

PUBLIC LAW BOARD NO. 4093

Parties to Dispute:

United Transportation Union)	
Yardmasters Department)	
)	Case No. 16
vs.)	
)	Award No. 16
CSX Transportation, Inc.)	

STATEMENT OF CLAIM:

Claim and request that Yardmaster R. B. McKnight, Jr. be paid for all time lost including overtime and holidays as result of discipline assessed February 28, 1986 when he was assessed 90 days actual suspension, and that his service record be cleared of the charges and the discipline.

OPINION OF THE BOARD

Claimant received notice by letter dated February 14, 1986 to attend a Board of Inquiry. The Claimant was charged with alleged insubordination to the Assistant Trainmaster at Russell Kentucky on or about 3:05 P.M. on February 10, 1986. Following the Inquiry, the Claimant was notified that he had been found guilty as charged and assessed ninety (90) days actual suspension.

Among the procedural arguments raised on the property, the Organization argues that the charge letter was incorrect, the hearing officer was prejudiced, the second member of the Board discussed the discipline to be given before the Board of Inquiry was held, the Board asked leading and improper questions and the Carrier violated the time limits of the Agreement. On the substantive merits, the Organization argues that the Carrier has failed to sustain its burden of proof that the Claimant was insubordinate.

The Carrier argues that the Claimant received his full rights to a fair and impartial investigation under the Agreement. It

denies any procedural violations including a time limits violation. The Carrier argues that the Claimant was properly charged and the evidence substantiates that he acted in an insubordinate manner to the Assistant Trainmaster.

As a preliminary point, the Board points out that it's authority is limited by the Agreement between the parties. It further points out that in this industry it's decision must be grounded not only with Rule support, but also with evidence of record as developed on the property. Assertions and arguments raised for the first time in ex parte may not be considered.

The Board has carefully reviewed the procedural arguments raised by the Organization. We reject the argument that the charge letter is inaccurate, in that it referred to a specific event "at/or about 3:05 P.M. on February 10, 1986." The incident was on going and 3:25 P.M. was more accurate, but the letter was clear enough to this Board as to avoid a procedural defect.

As for the alleged time limits violation, the Carrier argues that it responded within the time limits and sent it's response to the return address listed. The Carrier further argues that it had no other mailing address. Finding no rebuttal on the property, the probative evidence substantiates that the Organization's late receipt was neither due to Carrier's late response, nor to Carrier's failures. As the on property record substantiates that fact, and arguments raised for the first time ex parte are too late for consideration, the Board cannot rule the Carrier in violation of the time limits of the Agreement.

The Board is further confronted with procedural issues and a record before us that constrains our ability to reach the merits. This is because the Organization's assertions on the property were not refuted. As stated in Third Division Award 14385:

"...An assertion which is not denied although there is both time and opportunity to deny it must be deemed uncontroverted and, therefore, proof of its substance..."

The Agreement provides that employees "will not be disciplined... without being given a fair and impartial hearing." The Organization charged that of the two hearing officers the first, P. V. Cottrell stated before the hearing that the Claimant was "in a lot of trouble" and that such statement shows a prejudgment against the Claimant. The Organization also argues that the Board of Inquiry was called "out of a prejudice" against the Claimant. At any point on the property these bald assertions could have been denied. They were not.

The Organization further charged that the second hearing officer was also prejudiced against the Claimant. By letter of April 16, 1986 the Organization wrote to Division Manager J. J. Kerns a letter which stated:

"There was also a phone conversation over a speaker phone between H. V. Harris and J. J. Kerns in the presents (sic) of J. R. Johnson, Trainmaster. In this conversation the discipline that was to be handed down to Mr. McKnight was discussed. This conversation took place before (emphasis in original) the Board of Inquiry was held. This shows (sic) that both members of the Board prejudged Mr. McKnight and even went so far as to decide what discipline they were going to recommend."

Mr. Kerns responded without denial that such conversation had taken place between himself and Mr. Harris, a Carrier member of the Board of Inquiry. In addition, the Board finds no rebuttal to Organization assertions of prejudice against the Claimant. The time for Carrier rebuttal was on the property and not before this Board. Unrebutted assertions are accepted as fact (Third Division Awards 12840, 20041, 20109, 14385; Fourth Division Awards 2863, 3480).

Even further, the Organization charged on property that Carrier officers asked leading questions. At the very beginning of the investigation the Board finds a set of extremely strong

questions which evidenced manifest bias, as no record existed to provide a foundation for them.

Q (38) "Did [Claimant] become angry when you instructed him relative to this move with the Snapper crew?"
(A:..."yes, Sir, he did.")

Q (39) "Did he come forward in his seat and state, "do you want to work this job?" (A: "Yes, Sir, he did.")

Q (40) "Did he make angry gestures with his hands?"
(A: "Yes, Sir.")

.....

Q (44) "Was [Claimant] quarrelsome?" (A: "Yes, Sir, he was.")

Q (45) "Was [Claimant] loud and boisterous?" (A: "Yes, Sir, he was.")

Q (46) "Was [Claimant] argumentative?" (A: "Yes, Sir.")

Q (47) "Did [Claimant] defy your authority as Assistant Trainmaster." (A: "Yes, Sir, he did.")

Q (48) "...I read to you from Websters New Collegiate Dictionary, a definition of the word "insubordination." ..."The act of not being subordinate; not submitting to authority; disobedient; mutinous." Did [Claimant] submit to your authority?" (A: "No, Sir, he didn't.")

Q (49) "Was [Claimant] disobedient to you as Assistant Trainmaster?" (A: "Yes, Sir.")

The above mentioned leading questions and others in the hearing did not develop facts. The probative evidence supports the Organization's assertions that the hearing officers had already decided Claimant's guilt.

The Board strongly believes that hearing officers need not follow technical rules of procedure and evidence, but they must conduct the hearing in such a manner as to show impartiality with no predisposition against the Claimant. Nor can they assess guilt and consider the discipline to be imposed prior to the completion

of the hearing when all the evidence of the investigation has been gathered and a fair analysis can be made. If they stray too far from this procedure the Board has no alternative but to assume that the Claimant has been deprived of a fair and impartial hearing.

We have searched the record for facts relative to who made the decision on discipline. The Organization stated on property that the Board members prejudged Claimant and before the hearing took place, "even went so far as to decide what discipline they were going to recommend." The Board concludes that the leading questions were asked by an officer who recommended discipline prior to the hearing (an unrebutted statement of fact). The net cumulative effect forces this Board to reach a decision that Claimant's Agreement rights were violated.

However unpleasant it may be for this Board to make a decision on procedural grounds, and in an instance where we suspect from the transcript that the Claimant was not altogether blameless, we are forced to do so in this instant case. The Carrier did not deny on the property that both of it's hearing officers were prejudiced against the Claimant. The Carrier did not deny that the hearing was called "out of prejudice" against the Claimant. Nor did it ever deny on the property that the discipline to be handed down to the Claimant was discussed before the alleged charges were heard before the Board of Inquiry. We have further reviewed the Organization's allegation that Board members asked leading questions. That allegation was not denied by the Carrier in any correspondence on the property and is evidenced in the transcript. While this Board prefers to rule on merits, it is constrained to sustain a claim where, as here, the Carrier has failed to refute allegations which when taken as a whole indicate Claimant did not receive a fair and impartial hearing. The Board is constrained by this record to sustain the Claim without consideration of merits.

FINDINGS

Public Law Board No. 4093 upon the whole record and all the evidence finds that:

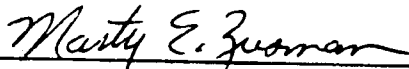
The Carrier and the Employee involved in this dispute are respectfully Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

That the Agreement has been violated.

AWARD

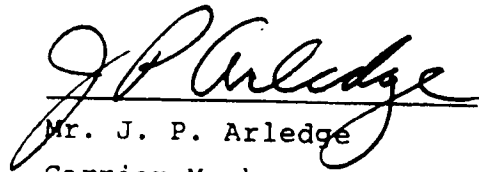
Claim sustained.



Marty E. Zusman, Chairman
Neutral Member



Mr. R. C. Arthur
Employee Member



Mr. J. P. Arledge
Carrier Member

Date: 8/28/89.