

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31020
Docket No. MW-31554
95-3-93-3-573

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Midsouth Rail Corporation

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

- (1) The disciplinary disqualification of Mr. M. Evans as a foreman on December 23, 1992, for alleged violation of MidSouth Corporation Operating Rule B and Safety Rules GR-16 and GR-3, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 93-013-MW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Evans' record shall be cleared of the charges leveled against him, the disqualification shall be rescinded and he shall be compensated for all wage loss suffered."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.

The Claimant had worked for the Carrier for three and a half years at the time he was charged with not giving undivided attention to duty, thus allegedly not performing his duties

efficiently or at acceptable standards. At the time, he was working as a Foreman, a position he held from April 2, 1992.

The Claimant's immediate Supervisor took exception to the amount of work completed on November 17, 1992, by the Claimant and his two co-workers. Subsequent to an investigation into the matter, the Claimant was dismissed from his position as Foreman. The disqualification resulted from the Carrier's determination that the Claimant had violated the following Rules:

"General Rule 3 - from the Safety Book:

All employees must follow instructions from proper authority and must perform all duties efficiently and safely."

"General Rule 16 - from the Safety Book:

Undivided attention to duty is required. While on duty employees must not engage in any activity that will interfered (sic) with or distract their attention from their work."

"Rule B - from the Operating Rule Book:

Employees whose duties are prescribed by these rules must be provided a copy which must be available for reference while on duty and if in doubt as to their meaning must apply to proper authority for an explanation. In case of doubt or uncertainties where needed action is necessary, the safe course must be taken. Employees will comply with instructions issued by officers of various departments when applicable to their duties. Employees will be required to meet acceptable standards of performance."

These rules had not been cited in the original charge letter, but were contained in the disqualification letter.

The Organization argues that the Carrier failed to cite specific Rule violations in its charge letter as required by Rule 35, thus failing to afford the Claimant due process. Furthermore, the Organization contends the Carrier failed to provide a full and fair hearing to the Claimant when they permitted the admission of hearsay evidence and unsubstantiated facts.

In addition, it is the Organization's position that there was insufficient evidence to support the Carrier's findings. Furthermore, they hold that even if the Claimant were guilty of the charges, the discipline was harsh, capricious and in violation of the Agreement. Finally, they raise the issue of disparate treatment based on the fact the other two crew members charged in the incident were not disciplined.

The Carrier holds that the Claimant was properly notified of the charges against him and the investigation was fair and impartial. The Carrier further argues that the charges were supported by sufficient evidence. They hold that the discipline issued was within the prerogative of the Carrier and the disqualification was appropriate, considering there were no mitigating or technical circumstances to alter the discipline.

The Board has reviewed the evidence carefully. We do not believe the evidence presented is sufficient to sustain the discipline issued to the Claimant. The Organization presents very cogent facts and persuasive arguments regarding the failure of the Supervisor to demonstrate first, that there were established standards the Claimant should have been aware of relative to how much work he should have been able to complete with his crew. Secondly, there was little concrete evidence presented which supported the contention that the Claimant failed to complete a sufficient amount of work. The record shows that much of the evidence presented through testimony was based on conjecture and not enough was supported by facts. While comparing the amount of work performed by different crews has some validity, it is not totally determinative, especially in view of the fact the track covered and the equipment used were different. A more appropriate method of proof would have involved an actual trial run by the Supervisor using the same equipment and the same track interruptions. As it was, there was nothing in the transcript which revealed the amount of time the Claimant would have taken in delivering equipment or the amount of time necessary to release the track for the train to pass, etc. Absent such information it is impossible to determine the Claimant failed to perform a sufficient amount of work.

Furthermore, the Board does not believe the evidence supports a conclusion that the Claimant is incapable of performing his job as Foreman. Even if the charges had been adequately supported, without evidence that the Claimant had been properly appraised of what was expected of him and what standards he was expected to maintain, the Board does not believe disqualification is acceptable discipline. However, if the Board considered it an appropriate disciplinary measure, we would find it harsh and unacceptable, especially as a first discipline and especially under the

circumstances outlined here. An employee in a new position, even one of added responsibility, should be given some guidance in the early stages so that he can develop to his full potential. This is not only good for the employee, but is important to the employer, as well. There was no evidence presented which revealed this type of guidance was provided to the Claimant.

AWARD

Claim sustained.

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 26th day of July 1995.