

Award No. 5362

Docket No. 5207

2-WT-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 106, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Car Repairman, Rufus E. Samuel, was unjustly assessed with a thirty (30) calendar day suspension from the service commencing September 14, 1965.

2. That accordingly, Rufus E. Samuel is entitled to be compensated for all wage loss that resulted from his unjust suspension from the service.

EMPLOYEES' STATEMENT OF FACTS: Car Repairman, Rufus E. Samuel, hereinafter referred to as the Claimant, is employed on the 3:00 P.M. to 11:00 P.M. shift, Union Station, Washington Terminal Company, hereinafter referred to as the Carrier. On July 7, 1965 the Claimant was notified by the Carrier's Master Mechanic to report at Room 205, Union Station at 12:30 P.M., Friday, July 9, 1965, for a hearing on the charge of "Failure to properly perform his duties by not opening train line angle cock and signal cock when he made the coupling between the 4th and 5th cars in train, namely S.A.L. 360 and P.R.R. 1703, resulting in air brakes failing to apply and release on 8 rear cars in train causing delay to train 176 at Washington, D.C. on July 2, 1965.", copy attached and designated Exhibit (A), the Claimant did not receive this notice of charge due to being off duty account of illness, consequently, the Carrier's Master Mechanic notified the Claimant by notice dated July 9, 1965 that his hearing was postponed until July 26, 1965, copy attached and designated Exhibit (B), the hearing was held on schedule and transcript of hearing it herewith attached and designated Exhibit (C), on September 1, 1965 the Claimant received notice from the Carrier's Master Mechanic that he had been found guilty as charged and that he was thereby notified that he was suspended for a period of thirty (30) calendar days beginning September 14, 1965, copy attached and designated Exhibit (D). The Claimant's case has been handled in accordance with the collective controlling agreement effective June 16, 1946, up to and including the highest designated officer of the Carrier to whom such

No interference with the discipline is justified. The claim should be denied.

Oral hearing is waived unless requested by the petitioning organization.

(Exhibits not reproduced.)

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 was suspended for 30 days for causing a 10-minute delay to a train on July 2, 1965, by failing to open the signal and angle cocks between the fourth and fifth cars. The Employes contend that this discipline was unjust because the offense was not proven and the penalty is too severe.

The evidence was sufficient for the Carrier to conclude that the claimant failed to open the cocks. It was the claimant's responsibility to open the cocks. Shortly after the time the claimant was supposed to have opened the cocks, first the signal cock and then the angle cock was found closed. While conceding that claimant may have failed to open the signal cock, the Employes argue that testimony of the claimant and his co-worker shows that the supervisor who discovered the closed signal cock must have accidentally closed the angle cock while opening the signal cock. The supervisor denied closing the angle cock.

It is the responsibility of the Carrier, not this Board, to resolve such conflicts in the evidence. The Carrier observed the demeanor of the witnesses. The Carrier has the expertise to evaluate such matters as whether the air the claimant and his co-worker believed they heard in testing the train line necessarily indicated the angle cock was open or was merely residual air.

Once it has been ascertained, as in this case, that the Carrier's determination is supported by persuasive, creditable evidence, this Board's review of the evidence is ended. E.g., Award 2-3676 (Johnson); Award 2-3530 (Stone); Award 2-3266 (Hornbeck).

The discipline assessed for the proven misconduct was unreasonably severe. This Board has a very limited role in reviewing the severity of discipline assessed for proven misconduct. The discipline assessed by the Carrier should and can be set aside only if it is so incommensurate with the proven misconduct, viewed in the light of the employe's previous record and the other surrounding circumstances, that it appears that the Carrier must have been acting on the basis of personal animosity toward the employe. E.g., Award 2-5183 (Harwood); Award 2-4532 (Seidenberg); Award 2-3874 (Anrod); Award 2-3828 (Doyle); Award 2-3430 (Murphy).

Considering the nature and seriousness of the offense, the previous record of the claimant, and the conclusiveness of the evidence against the claimant, we believe that such an appearance is presented by this case.

There is no indication that the failure to open the cocks was anything other than an inadvertent oversight on the part of claimant. The test procedures utilized by the Carrier ordinarily would have permitted the claimant's error to be detected and corrected without delaying the train. The error was not so detected in this case because of a combination of unusual circumstances.

This was the claimant's first instance of this particular error and was only his fourth instance of oversight or carelessness in 22 years of service as a car repairman. His previous instances of carelessness all occurred in failing to release a hand brake, for which he was twice reprimanded and once suspended for four days. His suspension for 1½ months for fighting and for five days for leaving early and falsifying his time card are unrelated to carelessness, and bear little weight in determining a proper suspension for rehabilitating the claimant and warning the other employes about carelessness.

Finally, although the evidence against the claimant was sufficient for the Carrier to conclude that the claimant was responsible, the inconclusiveness of the evidence against the claimant must be considered in determining the penalty to be assessed. What is a proper penalty when the evidence is clear may not be proper when the evidence is debatable.

While recognizing that the line between a permissible penalty and an impermissible penalty is not exact, we believe that under the facts of this case any suspension longer than 15 days would be unjust.

For the last 15 days of his 30-day suspension, the claimant is entitled to be reinstated "with his seniority rights unimpaired, and compensated for his net wage loss, if any, resulting from said suspension", as provided by Rule 29.

AWARD

Claim is sustained as to the last 15 days of claimant's suspension and is denied as to the first 15 days of that suspension.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1968.