Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 4786
FOURTH DIVISION Docket No. 4773
91-4-90-4-14

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, Inc. (Former Baltimore and Ohio
(Railroad Company)

STATEMENT OF CLAIM:

"Claim and request that former regular Yardmaster F. M. Weller be reinstated as yardmaster with seniority and all other rights unimpaired and that he be paid for each and every day that he would have worked as a yardmaster including overtime and holiday pay; that he be paid one day at the punitive rate of pay for attending an investigation on May 22, 1989; and paid one days' pay at the punitive rate of pay for attending a meeting with the terminal superintendent on May 16, 1989 and that his record be cleared of the discipline assessed 'disqualification as yardmaster' as the result of the May 22, 1989 investigation."

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.

On May 17, 1989, the Claimant was sent written notice to appear at an Investigation on May 22, 1989, in connection with the following charge:

"You are charged with responsibility in connection with failure to comply with instructions to pull gondolas SCL 130737, SBD 998216 and SCL 133142 from the Loop Track, Locust Point Yard, Baltimore, Maryland, on May 10, 1989."

The Hearing was held on May 22, 1989, and the Claimant was represented by the General Chairman. The Claimant was notified by letter dated May 23, 1989, that he had been found guilty, and "the discipline assessed is disqualification as Yardmaster, effective immediately." The Claimant thereafter elected to enter other Carrier service to which his seniority entitled him.

In addition to protesting the disciplinary action, the Organization raises several procedural issues which require review. Article 22 reads in pertinent part as follows:

> "(a) Yardmasters shall not be disciplined, disqualified subsequent to their being qualified, or dismissed without a fair and impartial hearing before a proper officer. Such employee shall be apprised in writing of the precise charge against him, with copy to the Regional Chairman, and hearing will be held within ten (10) days, if possible. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by the duly authorized representative. He may, however, be held out of service pending such investigation."

The Organization notes that the Carrier failed to send a copy of the decision to the Regional Chairman, as required by Rule 22 (b). The Carrier admits its failure in this regard, but notes that it was the General Chairman, not the Regional Chairman, who represented the Claimant at the Hearing, and a copy was sent to the General Chairman. Thus, the Carrier claims it is in substantial and sufficient compliance with the Rule.

In support of its contention that literal compliance is required and failing such the disciplinary action must be reversed, the Organization cites six Awards involving the parties hereto in which such reasoning was sustained. Examination of these Awards, as quoted by the Organization, shows that three of these Awards concerned the failure to notify the Organization of the Hearing itself, thus potentially depriving the Claimant of representation. The other three Awards involve instances where no notice whatsoever of the resulting disciplinary action was sent to the Organization. The Board finds that these instances are considerably different from the situation here under review. Here, the General Chairman (who represented the Claimant at the Hearing) received notice. While such notice should have gone to the Regional Chairman, the Board does not find this error of sufficient weight to void the discipline.

A second procedural objection concerns the fact that the Hearing was conducted on May 22, 1989, in excess of ten days following the incident occurring on May 10, 1989. The Organization suggests that this is in violation of Article 22 (a), which states:

". . . Such employee shall be apprised in writing of the precise charge against him, . . . and hearing will be held within the (10) days, if possible."

The Hearing was held 12 days after the incident and five days after the charge notice. Rule 22 (a) does not specifically state whether the ten days refers to the incident or the charge notice, and neither party offered evidence of established practice as to which of these applies. Again, the Organization provided reference to a number of Awards which overturned disciplinary action based on failure to meet similar time limits. In all these Awards, however, the contractual language is far more precise as to the number of days from the incident or from the charge notice. Because of the ambiguity in the Rule applicable here, the Board concludes there is no grounds to find the Hearing improper.

Other procedural matters raised by the Organization during the Claim handling procedure are likewise found without substance.

As to the merits, the record is entirely clear on the sequence of events. Prior to 3 P.M. on May 10, 1989, the Terminal Superintendent advised the day Yardmaster that three gondola cars "were to be moved that afternoon without fail." The move was not accomplised on the day trick, and the day Yardmaster left a turnover report for the Claimant, who came on duty at 2:30 P.M., reading in part as follows:

"No overtime on yard crews - [Terminal Superintendent] Lemaster

SCL 133142 - SCL 130737 - SBD 998216 - (70) - In Riverside loop (LDR) Move - Lemaster."

In the course of his duties on his trick from 2:30 P.M. to 10:30 P.M., the Claimant did not move the cars. At the end of his trick, he left a turnover for the next trick Yardmaster with identical instructions as to the three cars. The cars were not, in fact, moved until the next morning.

As explanation, the Claimant stated the following at the Hearing:

"I scheduled to get to them later in the evening but the work in the yard had been so that I could not have been able to pull them without making overtime and if you'll notice in Exhibit A on the top, per instructions of Mr. Lemaster, as specifically part of his messages, that there was no overtime to be made with the yard crews."

The Claimant further testified that he had not been advised by anyone that the three-car movement was "hot."

The Board finds that the record simply does not support the Carrier's disciplinary action in disqualifying the Claimant as Yardmaster. While the three cars were not moved on the Claimant's trick, there is no evidence that the urgent message given to the day Yardmaster was conveyed to the Claimant, other than as one of a list of moves, all preceded by a "no overtime" caution. Nor does the record show any previous disciplinary action against the Claimant as Yardmaster, other than several "discussions" alluded to by the Carrier, but not substantiated by placement on the Claimant's record. While there may be some question as to the Claimant's priority of tasks to be performed on his trick, the failure to complete listed tasks on a turnover report is not shown to be of great significance.

The Carrier contends that it is within its discretion to determine the qualifications of an employee. In this instance, however, the action was taken in response to a specific incident and recorded as discipline. It is thus properly reviewable as to the merits of the alleged infraction. Further, the Carrier has placed in the record its offer to restore the Claimant to Yardmaster status on a leniency status. Since this offer of settlement was refused, the Carrier was well within its rights to withdraw the offer. It does demonstrate, however, that the Carrier was not wholly convinced as to the Claimant's lack of qualification for the position.

The Award will direct the return of the Claimant to Yardmaster status with pay for the difference in pay, if any, between what he would have earned as against earnings actually received in the position he placed himself. The Organization argues that the Claimant should receive his full loss of pay as a Yardmaster, pointing to Article 22 (d), which reads as follows:

> "(d) If the final decision decrees that the charge or charges against the employee are not sustained, the record shall be cleared of same and the employee reinstated and compensated for the difference between the amount he would have earned in service and amount he earned from outside employment during the period he was out of service."

Since there was no "outside employment", the Organization argues that no deduction is proper. Article 22 (d), however, obviously applies to an employee who had been placed out of service. This does not prevent the Board from devising an appropriate remedy to the Claim, and here the Board finds that pay beyond what the Claimant would have earned is inappropriate.

A W A R D

Claim sustained in accordance with the Findings.

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Docket No. 4773
91-4-90-4-14

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1991.