, W. D. Zalusky, whose letter of October 26, 1967 to Carrier’s Superintendent, Mr. C. Lamphere, reads in part as follows:

“This is in reference to Foreman, C. E. Cayler’s work performance on October 21 and 22. It is my personal feeling that Mr. Cayler is not a qualified foreman and if what Mr. Jones says in his letter of October 24 is true, it bears this out. . . .”

* * * * *

It is obvious that through Mr. Cayler’s inability to fully understand foreman duties all afternoon connections were missed, due to the fact that instead of yarding cattle in the second alley where the pens were fed, he instructed them to yard in the front alley because of the fact that it was easier. . . .

In view of the above I feel that Mr. Cayler should be held for investigation and if the facts warrant be disqualified from holding a Foreman’s position.”

Further in answer to the General Chairman's letter of November 30, 1967, which appealed Carrier's decision to "demote" Claimant, Carrier's Vice President and General Manager, W. F. Bannon, in his letter of December 6, 1967, addressed to Said General Chairman, Mr. R. M. Curran, states in part:

"Please refer to your letter of November 30, 1967, File MT-98, dealing with the investigation of C. E. Cayler where the Minnesota Transfer disqualified him for position of Stockyard Foreman.

I have read the transcript of the investigation very thoroughly and I am very much concerned with Mr. Cayler, and I feel that if you had read the transcript you would also understand the position that the Carrier had taken in the disqualification of Mr. Cayler.

* * * * *

As you can see from the foregoing statements Mr. Cayler is not qualified to be a Foreman of the Stockyards at the Minnesota Transfer, therefore, your request for reinstatement as Foreman and compensation of all earnings is respectfully declined."

It wasn't until the Organization's General Chairman's letter of March 12, 1968 to the Carrier's Vice President—Labor Relations, in which letter he pointed out that Rule 13(a) of the Agreement prohibits "disqualification" for lack of fitness and ability after a period of thirty (30) working days on said position, that Carrier began to allege that Claimant was "disciplined" rather than "disqualified".

Therefore, it is our conclusion, in view of Carrier's own statements aforesaid of its position on the record, that Claimant was "disqualified" for lack of fitness and ability rather than disciplined in this case. Carrier, having elected to proceed in a determination of Claimant's lack of qualifications for the position in question, thus is subject to and bound by the specific restrictions as set forth in Rule 13(a), namely, that an employe will not be disqualified for lack of fitness and ability to do such work after a period of 30 working days thereon. Inasmuch as it is undisputed that Claimant had more than 30 working days on said Stockyard Foreman's position, we find that Carrier violated the Agreement herein.

In regard to damages, Carrier alleges that Claimant was physically unable to perform any service between April 26, 1968 and July 1, 1968; that subsequent thereto, Claimant was taken out of service on July 21, 1968 for investigation on a charge of insubordination and was dismissed as a result of said investigation effective August 21, 1968.

The Organization does not deny that Claimant was physically unable to perform service between April 26, 1968 and July 1, 1968 due to an on-the-job injury, but argues that had he not been disqualified from the foreman's position in question, he would not have suffered the on-the-job injury. This argument is untenable inasmuch as it is based on pure conjecture and speculation.

Therefore, Claimant is entitled to damages from November 13, 1967 to the date of his discharge on August 21, 1968, excepting the period of April 26, 1968 to July 1, 1968. Said damages shall be based upon the difference in the

pay of the said Stockyard Foreman's position and the position he held up to the date of his discharge.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was violated to the extent expressed in Opinion.

A W A R D

Claim partly sustained and partly denied in accordance with the foregoing Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of October 1969.