

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26401
Docket Number SG-27005

John E. Cloney, Referee

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Clinchfield Railroad Company

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Seaboard System Railroad (Clinchfield):

On behalf of Signal Foreman R. O. Moore for reinstatement to service account of being dismissed from service by Carrier for alleged rule violations on February 22, 1985. Carrier file 15-50 (85-14)L."

OPINION OF BOARD: The Notice of Investigation involved here was dated January 30, 1985. It required Claimant's attendance on February 13, 1985, in connection with an accident of January 28, 1985. It charged violation of several safety related rules. The Notice was sent by Certified Mail, postmarked January 31, 1985, but was not received by Claimant until February 7 or 8, 1985, according to the Organization. Rule 50 of the Agreement provides in part that "Charges will be made within five days" At the Investigation the Organization objected to proceeding on the basis that Claimant was "not charged within the five (5) days set forth in Rule 50"

The Investigation proceeded. It established that Claimant, who was a Foreman, and his gang arrived at a job site at about 10:30 A.M. An operator of a backhoe who worked for a Contractor arrived shortly thereafter. The operator had never worked with Claimant's gang before but Claimant did not inquire if he had any prior experience working around trains. The operator was to dig a ditch. Claimant showed him where it was to be dug and the operator began working at about 11:00 A.M. or 11:05 A.M. The site was 150 to 200 yards from a curve. Claimant did not post any flags nor did he seek any information regarding train movements or take any other steps to protect the operator or his equipment. Within a very few minutes the operator, who was working close enough to foul the track was struck by a train coming around the curve. He was thrown 30' and injured. Damage to the machine was in excess of \$14,000.00.

At the Hearing after all testimony was received the Hearing Officer excused all witnesses and stated "we will review the personal record . . ." of Claimant. That record, which became part of the Transcript consisted of five letters written to Claimant by Carrier officials over the period October, 1979 - December, 1983, regarding items such as expense account irregularities, garnishments, attendance, etc. None of these letters dealt with safety issues. There was also a letter of commendation in February, 1979. Also included was a letter dated February 2, 1985, addressed "To Whom It May Concern" and signed by seven members of Gang 17. It complained of numerous instances of alleged unsafe practices by Claimant going back to at least June of 1984, and including the January 28, 1985, accident which was the basis of the Investigation. Three of the gang members who signed the letter testified at the Investigation.

On February 22, 1985, Claimant was notified that "Evidence developed at the investigation clearly established that you were guilty as charged" and he was immediately dismissed.

On March 2, 1985, the General Chairman appealed, asserting a violation of Rule 50 and stating:

"Also, we reserve the right to add to this appeal and/or change once we receive copy of transcript of investigation and/or hearing."

After the Chief Communications & Signals Officer declined the appeal the General Chairman appealed to the Director of Labor Relations on March 22, 1985, again asserting violation of Rule 50 and stating:

"We object to Mr. Moore personal record being a part of the transcript."

On April 8, 1985, the Director of Labor Relations responded in part:

"We have carefully reviewed your appeal and it is, indeed, noteworthy that you have obviously conceded Mr. Moore's guilt, having based your appeal solely on your perception of procedural improprieties. These allegations contained in your previous correspondence and in your appeal to this office regarding this matter are totally without merit."

After further correspondence and discussions the General Chairman wrote the Director of Labor Relations on October 1, 1985, that:

"We ask at this time, notwithstanding the precedual (sic) improprieties, the discipline assessed Mr. Moore is excessive and not commensurate with the alleged offense."

On November 25, 1985, the Director of Labor Relations responded:

". . . as previously pointed out by this office, the discipline assessed was fully warranted in view of the serious nature of the offense. Claimant's negligence resulted in substantial property damage

and personal injury to the contractor's back hoe operator. There was absolutely no excuse whatsoever for Claimant's indifference to duty and his record indicates that he is (sic) previously been the subject of complaints from his fellow employees for safety related matters."

Contrary to the Organization this Board is of the view that the charges were "made" within the meaning of Rule 50 when properly addressed charges were placed in the Mail system.

Consideration of an employee's past record, good or bad, in assessing the extent of discipline, once it has been established that charges have been proven, is legitimate. It is obviously necessary to use discrimination in determining just what constitutes a past "record" that may be considered. Here there were several discipline letters from Carrier to Claimant. He obviously had an opportunity to challenge or respond to those if he thought it appropriate. Reliance on such items is justified. However the letter of February 2, 1985, is an entirely different matter. There is nothing to suggest Claimant had ever seen this letter or knew of it, at any time prior to conclusion of the testimony at the Hearing. He had never been confronted with or given an opportunity to respond to its allegations (except the one regarding the incident under investigation). Three of the signers of the letter testified at the Investigation. They were asked no questions regarding the contents of the letter. Of course Claimant could not do so as he didn't know of its existence. Thus none of the numerous allegations covering at least a six month period had ever been the subject of any inquiry or verification (again except for the January 28, 1985, incident). We do not believe that allegations which have never been investigated or corroborated and with which an employee has never been confronted can be considered in assessing discipline. The potential for abuse in holding otherwise seems obvious.

There was substantial evidence at the Investigation for Carrier to conclude the charges against Claimant had been proven and it is not for us to question Carrier's judgment in that regard.

This Board recognizes that once responsibility has been established it is not our function to second guess the extent of discipline in the absence of circumstances showing the penalty was "unjust, unreasonable or arbitrary." (Third Division Award 16800.) That Carrier relied to some extent upon the February 2, 1985, letter in assessing discipline is clear from the Director of Labor Relations' November 25, 1985, letter citing it in response to the contention the discipline was excessive. We view that reliance as unreasonable and unfair. Accordingly, we must require Claimant's reinstatement with seniority unimpaired, but with no backpay.

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 Employees involved in this dispute are respectively Carrier and Employees 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

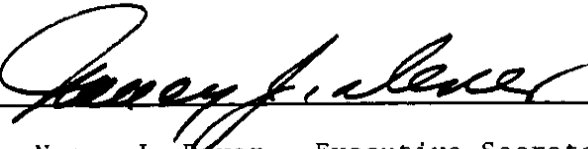
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

A handwritten signature in cursive script, appearing to read "Nancy J. Lever", is written over a horizontal line.

Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1987.

CARRIER MEMBERS' DISSENT TO
Award No. 26401, Docket No. SG-27005
John E. Cloney, Referee

In rendering this Award the Majority has chosen to ignore the ever growing list of well reasoned Awards of this Board which have consistently held that the Board has no authority to render a decision on an issue that was not specifically identified during the handling of the claim or grievance on the property.

It is the intent of the Railway Labor Act that all issues in a dispute before the Board shall be framed by the parties in the "usual manner" of handling claims and grievances on the property. Otherwise, the parties to the dispute are deprived of fundamental due process rights necessary to develop the facts and present their respective positions on the issue as it pertains to the dispute.

This dispute involved a Signal Gang Foreman on the Clinchfield Railroad who was dismissed for his failure to comply with safety rules requiring proper protection against train movements and his responsibility for a contractor's backhoe being struck by a train coming around a curve causing injury to the operator and very costly damage to the equipment.

There were two issues before the Board: (1) the Brotherhood's allegation that the disciplinary action should be set aside because the notice of investigation/letter of charge was not timely received by the accused, an alleged violation of Rule 50, the discipline rule; and (2) the Brotherhood's allegation that the penalty assessed (dismissal) was excessive for the offense.

After recognizing that the charges were timely made, that the charges were proven, and that it is not the Board's function to substitute its judgment for the Carrier's in assessing discipline once responsibility has been established, the Majority did just that.

The Award ordered the Claimant's reinstatement with seniority unimpaired, but without backpay - not because his offense did not warrant dismissal or because of any mitigating circumstances justifying leniency, but because of the Majority's totally erroneous opinion that in assessing discipline the "Carrier relied to some extent" on a February 2, 1985 letter from the seven members of the Claimant's gang complaining about the Claimant's unsafe practices, which letter was in the Claimant's personal record file that was reviewed at the investigation. That was not an issue before the Board.

At the beginning of the investigation the Claimant's representative (Local Chairman) did protest reviewing his personal record during the investigation, contending this was prohibited by Rule 50, and during handling on the property the Claimant's representative (General Chairman) did protest his personal record being a part of the transcript without giving a reason; however, those were alleged procedural errors that were abandoned by the Brotherhood and not mentioned in the Brotherhood's Ex Parte Submission or Rebuttal.

There was no challenge of the February 2, 1985 letter as part of the Claimant's personal record at the investigation, during the handling on the property, or before the Board; and there was never an allegation by the Brotherhood that the Carrier relied on the letter in assessing discipline. Nevertheless, the Award states:

"There is nothing to suggest Claimant had ever seen this letter or knew of it, at any time prior to the conclusion of the testimony at the Hearing. He had never been confronted with or given an opportunity to respond to its allegations (except the one regarding the incident under investigation). Three of the signers of the letter testified at the Investigation. They were asked no questions regarding the contents of the letter. Of course Claimant could not do so as he didn't know of its existence. Thus none of the numerous allegations covering at least a six month period had ever been the subject of any inquiry or verification (again except for the January 28, 1985 incident). We do not believe that allegations which have never been investigated or corroborated and with which an employee has never been confronted can be considered in assessing discipline. The potential for abuse in holding otherwise seems obvious."

It is not true that the Claimant had never been confronted with or given an opportunity to respond to the letter. Following the review of the Claimant's personal record at the investigation, which included the letter, Claimant Moore and his representative were asked by Conducting Officer Moore if they had questions of anyone prior to the close of the investigation, as evidenced by the transcript:

"Q. Mr. Moore, do you have any questions at this time? Do you have any questions of anyone at this time?

A. No sir.

"Q. Mr. King, do you have any questions of anyone?

A. No sir, I don't believe so.

"Conducting Officer Moore comments: If there is nothing else then, we will proceed to close these proceedings.

- "Q. Mr. Moore, do you feel that this investigation has been held in a fair and impartial manner?
A. Yes sir.

- "Q. Mr. King, do you feel that this investigation has been held in a fair and impartial manner?
A. I would really like to see the transcript of it before I render a decision on that."

It is not true that the Carrier relied on "the letter" in assessing discipline. Following the investigation, the Assistant Chief Engineer-Signals Construction gave the following reason for the decision to dismiss the Claimant in letter dated February 22, 1985:

"Evidence developed at the investigation clearly established that you were guilty as charged.

"Accordingly in view of your proven guilt, you are hereby dismissed from service effective immediately."

The Carrier was entirely justified in dismissing the Claimant for his offenses. There was no need to bolster that decision by relying on his prior record and the Carrier did not do so. The Majority ignored this fact and stated in the Award:

"That Carrier relied to some extent upon the February 2, 1985 letter in assessing discipline is clear from the Director of Labor Relations' November 25, 1985 letter citing it in response to the contention the discipline was excessive. We view that reliance as unreasonable and unfair. Accordingly, we must require Claimant's reinstatement with seniority unimpaired, but with no backpay."

The Majority confused the February 22, 1985 decision on discipline with the November 25, 1985 decision on the appeal. The General Chairman's October 1, 1985 letter can only be characterized as a plea for leniency; and the remarks by the Director of Labor Relations in the November 25, 1985 letter, which were seized upon by the Majority to justify the decision in this case, were not to bolster the Carrier's February 22, 1985 decision to dismiss the Claimant for his offenses, but to bolster the Carrier's November 25, 1985 decision to deny the plea for leniency.

A Board decision based on an issue that was never before the Carrier during handling on the property or at Board level is far more than unreasonable and unfair - it deprives the Carrier of its fundamental due process rights guaranteed by the Railway Labor Act and the Rules of this Board.

Carrier Members' Dissent - Award No. 26401

Award No. 26401 is based on the Majority's speculative and erroneous decision on an issue which was not raised during the handling of the dispute on the property and which was not before the Board. The Award is palpably erroneous and we vigorously dissent thereto.

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

F. V. Varga
F. V. Varga

J. E. Yost
J. E. Yost

August 10, 1987