

SPECIAL BOARD OF ADJUSTMENT
PUBLIC LAW BOARD NO. 3729

CONSOLIDATED RAIL CORPORATION
"CARRIER"

and

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES
"ORGANIZATION"

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CASE NO. 4

AWARD NO. 2

STATEMENT OF CLAIM

Claim of the Brotherhood (CR-396-D) that:

"(a) The disqualification as Foreman and Assistant Foreman assessed Claimant R.J. Baker was without just and sufficient cause in an arbitrary and capricious manner.

(b) The Claimant, R.J. Baker, shall be reinstated as a Foreman and Assistant Foreman and shall be compensated for any lost earnings as a result of this disqualification."

This case arose when the Carrier charged Robert J. Baker, hereinafter the Claimant, with failing to be properly attired at work. The specific charges, contained in a Notice of Investigation dated July 1, 1983, were as follows:

"Violation of Rule "B" of the Rules of the
Transportation Department which reads:

'Employees must be familiar with and obey all rules and special instructions.

They must follow instructions from proper authorities and must perform all duties efficiently and safely.'

Violation of Rule 3001(a) of the Conrail Safety Rules for Maintenance of Way Employees which reads:

'Immediate Supervisor shall: (a) be responsible for the safety instruction and safe performance of all the men under his jurisdiction, including employees from another department or gang.'

Violation of Rule 3020(a) of the Safety Rules for Maintenance of Way Employees which reads:

'Wear suitable gloves and clothing (a) that gives ample body, arm and leg protection. When acetylene, electric or thermit cutting or welding, wear cuffless overalls or trousers. Short sleeve or "T" type shirt may be worn if not performing work requiring arm protection.'

Violation of Rule 3051(a), (b) of the Safety Rules for Maintenance of Way Employees which reads:

'Employees to whom company personal protective equipment has been issued will be responsible for: (c) Having the equipment available for immediate use; (d) Wearing the equipment in a manner to provide the intended protection.'

Violation of Rule 3060 of the Safety Rules for Maintenance of Way Employees which reads:

'Wear approved helmet with nape strap while on duty (except in a building or highway vehicle, unless working on same)."

Alleged violation of these rules took place on June 29, 1983, when you were found at 10:40 A.M. working in Goodman Street Yard at Rochester, New York, without hard hat, without shirt, with pant legs rolled up to the knees and fastened there with safety straps."

The hearing was held on September 27, 1983. The Claimant was present and represented by the Organization. By letter dated September 27, 1983, the Carrier notified the Claimant that he had been found guilty of the charges and assessed a penalty of being "disqualified as foreman and assistant foreman." The above quoted claim was then filed on behalf of the Claimant.

In June, 1983, the Claimant was a foreman, a position he had held for seven years. The Claimant had at that time worked with the Carrier nine years.

On June 29, 1983, the date of the incident giving rise to this claim, the Claimant was working the Goodman Street Yard at Rochester, New York. At approximately 10:40 A.M. Assistant Division Engineer Hammons and Track Supervisor McCartney drove by the Claimant and three or four other men under the Claimant's jurisdiction. They noticed that the Claimant did not have a shirt or hardhat and his pants were rolled up to his knees. The Claimant was standing in the gauge of the track with a hammer in his hand, and Hammons believed the Claimant and his gang were in the process of applying rail anchors.

Hammons believed the Claimant's dress violated Carrier safety rules. As he had previously spoken to the Claimant on

several occasions about the need to wear a hardhat and follow safety rules, Hammons confronted the Claimant, told him that formal charges would be brought and told him to get on the proper attire or leave the Carrier's property. Hammons then left and did not see the Claimant again that day.

The Claimant worked approximately 90 more days after this incident as foreman before being disqualified.

POSITION OF THE PARTIES

The Carrier contends that the Claimant's culpability is clearly established in the substantial, eyewitness accounts of Hammons and McCartney, both of which testified that the Claimant was working without a hardhat or shirt and with his pant legs rolled up to the knee. The Claimant's attire violated safety rules, which the Carrier has the right and responsibility to establish and enforce for the safe conduct of its operations.

Moreover, the disqualification assessed against the Grievant was entirely commensurate with the gravity of the proven offense. Claimant's refusal to follow safety rules is inconsistent with performing the supervisory duties of a foreman or assistant foreman. As the penalty was not arbitrary or unreasonable, this Board does not have authority to substitute its judgement for that of the Carrier.

The Carrier rejects the defenses raised by the Organization. First, the Claimant's self-serving statement that he had completed a particular task does not mitigate his guilt,

as he was still on Carrier's property to work. Second, the Claimant's contention that other employees violated safety rules is unsubstantiated, and it is well-settled that the dereliction or negligence of others does not excuse an employee's own dereliction.

The Organization initially contends that the charges against the Claimant are improper in their entirety, as the Carrier discriminatorily enforced the safety rules concerning dress. The Claimant testified credibly that the gang to which he was assigned also violated the alleged safety rules and were not disciplined. Furthermore, the Claimant was not properly warned that improper dress could result in discipline.

The Organization further maintains that the Claimant was not improperly dressed while working. Rather, his pant legs were fastened at mid-calf with safety straps rather than rolled up and he was not wearing a shirt because he had just finished working on a particular job and was wiping off his sweat. The Carrier has no evidence that the Claimant was dressed improperly while working, as Hammons and McCartney both testified that they did not observe the Claimant before or after confronting him at approximately 10:40 A.M.

Without departing from its position that the Claimant was not guilty of the charges, the Organization alternatively argues that the discipline assessed was excessive and arbitrary. The Claimant is obviously capable of serving as foreman, as he held the position seven years before and 90 days after the

incident. The penalty of permanent disqualification is not reasonably related to the seriousness of this offense. Prior awards establish that in this circumstance, the penalty should be set aside.

OPINION

There is substantial, credible evidence in the record to support the Carrier's finding that the Claimant was guilty as charged. Two eyewitnesses clearly testified that they observed the Grievant without a hat and shirt. This violated Carrier safety rules. The Claimant was on Carrier property and in the middle of his work shift. In addition, Hammons testified that he had repeatedly instructed the Claimant to follow the safety rules.

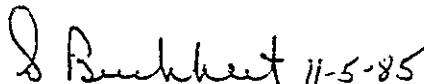
The record does not support the Organization's contention that the discipline assessed against the Claimant was improper because other employees similarly dressed were not disciplined. There is no evidence that those employees had been previously warned. Furthermore, as the Claimant was a foreman, his disregard for the safety rules was more serious than a regular employee. Foreman by definition must lead men under their jurisdiction. A foreman that flaunts safety rules likely affects the habits of other employees.

However, this Board agrees with the Organization that the penalty of permanent disqualification from foreman or assistant foreman was excessive and not reasonably related to

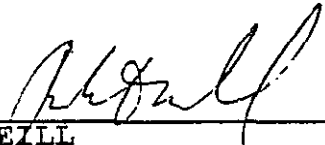
the seriousness of the offense. The Board agrees that misdemeanors do not require lifetime penalties. Moreover, the Claimant apparently functioned effectively as a foreman before and after the incident. Accordingly, the Board shall order the disqualification removed.

AWARD


The claim is sustained in part. The Carrier shall within 30 days remove the Claimant's disqualification for foreman or assistant foreman. The Carrier shall not be required to compensate the Claimant for any lost earnings as a result of the disqualification.



S. BUCHHEIT
Neutral Member



R. O'NEILL
Carrier Member



J. P. CASSESE
Organization Member