Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 10701
SECOND DIVISION Docket No. 10730
2-NIRC-CM- '85

The Second Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

Parties to Dispute: ( Brotherhood Railway Carmen of the United
( States & Canada
(
( Northeast Illinois Regional Commuter Railroad
( Corporation

Dispute: Claim of Employes:

1. That Coach Cleaner B. J. Means, as a result of a hearing held on September 29, 1983, was unjustly given a ten day deferred suspension and a one year probationary period.

2. That the Northeast Illinois Regional Commuter Railroad Corporation violated Rule 34(g) of the current Agreement dated September 1, 1949, by not providing Coach B. J. Means with a fair and impartial hearing prior to unjustly disciplining him.

3. That the Northeast Illinois Regional Commuter Railroad Corporation be ordered to expunge from Coach B. J. Means work record any mention of this unjust discipline.

FINDINGS:

The Second 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 employe 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, Coach Cleaner B. J. Means, is employed by the Carrier, Northeast Illinois Regional Commuter Railroad Corporation, at its Western Avenue Coach Yard. On September 29, 1983, an investigation was held on charges that the Claimant failed to properly perform his duties on September 19, 1983. As a result, the Claimant received a ten-day deferred suspension and one year's probation, effective October 20, 1983. The Organization subsequently filed this Claim on the Claimant's behalf.

The Organization contends that the Carrier violated Rule 34(g) of the controlling Agreement, which provides:

> "An employee who has been in the service thirty (30) days shall not be disciplined or dismissed without first having been given a fair and impartial hearing. Suspension, in proper cases, pending a hearing, which shall be prompt, shall not be deemed a violation of this Rule. At a reasonable time prior to the hearing such employee will be apprised of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. An employee involved in a formal investigation or hearing will be represented thereat, if he so desires, by the duly authorized craft committee, or their representative.

The Organization asserts that the Carrier did not inform the Claimant of the precise charges against him. The letter of charges did not specify any Rules violations. Also, the Claimant did not receive a fair and impartial hearing; the Hearing Officer refused to allow the Claimant himself to question the Carrier's witnesses.

The Organization further contends that the Carrier did not meet its burden of proof. Although the Claimant admits that he was talking with a fellow employee, the Organization asserts that the two were discussing company business. The Organization also points out that the Claimant's Foreman testified that the Claimant finished his assigned duties on the day in question. Finally, the Organization maintains that the Claimant has a flawless record during almost thirty years of service.

The Organization therefore argues that the Claim should be allowed, and the Claimant's record cleared of all references to the disputed discipline.

The Carrier contends that the investigation established that the Claimant violated Rule Q of the Carrier's Employee Conduct Procedure, Form PE-01-RC, which provides, in part:

> "Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves, nor exchange duties with, or substitute others in their place without proper authority.

The Carrier asserts that the Claimant was not attending to his duties at the date and time in question; at the hearing, the Claimant admitted to having a brief conversation with a fellow employee. Also, the Carrier's witnesses observed this conversation and then the Claimant later sitting inside a railroad car.

The Carrier further asserts that although Rule Q was not mentioned in the notice of charges, it is a universal Rule of railroading and implied in the notice's description of the incident. Also, Rule 34(g) does not require that specific Rule violations must be listed in the notice.

The Carrier then points out that although the Hearing Officer did not allow the Claimant to question witnesses himself, the Claimant's representative was allowed to cross-examine all witnesses; the Claimant had an opportunity to bring out any and all facts in his own behalf. The Claimant therefore received due process.

The Carrier therefore contends that the Claim should be denied in its entirety.

This Board has reviewed all of the evidence and testimony in this case, and we find that the Claimant was guaranteed all of his rights during the hearing and that the hearing was held in a fair and impartial manner.

Moreover, we find that there is substantial evidence in the record to support the Carrier's position that the Claimant did not properly perform his duties on September 19, 1983, and spent a considerable amount of time engaging in a conversation with a fellow employee both outside and inside a car. The two employees were observed wasting time by both the Police Captain and Shop Superintendent. This action on the part of the Claimant was a clear violation of Rule Q, and the Claimant was properly found guilty by the Hearing Officer. Therefore, the Carrier was within its rights to issue discipline to the Claimant.

Once this Board has determined that a Carrier had presented sufficient evidence to support a guilty finding, we must then turn our attention to the type of discipline imposed on a Claimant by a Carrier. This Board normally will not second-guess a Carrier in the imposition of discipline unless the Carrier's action was unreasonable, arbitrary, or capricious.

In the case at hand, the Claimant had been employed in the railroad industry for over thirty years with no evidence in the record of any previous discipline. He was found guilty of a minor infraction, basically wasting thirteen minutes of the Carrier's time. He certainly should have received a written warning from the Carrier for this violation, putting him on notice that that type of behavior would not be tolerated. However, both the ten-day deferred suspension and the one-year probation are unreasonable and arbitrary penalties and cannot be allowed to stand. Hence, we hereby reduce the penalties to a written warning.

## A W A R D

Claim sustained in accordance with the Findings.

Award No. 10701
Docket No. 10730
2-NIRC-CM- '85

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 8th day of January 1986.