

Award No. 4536

Docket No. 4500

2-RDG-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)**

READING COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1 — That under the current agreement Car Inspector Robert A. Dorsheimer was unjustly suspended three (3) actual days work June 22, 23 and 24, 1962.

2 — That accordingly the Carrier be ordered to make Robert A. Dorsheimer whole by reimbursing him for the three (3) days work lost; also that his service record be unimpaired.

EMPLOYEES' STATEMENT OF FACTS: Robert A. Dorsheimer, hereinafter referred to as the claimant, has been a car inspector, Rutherford Yards, since December 21, 1954.

On May 31, 1962, general foreman, R. E. Houser directed a letter to the claimant citing him for investigation at 1 P. M. (EDST), June 1, 1962, on a charge of "failure to detect retaining Cotter missing from brake shaft and Placard and Placard Holder missing, Fireman's Side, UTLX 90598, resulting in exceptions being taken by ICC Inspector at Abrams May 25, 1962."

The hearing was held on Friday, June 1, 1962.

Under date of June 16, 1962, General Foreman R. E. Houser, Jr., wrote the claimant advising him he was given three (3) days actual suspension, June 22, 23 and 24, 1962.

The agreement effective January 16, 1940, as subsequently amended is controlling.

Carrier maintains, therefore, that the carmen's brotherhood here requests the Second Division to set aside the considered judgment of the officers of the carrier who are responsible for the safe and efficient operation of the railroad and who passed on the evidence and approved the discipline in this case and substitute therefor the judgment of the carmen's brotherhood.

The board has, on many occasions, properly held that the assessment of discipline is a matter within the discretion of the carrier. Carrier maintains that in the instant case there was no abuse of discretion in the discipline assessed Car Inspector Dorsheimer and that such discipline was warranted and justified. The discipline was not assessed arbitrarily, capriciously or without sufficient cause and your board has previously held that where the carrier has not acted arbitrarily, unreasonably and without just cause the judgment of the carrier would not be disturbed.

The board should note that in the handling of this grievance on the property the claimant, when questioned during hearing and investigation as to whether he could have missed the cotter key at the time of his inspection, answered in the affirmative. Further in the transcript of the hearing and investigation, Car Inspector Dorsheimer was questioned as follows:

"Q. Is there anything further you would like to say in connection with this case which has not been developed through questioning?"

"A. I inspect many cars during my tour of duty, however, being human and subject to human error, I could have overlooked this condition. I have always felt that I make a thorough inspection of cars and overlooking this particular defect for me is an exception rather than a rule."

In addition to the facts set forth herein, carrier submits that at no time during the hearing and investigation was question raised by claimant or his representative as to the procedural aspects of the hearing, and when asked in closing the transcript of the hearing and investigation if it was conducted in a fair and impartial manner and in accordance with schedule requirements, they both replied that it was.

Under all the facts and circumstances, carrier submits the discipline assessed Car Inspector Dorsheimer was not excessive or without sufficient cause and was warranted and justified and carrier respectfully requests the Board to so find and deny the claim in its entirety.

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 Division, upon a review and analysis of the record, finds that the investigation hearing did not conform to, and was violative of, Rule 34 captioned "Grievances and Discipline". The Rule in its relevant part, states:

"No employee shall be disciplined without a fair hearing. . . ."

The record of the case discloses that the same General Foreman preferred the charges, presided at the hearing, proffered and discussed the evidence, and finally made the determination of guilt and assessed the measure of discipline against the claimant.

The Carrier offered no witness. The only evidence against the claimant was introduced and analyzed by the presiding officer. This case is not comparable to those cases where it is the **Office of the General Foreman** who prefers charges and the General Foreman presides at the hearing, but the evidence against the Claimant is proffered by a staff member within the Office of the General Foreman. (See for example Award No. 4211). In the instant case, the entire matter was initiated, conducted and concluded by one and the same official.

The Division finds that a course of conduct such as revealed by the facts of this case vitiates the protection inherent in the contractual guarantee for a fair trial. The basic concept of fairness is nullified when the same official is complaining officer, judge, witness and jury. The defect in the proceedings is not cured even if the official personally was not arbitrary in his conduct at the investigation.

Because the Division finds that Rule 34 was violated by the specific facts of this case, the Division deems it unnecessary to make any determination as to whether the proceedings were also materially defective by virtue of the presiding officer's statement at the hearing that "the purpose of the investigation is not for assessing discipline but to bring out the immediate corrective action where Safety Appliances defects are involved. Is that understood by you?"

In light of the entire record of this case, the Division has no recourse but to sustain the claim because of the violation of Rule 34.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of June, 1964.