

The Fourth Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union - Yardmasters Department
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim and request that former Yardmaster James Roberts be reinstated to the position of Yardmaster with all rights and seniority unimpaired, and that the Claimant be paid for all time lost and expenses, cost and interest on pay due him because of being disqualified as the result of the investigation held January 4, 1989.

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.

Following an Investigation, the Claimant was disqualified by the Carrier as Yardmaster for setting out a car on the wrong track. Carrier maintains that Claimant was fully knowledgeable by both verbal and written instruction that cars must be properly placed. The Carrier insists that substantial proof was presented to document Claimant's failure to properly perform his duties.

The Organization has denied that sufficient evidence was presented to prove guilt. Moreover, the Organization argues that the Carrier has violated the Claimant's rights to an impartial and full process of appeal.

We have reviewed the process and find that Claimant's rights were violated. The record demonstrates that by letter of December 22, 1988, Assistant Vice President and Division Manager Koch officially charged the Claimant with an alleged violation. By letter of January 6, 1989, Mr. Koch did review the transcript and assess the discipline of disqualification.

The record further indicates that the Organization thereafter addressed an appeal to both Mr. Koch and the Manager of Labor Relations, Mr. Lacy. Mr. Koch responded first by letter of March 2, 1989 and Mr. Lacy later on April 4, 1989. The Organization contends after both Mr. Koch's response of March 2, 1989 and the final conference, that he "was the charging Officer, discipline Officer, and Highest Officer in this case." In fact, as this is not rebutted, the Organization holds that it is fact. While it may be fact, there can be no doubt that Mr. Lacy responded to the February 10, 1989 letter after the final appeals officer Mr. Koch reviewed his own discipline decision and denied the Claimant's appeal. Rule 19(c) states that:

"An employe dissatisfied with a decision will have the right of appeal in succession up to and including the highest officer designated by the Company to handle such cases."

Clearly, the "succession" was not followed and the integrity of the Claimant's full rights of appeal were denied when the Highest Officer handled the Claim on March 2, 1989 (Footnote 1). Mr. Lacy's April 4, 1989 response is little more than a few perfunctory sentences of denial. Mr. Koch's review of his own decision is incisive, accurate and clearly made without any other independent review. Such action violated the Agreement.


In the instant case, we are constrained to find that through Carrier's actions, Claimant was not afforded a fair and impartial appeal process "in succession up to and including the highest officer...." The Carrier never denied the charge that Mr. Koch played all relevant roles of charging, assessing guilt and as Highest Officer reviewing and concurring with his own decision without any prior independent review by an additional Carrier official. We find that this action substantially denied the Claimant his procedural rights. Carrier never denied the repeated assertion of multiple roles even though it had ample time to do so. We find ourselves forced by precedent and the language of the Rule to sustain the Claim to the extent of reinstatement with unimpaired rights and seniority, and with payment for lost time under the Agreement (Fourth Division Awards 4042, 3746, 2566).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of April 1991.

(Footnote 1) It stands as fact in this record that Mr. Koch was the Highest Officer "in this case." The Board is aware that he is not technically or officially the highest officer or Manager of Labor Relations.

CARRIER MEMBERS' DISSENT
TO
AWARD 4771, DOCKET 4757
(Referee Zusman)

Dissent to this decision is necessary both because the evidence of guilt is unrefuted in the record and because of the completely errant conclusion that the appeal process was fatally flawed in the progression of this matter.

There is no dispute in the record before the Board that Claimant did knowingly switch a load of plate steel onto Track No. 20. Claimant admitted that he took no action to correct the misclassification and that he had been counselled for similar infractions. To these facts of record, the Majority gives scant attention.

The Majority, instead has concluded that Claimant, "...was not afforded a fair and impartial appeal process...." This is predicated on the asserted multiple roles performed by Mr. Koch and the improper and invalid contention that Claimant's appeal was not made in proper succession based on a blatantly false assertion made by the General Chairman.

While Mr. Koch, the Assistant Vice President and Division Manager did sign the Notice for Investigation and the Discipline Notice, such, in and of itself is NOT evidence of any improper handling and the Organization has not argued that the Claimant was prejudiced in this regard.

By a letter dated February 10, 1989, the General Chairman further appealed this case as follows:

"I Robert W. Olson General Chairman of Local Lodge 32 do not agree with Mr. J. A. Koch's discipline and hereby appeal this case to Mr. David J. Lacy, Manager of Labor Relations." (Emphasis added)

It is self-evident that the Organization was appealing the discipline assessed to the next level of appeal, i.e., to Manager of Labor Relations Lacy. Although Mr. Koch was an addressee, it is manifestly certain that he was receiving the letter to indicate the Organization's rejection of the discipline decision. That this is so is again made self-evident in the Organization's March 4, 1989 letter, wherein the General Chairman stated:

"In my February 10, 1989 letter I appealed this matter to Mr. David J. Lacy..."

* * *

"I further hereby appeal this case to Mr. David J. Lacy for handling, with copy of this letter." (Emphasis added)

Thus, in the very language used by the Organization, the evidence of record is clear; the discipline assessed by Mr. Koch was appealed to Mr. Lacy in the normal succession.

That such procedure is correct, is substantiated in prior Awards of this Division. Award 4705 (1989):

"The Organization contends before the Board that Carrier's Assistant Vice President and Division Manager issued the discipline notice and was also the first level appeals officer, and that such procedure deprived the Claimant of proper appeal on the property....Appeal was made to the Assistant Vice President and Division Manager on April 17, 1987, which appeal was denied on June 1, 1987. The decision of the Assistant Vice President and Division Manager was rejected by the Organization on June 13, 1987. Appeal was made to the Manager of Labor Relations on June 25, 1987. (Emphasis added)

In Award 4706:

"Following the notice of discipline imposed, claim was initiated in Claimant's behalf in appeal to the Assistant Vice President and Division Manager on April 17, 1987, was denied on June 1, 1987, and appealed to Carrier's Manager of Labor Relations on June 25, 1987."

In Award 4688 (1989):

"First of all, the cases relied on by the Organization are distinguishable on their facts. Mr. Koch did not serve as a hearing officer or as a witness. In short, we do not see any substance to the multiplicity of roles argument in this case." (Emphasis added)

In this matter, although the Organization brazenly asserted that Mr. Koch was, "the interrogating officer, and the highest officer..." the record substantiates that Mr. P. E. Fields, Assistant Terminal Manager, conducted the Investigation and as noted above, the Organization further appealed the claim to Director of Labor Relations Lacy and such appeal was subsequently handled with him.

Further, the Majority has concluded that Claimant's right of appeal, "were denied when the Highest Officer handled the Claim on March 2, 1989 (Footnote 1). - It stands as fact in this record that Mr. Koch was the Highest Officer 'in this case'."

This conclusion is based on the following assertion made by the Organization. In their March 4, 1989 letter, the Organization asserts:

"Also I find that you are the charging officer, the interrogating officer, and the highest officer, therefore, the investigation was not fair or impartial in any way, shape or form.

In my February 10, 1989 letter, I appealed this matter to Mr. David J. Lacy who takes his orders from you." (Emphasis added)

In their May 22, 1989 letter, subsequent to final handling of this case, the Organization, in progressing the matter to the Organization's Assistant to the President, asserted:

"I, Robert W. Olson, hereby appeal this case to Mr. Donald R. Carver Assistant to the President for further handling.

Conference on the above case was held on April 18, 1989. It was in agreement at that conference that Mr. Koch was the charging Officer, discipline Officer, and Highest Officer in this case."

As noted above, Mr. Koch was NOT the "interrogating officer" and since the Organization again noted that it had appealed this matter to Mr. Lacy by letter dated February 10, 1989, it must be considered de facto that Mr. Koch was not the highest designated officer. As a matter of record, as well as fact, the appeal was handled in conference on April 18, 1989 and confirmed by letter dated May 11, 1989 from Manager of Labor Relations Lacy. To conclude that a bald misrepresentation by the Organization must be considered FACTUAL, both ignores the requirement of Rule 19(c), i.e., highest officer designated by the Company, NOT THE UNION REPRESENTATIVE and the FACTS of record which in themselves provide substantial evidence in rebuttal of the Organization's assertion.

In recent Fourth Division Award 4753 (November, 1990), this same Majority noted:

"The Carrier by now should be well aware that unrefuted on-property statements must be accepted as fact (Fourth Division Awards 3480, 2863; Third Division Awards 20041, 12840). However, the Board is confronted herein with a

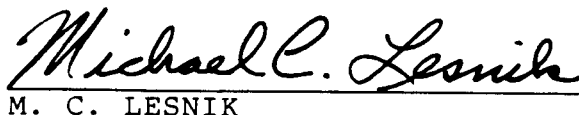
failure on the part of the Carrier to rebut an assertion that appears clear and obvious from the record to be false. The Board cannot under the instant circumstances, where the Agreement and record are clear as to no violation, hold the Carrier to be in violation simply because its officers were deficient in a full on-property record of rebuttal and refutation. The Board therefore finds no violation in its close examination of this record."
(Emphasis added)

Finally, it must be pointed out that Rule 19(d) provides the contractual recovery that can be made. Items claimed that are outside of the contractual provision are not within the authority of this Board to Award.

We Vigorously Dissent.


P. V. VARGA


M. W. FINGERHUT


M. C. LESNIK