Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28802
THIRD DIVISION Docket No. MW-27559
91-3-86-3-822

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Western Lines)

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

(1) The Carrier violated the Agreement when it disciplined Laborer R. P. Binder (disqualified as laborer on Gang No. 98) without benefit of a hearing as stipulated in Rule 45(a) (Carrier's File MofW 138-80).

(2) The claimant shall be returned to his position on Crossing and Switch Gang No. 98 and he shall be paid per diem allowance for all days withheld therefrom because of the violation referred to in Part (1) hereof."

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 employe 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 entered the Carrier's service on October 10, 1970, and was assigned to the Carrier's Track Subdepartment, Western Seniority District, Sacramento Division. At the time of the events giving rise to this claim, in May 1985, Claimant held a laborer position on a Regional Production Gang known as Crossing and Switch (C & S) Gang No. 98. That Gang is not assigned a permanent headquarters or assembly point, but continually progresses along the track day by day. The Carrier does not provide mobile living quarters for the Gang but instead gives each member a per diem allowance, for meals and lodging, in addition to regular wages.

On May 6, 1985, Claimant was disqualified by the Carrier from that position "[d]ue to [his] inability to maintain satisfactory production output required" of such employees. Claimant therefore was free to exercise seniority to another position. On May 7, 1985, he returned to the position he had held immediately before assignment to the Regional Production Gang, namely, a laborer position on the Carrier's Track Gang No. 12 at Los Banos, California. That position, being headquartered at Los Banos, did not involve the payment of a subsistence per diem in addition to wages.

On May 17, 1985, the Organization filed this claim on behalf of Claimant. The Organization contends that, in removing Claimant from his assignment on C & S Gang No. 98, the Carrier violated Rule 45 of the Agreement, because Claimant was not afforded a hearing prior to his removal. Rule 45 provides as follows, in pertinent part:

"RULE 45 - HEARINGS

Notice. - (a) Employes in the service sixty (60) calendar days or more shall not be disciplined nor dismissed without first being given a fair and impartial hearing before an officer of the Company (who shall be an individual other than the one preferring charges) and decision having been rendered in accordance with this rule. When charges are made against an employe, the Company shall notify the employe in writing of the specific charges made against him by personal delivery evidenced by receipt or by Registered or Certified Mail, Return Receipt Requested. The employe shall be allowed not more than ten (10) days from receipt of notice for the purpose of securing witnesses which he may desire to have appear at the hearing. Employes covered by this agreement will be entitled to representation by a duly authorized representative of the Organization, or by an employe coming within the scope of this agreement. The duly authorized representative of the Organization may be assisted by another member of the Organization. The hearing shall be held not later than twenty (20) days from the date of receipt of notice by employe, unless extended by joint agreement between the Carrier and the employe or his representative and decision shall be rendered promptly.

Where circumstances indicate an employe should not be permitted to continue in service, he may be suspended pending an investigation.

Charges not Sustained. - (b) If the charge against the employe is not sustained, his record shall be cleared and he shall be compensated for net wage loss which may have been suffered by him as a result of the charge for which hearing was held."

The Carrier argues that its removal of Claimant from the C & S Gang was not covered by Rule 45, but instead was covered by and in conformity with Appendix V to the Agreement. Appendix V consists of a letter of agreement between the Parties dated August 30, 1979, stating:

"An employe regularly assigned to a position, or whose displacement is accepted, who fails within a reasonable time to demonstrate fitness and ability shall vacate position on which disqualified and shall, within five (5) working days, return to his former position,

providing it has not been abolished or taken by a senior employe through displacement, in which case the returning employe shall exercise displacement rights in accordance with Rule 13."

The disqualification of Claimant was based upon the recommendation of the Carrier's General Track Foreman. That recommendation, contained in a letter dated May 6, 1985 to the Carrier's Regional Maintenance of Way Manager, stated:

"Mr. R. P. Binder, as a member of C&S 98, has been assigned as one of the support forces behind TG-5 doing quality control work. Mr. Binder's attitude is one of complete indifference to duty which has lead to a general demoralizing affect on the people working with and around him.

As you well know, the primary function of the gang is to do the final spiking and apply rail anchors to conform to standard and raise down ties ahead of the Surfacing Gang.

The following is list of Mr. Binder's performance on the above-mentioned tasks:

1. SPIKING - When assigned to spike with air hammer, he drives a spike then stops, removes his gloves and hat, then takes out his handkerchief and wipes his safety glasses off then he puts his handkerchief away, replaces his gloves and hard hat and the process is repeated for each spike. During the time it takes Mr. Binder to drive one spike, the person on the opposite side has driven fifteen (15) spikes. Repeated cautioning as to poor working habits is met with comments such as: 'so' or 'so what'.

2. APPLYING RAIL ANCHORS - When assigned to do this job, Mr. Binder stays back behind the other employees in order to avoid having to do any work at all, or if left a specific amount to do, takes so long in doing it that he is left far behind the other people doing two to three times as much work. Repeated cautioning to Mr. Binder as to the work that is required of him would result in him answering: 'so' or 'so what'. Complaints of the other employees around him about his performance brought the comment from Mr. Binder that he only has one speed and nobody is going to make him work any faster or harder.

3. RAISING DOWN TIES - When assigned this duty, Mr. Binder is exceedingly slow and falls so far behind the other employees that it has been necessary to double back the other people to help him get caught up with what was only his fair amount. When doing this job, you

> work in pairs and the condition exists that no one else wants to work with him because he will not keep up. This has caused the other employees to be criticized as well. When Mr. Binder is cautioned as to his performance, his comment is still 'so' or 'so what'.
>
> As previously mentioned, the overall morale in the support forces behind TG-5 has fallen so low because of Mr. Binder's performance that I feel we can no longer continue to utilize Mr. Binder. Repeated request [sic] by myself for improved performance as well as detailed explanation of work several times daily over the last several weeks has met with negative response from Mr. Binder, therefore, I recommend that we disqualify Mr. Binder as a Regional Gang Laborer."

The Organization argues that the disqualification of Claimant was not in conformance with the letter agreement (Appendix V), but instead was disciplinary. The Organization relies on the fact that Claimant had established seniority as a track laborer in October 1970, almost 15 years before the disqualification. The record does not disclose how long Claimant had held the position on the Regional Production Gang before he was disqualified. The Organization argues that Claimant had no problem in that position until he came under the supervision of the General Foreman who recommended his disqualification, but the record does not reflect when that occurred either. The Organization has not produced evidence contradicting the assertions about Claimant's performance contained in the General Foreman's letter quoted above. (In its submission to this Board, the Organization has attached correspondence from Claimant suggesting that, after Claimant's disqualification and return to Los Banos, he was assigned to perform work there which was identical to that from which he had been disqualified on the C&S Gang. However, that evidence was not presented on the property. Furthermore, as the Carrier points out, the assertion from Claimant does not indicate whether the workload at Los Banos was similar to when he was disqualified.)

However, the Organization also relies on the contents of that letter to support its contention that the disqualification of Claimant was disciplinary. The Organization reasons that the General Foreman's letter imputes to Claimant deliberate misconduct rather than inability to perform. The Organization notes that a statement from the Regional Maintenance of Way Manager, who received and approved the General Manager's recommendation, described Claimant's conduct as constituting "deliberate, planned poor performance." According to the Organization, that is the language of a disciplinary charge, rather than a disqualification for failure to demonstrate fitness and ability.

The Organization refers to precedent in which the disqualification of an employee has been held actually to have been discipline which therefore should have been imposed pursuant to disciplinary rules. However, in the two

Awards of this Board cited by the Organization, Third Division Awards 14803 and 11256, the impact on the employees was to remove them altogether from the Carrier's service. In Award 11256, the Board commented: "For all practical purposes, [claimant] was utterly dismissed (discharged from said service)...." Likewise, in Award 14803, the Claimant never again worked for the Carrier after his disqualification. In the present case, Claimant was permitted to exercise seniority to another like-rated position, and did so in such a way as to suffer no loss of wages.

On the other hand, as the Carrier points out, there is abundant precedent for the proposition that a Carrier has the inherent authority and discretion to determine the fitness of an employee for any particular assignment. As was said in Third Division Award 24068:

> "it is well established that once Carrier has presented a rationale for its conclusion that an employe is not qualified for a particular position, it is incumbent on [the Organization] to present evidence to establish Claimant's ability [citations omitted]. In the absence of a showing that Carrier's conclusion was arbitrary or capricious and did not properly consider claimant's ability, the claim must fail."

Once the Carrier has articulated the Claimant's deficiencies, the Organization bears the burden of introducing evidence indicating that the Claimant was in fact fit and able to perform the position and possessed the ability that the Carrier has asserted to be lacking. Third Division Awards 24068, 23860, 18286, etc. A situation much like this one was involved in Third Division Award 25331, where the Board said:

> "[T]he Claimant commenced work as a Spike Reclaimer Operator. After the Carrier's Officials concluded that his production was not sufficient because he failed to keep ahead of the tie shears, and, consequently, slowed down the progress of the entire work gang. Because of his low production, he was disqualified as an Operator. The Claimant then chose to take a furlough rather than exercise his seniority for a Trackman position. However, he ultimately returned to work as a Trackman.

In that case, the Board sustained the Carrier's action in disqualifying the employee.

The Fourth Division, in Award 3260, has said:

> "[U]nless there is a showing of substantive evidence of probative value that Carrier wilfully and maliciously demoted an employe with intention to punish such employe for his shortcomings, there is no basis for concluding that the matter was disciplinary in nature entitling the employe to a hearing. Absent such showing it is universally accepted by the awards of this Board that Carrier has the right to determine fitness and ability of an

employe for a position ... and such determination shall not be disturbed by this Board unless it appears that the decision was arbitrary or capricious."

These Awards reflect a reasoned view of the applicable agreement. The Carrier maintains the latitude to determine that an employee is unfit based not only upon the employee's latent ability to do the work but also upon his apparent willingness to do it. If an employee fails to perform to the minimally accepted level, whether because of a lack of skills or a lack of commitment, the Carrier is within its rights under the Agreement to disqualify him in the manner the Agreement provides. Such a disqualification should not be deemed by the Board to be disciplinary, requiring a hearing, unless there is evidence that the Carrier intended it to punish the employee rather than to simply remove him from a position in which he has been unsatisfactory. There is no such evidence in this case. If such evidence exists, it was the burden of the Organization to present it. The Carrier's letter of disqualification is insufficient by itself. Therefore, the claim cannot be sustained.

In any event, Claimant would not be entitled to an award of per diem allowance for the days he would have worked on the C&S gang if he had not been removed from that gang. The precedent is clear that a Claimant is entitled to an award of per diem only when he has worked a position which required him to bear the sorts of expenses which the per diem is to cover. See, Third Division Awards 26357, 26055, 12030.

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 15th day of May 1991.