

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29605
Docket No. MW-29898
93-3-91-3-274

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(
(CSX Transportation, Inc. (former
(A&WP-WofA-AJT-Georgia Railroads)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier refused to grant Maintenance of Way employe F. E. Scott an unjust treatment hearing after notice on his behalf by General Chairman N. V. Nihoul dated January 25, 1990, which clearly specified the nature of his complaint * [System File 90-24(GA)/12(90-487) AWP].

(2) As a consequence of the violation referenced above, the Carrier shall reinstate Claimant F. E. Scott to the foreman's position on Force 5A33 and he shall be made whole for all wage and fringe benefit loss suffered as a result of the Carrier's action.

* Notice to be reproduced within our Initial Submission.*

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.

The facts of the instant case are not in dispute. By letter

of November 20, 1989, Claimant was charged with improperly allowing a brush cutting gang he was supervising to occupy the main track of the Georgia Subdivision without permission from the train dispatcher. He was instructed to appear for a hearing scheduled for November 30, 1989. In a signed statement dated November 21, 1989, however, Claimant informed Division Engineer J. S. DeLong as follows:

"...in reference to Roadmaster Bowden's letter of charges dated 11/20/89, for violating Operating Rule 704. I accept the full responsibility for this incident and request to waive my rights for a formal hearing. I will accept whatever discipline deemed necessary by the Carrier."

Division Engineer DeLong responded in pertinent part as follows:

"It is...my decision that you be given five (5) days actual suspension from December 5 and ending December 9, 1989. You will also be required to demonstrate to Trainmaster N. A. McNeill a sufficient knowledge of the Operating rules, particularly the ones pertaining to operation of on-track equipment and occupation of the track, before you will be allowed to resume supervision of equipment and work that will require you to occupy the track under Operating Rule 704."

Although Claimant had not yet passed the relevant rules test, he bid on, and was erroneously awarded a vacant Foreman position. When the error was discovered on January 17, 1990, Claimant was informed that he was not qualified for the position and removed from the assignment.

By letter dated January 25, 1990, General Chairman N. V. Nihoul wrote Division Engineer DeLong requesting that an "unjust treatment" hearing be arranged because Claimant had been "...unjustly treated and discriminated against as a result of the Carrier disqualifying him from the...Foreman's position." Division Engineer denied the request in a letter dated January 26, 1990:

"I AM IN RECEIPT OF GENERAL CHAIRMAN N. V. NIHOL'S JANUARY 25, 1990, LETTER REQUESTING ON YOUR BEHALF A HEARING INTO DISQUALIFICATION AS FOREMAN ON GANG 5A33 AT HULSEY YARD ON JANUARY 17, 1990.

AS YOU RECALL, YOU WERE CHARGED ON NOVEMBER 20, 1989, BY ROADMASTER BOWDEN WITH OCCUPYING THE MAINLINE AT SOCIAL CIRCLE, GA, WITH THE BRUSH CUTTER UNDER YOUR SUPERVISION,

WITHOUT PROPER AUTHORITY ON NOVEMBER 14, 1989. YOU SUBSEQUENTLY ACCEPTED RESPONSIBILITY ON NOVEMBER 21, 1989, AND WAS AWARDED A DISCIPLINE CONSISTING OF A FIVE (5) DAY ACTUAL SUSPENSION AND A REQUIREMENT THAT YOU "DEMONSTRATE TO TRAINMASTER N. A. MCNEILL A SUFFICIENT KNOWLEDGE OF THE OPERATING RULES, PARTICULARLY THE ONES PERTAINING TO OPERATION OF ON-TRACK EQUIPMENT AND OCCUPATION OF THE TRACK, BEFORE YOU WILL BE ALLOWED TO RESUME SUPERVISION OF EQUIPMENT AND WORK THAT WILL REQUIRE YOU TO OCCUPY THE TRACK UNDER OPERATING RULE 704."

ON DECEMBER 15, 1989, DECEMBER 19, 1989, AND JANUARY 17, 1990, TRAINMASTER MCNEILL EXAMINED YOU ON THE OPERATING RULES PER MY LETTER OF DISCIPLINE. EACH TIME, MR. MCNEILL WENT OVER THE QUESTIONS YOU MISSED AND ALLOWED YOU TO STUDY THEM AND RETURN TO ANSWER JUST THE ONES YOU MISSED. ON JANUARY 17, 1990, YOU WERE EVEN ALLOWED TO HAVE AN OPEN OPERATING RULE BOOK WITH THE ANSWERS MARKED. YOU WERE STILL NOT ABLE TO ADEQUATELY DEMONSTRATE TO MR. MCNEILL THAT YOU HAD A GOOD UNDERSTANDING OF THE REQUIRED RULES.

UNDER THE TERMS OF YOUR DISCIPLINE, YOU HAVE NOT BEEN ABLE TO DEMONSTRATE A SUFFICIENT KNOWLEDGE OF THE OPERATING RULES. IT IS WITHOUT QUESTION A REQUIREMENT OF FOREMEN AND OTHERS RESPONSIBLE FOR GETTING TIME TO OCCUPY THE TRACK TO HAVE THIS KNOWLEDGE. SINCE YOU HAVE NOT BEEN ABLE TO DEMONSTRATE THIS, YOU WERE DISQUALIFIED FROM HOLDING A FOREMAN'S POSITION UNTIL YOU CAN DEMONSTRATE TO CSX TRANSPORTATION THAT YOU POSSESS AN UNDERSTANDING OF THE OPERATING RULES. YOU SHOULD NOT HAVE BEEN AWARDED THE FOREMAN'S POSITION AT HULSEY YARD ON GANG 5A33 AND AS SOON AS THIS MISTAKE WAS DETECTED, IT WAS CORRECTED BY YOUR REMOVAL FROM THE FOREMAN'S POSITION AND NOT BY ANY ACTION FROM ROADMASTER WHITE OTHER THAN HIS DELIVERY OF THE MESSAGE ACCOUNT YOUR WORKING ON HIS DISTRICT AT THE TIME. YOU WERE WELL AWARE OF THE CONDITIONS OF YOUR DISCIPLINE PRIOR TO YOUR BIDDING ON THE JOB AT HULSEY AND KNOWING THAT YOU HAD NOT DEMONSTRATED TO MR. MCNEILL A SUFFICIENT KNOWLEDGE OF THE OPERATING RULES PRIOR TO YOUR BIDDING ON THE FOREMAN'S POSITION, YOU CANNOT EXPECT CSX TRANSPORTATION TO DO ANYTHING OTHER THAN REMOVE YOU FROM THE POSITION UNTIL YOU CAN SHOW THIS RAILROAD THAT YOU CAN SAFELY SUPERVISE THE WORK UNDER YOUR CHARGE.

ACCOUNT THE ABOVE, YOUR REQUEST FOR A HEARING IS DENIED."

That denial was subsequently appealed up to and including the

highest designated Carrier officer, and following conference between the Parties, remains unresolved. Thus, it is properly before the Board for adjudication.

Rule 39 reads in pertinent part as follows:

"An employee...who may consider himself unjustly treated, shall be granted a fair and impartial hearing by a designated official of the Company. Such hearing shall take place within ten (10) calendar days after notice by either party. Such notice shall be in writing, with copy to the General Chairman, and shall clearly specify the charge or nature of the complaint."

It is the position of the Carrier that there has been no violation of Rule 39 as alleged and that the penalty sought is excessive and outside the purview of this Board. The Carrier points out that Claimant accepted full responsibility for the rule violation, waived his right to a full hearing, and agreed to accept the discipline imposed. With full knowledge that he had not attained sufficient proficiency in the Operating Rules, he bid on a Foreman's position (contrary to the discipline that he had agreed to) and was incorrectly awarded same.

For its part, the Organization maintains that the Carrier did not provide Claimant with the unjust treatment hearing to which he was entitled within ten (10) days of being notified in writing of the specific nature of the complaint. Accordingly, Carrier was in direct violation of Rule 39 and, as remedy, Claimant should be reinstated to the foreman's position on Force 5A33 and made whole for all wage and fringe benefit loss suffered as a result of the Carrier's action.

There is no support on the record before the Board for restoring Claimant to a foreman's position for which he was clearly not qualified under the provisions of the discipline he voluntarily accepted. Accordingly, that portion of the Organization's claim must be denied. The language of Rule 39, Section 2, does clearly establish Claimant's right to request and be granted an unjust treatment hearing in connection with his removal from the foreman's position on January 17, 1990. Carrier's unilateral determination that such a request was frivolous or without merit does not absolve it from complying with the clear language of the agreement between the Parties. Thus, if Claimant still desires an unjust treatment hearing regarding his removal from a position to which he clearly was not entitled, Carrier shall comply with that request within thirty (30) days of receipt of this award.

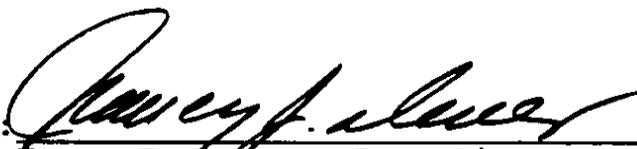
Form 1
Page 5

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A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.