

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

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

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

(1) The disciplinary demotion of Track Foreman H. D. Miller, his disqualification as track foreman and the fifteen (15) days of suspension imposed upon him for alleged failure to obtain permission to obstruct Beasley's Point Secondary track for maintenance work in the vicinity of Mile Post 53.9 on July 16, 1984 was without just and sufficient cause (System Docket CR-1188-D).

(2) Mr. H. D. Miller shall be reinstated as a track foreman with seniority as such unimpaired, his record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

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 employes involved in this dispute are respectively carrier and employes 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.

Claimant, a Track Foreman with eight (8) years of service, was instructed to attend a hearing on August 14, 1984, in connection with the following charge:

"Failure to obtain permission to obstruct the Beasley's Point Secondary track for maintenance work in the vicinity of M.P. 53.9 on July 16th, 1984 at approximately 1:30 P.M. in violation of Rule 101, Conrail's Rules of the Transportation Department."

Following the hearing, Claimant was notified that he had been assessed a fifteen (15) day suspension and disqualified as Foreman. The disqualification was lifted on April 1, 1985. Carrier argues that Claimant's culpability was demonstrated with substantial and credible evidence and that the discipline assessed was commensurate with the proven offense. The Organization, on the other hand, asserts that Carrier has failed to meet its burden of proof in this case and that Claimant complied with the provisions of Rule 101 at all times. That Rule provides as follows:

"101. Without permission of the train dispatcher, no work must be attempted on or adjacent to a main or secondary track, controlled siding or siding, which may create a condition interfering with the safe movement of trains at Normal Speed. Before the track is obstructed, protection against trains in both directions must be provided, and trains approaching the obstruction must be notified by train order or Bulletin Order."

The record discloses the following pertinent information. On July 16, 1984, Claimant was a Track Foreman under the supervision of an Assistant Track Supervisor. According to the Assistant Track Supervisor, Claimant was told to obtain permission to obstruct the Beasley's Point secondary in the vicinity of M.P. 53.9 at approximately 1:30 P.M. After he was issued this instruction, the Assistant Track Supervisor testified, Claimant left in the Carrier's truck to oversee the unloading of the tamper. Upon his return, the Assistant Track Supervisor asked the Claimant if he had obtained permission to obstruct the track. Claimant purportedly responded that he had.

There is no dispute that Claimant did not obtain fouling permission. Claimant denies that he was instructed to do so. His testimony is that he contracted Winslow Tower to obtain permission to store a tamper on the old scale track near M.P. 53.9. Claimant insisted that he did not believe he needed fouling permission since the tamper went directly onto the siding. It was only when Claimant returned to the job site after picking up some materials that he observed that a contractor was replacing the crossing and a temporary crossing had been constructed near the permanent one. Several pieces of equipment were fouling the track.

Claimant acknowledged that he did obtain obstruction permission in accordance with Rule 101 on the three previous days. However, Claimant testified that he did not believe that conditions on the date in question warranted following the provisions of Rule 101.

Based on our review of the record evidence in its entirety, we find no basis for overturning the discipline imposed here. There is clearly a conflict in the testimony as to whether or not Claimant was instructed by the Assistant Track Supervisor to obtain permission to obstruct the track. However, resolution of that conflict is not within the province of this Board.

It is well-settled that the functions of weighing evidence, attempting to resolve conflicts therein, or passing upon the credibility of witnesses are reserved to the hearing officer. The Board may not reverse Carrier's determination merely because of conflicts in testimony. See, e.g., Third Division Awards 25655, 25916; Fourth Division Award 4417.

So stating, we note that the evidence established that even absent a direct instruction, Claimant, with five years' experience as a Foreman, knew or should have known that the gang needed permission to occupy the track. Claimant also knew that he was the individual who had to obtain the necessary permission. In fact, he had done so on the three previous days. We believe the record fully supports the conclusion that Claimant was guilty of the charged lodged against him.

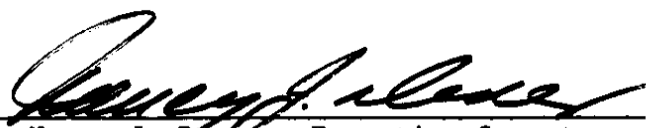
Nor is our conclusion altered by the letters or statements from other members of the gang. Although the Organization has belatedly asked us to consider these statements as refuting the Assistant Track Supervisor's testimony, and corroborating Claimant's testimony, the Board is without authority to consider these statements or any other evidence which was not introduced until after the investigation. See, e.g., First Division Awards 13604, 15319, 16301, 16584; Third Division Award 9102. As the record stands, we find substantial evidence to support Carrier's conclusion that Claimant failed to obtain the necessary permission to obstruct the track and, in so doing, violated Rule 101.

As a final matter, we find no grounds for substituting our judgment for that of Carrier's with respect to the quantum of discipline imposed. Claimant's record discloses that only a few months before the incident at issue took place, Claimant had received discipline on two separate occasions for failure to follow instructions. We conclude that the discipline was commensurate with the severity of the offense. Accordingly, we rule to deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of March 1989.