

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Form 1

Award No. 30124  
Docket No. CL-28832  
94-3-89-3-339

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

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

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

1. Carrier violated the effective agreement when, following an investigation which was completed on August 30, 1988, it issued discipline in the form of ten (10) demerits against the record of Tower Operator D.R. Lightfoot, Jr., without just cause.
2. Carrier shall now rescind the discipline assessed and shall clear Mr. Lightfoot's record of the charges placed against him."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

This claim challenges the Carrier's September 6, 1988 decision to assess Claimant ten demerits for speeding and for being discourteous to U.S. Steel security officers on July 23, 1988.

Claimant has been in service with the Carrier since June 14, 1976. The Investigation began on August 3, 1988, as scheduled. After hearing certain testimony, the Hearing Officer postponed the Investigation at the Organization's request so that the Organization could secure the presence of an additional witness,

the Assistant Trainmaster. The Investigation was completed on August 30, 1988.

On September 6, 1988, the Carrier sent Claimant the following letter:

"From the facts developed at this investigation and from a review of the transcript, it has been determined that you were responsible as charged, thereby in violation of Rule 700, Rules of Operating Department, as well as General Notice #4, General Rule K, and Safety Rule #12.

For your violation of the aforementioned rules, you are hereby assessed ten (10) demerit marks."

The Board has carefully examined the record and concludes that the claim must be denied. The Board initially concludes that Claimant received a fair and impartial hearing. Contrary to the argument of the Organization, the charge was sufficiently specific to apprise Claimant of the matters to be investigated.

The attachment of a report to the charge letter detailing the incident satisfied the requirements of Article 43(b) as Claimant was able to anticipate the charges against him. The Board's review of the hearing transcript confirms that conclusion.

The Board further concludes that the Investigation itself was conducted within the appropriate parameters. The Organization asserts that the Hearing Officer asked leading questions of the security personnel. However, the instances cited occurred at the beginning of the second day of the Investigation, when the Hearing Officer was recapitulating testimony from the first day.

Of more concern is the Organization's objection that the Hearing Officer was observed to be conferring with one of the witnesses at the proceeding, prior to the start of the second day of the Investigation. The hearing was continued over the objection of the Organization on that point.

Nonetheless, the record demonstrates that the Hearing Officer conducted the hearing itself in a fair and impartial manner. Officer Rosenbaum, Lt. Jacques and Assistant Trainmaster Nelson appeared at the Investigation. Indeed, the Hearing Officer postponed the Investigation so that Nelson could be present. Claimant was afforded the opportunity to produce witnesses on his behalf and to cross-examine the Carrier's witnesses. The Hearing Officer did not limit or interfere with that cross examination. Having reviewed the record, the Board cannot agree with the

Organization that the Hearing Officer was not fair and impartial.

With regard to the merits of the Claim, it is well-settled that, in reviewing discipline cases, the Board must determine whether there is "substantial evidence in support of the Carrier's action." First Division Award 16785. This Board has summarized its limited role in such cases as follows:

"We have many times said that under such circumstances [where the Carrier's Hearing Officer has observed the witnesses] it is not the function of this Board to weigh the evidence, for if the evidence is substantial and tends to support the charge made, the findings of the Carrier on the evidence even though it is in conflict, will not be disturbed." Third Division Award 4840.

Moreover, as this Board held in Third Division Award 25491, when the factual determinations are supported by substantial evidence in the record, "the Board will not substitute its judgment for that of the Carrier that Claimant's conduct constituted a disciplinable offense."

The Board concludes that substantial evidence in the record supports the Carrier's decision to impose discipline. Rule 700 provides as follows:

"Employees ... must be civil and courteous ... Employees who are quarrelsome ... or who are careless of the safety of themselves or others ... or who do not have or fail to exercise good judgment will not be retained in the service."

General Rule K provides that "To avoid annoyance to the public, employees ... must be orderly and courteous." Safety Rule #12 states as follows:

"Persons operating motor vehicles on company property must restrict speed in accordance with warning signs on shop roadways or at other points where there is danger to employees. Ample warning of the approach of such vehicles must be given. Driving courtesies must be shown at all times."

The Board concludes that the testimony which is not at issue establishes a sufficient basis for sustaining the discipline. That testimony establishes that: (1) Claimant was speeding on U.S. Steel property; (2) he was speeding while on his way to work; and (3) he refused to identify himself to the U.S. Steel security officers when they requested that he do so.

Claimant admitted at the hearing that he had been speeding on July 23, 1988. He testified that he was driving "approximately 40 mph but not 60...." Claimant also testified that the posted speed limits are 20 mph in the Center Gate and 30 mph elsewhere along Route 20. Claimant further testified that he was "ten minutes late for work" when the Officer first requested to see his driver's license. He also acknowledged that he did not "produce any identification."

The Assistant Trainmaster witnessed the exchange between Claimant and the security officers at the West Gate. He testified that Claimant told the officers that he did not feel that he had to show any identification. The Assistant Trainmaster further testified that Claimant told him afterwards that "he had felt he was speeding but he said he did not feel he was going anywhere near 60 mph."

This undisputed testimony alone provides a sufficient basis for violations of Rule 700 and Safety Rule #12.

The testimony was in conflict on certain issues. However, in accordance with the precedents reviewed above, the Board will not disturb the Hearing Officer's findings on these and other issues of conflicting testimony.

The Organization contends that discipline was inappropriate because Claimant was off duty at the time of the incident. Under the specific facts of this case, the Board concludes that discipline was in fact appropriate. Rule 700, General Rule K and Safety Rule #12 are not limited to on duty conduct. Rather, those rules are drafted so as to encompass off duty conduct.

The Organization correctly contends that the following standard governs discipline for off duty conduct:

"... an employee's off duty misconduct may be the subject of employer discipline where that conduct was found to be related to his employment or was found to have an actual or reasonably foreseeable adverse effect upon the business." Third Division Award 20874.

The Organization did not contest the Carrier's statement that, at the time of this incident, the Carrier was wholly-owned by USX. In addition, the portion of Route 20 on which Claimant was speeding was the property of U.S. Steel. It is also undisputed that U.S. Steel was (and remains) the Carrier's largest customer. Further, Claimant's discourteous and uncooperative behavior toward the security officers took place at the Carrier's West Gate facility while Claimant was on duty.

The Board concludes that the above-quoted standard is satisfied in this case. The incident was "related to [Claimant's] employment." Claimant was speeding because he was late for work. The incident thus occurred during his regularly scheduled hours. He was also driving on the property of the then-parent company of the Carrier.

Claimant was discourteous and uncooperative with the then-parent company's security officers in a conversation held on the Carrier's property. That conversation took place after Claimant had assumed his duties. Moreover, he could have seriously injured himself or other employes by driving at unsafe speeds and by running two stop signs.

The Board has a well-defined role in evaluating the penalty assessed in such disciplinary situations. As the Second Division held in Award 1323, "it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the Carrier's in disciplinary matters, unless the Carrier's action be so arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion."

No such abuse of discretion occurred here. The penalty of ten demerits did not jeopardize Claimant's employment, since the Carrier's disciplinary policy provided 100 demerits as the triggering point for dismissal. Given the gravity of the offense and the possibility that Claimant could have endangered his own life and that of others, the penalty was not arbitrary or capricious. In addition, Claimant was unrepentant when confronted with his misconduct. The Hearing Officer also took into account Claimant's prior record in determining the degree of discipline.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Catherine Loughrin / llw  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.