

The Fourth Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union - Yardmasters Department
(CSX Transportation
(former Baltimore and Ohio Chicago Terminal)

STATEMENT OF CLAIM:

Yardmaster R. P. Burns is claiming reinstatement as yardmaster with seniority rights unimpaired and compensation for all time lost as a result of discipline assessed of disqualification as yardmaster following investigation held October 7, 1987.

FINDINGS:

The Fourth 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 employes 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 was assigned as Yardmaster at Halsted Street with assigned hours from 2:30 P.M. to 10:30 P.M. On September 19, 1987, the Claimant held a telephone conversation at approximately 2:25 P.M. with the Terminal Trainmaster concerning work assignments for this shift. At 3:20 P.M., there was a further conversation between the two, although the record leaves doubt as to which one initiated the call. As a result of this latter conversation, the Claimant was directed to attend an investigative hearing under the following charge:

"You are charged with responsibility, if any, in connection with being insubordinate, and conduct unbecoming of an employe, in that you were boisterous, quarrelsome, and questioning the authority of Terminal Trainmaster R. L. Bierman at about 1520 hours while working as yardmaster at Halsted Street on Saturday, September 19, 1987.

Arrange to attend investigation to be held at Agency Conference Room 13600 South Halsted Street, Riverdale, Illinois at 0900 hours Monday, September 29, 1987."

Following the investigative hearing, the Claimant was sent, on October 20, 1987, the following disciplinary notice:

"You have been found at fault in violation of Rules 545, 547, and 501 of the CSX Operating Book of Rules, and the discipline administered is: DISQUALIFIED AS YARDMASTER, effective October 20, 1987.

Your record will be marked accordingly."

The cited Rules read as follows:

"Rule 545: Yardmasters report to and receive instructions from Trainmasters or other designated officers. They also must comply with the instructions of other company officers.

Rule 547: Yardmasters must answer questions and furnish information relating to movement within the yard to those authorized to receive such information. They will give clear instructions in such a manner so that they will not be misunderstood by others."

Rule 501: Civil and courteous behavior is required of all employees in their dealing with the public and with each other. Boisterous, profane or vulgar language is forbidden. Employees must not enter into altercations, play practical jokes, scuffle or wrestle while on duty while on company property.

Employees must not be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless or incompetent. They must not willfully neglect their duty, endanger life or property or make false statements or conceal facts concerning matters under investigation."

The entire substance of the charge against the Claimant is found in testimony by the Trainmaster during the Hearing, as follows:

"Q20. At what time did you have further conversation with Mr. Burns?

A20. At approximately 3:20 PM, I called Mr. Burns back to see the progress that Run 45 was making as he starts at 2:30 also. Whenever I talked with Mr. Burns at 3:20 to find out what 45 was doing, at that time he said he was tired of being harassed every day and why do we always fill up C-1 and C-2 so that he can't use the short crossovers and told him, I said Rod, I said look, whatever you have to do, I've got to get the pigs out of C-2, that they have to make 205 to go to the Hill, then I want to uncover them BN's and I want to get the main done; and he said, you know he said, every time you call over here, you harass me, he said everybody in that office harasses me and he said, who in the ... do you think you are telling me what to do.

At that time I told Mr. Burns, I said I'll show you exactly who I am, I told him he was relieved of responsibility, that I would not put up with his talking to me that way, I don't talk to him that way and that he may talk to other people in that tone of voice and with the vulgarity and that I would not permit that talking to be done to me like that."

The Claimant denied specifically that he had used the obscene word quoted by the Trainmaster or that he had been insubordinate. He stated that he spoke in a normal voice level.

Although another Carrier official heard the Trainmaster's end of the conversation, there was no one other than the Trainmaster who heard what the Claimant said.

For the purposes of resolving this dispute, the Board will make the assumption (possibly incorrect) that the Trainmaster's account is accurate. Nothing in this conversation or in any other information developed at the Hearing demonstrated the Claimant's possible guilt of violating Rules 545 or 547. Further, the charge issued to the Claimant made no reference to such alleged violation. Thus, the findings must be limited to consideration of adherence to Rule 501. Assuming again the accuracy of the Trainmaster's version, there was no showing of insubordination in the sense of refusal to obey orders. The use of a four-letter expletive was improper conduct as was the tone adopted toward the Trainmaster (if accurately reported), and this was perhaps deserving of some disciplinary response. However, disqualification from the Yardmaster position was entirely unwarranted.

The Board must also review three procedural objections raised by the Organization. These were the alleged lack of a precise charge; the failure to provide a copy of the hearing transcript to the General Chairman within 20 days; and the multiple roles played by the hearing officer.

As to the charge itself, the Board finds it sufficiently precise to cover the telephone conversation. It did not, of course, cover any aspect of Rules 545 and 547. Thus, the charge was deficient as to these two Rules (or, as noted above, the discipline for these two Rules was unfounded). As to the time requirement for providing a hearing transcript, the Board does not find that this is specifically covered in Rule 12(b). The transcript was received in sufficient time for the Organization and the Claimant to initiate a claim.


As to the issue of multiple roles, the Organization correctly points out that the hearing officer also served as one of the Carrier officials reviewing the discipline. This is in addition to evidence presented by the Organization that the hearing officer also made known his conclusion following the hearing that the Claimant was "at fault." The effect of this was to deny to the Claimant the right of an unbiased review at the appeals level. In addition to the findings on the merits, this could be sufficient to require reversal of the disciplinary action.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:


Nancy J. Dexter - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 4712; DOCKET 4700

(Referee Herbert L. Marx, Jr.)

The Majority acknowledges that Claimant's actions were "perhaps deserving of some disciplinary response" but nonetheless sustained the claim in its entirety. The Majority's rationale was based upon its factual finding that the Hearing Officer also was involved in the appeal process and that such involvement automatically denied Claimant his Agreement due process rights.

Initially, we are constrained to point out that the Majority's factual finding is erroneous. The Hearing Officer was Terminal Superintendent Heavner. The record is clear that apart from conducting the investigation, Heavner took no further part in the case. Heavner did not even assess the discipline let alone act as an appeals officer.

Furthermore, even if Heavner had been involved in the process, we would take issue with the Majority's mechanistic approach to determining whether Claimant's Agreement due process rights were violated. The correct approach in cases involving multiplicity of roles was set forth by the same Referee involved in this case in Third Division Award 25503, wherein he stated:

"The difficulties involved in multiple roles of Carrier representatives in disciplinary matters have been reviewed in countless previous awards. Depending on the entire circumstances, this may or may not lead to the conclusion that the Claimant (subject to loss of employment or other disciplin-

ary penalty) did not receive a proper hearing, leading to a sustaining award on that basis alone.

While Award No. 25361 may be bottomed on the particular facts and circumstances therein, the Board does not find that the use of Award No. 24476 is appropriate here. The Board finds the so-called 'multitude of roles' here was virtually preordained by the procedures required in Rules 34 and 27. At the 'unjust treatment' hearing, the Manager of Revenue and Car Accounting necessarily was the Carrier's witness, since it was his judgment on which the initial displacement refusal was based. Had the Organization determined to pursue the question of 'unjust treatment,' Rule 34 would have provided further review of the matter at a higher Carrier level by an official not directly involved in the incident.

The Organization instead exercised its right to initiate a time claim. Under Rule 27, this was necessarily directed to the same Manager of Revenue and Car Accounting. The question now became whether or not applicable rules had been violated. While as the Organization points out, a denial would be anticipated, the Claimant's rights were fully preserved in appealing the matter beyond this level."
(Emphasis added)

In so holding, the Referee was doing no more than following well-settled precedent as shown in the following Awards which were submitted to him.

(Second Division Award 11122)

"The multiple roles of the Assistant Superintendent Car Department, as the Charging Officer and the first Appeal Officer, after testifying in the investigation, in no manner deprived Claimant of a fair hearing, nor denied him the appeal process, especially as further appeal was made to higher Officers than the Assistant Superintendent Car Department." (Emphasis added)

(Third Division Award 27610)

"The Organization skillfully contends that Claimant was deprived of independent review of his case because the Carrier Officer who signed the discipline letter was also the same officer to whom the Organization was required to appeal under the discipline procedure. The Organization cites Third Division Award 24547 in support. We concur with the Board's views expressed in Third Division Award 24547, when the multiplicity of roles played by an appeals officer expresses the final decision on Claimant's case. Here, Claimant's appeal was carried to the next officer who presumably reviewed the matter de novo. See Third Division Award 25149."

We are convinced that if the Referee had followed his own rationale contained in Third Division Award 25503, he would not have sustained the claim in its entirety, even under his mistaken finding of fact.

Michael C. Lesnik

M. C. Lesnik

M. W. Fingerhut

M. W. Fingerhut

P. V. Varga

P. V. Varga