

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33436
Docket No. MW-34156
99-3-97-3-711**

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

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline [thirty (30) day suspension] imposed upon Foreman M. Bridges for his alleged ‘ . . . incompetency, performing poor quality work and failure to direct the forces under your supervision properly as the foreman of the 5XT4 team.’ was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement [System File SPG-D-1781/12 (96-1347) CSX].

(2) The Claimant’s record shall be cleared of the charges leveled against him 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 were given due notice of hearing thereon.

As of the date of the incident in question, the Carrier had employed Claimant for a period of approximately 25 years. At the time of the incident, Claimant was a Surfacing Foreman and had recently received a 10-day suspension (Third Award 33435).

The incident which led to Claimant's 30-day suspension took place on July 22, 1996. At that time, the Claimant was in charge of approximately 25 men on the track surfacing portion of the gang. As the Foreman of the Surfacing Gang, Claimant was responsible to ensure that track had been properly surfaced. This included insuring that all rail anchors were properly in place, that all down ties were brought up, that the ballast was properly dressed and that line swings and elevation deviations were removed from the track surface.

Claimant's supervisor was Gang Supervisor Hanshew. Hanshew claimed that prior to July 22, 1996, he had spoken with Claimant on several occasions about the quality of his work. Hanshew claims that he had indicated that Claimant's work was not of proper quality. He also indicated that he had previously coached and counseled Claimant about the quality of his work. On July 22, Hanshew inspected the surfacing work performed earlier in the day by the Claimant's gang. When he performed this inspection, he found that approximately 40% of the rail anchors had not been properly squeezed. As a result of this inspection, as well as the prior incidents in which Hanshew had counseled Claimant, Claimant was advised that he would be removed from the surfacing responsibilities and placed on crossing work.

Based on this inspection, Hanshew estimated that only 5% of the 40% of the anchors not squeezed would have been caused because of ballast problems and thus would not have been Claimant's responsibility. During the investigation, Claimant agreed that it was his overall responsibility to ensure that the anchors were properly squeezed. Based on these actions, a 30-day suspension was imposed upon Claimant.

By letter dated August 1, 1996, Claimant was instructed to attend an Investigation on August 7, 1996 at the Roadmaster's Office in Warren, Ohio, charged with incompetency, performing poor quality work, and failure to direct the forces under his supervision properly as the Foreman of the 5XT4 team. The Investigation was postponed once a riot took place on August 8, 1996. As a result of the Investigation, on August 28, 1996 Claimant was suspended for 30 days from September 2, until October 11, and returning to work on October 14, 1996.

The Organization claims that the suspension was unjust. According to the Organization, Claimant properly fulfilled his duties on July 22 and that the rail anchors were properly squeezed in the location where Claimant was working. Hanshew's claim that 40% of the rail anchors were not properly squeezed is incorrect.

Further, the Organization contends that Claimant did not receive a fair and impartial Hearing. The Organization contends that Claimant did not have proper notice of the Investigation. Claimant received his Notice of Investigation on August 6, 1996 which was scheduled for August 7, 1996 and did not give him the proper notice.

The Carrier claims that there is substantial evidence to support its position that Claimant engaged in the acts alleged. Supervisor Hanshew inspected the area which Claimant was in charge of surfacing at the end of the day on July 22. At that time, he determined that 40% of the rail anchors were not squeezed properly. Claimant was ultimately responsible for these deficiencies and the Carrier imposed an appropriate punishment. This degree of suspension is especially appropriate in light of the fact that Claimant had been previously counseled and because he had received a 10 day suspension for incompetence. The Carrier also contends that Claimant did receive a fair and impartial Hearing. Claimant did receive his Notice of Investigation on August 5, but did not pick up his mail until August 6. In addition, the Investigation, which was originally scheduled for August 7, did not take place until August 8. Further, the Conducting Officer indicated that he would be willing to take a recess for the Organization to further prepare. Finally, at the conclusion of the Investigation, the Claimant agreed that his "due process" rights had been protected during the course of the Investigation.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166).

We have had the opportunity to review the transcript and the positions of both parties. On the question of whether Claimant was guilty of incompetency, performing poor quality work and failure to direct the forces under his supervision properly as the Foreman of the 5XT4 team on July 22, 1996, the Board finds that there is substantial evidence to sustain Carrier's position. Essentially, this comes down to a matter of credibility. With regard to the proper squeezing of the rail anchors, the Organization claims that the Claimant acted properly and that the rail anchors were properly squeezed. The Carrier claims that the Claimant failed to properly perform his duties as a Foreman and that 40% of the rail anchors were not properly squeezed. Thus, it is the word of the Claimant against the word of Supervisor Hanshew. As stated above, our role is limited to determining if there is substantial evidence to sustain a finding of guilty. At the Investigation, testimony was presented from Supervisor Hanshew and the Claimant. Here, the Hearing Officer found that Supervisor Hanshew properly found that 40% of the rail anchors in the relevant area were not squeezed properly. There is substantial evidence in the record to substantiate this claim and we will not substitute our judgment for that of the Carrier. It is not our role to redetermine credibility (See Public Law Board No. 2917, Award 5; Second Division Award 481). Thus, on the issue of whether Claimant was properly found guilty of incompetency, performing poor work quality and failure to direct the forces under his supervision properly as the Foreman of the 5XT4 team on July 22, 1996, the Board finds that there is substantial evidence to support the Carrier's position.

We next review the question of whether Claimant was denied a fair and impartial Hearing. As indicated above, the Organization claims that a fair Hearing was denied because Claimant did not have an appropriate amount of notice. First, it should be noted that Claimant admitted that the Notice arrived on August 5. Further, while the Investigation was scheduled for August 7, the transcript reflects that it was postponed until August 8. In addition, the Conducting Officer indicated a willingness to pause (briefly) so that the Organization representative could have additional time to prepare.

In addition, we have had the opportunity to review the transcript in its entirety. Based on the evidence in the transcript, we find that the Organization was able to prepare and present its case effectively. Finally, at the conclusion of the Investigation, the Claimant confirmed that he had received a fair and impartial Hearing:

"Ludwig: The record is so noted, and with that Mr. Bridges, I'll ask if you believe that this was a

fair and impartial hearing and conducted in accordance with the terms of your working agreement?

STATEMENT VICE CHAIRMAN P. E. LANTZ:

Lantz: Ordinarily the Organization answers that question for the charged employee, but at this time I'll let Mr. Bridges answer it if he wants to.

Bridges: I'll say yes. I appreciate what you have done.

Ludwig. And I appreciate that answer and with that we'll bring this hearing to a close."

Thus, based upon the transcript as well as the statement of the Claimant, any delay does not appear to have prejudiced the Organization. Thus, we reject this claim of the Organization.

With regard to the penalty imposed, as noted above, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. In this case, we cannot say that the Carrier's actions were unjust, unreasonable or arbitrary. Thus, we uphold the 30-day suspension imposed.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 23rd day of August 1999.