

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30757
Docket No. CL-31117
95-3-93-3-39

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

(Transportation Communications International
(Union
PARTIES TO DISPUTE: (
(Elgin, Joliet & Eastern Railway

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood (GL-10919) that:

1. Carrier violated the effective agreement when, following an investigation held on February 25, 1992, it imposed discipline in the form of forty (40) demerits against the record of Mr. W. Shukitis without just cause.
2. Carrier shall rescind the discipline imposed, shall clear his record of the charge placed against him and shall compensate him for the time spent in attendance at the investigation in accordance with Rule 43 of the Agreement."

FINDINGS:

The Third Division of the Adjustment Board, upon the entire record and all 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 herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is employed by the Carrier as a Clerk. In January of 1992, he was assigned to the Carrier's Kirk Yard in Gary, Indiana. Claimant drives to work. His route takes him from the Indiana Toll Road to the Buchanan Street North exit, which is a curving ramp with a Stop sign at the bottom, one block on Buchanan Street, and then right at a wye in the road to the Carrier's office where he works. To the left at the wye is USX's Gary Works, a major customer of the Carrier. The ramp is, however, on public property.

On January 19, 1992, while on his way to work in his private vehicle at 10:30 p.m., Claimant was observed by a U. S. Steel Security Officer (the "Officer"), who reported that he drove through the Stop sign at the foot of the Buchanan Street exit ramp, without stopping, at a speed the officer estimated (without radar or other confirmation) at approximately 30 miles per hour. Claimant denied having run the Stop sign and stated that the ramp was too sharp to have been going 30 miles per hour. The Stop sign and the ramp and street are public property. Insofar as the record indicates, U.S. Steel security personnel do not possess police powers.

The Carrier had notified its employees, through Special Instruction KT-27 that U.S. Steel Security would be stepping up monitoring of traffic on areas including Buchanan Street because Carrier employees were not obeying traffic safety regulations on U. S. Steel property. The Instruction notified employees that failure to comply with traffic regulations could result in loss of driving privileges on U.S. Steel property.

The Officer followed Claimant to the EJ&E office and demanded to see his Carrier identification. Claimant refused and walked into his office. The Officer summoned his Lieutenant, who arrived and talked with Claimant's supervisor, the Trainmaster, who was also present. The Lieutenant learned Claimant's identity from the Trainmaster and issued to the Trainmaster (not to Claimant) a "Traffic Safety Violation", a "ticket" without direct legal consequence except for employees of USX, although such violations can be used as a basis to ban outsiders from U.S. Steel property.

The Lieutenant and Claimant got into an altercation following issuance of the ticket, apparently started when the Lieutenant spoke harshly to Claimant, who responded that he wouldn't be talked to like that and that the Lieutenant was not talking to his kid or wife, to which the Lieutenant took offense and moved toward Claimant. The Trainmaster stepped between; and further problem was avoided.

The Carrier summoned Claimant to an investigatory hearing to develop facts and determine responsibility in connection with his "improper driving practice on [his] way to work and the alleged improper conduct exhibited by [him] within the Trainmaster's Office with . . . USS Plant Security." The hearing was convened on February 25, 1992, at which the above testimony was taken.

Following the hearing, the Carrier found Claimant guilty of improper driving and improper conduct in the Trainmaster's office, found his conduct to be in violation of Special Instruction KT-27,

General Regulations 700 (requiring employees to be civil and courteous) and 701 (requiring employees to give safety highest priority and prohibiting unsafe practices), as well as various Motor Vehicle Rules. It assessed him 40 demerit marks (100 demerits trigger dismissal).

The Organization protested imposition of the discipline. The claim was progressed in the usual manner, without resolution; and was brought to this Board.

The Organization argues that the Carrier's action must be overturned because the hearing officer prejudged Claimant's guilt, thereby depriving him of a fair and impartial hearing and that he was found guilty of rules violations with which he had not been charged. It asserts that the Carrier failed to prove that Claimant committed the traffic offense or engaged in improper conduct, but contends that, even if Claimant committed the traffic violation, he was not on duty or on Carrier property and the conduct was not a proper subject of discipline. It urges that the imposition of discipline was improper and the penalty, in any event, arbitrary and excessive. The Organization urges, therefore, that the Claim be sustained and urges, further, that Claimant be paid for his time spent in the Investigation.

The Carrier argues that Claimant's guilt is established by substantial evidence. It asserts that the propriety of Carrier's disciplining of employees for similar conduct has previously been sustained by this Board in Third Division Award 30124, between these same Parties.

The Carrier argues that the charges against Claimant were more specific than the rules and were sufficiently clear to provide notice and opportunity to prepare his defense. The Carrier contends that the Organization did not raise the argument on the property and cannot raise it for the first time before the Board. It also contends that the penalty imposed was lenient, in light of Claimant's offense and his record of 10 prior offenses, including six suspensions. It argues that the Organization cannot claim compensation for Claimant's time spent at the investigation, since it did not raise the issue on the property, as well as because he attended the investigation voluntarily and because he is not entitled under any circumstances unless the claim is sustained. The Carrier denies any violation of Claimant's due process. It urges that the claim be denied.

The Board has considered Claimant's arguments that he was deprived of due process and fair hearing because the Hearing Officer had predetermined his guilt and because he was not charged

with violation of specific rules until after the investigation. We are not persuaded. There is no evidence in the transcript or in the correspondence between the Parties which indicates prejudgment by the Hearing Officer. Absent a specific rule requirement, due process is satisfied if the charges against an employee are sufficiently clear to apprise the employee of the conduct in question and adequately allow preparation of his defenses. Indeed, until the investigation is complete, it may not be possible to ascertain whether the employee has violated specific rules.

With respect to the merits, the record contains substantial evidence, in the form of testimony of the USX Security Officer, that Claimant ran the Stop sign. That is sufficient, under Board precedent, to conclude that Claimant committed the traffic offense with which he is charged.

Commission of such an offense while an employee of this Carrier is on his way to work has been by this Board in Award 30124 to be sufficiently "related to [Claimant's] employment" to support application of Rule 701 and Safety Rule 14 (requiring, in part, that employees must stop when required by safety). While a nexus is required between misconduct and a Company rule in order to support discipline, the Board is persuaded that the application of that Award to the particular circumstances of this case supports the existence of such a nexus. However, the Board does not hold that the Carrier's rules may be generally applied to off-duty conduct away from the workplace.

Of Claimant's culpability in the second charge the Board is not persuaded. Insofar as the record indicates, USS Security has no police powers on the Carrier's property, where the alleged "improper conduct" took place. The Carrier's rules in effect at the time of this incident do not make USX Security its agents or obligate Carrier employees to furnish them with identification. The Board is not persuaded that Claimant's failure to do so was improper; Security's proper response to obtain Claimant's identify was to contact his Supervisor - which it did. Rule 700 requires employees to be courteous to everyone. That rule applied to Claimant's interaction with the Lieutenant. However, the record, in the form of the testimony of Claimant, the Trainmaster and the Security officer (the lieutenant did not testify) does not support a conclusion that Claimant's conduct was discourteous to the Lieutenant or otherwise improper. Thus, the Carrier's second charge against Claimant fails for lack of proof.

When an employee's guilt is established, the Board accords deference to the Carrier's determinations as to the amount of discipline to be imposed and does not modify the penalty unless it

is arbitrary and excessive. However, where, as here, the employee is disciplined for two offenses (unsafe driving and improper conduct) and one is rejected, reduction of the penalty is appropriate. Since Claimant's record contained no violations for almost four years before the incident at issue (for attendance) and no misconduct since 1977, the Carrier's argument that a harsher penalty than was imposed on the employee in Award 30124 (10 demerits) should be sustained on the basis of Claimant's record is unpersuasive. The Award reflects the Board's determination as to the appropriate penalty.

Claimant's entitlement to reimbursement for time spent in the investigation was not raised on the property and, under established Board precedent, cannot be presented for the first time in this proceeding.

Claimant violated Rule 700 and Safety Rule 14 by running the Stop Sign, but did not otherwise engage in improper conduct. The penalty of 40 demerits is excessive for the surviving charge and is reduced to 10 demerits. Claimant's records shall be amended to reflect the reduction, and he shall be compensated for any wages and benefits lost. Claimant is not entitled to compensation for time spent in the Investigation.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 24th day of February 1995.