

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Terminal Railroad Association of St. Louis)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline imposed upon Track Foreman D. Matthes (30 days' suspension and permanent removal of track foreman's seniority), for alleged violation of T.R.R.A. Operating and Safety Rules; General Rules A, B, F, M and N, was arbitrary and excessive (System File 1990-27).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Matthes shall be compensated for all wage loss suffered and his seniority as track foreman shall be reinstated and all rights unimpaired."

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.

On September 19, 1990, Claimant was assigned as a Track Foreman on System Gang #7, which was working on a tie renewal project. On that day, Claimant, with prior permission from his Supervisor, left work early for a doctor's appointment. When he left work, Claimant did not leave instructions for the employees working under his supervision. As a result, according to Carrier, he did not ensure that the track would be left in a safe condition when the crew went home. He was also unaware that the track had not been taken out of service, despite the fact it was no longer in compliance with FRA standards as a result of the work which had been performed.

After an Investigation, at which he was charged with failing to perform his duties by leaving the track in an unsafe condition, Claimant was assessed a 30 day suspension and his seniority as a Foreman was removed.

There is substantial evidence in the record to support Carrier's charge. At the Investigation, Claimant admitted he was negligent in not determining that the track had been taken out of service.

The Organization argues Claimant was denied contractual due process because he was removed from his position as Foreman on September 20, 1990, prior to the Investigation. We do not view this as a disciplinary action. Rather, this is similar to an employee being withheld from service pending an investigation when there are valid concerns about his ability to work safely. In this case, Carrier removed Claimant from his position as Foreman, thereby allowing him to continue to work in a less responsible position. There is no indication this was intended to supersede the disciplinary process provided by the Agreement.

The Organization has also objected to the fact that the Carrier official to whom it filed its original appeal was also the Hearing Officer and the official who issued the discipline. We recognize there is a split of arbitral authority on the issue of a disciplined employee's right to independent review at each stage of the appeal process. While some have held an employee is denied contractual due process when the first appeal is answered by the same official who conducted the hearing and/or issued the discipline, others have been satisfied that due process has been afforded when there is a second level of appeal to an official who was not involved in the disciplinary process. We agree with the latter line of authority. Absent agreement provisions to the contrary, we are satisfied that due process has been served when at least on review on the property is made by someone outside the disciplinary process. With this protection present, we fail to see how a first step review by the hearing officer would deny due process.

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Having found the charge was proven, we turn to the quantum of discipline. In this regard, we find no basis to modify the Carrier's decision. We would hope, however, that Claimant would be given full consideration for promotion after he has demonstrated to the Carrier that he has taken remedial actions to improve his ability to supervise others.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Sever - Executive Secretary

Dated at Chicago, Illinois, this 21st Day of January 1993.