



Award No. 5839

Docket No. 5712

2-SOU-CM- -70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES'
DEPARTMENT, AFL — CIO
(Carmen)**

SOUTHERN RAILWAY COMPANY

DISPUTE: Claim of Employees:

1. That under the current Agreement, Carman C. G. Hood, Charlotte, North Carolina, was improperly suspended from service March 29, 1967 to April 17, 1967, a loss of fourteen (14) days.
2. That accordingly, the Carrier be ordered to compensate the aforementioned employe for all time lost beginning March 29, 1967 to April 17, 1967.

EMPLOYES' STATEMENT OF FACTS: Carman C. G. Hood, Charlotte, North Carolina, hereinafter referred to as the claimant, was employed by Southern Railway Company, hereinafter referred to as the carrier, at Charlotte, North Carolina, in carrier's Charlotte Train Yard. Preliminary investigation was held on March 27, 1967, after which claimant was charged with, "Failure to properly inspect SFRD 5207 and failed to detect, report or repair broken center sill." Claimant was not given a copy of the charges, however, was advised by the general foreman to appear for investigation at 1:30 P.M., March 28, 1967.

Formal investigation was held on March 28, 1967.

On March 29, 1967, claimant was advised that for his dereliction of duty he was suspended from service of the Southern Railway Company for a period of not less than 30 days. Claimant was returned to service with full rights on April 17, 1967.

This dispute has been handled with all of carrier's officers designated to handle such disputes, in compliance with the current agreement, all of whom have refused or declined to make satisfactory settlement.

The agreement effective March 1, 1926, as subsequently amended is controlling.

POSITION OF EMPLOYES: It is submitted that the claimant was subject to the protection of the provisions of the aforesaid controlling Agreement made in pursuance of the amended Railway Labor Act, which reads in pertinent part:

In the absence of any showing that the discipline imposed in suspending Carman Hood for dereliction of duty was arbitrary or capricious or in bad faith, the board should follow the principle of the above referred to awards.

CONCLUSION

Carrier has proven that:

(a) Under the current agreement Carman Hood was properly suspended during the period March 29, 1967 to April 17, 1967.

(b) The charge against Carman Hood was proven at a fairly and impartially conducted investigation in which he was duly represented and testified. The evidence of record adduced at that investigation clearly reveals the indisputable fact that he was guilty as charged and was therefore disciplined for just and sufficient cause.

(c) There can be no showing that the discipline imposed was arbitrary or capricious or in bad faith. Carrier's action in suspending Carman Hood for 13 1/2 days without pay is fully supported by the principles of awards of all four divisions of the Board.

(d) The board is without authority to substitute its judgment for that of the carrier. As evidenced herein, it has so held on many occasions.

On the basis of the evidence of record, the claim presented by the brotherhood should be denied. Carrier therefore requests that the board make a denial award.

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 were given due notice of hearing thereon.

At the time of the incidents here involved Claimant was a Car Inspector in Carrier's Charlotte, North Carolina, Train Yard, which position he had held from March 19, 1967. He had been in the Carrier's employ for approximately 25 years—16 years in train yard service—seniority as a carman dating from February 21, 1949.

Contained in Carmen's bulletin book at Charlotte is a copy of the following letter of instructions from Assistant Chief Mechanical Officer:

"Atlanta, Georgia—April 21, 1961 e—

SUBJECT: Cars With Duryea Underframes

ALL MASTER MECHANICS:

Quite a number of cars with Duryea underframes have been found defective at the center sill between the end sill and the bolster. Some few have been found defective behind the bolster.

You or your General Foreman are to talk to each Carman concerning such cars and instruct them to closely inspect center sills and do the necessary when defects are located."

Pursuant to those instructions Carrier states in its Submission:

Master Mechanic P. T. Hoskins, Jr. required all General Foremen under his jurisdiction to personally instruct each and every carman to closely inspect cars with Duryea underframes, and how to go about making such close inspection. (Emphasis Supplied)

Refrigerator car SFRD-5207 equipped with a Duryea cushion underframe, owned by A.T.&S.F. Railway, came into the train yard at Charlotte, under load and was destined to be placed in Local Freight Train No. 73 for subsequent movement to Pineville, North Carolina—10 miles from Charlotte Yard—to be unloaded and then returned empty to Charlotte. Carman Hood, Claimant herein, was assigned to inspect the car at Charlotte, prior to its departure from Pineville, on March 15, 1967. On March 18, 1967, sometime after its return from Pineville it was inspected by 2 other Carmen at Charlotte preparatory to departure in Train No. 253, in which it was placed as 15th car from the rear. Train No. 253, destined for Columbia, South Carolina, had six engines. The number of cars in the train is not found in the record—from the number of engines it is fair to assume that there were a large number of cars. After departure Charlotte, Train No. 253 had a derailment of car SFRD-5207 and the next 5 cars immediately behind it. Carrier found the cause of the derailment to be "Center sill broke at body bolster on car SFRD 5207 South "B" end."

On March 27, 1967, Claimant was verbally informed by his Foreman to attend an investigation at 1:30 P.M. March 28, 1967. He did. The Hearing Officer was P. T. Hoskins, Jr., Master Mechanic, who framed the charge in a question addressed to Claimant:

"(Q) Mr. Hood you are charged with failure to properly inspect SFRD 5207, in that you failed to detect, report or repair broken center sill, are you guilty of this charge?

(A) No sir, I am not."

After hearing held the Hearing Officer made his findings and imposed discipline in the following communication addressed to Claimant:

"In the investigation held with you on March 28, 1967, you were charged with failure to properly inspect SFRD 5207 and failed to detect, report or repair broken center sill. This broken sill pulled out at MP 31.5 on train 253 March 18, 1967 and caused an extensive (sic) and costly derailment.

For this derliction (sic) of duty you will be suspended from service of the Southern Railway for a period of not less than 30 days."

Claimant was returned to service on April 17, 1967.

The sole issue with which we are confronted is whether the record contains a preponderance of substantial material and relevant evidence of probative value to support Carrier's finding of Claimant's guilt as charged. This being a discipline case the burden of proof is Carrier's.

The best evidence is in the transcript of the hearing and subsequent positions taken by the parties in the handling of the Claim on the property and uncontroverted admissions and statements of facts made in the Submissions.

FROM THE TRANSCRIPT

In our quotes from the transcript the emphasis are supplied.

Testimony of B. F. Brady, General Foreman, in response to questions by the Hearing Officer:

"(Q) Mr. Brady, did you go to the scene of this derailment?

(A) Yes sir, I did.

(Q) Do you agree that the SFRD 5207 was the cause of this derailment?

(A) Yes sir, on B end of this car approximately six or eight foot of the sill was pulled out of this car.

(Q) Did you see this car at any time before you saw it in the derailment?

(A) Yes sir, on Wednesday the 15th when Mr. Hood was in the process of running the Local No. 73 to Pineville, he came to me on the repair track and said that he had a car with a low coupler and that the body bolsters were sagging or broken on the ends, and that he wanted me to come down and look at it. We carried material to raise the coupler when we went to the car. I looked at the body bolsters, they were broken right on the end, and were slightly sagged. This car was also equipped with a duryea underframe and the braces along the side of the center sill were broken on the B end. Mr. Hood mentioned this broken brace to me, and I then asked him, Charlie is the center sill broken? He said no the sill is not broken. Well, I said, the braces along the side of the sill are not of any importance as far as pulling power is concerned, and if the sill is alright let it go on down to Pineville and be unloaded. He then said 'well I am going to put a Home Shop tag on it', 'I said alright.' I then helped him raise the coupler, and car proceeded in the Local. I didn't know anything more about the car until Train No. 253 derailed and I went to the scene thereafter.

(Q) Was it Mr. Hood's responsibility to have seen the broken sill on this car before he applied the Home Shop tag?

(A) The instructions on the Southern are to inspect duryea underframes closely, we have had trouble with them and they have caused many derailments. Car in distress should have noted distressed possibilities on the card. If the car was not safe to run the Home Shop tag should have so stated.

(Q) Could Mr. Hood have seen the broken center sill?

(A) Yes sir, on the left side of the car the sill was all old break, he could have detected that side. The other side was partially old but it was on the top portion of the sill but I don't think that he could have seen that particular side. But on the old side it was an old break and it had been badly battered together.

(Q) Did Mr. Hood detect, report or repair broken sill on SFRD 5207?

(A) No sir."

Under examination by E. L. Deal, Claimant's representative, Brady testified:

(Q) Mr. Brady, when you looked at the body bolsters did you see anything wrong with the center sills?

- (A) No sir, Mr. Deal I didn't go under the car, you would have to go under the car to have detected this broken sill.
- (Q) Could you have seen it from the side, going under the car and looking at it from the side could you have seen it?
- (A) You couldn't have seen it from the side, you would have had to see it from the bottom because it had a brace that went along the side of the center sill.
- (Q) How much of the sill is expose to the eye?
- (A) Looking at it from a side view there is not any of the sill exposed. None of the sill is exposed on the side view except there is some along the side there is some holes in that brace that goes beside the sill, thats behind the body bolster you can see approximately two or three feet of the sill on the end.
- (Q) Where was the old break Mr. Brady, in front or behind the body bolster?
- (A) It was behind the body bolster, approximately nine or ten inches behind the body bolster.
- (Q) What would a man had to have done to seen that break?
- (A) He would had to have gotten under the car.
- (Q) Wouldn't he had to have gotten under the car and over the truck looking at it from an angle say from the axle, do you think a man could have seen it from just looking from the axle up?
- (A) Yes sir, I think he could have. But he would have had to have gotten under the car and like you say, partially on the truck.
- (Q) Then if the crack had not been open at the time he looked at it would you have been able to have seen it from the truck without getting closer to it?
- (A) Well the way this sill has been battering against its self Mr. Deal I don't believe that it would have been close enough together that he would have had to crawl under and get real close to it. I believe that he could have seen it from the axle portion of the truck.
- (Q) But it is possible that the crack could have been closed at the the time of inspection, is that right?
- (A) Well it's possible that it could have been closed, but there would still be a crack."

F. C. Moore, General Foreman, Spencer, testified under questioning by the Hearing Officer:

"(Q) Mr. Moore, did you go to the derailment and did you inspect SFRD 5207?

(A) I did.

(Q) Will you describe the break in the center sill on that car?

(A) On this car on the left side the sill was broken entirely into, both sides were broken entirely into, but the left side was 100 per cent old defect. On the right side the sill was broken, starting at the bottom of the sill at the flange a little more than half the way up was all new break the remainder of the sill was old break.

(Q) The percentage of break shown would be approximately how much?

(A) Approximately 70 per cent old defect.

(Q) Did you see a Home Shop tag that came off of this car?

(A) Yes sir, I did.

(Q) Was the broken center sill mentioned on this Home Shop tag?

(A) No, the Home Shop tag said broken body bolster, it did not mention the center sill.

(Q) Then if Mr. Hood had made a proper inspection of this car would he have seen the broken center sill?

(A) A portion of it, yes sir.

(Q) Is it the carman's responsibility to inspect cars equipped with duryea center sills?

(A) Yes sir. Duryea should be given special consideration since they have given so much trouble. We have had numerous derailments account of broken sills on these cars. They are supposed to be given special attention when they are inspected.

(Q) Did Mr. Hood do this?

(A) In my opinion he did not."

In response to being asked by the Hearing Officer "for your statement," Claimant replied:

"(A) On March 15th, I was working No. 173 and the south end car was broken on both ends on the left side and I put Home Shop tags on it. I had some more cars to drop in on it, on this cut of cars before the local engine could get on. So I inspected all the way round and looked underneath of the car because I knew that it was a duryea cushion underframe and I know the instructions on it. I did not detect anything except what I stated on the Home Tag, anything else was concealed in my estimation. An when they dropped the next car down I had about four inches on my knuckle and I was afraid it would come uncoupled. I saw Mr. Brady's truck at the rip track and I went up and I got him and we took the material as he stated and went down and raised the coupler, I had to get underneath the car and he was in between the cars also and we got our shim put in there to raise the coupler up to the height where it wouldn't come uncouple. He and I both were satisfied that the car would make the trip down to Pineville and return and that was my last information on this car until yesterday at noon, or about three o'clock, I didn't know anything about it."

and under examination by the Hearing Officer:

"(Q) Do you doubt that left sill behind the bolster was 100 per cent old break?

(A) I don't doubt it because I didn't even see it, if I had seen it I could tell for myself, the only thing I can do is just take the other peoples word for it.

(Q) Did you hear both Mr. Brady and Mr. Moore state that the crack across the bottom of the sill could have been seen?

(A) I heard both of them state that.

(Q) Isn't it a carman's responsibility to see cracked center sills?

(A) He is suppose to see anything that is not concealed

(Q) Did you do that on this car Mr. Hood?

(A) To the best of my knowledge, yes sir.

(Q) But the fact remains that the sill was cracked, is that correct?

(A) I don't say that it is cracked because I didn't see the crack.

(Q) But from the testimony that has been brought forth in this investigation you now know that it was, in that correct?

(A) I don't know that it was, no sir, the only thing that I know was that these two said that it was.

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(Q) Did you also have time to inspect the center sill on this car if you were in doubt?

(A) Yes sir."

Again the Hearing Officer questioned General Foreman Brady:

(Q) Did you also have time to inspect the center sill on this car if you were in doubt?

(A) Yes sir."

Again the Hearing Officer questioned General Foreman Brady:

(Q) Mr. Brady, did Mr. Hood apply the Home Shop tag to this car after the coupler was shimmed?

(A) Mr. Hoskins, I can't answer the question because I didn't personally see the tag on the car before it left on the Local, I did not see him apply the tag, all I know is that he told me that he was going to put a Home Shop tag on the car, I did not see him apply the tag.

(Q) But you did see the tag after No. 253's derailment occurred, is that correct?

(A) Yes sir, that is correct, it was tagged on both sides, I took the tags off myself.

(Q) And when was the tags dated?

(A) Dated the 15th, March 15th.

(Q) When was this car again dispatched from Charlotte?

(A) Dispatched on Train No. 253 to Columbia on the 18th.

(Q) Did the car inspector look at this car outbound at that time?

(A) Yes sir.

(Q) Who was responsible?

(A) The pool mark on the side of the car three triangle eighteen, which is car inspector J. Sweitzer.

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(Q) Would Mr. Sweitzer make a closer inspection of a car that had a Home Shop tag on it?

(A) It would be the practice of the car inspector to read Home Shop tag and to notice the defect mentioned to see if they had progressed or gotten any worse or anything of that nature. Yes, I think he would look at the defects mentioned on the card.

- (Q) Did Mr. Sweitzer call the foreman's attention to this car before it departed on Train No. 253 on the 18th?
- (A) Mr. Hoskins, I worked at night on that particular day and no one left anything to me that this particular car was bad order or anything of that nature."

ADMISSIONS

Chronological pertinent facts: (1) car was inspected by Claimant on March 15 prior to departure & return from Pineville; (2) car returned to Charlotte Yard sometime before March 18; (3) car was inspected by 2 inspectors prior to departure from the yard March 18; and (4) derailment occurred on March 20.

In the final declination of the Claim on the property Assistant Vice President, Labor Relations, stated:

I have been unable to determine the name of the carman making inspection of train No. 253 leaving Charlotte on March 18. My investigation reveals however that Carman Sweitzer, to whom I referred in our discussion, was the carman who worked the journal boxes and inspected the car before it was dispatched. However he was not required to go under the car when he performed his inspection because blue flags were not displayed. Carman Hood was the man required to make a thorough inspection of the car by going under it.

The Carrier, itself, in its Rebuttal Submission quoted the letters of instructions promulgated by Assistant Chief Mechanical Officer, dated April 21, 1961, relative to "Duryea Underframes", *supra*, and instruction from Master Mechanic "each and every carman to closely inspect cars with Duryea underframes and how to go about making such close inspection."

RESOLUTION

Claimant inspected the car on March 15 in a manner which indicates his recognition of the responsibilities of a Car Inspector. He made repairs. He consulted the Foreman. He put Home Shop tags on it. His testimony that "He (the Foreman) and I were satisfied that the car would make the trip to Pineville and return" is unrefuted. The car did make the trip without incident.

The responsibility for inspection of the car for inclusion in Train No. 253, on March 18, destined to Columbia, South Carolina, especially compliance with Carrier's instructions to "each and every carman" relative to Duryea underframes was, at that point, vested in the two Carmen whose responsibility it was to make the inspection at that time (March 18). That they made a superficial inspection, which did not include inspection of the Duryea underframe, notwithstanding Carrier's instructions to "each and every carman," is admitted by Carrier. Carrier's proffered defense that: (1) it is a practice that Carmen do not make a complete examination of a car to which is attached a Home Shop tag and only look to see if the defects stated thereon have worsened; and (2) the Car Inspectors who inspected the car on March 18 for inclusion in Train No. 253 "was not required to go under the car when he performed his inspection because blue flags were not displayed", contravene Rule 158 of the Schedule Agreement and Carrier's self revealed instructions relative to cars having Duryea underframes.

Presumptive opinion evidence of Carrier's supervisory witnesses, unsupported by fact, that the center sill of the Duryea car had an old crack when

inspected on March 15 by Claimant and therefore Claimant was derelict in his duties by failure to detect it, is of no evidentiary value. It is possible, even though there was an old crack, the visual inspection would not have revealed it. Carrier adduced no factual evidence—only opinion—that the “old crack” could and should have been detected by Claimant by visual inspection. Claimant’s testimony that he inspected the center sill and saw no crack stands unrefuted. This is not to say that there was not an old crack; but, only that if there was it was not evident on visual inspection.

It is to be noted that after Claimant, on March 15, with the concurrence of his Foreman, released the car only for a trip to Pineville and back and that when it returned to Charlotte it had travelled about 20 miles during which it could have acquired any number of bad order defects not noted on the Home Shop tag. We find no reason, in the record, why the car when it returned to Charlotte train yard should be less thoroughly inspected before dispatch from the yard to any lesser extent than other cars in Train No. 253 in conformity with Carrier’s promulgated instructions to Car Inspectors.

The ultimate responsibility for the car’s mechanical worthiness for inclusion in Train No. 253, it cannot be gainsaid, was vested in the Car Inspectors who made the March 18 inspection. We are surprised and befuddled by Carrier’s attempt to place blame on the once removed inspection of Claimant in which he and the Foreman agreed only that the car could make the trip to Pineville and return. Since Carrier says it was an “old crack” that caused the derailment does the Carrier have the right to go back through numerous past inspections of the car prior to the derailment and select out of all the inspectors one on whom it chooses to place blame? We think not. The inspectors who release a car for inclusion in a train must bear the responsibilities for defects which they would have discovered in the thorough inspection required of them. We will sustain the Claim on its merits.

As to paragraph 2 of the Claim, Carrier has established that between March 29, 1967 and April 17, 1967, Claimant suffered the loss of 13 1/2 days pay. We will award that he be compensated in damages to that extent.

A W A R D

Claim sustained with compensation as found due in FINDINGS, above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1970.