

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30048
Docket No. MW-30127
94-3-91-3-561

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(CSX Corporation

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

1. The sixty (60) days' suspension imposed upon Trackman G. Bailey for alleged insubordination in connection with his alleged refusal to perform work as instructed on September 12, 1990 was arbitrary, unwarranted, on the basis of unproven charges and in violation of the Agreement [System File C-D-7205/12(90-1089) COS].

"2. The Agreement was violated when Trackman G. Bailey was subjected to harassment, intimidation, abuse and mistreatment from Supervisor VanKirk on September 12, 1990 [System File C-M-7170/12(90-1113)].

3. As a consequence of the violation referred to in Part (1) hereof, the Claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

4. As a consequence of the violation referred to in Part (2) hereof:

(a) the Carrier shall cease its harassment, intimidation, abuse and mistreatment of the Claimant and

(b) Supervisor VanKirk shall be removed from the rail force."

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 was assigned as a trackman working as a member of Rail Gang 5X09 in the vicinity of Balcony Falls, Virginia. On September 12, 1990, Claimant began his tour with the Rail Gang at 7:00 AM. At approximately 11:30 AM Claimant stopped to get a drink of water. While he was in the process of getting the drink of water, the Assistant Foreman of the gang approached him and instructed him to proceed to a point on a bridge to assist other workers to set anchor spikes. Claimant responded to this instruction by saying "soon as I get some water, I'll go work on your bridge." After additional colloquy between Claimant and the Assistant Foreman and after Claimant continued to remain at the water cooler consuming water, the Supervisor was called to the scene whereupon further verbal exchanges with the Claimant occurred. According to Claimant's testimony, "For 15 minutes I stood at the water cooler - - - I drank water". Eventually Claimant proceeded to the work area and resumed his assigned duties. The record does not identify the exact time.

Subsequently, by notice dated September 14, 1990, Claimant was instructed to appear on September 26, 1990, for a hearing on a charge of insubordination. The scheduled hearing was postponed to and held on October 16, 1990, at which time Claimant was present, represented and testified on his own behalf. Following the completion of the investigatory hearing, Claimant was notified by letter dated November 5, 1990, postmarked November 6, 1990, that he had been found at fault and was disciplined by suspension of sixty days.

The Organization argues that, in the first place, the notice of discipline was not timely given and therefore the entire proceeding should be nullified and Claimant's record cleared. The Organization further argues that the Carrier's decision to discipline the Claimant was based upon unproved charges and that the Claimant had been improperly subjected to harassment, intimidation, verbal abuse and mistreatment by the Supervisor. The Organization concluded by insisting that the Supervisor should be removed from the Rail Gang.

The Carrier, for its part, initially acknowledged that there had been a one day overrun in issuing the notice of discipline, but contended that this was a clerical error and did not vitiate the entire proceeding. Carrier, for the first time before this Board, argued that the time limit rule in question did not apply in the instant situation because Claimant had not been withheld from service pending the hearing. On the merits, the Carrier argued that the charges had been properly given and that the hearing record contained more than substantial evidence to support the conclusion that Claimant had been insubordinate on the date in question.

On the time limit issue, the Agreement Rule in question reads as follows:

"Rule 21 - Discipline and Grievances

(a)(1) Hearing - An employe who has met the Railway Company's entrance requirements and who has not been rejected within sixty (60) days as provided by Rule 2(a) shall not be disciplined or dismissed without a fair hearing, at which he shall have the right to be represented by one or more of the duly accredited representatives of his craft or class and have at such hearing the necessary witnesses. He may however, be suspended pending such hearing, which shall be held within twenty (20) days of the Company's knowledge of the alleged offense, and decision shall be rendered twenty (20) days from completion of hearing."

From our examination of the record, it is apparent that the hearing in this case was completed on October 16, 1990. The notice of discipline was dated November 5, 1990, but not placed in the U.S. Mail for delivery to the Claimant until November 6, 1990. From October 16 to and including November 5 is 20 days. The notice of discipline in this case was not rendered until it was placed in the mail for delivery to the Claimant. That was done on November 6 - the 21 days from the completion of the hearing. The Carrier's initial argument that the notice of discipline was "constructively rendered" on November 5 is specious at best. There is no language in the Rule which provides for constructively rendering a decision. The Carrier's secondary argument that the rule has no application in this instance because Claimant had not been withheld from service pending the hearing cannot be considered by this Board because it comes into the scenario for the very first time before this Board.

The language of the Agreement Rule is clear and all inclusive. It contains the mandatory word "shall" when directing that a decision be made within a specified time after the hearing has been

completed. Unfortunately for the Organization, the Rule does not contain any language provision which imposes a penalty for failure to strictly comply with the time limits which are set forth in the Rule. We cannot in this case and on the basis of the rule language as found here conclude that the discipline as assessed must be overturned on the sole basis of the one day delay in the rendering of the notice of discipline. We find particularly applicable in this instance the decision and advice expressed in Second Division Award 2466, to wit:

"The purpose of such a rule is to keep claims from growing stale and to expedite the proceedings covered by the rule. We find no merit in the contention that because of a few day's delay in issuing a statement the Carrier has lost the right to have discipline upheld. There is no showing in the record that the Claimants were injured by this brief delay. Most certainly the parties should attempt to stay within time limitations prescribed for procedural requirements, but the failure to do so cannot otherwise void the proper exercise of disciplinary control. Agreements of this kind regulating the employer-employee relationship must be given reasonable, workable construction and not construed so narrowly as to defeat justice".

On the merits, we find that Claimant's own testimony at the hearing gives considerable insight into the situation which existed on the date in question. Claimant acknowledged that he had "never been denied drinking water." At the time in question, Claimant apparently needed some drinking water. No one objected to his stopping to get some. He continued to refresh himself during the period of time that it took for the Assistant Foreman to walk the approximate 250 yards from where he was to the Claimant's location at the water cooler. He continued to refresh himself with water during the discussion which took place with the Assistant Foreman. He continued to consume water during the "two minutes or so" that he says it took for the Supervisor to come from where he was to Claimant's location after being summoned by the Assistant Foreman. Claimant testified that he continued to consume water during the "15 minutes - - while (the Supervisor) cussed and humiliated me." He further testified that "the whole time (he) cussed me and talk to me like a dog, I drank water." Claimant clearly was not denied water.

As for the contention relative to abusive and profane language by the Supervisor, we do not find a single word of profane or intimidating language in any of the testimony of the hearing record. Neither is there any "cussing" or harassment or humiliation to be found in the hearing transcript. There is nothing in this record to demonstrate or prove that Claimant had

been singled out or treated in any untoward manner by either the Assistant Foreman or the Supervisor. There is, on the other hand, substantial evidence, including Claimant's own testimony, to support the conclusion that Claimant, by his reluctance and refusal to act when ordered to act, was guilty of insubordination for which discipline was justified. The assessment of a suspension of sixty days was not an unreasonable application of discipline for the proven offense. This Board will not interfere with the action as taken.

As for the Organization's contention that the Supervisor should be removed from his position as well as Claimant's unsubstantiated allegations of violations of civil rights, human rights and constitutional rights, this Board has no authority to make rulings on any of these issues and summarily dismisses all such contentions and allegations.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.