

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

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

(1) The discipline (reprimand) imposed upon Mr. C. C. Rhodes for alleged responsibility in connection with the falsification of PA-15 report dated December 17, 1982 and alleged failure to adhere to Conrail Order AD 0.28 dated May 5, 1982 was unjust, unreasonable and in violation of the Agreement (System Docket CR-971D).

(2) The reprimand imposed upon the claimant shall be expunged from his record."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

In 1982, Claimant was working as Assistant Division Engineer at Indianapolis, Indiana. This job is a Carrier official position to which Claimant had been promoted from the Maintenance of Way craft or class. As ADE, Claimant was not subject to or covered by the Collective Bargaining Agreement between Carrier and the Organization.

Sometime in 1982, Claimant directed Delco Excavating, a vendor with whom Carrier had a right of way clean-up contract, to remove some old ties in Subdivision No. 2 on the Indiana-Cleveland main line. After Delco Excavating had performed most of this work, Claimant learned that a different contractor had been awarded the subcontract to clean up Subdivision No. 2. Upon discovering his error, Claimant instructed Delco Excavating to stop the work. The subcontractor did cease work but applied to Claimant for payment for the clean-up work actually performed.

Carrier determined that Delco Excavating held the subcontract for clean-up work in Subdivision No. 1, not Subdivision No. 2. He also determined that there were unexpended funds under the Subdivision No. 1 contract awarded to Delco Excavating. Claimant instructed his subordinates to arrange for payment of Delco Excavating out of the Subdivision No. 1 funds by preparing a voucher to show that the work performed in Subdivision No. 2 had been performed in Subdivision No. 1. On the basis of this voucher, dated November 22, 1982, Delco Excavating was paid for the work it actually had performed in Subdivision No. 2.

Approximately one year after the foregoing incident, the Chief Special Auditor determined that Delco Excavating had been paid from Subdivision No. 1 funds for work performed in Subdivision No. 2. The Chief Special Auditor interviewed Claimant on January 31, 1984. During that interview Claimant freely described the transaction and surrounding circumstances. On February 24, 1984, he signed a written notarized statement again setting forth all of the foregoing details.

The record does not show what the Chief Special Auditor reported to his supervisors, or to whom he reported the incident. Over repeated objections of Claimant's representative the Chief Special Auditor refused to answer any questions relating to these issues. The Carrier Hearing Officer refused to direct the witness to answer. We do know that subsequent to, and manifestly because of, that report Carrier demoted Claimant from his managerial position and directed him to exercise displacement rights into the craft or class.

Claimant exercised his seniority on April 13, 1987, and four days later Carrier served him with notice to attend a hearing on April 25, 1987, on the following charges:

- "(1) Your responsibility in connection with the falsification of PA-15 report, supplemental receiving report, dated December 17, 1982 indicating rental of a 950 loader at \$51.00 per hour, on October 15, 18, 19, 20, 21, 22, 25, 26, 27, 28 and 29, 1982, rental of a 977 Loader at \$62.00 per hour on October 22, 25, 26, 27, 28 and 29, 1982 and rental of a D-3 Dozer at \$34.00 per hour on October 15, 18, 19, 20 and 21, 1982.
- (2) Failure to adhere to Conrail Order AD 0.28 titled 'outside Services and Non Revenue Equipment Rentals,' dated May 5, 1982."

Following the hearing, Carrier imposed a written reprimand upon Claimant and made a permanent entry in his personal record that he "violated Company policy by participating in the development of improper charges."

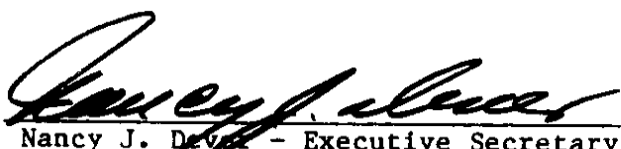
We have reviewed this record with extreme care and come away absolutely convinced that the disciplinary action under review must be rescinded. Even if arguendo the disciplinary investigation was not void from the beginning due to time limits violations, Claimant did not receive a full, fair and impartial hearing. The chief witness against him, the Chief Special Auditor, repeatedly refused to answer relevant and material questions put by Claimant's representative. Despite frequent objections by the representative and repeated requests that the witness be directed to cooperate, the Hearing Officer not only declined to direct the witness to answer but endorsed the witnesses refusal. Finally, notwithstanding these serious defects in the hearing process, the record evidence does not support a conclusion that Claimant participated in overcharging, payment for services not rendered or any other "improper charges." At worst, he failed to follow strict formal accounting procedures for paying a subcontractor for work performed. But there is not one iota of evidence that he dishonestly "falsified" documents or participated in the development of "improper charges." Similarly, the record evidence is barren of support for the charge that "he failed to adhere to Conrail Order ADO.28." The disciplinary representative of Claimant is an arbitrary and unreasonable escalation of form over substance and an abuse of managerial discretion which must be set aside.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of August 1988.