

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30492
Docket No. MW-30856
94-3-92-3-693

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 Chesapeake
(and Ohio Railway Company)

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

- (1) The discipline imposed upon Foreman James Chamblee for failing to allegedly (sic) perform his work to standards prior to December 20, 1990 was without just and sufficient cause, arbitrary and in violation of the Agreement. [Sytem File C-D-5296/12 (91-1276) COS]
- (2) As a consequence of the violation referred to in Part (1) above, Claimant James Chamblee shall have his foreman and assistant foreman seniority restored 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 employee or employees involved in this dispute are respectively carrier and employee 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.

Prior to his disciplinary disqualification, Claimant was regularly assigned as a foreman at Carrier's terminal facility in Newport News, Virginia. On December 20, 1990, following an extensive inspection of the tracks at the Newport News terminal,

Carrier's inspector noted many defects in the tracks. By letter of December 28, 1990, Claimant was notified as follows:

"...you are charged with your responsibility in connection with failing to perform your work to standards, failing to perform quality work and leaving your work area in an unsafe and messy condition while working in Newport News Terminal."

After several postponements, an Investigation was held on August 13, 1991. Following the Investigation, Claimant was informed by letter of August 23, 1991, that he had been found "guilty as charged", and that the discipline assessed was loss of his Foreman and Assistant Foreman rights. That discipline was appealed by the Organization on behalf of Claimant by letter of September 18, 1991. The appeal was denied and the claim was subsequently progressed up to and including the highest Carrier officer authorized to handle such matters. Following a conference on the property on December 2, 1991, the issue remained unresolved.

The Organization has raised a procedural objection concerning the statement of charges contained in Carrier's December 28, 1990 letter to Claimant. Pertinent to its objection is Rule 21(b) of the Agreement between the Parties which reads:

"(b) Advice of Cause -- The employee involved [in a discipline hearing] will be notified in writing of the charge against him, not less than ten (10) days before date of hearing, with copy of such notice to the General Chairman."

It is the position of the Organization that the charges as written were vague. It maintains that although Claimant's representative presented a "generic" defense of Claimant's actions at the hearing, the lack of specific allegations or specific dates severely hampered his defense. The Organization notes that the principle that discipline charges cannot be vague but must be specific, exact and precise, is well established. In support of its position, the Organization points to the Third Division Award 25068, which reads in pertinent part as follows:

"An examination of the record of the investigation as well as the charges,...supports Petitioner's position. The charges were indeed vague and totally inadequate on a prima facie basis; nevertheless, Carrier did raise at the investigation specific violations related to...the charges. Serious accusations, such as those herein, must contain specific information with regard to the time, date and nature of the alleged infractions. Such information was lacking and makes the task of defending (much less the reviewing authority) virtually impossible. Thus, this Board cannot reach either the merits of the dispute or the other arguments presented: the claim must be sustained."

It is apparent from the imprecision of the charges leveled against Claimant in Carrier's letter of December 28, 1990, that the above-cited Award is directly on point. Carrier clearly failed to enunciate at the outset the specific infractions with which Claimant was charged, and the dates upon which those infractions allegedly incurred. Thus, Claimant and his representative were prevented by Carrier from mounting anything approaching an adequate defense in Claimant's behalf. In light of this fatal procedural flaw, the Board cannot reach the merits of the case and the claim is sustained as presented.

AWARD

Claim sustained.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.

CARRIER MEMBERS' DISSENT

TO

THIRD DIVISION AWARD NO. 30492, DOCKET NO. MW-30856

(REFEREE WESMAN)

In this case, the Board was presented with circumstances involving the disqualification of a Track Foreman on the basis of his obvious inability, or unwillingness, to properly maintain his assigned territory according to approved standards, standards with which he openly acknowledged familiarity. It was further proven during the Hearing that the Claimant had received, on at least two separate occasions, copies of the Carrier's Engineering Department Book of Track Safety Standards.

This notwithstanding, and for reasons known only to the author of this Award, the Majority chose to overlook the voluminous testimony as to the Claimant's lack of qualification, testimony which was provided by multiple witnesses, and ruled that:

"Carrier clearly failed to enunciate at the outset the specific infractions with which Claimant was charged, and the dates upon which those infractions allegedly incurred (sic). Thus, Claimant and his representative were prevented by Carrier from mounting anything approaching an adequate defense in Claimant's behalf. In light of this fatal procedural flaw, the Board cannot reach the merits of the case and the claim is sustained as presented."

The applicable Agreement Rule stipulates that the charged employee must be presented with Advice of Cause, in writing,

"...of the charge against him, not less than (10) days before date of hearing, with copy of such notice to the General Chairman."

In this regard, and in response to a similar allegation by another Organization involving the very same Agreement Rule, Referee Eckehard Muessig found in Award 24 of Public Law Board No. 4698, copy of which was provided within the record:

"The General test, with respect to the preciseness of the charge, is whether it presents a full and clear statement of the objectives so that the nature of the charge is known by the person charged."

That such was true in the instant case is clearly indicated by the detailed defense presented at the Hearing. However, the Majority apparently relied upon only that part of the proceedings wherein the Claimant's representative enunciated repetitive objections to charges which, by their very nature, are

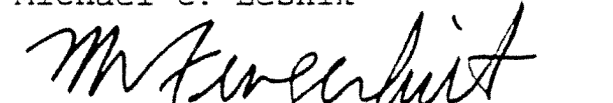
CARRIER MEMBERS' DISSENT TO
THIRD DIVISION AWARD NO. 30492
DOCKET NO. MW-30856
(REFEREE WESMAN)
page 2

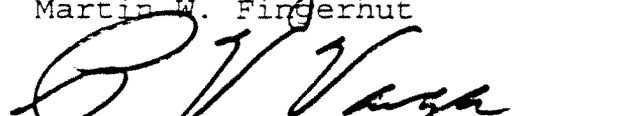
comprised of a number of deviations to standard work practices, occurring and accumulating to create a general state of disrepair over a period of time.

In any event, it should be noted that in sustaining the claim on alleged procedural deficiencies, the Board has not mitigated or otherwise vindicated Claimant's failure to properly perform his duties, facts which were thoroughly proven during the three hours of testimony and cross-examination adduced within the Hearing. It is clear from that record that both the Claimant and his representative were presented with "...a full and clear statement of the objectives..." for the Hearing, and that such statement was sufficient to ensure "...that the nature of the charge is known by the person charged."

For these reasons, this Award is palpably erroneous and cannot be considered to have any precedential force or effect.


Michael C. Lesnik


Martin W. Fingerhut


Paul V. Varga

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 30492, DOCKET MW-30856
(Referee Wesman)

The Dissent to this award is nothing more than a rehashing of the Carrier's position which was considered by the Board and rejected. Specific exception is taken, however, to the Carrier Members' attempt to portray this award as supportive of the charges against the Claimant. Such a portrayal is contrary to the specific language of the award, which clearly states:

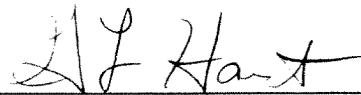
"*** In light of this fatal procedural flaw, the Board cannot reach the merits of the case and the claim is sustained as presented."

The foregoing makes it crystal clear that the Board sustained the Organization's procedural objection to the charges as a threshold matter and the merits of the allegations against the Claimant were not considered. Hence, the Board obviously found the charge contained in the Carrier's Advice of Cause so vague as to preclude any determination of the Claimant's culpability in relation thereto and the Carrier Members' contention that a charge against the Claimant was proven at the hearing is not endorsed by the Majority. The Carrier Members' attempt to enter the conclusions to which the Carrier arrived after the hearing as dicta within their Dissent does nothing to support a charge which was not properly made or to

Labor Member's Response
Award 30492
Page Two

show that the award is erroneous. As the Carrier Members have so eloquently stated in another case, "Labeling an Award 'palpably erroneous' does not make it so. ***" This award is correct and stands as precedent.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "G. L. Hart", written over a horizontal line.

G. L. Hart,
Labor Member