NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6282

UNITED TRANSPORTATION UNION YARDMASTER DEPARTMENT	OPINION AND AWARD
and	Case No. 1
CSX TRANSPORTATION, INC.	W. H. Donahue, Jr.

STATEMENT OF CLAIM:

"Request is hereby made to remove discipline from Mr. Donahue's record, immediately reinstate Mr. Donahue with seniority rights unimpaired, and fully compensate Mr. Donahue for all lost wages in accordance with Rule 6-A."

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Following his removal from service on February 24, 1998 and an Investigation and Hearing held on March 12, 1998, Yardmaster Donahue was dismissed on March 24, 1998 for composing and transmitting inappropriate messages on Carrier's fax machines.

The Organization here argues that Carrier's action in withholding Claimant from service pending an investigation and without advising him of the reasons therefor was a violation of the Rules governing the handling of major offenses. Rule 6-A-1 (b) of the controlling Agreement provides:

> "A Yardmaster who has been in the Company's service sixty (60) calendar days or longer and against whom the Company has preferred specific charges, in writing, shall not be disqualified, suspended or dismissed without a hearing."

Claimant had been in Carrier's employ for 26 years when he was removed from service on the evening of February 24, 1998 without explanation by Road Foreman J. J. O'Neil,

accompanied by two Conrail Police Officers for what both Parties agree was a major offense. On February 26, Manager-Administration S. M. Giroux sent Claimant a Certified Letter "confirming your discussion with J. J. O'Neil...on February 24, 1998...At that time you were notified that you are removed from...service...pending an investigation into allegations of conduct unbecoming a Conrail employee in connection with harassing FAX transmissions received on Conrail property..."

The following day, February 27, M. E. O'Donnell, the Organization's Local Chairperson, wrote to Lead Trainmaster James R. Courville protesting Claimant's removal from service with no indication of the reasons and demanding his immediate reinstatement. In reply, on March 5 Giroux mailed Claimant a Notice of Hearing directing him to appear on Mach 12, 1998 "in connection with the following:

> 1. Your violation of Conrail Administrative Order AD 0.19 'Threats or Acts of Violence in the Workplace' when you sent a series of FAXES which were vulgar, threatening and used racial slurs, (see attached exhibits) commencing on January 24, 1998 and ending February 8, 1998 to Conrail facilities at Beacon Park, MA and Readville, MA.
>
> 2. Your conduct unbecoming a Conrail employee by sending the messages noted in charge No. 1 which was designed to intimidate those Conrail employees receiving said transmissions. This conduct violates NORAC Rule D and violates Conrail's policy which provides employees with the right to a non-discriminatory work environment..."
>
> 3. Your violation of NORAC Rule L in that the transmissions noted in charge No. 1 constitute misuse of company equipment; i. e. FAX machines.
>
> Superintendent J. C. Decker was informed of your involvement with these FAX transmissions on February 19, 1998, as a result of a Conrail Police investigation."

Rule 6-A-1 (a) provides as follows:

> "...when a major offense has been committed, a yardmaster suspected by the company to be guilty thereof may be held out of service pending hearing and decision".

Although, as the Organization points out, there is some authority for the proposition that the Rule prohibits removal from service before an investigation, a close reading of the cases suggests that in every instance the awards relied upon take a more qualified view than the argument implies. Thus, for example, the Board in Third Division Award No.

20005 (Bergman) found that on the facts before it "there is no compelling reason or urgency shown to immediately remove the claimant from service...[t]here is nothing the record to show that he was a menace to the operation." Similarly, Third Division Award No. 21341 (Blackwell) concludes that withholding Claimants from service pending investigation was improper because "[I]n this case the record is barren of any indication that there was any compelling reason or urgency to remove the Claimants from service immediately." Likewise, Third Division Award No. 22034 (Lieberman) stands for the proposition that the act of removing an employee from service without a hearing is warranted when the well being of other employees is implicated. In that matter, the Board concluded that "the incident on August 14 did not meet the test, long relied upon in this industry, of conduct which could potentially prove hazardous to the employe, to other employes, to the public or to Carrier's property. Thus, Claimant should be compensated for all time held out of service prior to her receipt of Carrier's letter of dismissal..."[1]

The Board in Fourth Division Award No. 4607 (Fisher) involving these parties concluded that "[t]he Carrier had the right to remove an employee from service pending an investigation if it deemed that employee to be a risk to himself, another employee, the public safety or the Carrier's property. The decision is...dependent upon the nature of the offense." That appears to us to succinctly sum up the prevailing rule on this issue.

Applying that rule to the circumstances of this case, we conclude the Carrier exercised its discretion in an appropriate manner by withholding Claimant for a major offense pending an investigation in the face of potentially risky conduct.

With respect to the Organization's contention that it was contractually compelled to advise him of the reasons for its actions, while the Board inclines to the view that it may have been better policy to do so, policy is not our purview. Nothing in Rule 6-A-1 requires such an explanation. Further, on the record before us, while Carrier's representation on February 26 that Road Foreman O'Nelil had advised Claimant of the reasons for his removal proved to be inaccurate, it is clear that Claimant was given detailed information

[1] Third Division Award No. 20272 (Blackwell) cited by the Organization is inapposite. There the Board construes a Rule that expressly permits a Carrier to remove an employee from service pending investigation "only if his retention in service could be detrimental to himself, another person, or the Company."

on the nature of the charges shortly after his removal from service and accordingly was in no way compromised in mounting his defense to those charges by the delay.

As a last procedural issue, the Organization asserts that the conduct of the Hearing Officer was so blatantly unfair that it deprived Claimant of a fair and impartial hearing. A thorough review of the transcript reveals a Hearing Officer prone to calling a close game—a stickler for order. The transcript also records a relatively aggressive style and several remarks that are either inappropriate or inaccurate. On balance, however, it also reflects substantial latitude afforded to the Organization in making its case, no apparent inclination to prejudge Claimant and no significant mishandling of witnesses or substantive evidentiary issues that objectively could be said to have deprived Claimant of due process or adversely affected the outcome of the hearing.

With respect to the merits, the record indicates that between January 24, 1998 and February 8, 1999 3 inappropriate messages were sent via telecopier to Carrier's facilities in Beacon Park, MA and Readville, MA, two of them faxed to both locations. No good purpose is seen in going through the whole dreary litany of obloquy heaped on blacks, Italians, women, and gays, except to note that the messages laid upon the reader a malignant dose of vulgarity, trash talk, smut, threats and race-baiting. Through the assistance of Conrail's Police, Legal and Human Resource Departments, the Suffolk Country District Attorney's Office and Bell Atlantic's Annoyance Bureau, the faxes were ultimately traced to Claimant, who promptly admitted intentionally sending all but one of the offensive documents.[2]

In his effort to supply the context for it all, Claimant adds very little. He explained at his hearing that he wrote and sent the faxes as "caricature" in an effort to curb what he perceived as "a discriminatory workforce," but distances himself from any intention to threaten or offend anyone. As he testified at his hearing, "I did not say those words. I did not write those words...I was relaying it..."

To his credit, Claimant frankly admits to having violated Administrative Order AD 0.19

[2] He described on fax as having been composed by his children as a "birthday card," and sent by him inadvertently to Beacon Park. This fax does not flatter the kids. The Board is reminded of the famous Mrs. Kissel, who whenever she breaks wind, beats the dog.

prohibiting "Threats or Acts of Violence in the Workplace;" NORAC Rules D and L; and Carrier's "Equal Employment Policy," which in pertinent part provides:

> "It is the policy to provide a non-discriminatory workplace in which all employees are treated with respect. The policy expressly prohibits the use in the workplace of racial or sexual epithets and stereotypes, slang words, or names as well as any other language or actions which, by their nature or effect degrade, insult, intimidate or harass persons on the basis of race, color, religion, sex, sexual orientation, national origin, age disability or veteran status."

The Organization has struggled vigorously here to put a kind light on the evidence, but remaking the case into a public service effort on Claimant's part is not easy in the face of his disciplinary record. On January 24 1996--two years prior to these events--Claimant was suspended for thirty days for similar conduct. Thus, Claimant's past conduct itself pretty much grabs and cuts the throat of the argument that the discipline administered in this instance was not "corrective and progressive." Claimant had special reasons to be aware of Carrier's expectations in this regard, and had full opportunity to reflect on the appropriate process for exposing bigotry short of sending vicious racial slurs, sexist remarks and threats over Company lines without authorization or explanation and without ever having reported any "ongoing" problems in this regard to management.

If it were the duty of the Board to rationalize irrational conduct, on this record we would be stuck for a good explanation. Torn from context, the actions of Yardmaster Donahue seem unhinged. A 26-year employee steps forward and sends a series of terribly insulting messages over the Carrier's internal communications system. It is as if, out of the blue, the wiring has begun to smolder. A quarter of a century is a lot to throw away, and it is possible that with professional help this employee might be salvaged. But, reduced to its essentials, the Company has amply established and the Claimant has candidly admitted violation of important rules designed to insure safety and civility in the workplace; if leniency is in order, that judgment belongs to Carrier.

AWARD

The Claim is denied.

James E. Conway
Chairman and Neutral Member

Jerry D. Martin
Employee Member

S. R. Friedman
Company Member

Dated August 23, 2000