

PUBLIC LAW BOARD NO. 1838

Award No. 2

Case No. MW-LP-77-100  
MW-LP-77-102

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute Norfolk and Western Railway Company

Statement of Claim: (100) 1. Carrier violated the effective Agreement by unjustly and unfairly dismissing Welder Helper Davenport from Carrier service on December 27, 1976, especially Rules 33 and 35.

2. Claimant be restored to service, with vacation, seniority and all other rights unimpaired, and that he be paid for all time lost, at the applicable rate of pay.

(102) 1. Carrier violated Rule 33 of the effective Agreement by failing to give Welder Helper Davenport an investigation and hearing upon the request of his representative in his behalf, dated November 5, 1976.

2. Welder Helper Davenport be restored to service with vacation, seniority and all other rights unimpaired and that he be paid for all time lost.

Findings: The Board finds, after hearing upon the whole record and all evidence, that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 1, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearings held.

Claimant was employed April 24, 1974, as a Welder Helper. On November 2, 1976, while working with Welder T. E. Pritchard as a Welder Helper, on Bridge No. 7, the main line bridge under traffic, Claimant was taken to task by Welder Pritchard because Claimant Helper hadn't performed in a manner as the Welder thought that he should have. Said Welder used profanity in talking with Claimant Welder Helper as to his alleged failure to perform as expected. Claimant was dissatisfied with the content and progress of their conversation and he asked said Welder to go to the office with him to talk with the Assistant Terminal Supervisor Bridges and Buildings, Mr. Henderson. However, Mr. Henderson came upon both men whereupon Welder Pritchard told Mr. Henderson that he was through working with Claimant and that he would refuse to work with him. Welder Pritchard

then left and returned to his work. Mr. Henderson talked with Claimant and told him that Mr. Pritchard had been doing a good job and that he wanted them both to get along.

The next day Claimant was assigned to a different Welder and another Welder Helper was assigned to Welder Pritchard. Claimant, who was still dissatisfied as to his complaint of Welder Pritchard's conduct towards Claimant, brought the matter of his alleged unjust treatment to the attention of his representatives. The General Chairman, on November 5, 1971, requested a hearing thereon under Rule 33(F). However, the General Chairman failed to present sufficient specifics until requested therefor on November 10 to which he replied November 15, 1976. Carrier advised the General Chairman on November 26, 1976, that such hearing was scheduled for December 3, 1976. It was ultimately held January 18, 1977. Thus, the seed for Case No. 2 (LP-77-102) was sown.

The facts in Case No. 1 (LP-77-100) are that on November 24, 1976, Claimant was notified that he was to attend an investigation "to determine your responsibility in connection with your failure to properly and adequately perform your duties as a Welder Helper for the Norfolk and Western Railway." As a result of the investigation held, Claimant was adjudged guilty as charged and dismissed from service as discipline therefor.

Rule 33 - "Discipline and Grievances" in pertinent part provides:

"(a) An employee disciplined or dismissed will be advised of the cause for such action in writing. Upon a written request being made to the employee's immediate superior by the employee or his duly accredited representative within ten calendar days from date of advice, the employee shall be given an investigation.

(b) The investigation shall be held within the ten calendar days after the receipt of request for same, if practicable, and decision rendered within twenty calendar days after completion of the investigation....."

(f) An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for in this Rule 33 if written request is made to his immediate superior within ten calendar days of cause of complaint...."

It was deemed necessary because of the interrelationship of both cases to join same in a single Award. An analytical review of these two cases makes it crystal clear that Claimant's request to have Carrier hold

a Rule 33(f) hearing on his complaint of unjust treatment, (Case No. 2, LP-77-102), became the catalyst which thereafter inspired and resulted in Carrier setting up a different investigation, (Case No. 1, LP-77-100), for the ostensible purpose to "determine Claimant's failure to properly and adequately perform his duties as a Welder-Helper." This latter investigation was then given specific priority by Carrier over the hearing requested by Claimant and it resulted in Claimant being adjudged guilty as charged. He was discharged from service as a result thereof.

The Board finds and holds that Carrier's actions represent an abuse of its discretionary right to discipline and a flagrant violation of Rule 33 and particularly paragraph (f) thereof. Such improper Carrier action, no matter how well intentioned otherwise, is an error which compels the Board to set aside the conclusions reached by Carrier.

Carrier's violations of Rule 33 and the ensuing miscarriage of justice overshadows the fact that Claimant may well have not had a proper basis for concluding that he had been unjustly treated, as well as that there may also have been a basis for and a need of reasonably disciplining Claimant. However, any such possible conclusions were forfeited because of the arbitrary and capricious handling accorded Claimant merely because he attempted to exercise his contractual right under paragraph (f) of Rule 33.

Rule 33 (a) mandates that Carrier give written notice of the cause for any discipline that it issues to the employee affected thereby. Such requirement implies and confirms the fact that Carrier may issue discipline without any necessity to first hold an investigation thereon. Such affected employee is granted a right under this rule, if he so desires to exercise, to request an investigation to determine if proper cause existed for the discipline being questioned. However, the Board finds that the conferring of such employee right did not preclude Carrier from holding an investigation if it so desired before issuing discipline to an employee if thereby justified.

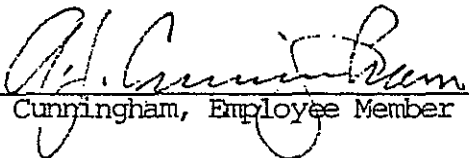
Rule 33 (f) mandates of Carrier that the exercise of the employee option,

granted thereunder, be objectively handled within the same prescribed procedural limitations as if the requested hearing were a disciplinary proceeding invoked by Carrier under Paragraph (a) of Rule 33. Carrier's arbitrary and capricious handling of Claimant's request resulted in a violation of Rule 33(f).

The record herein impels the Board to sustain the claim in Case No. 1 (LP-77-100). However, only part 1 of Case No. 2 (LP-77-102) is sustained with part 2 thereof being denied for convenience rather than dismissed because such was an improper claim and a remedy held to be not in consonance with part 1 thereof.

Award: Claim No. 1 (100) Sustained  
Claim No. 2 (102) Part 1 - Sustained  
Part 2 - Denied

Order: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

  
A. J. Cunningham, Employee Member

  
G. C. Edwards, Carrier Member

  
Arthur T. Van Wart, Chairman  
and Neutral Member

Issued at Atlanta, Georgia, March 30, 1978.