



Award No. 5849

Docket No. 5678

2-N&W-CM- '70

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O.**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: Claim of Employees:

1. That the Carrier violated the Agreement of January 1, 1943, as subsequently amended, between the Virginian Railway Company, and the employees represented by System Federation No. 40, now under the jurisdiction of System Federation No. 16, on the New River Division of the Virginian Railway, specifically at Elmore Shops, Elmore, West Virginia, when on Thursday, January 26, 1967, employees W. B. Dehart and A. C. Lilly were arraigned before an improper officer of Management for investigation charges that were not specific, resulting in unreasonable and capricious assessment of ten (10) days' record suspension, against their personal records.
2. That because of such violation, and capricious action, Carrier be ordered to remove such ten (10) days' record suspension from the said employees' personal records.

EMPLOYEES' STATEMENT OF FACTS: Carmen W. B. Dehart and A. C. Lilly, hereinafter referred to as claimants, are regularly employed as car inspectors by the Norfolk and Western Railway Company (formerly Virginian), hereinafter referred to as the carrier, at carrier's shops at Elmore, West Virginia, where said carrier maintains shops and a system of tracks, where trains and cars are inspected, serviced and repaired. Each of the claimants has rendered long and faithful years of service, having perfect personal records, and being considered among the closest observing and best general freight car inspectors at Elmore.

On January 22, 1967, said claimants, while inspecting a train of cars in track No. 11, discovered and placed bar order shop-tags on eight (8) defective cars, one of which was shopped for journal lubricating pad missing R-1. Said car was tagged with a standard four-(4) by eight-(8) inch bad order tag, with the defect being clearly defined, and car marked for repairs, with every necessary precaution being taken by claimants to prevent further damage to said car, while enroute to the Repair Tracks, with Claimant Lilly attaching the bad order tag and Claimant Dehart recording the car number on his record book for future reference.

quently. We recognize the need for discipline to maintain order, safeguard lives and property, and to assure a pattern of general efficiency.

As we regard the subject of discipline, it should be considered from the standpoint of reasonable effectiveness. Punishment of the violator should be of a degree compatible with the seriousness of the violation.

The purpose of discipline is two-fold—to punish the violator and to point out to other employees the seriousness of violations.”

Award 1323: “* * * it has become axiomatic that it is not the function of the National Railroad Adjustment Board to substitute its judgment for that of the carrier’s in disciplinary matters, unless the carrier’s action to arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion * * *.”

Also see Second Division Awards 1575, 1809, 1979, 2207, 2925, 3081 and 3430.

The record in this case speaks for itself. There is no question that carelessness on the part of Carmen Lilly and DeHart began a chain of events which caused the derailment of a train which not only resulted in unnecessary expense to the carrier but also placed the wellbeing of fellow employees in jeopardy. Discipline was assessed only after careful consideration was given the facts in the case, accordingly merits a denial of the demands of the employees.

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 employees 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.

On January 24, 1967, Carmen W. B. Dehart and A. C. Lilly were charged with “The responsibility in connection with derailment to train Extra East 822, at McCoy, on January 23, 1967, as the result of NYC Car Number 905281 being run out of Elmore with Bad-Order-Shop-Tag for R-1 lubricating pad missing.” An investigation was conducted on January 26, following which, on February 23, 1967, a ten day record suspension was assessed against each man. Claims were filed on March 17.

The events leading to the disciplinary action may be summarized as follows: On January 22, 1967 Claimant Lilly located eight shop cars during the course of his inspection of a train on Track No. 11. One car had a missing pad. He applied a shop tag on the North side of the car in accordance with normal procedure. He also had the journal box filled with oil so the car could get to the shop track. Later he called the Yardmaster to report the defective cars. In the Yardmaster’s absence he gave Yard Clerk R. D. Toliver, the eight car numbers, including NYC 905281. Claimant Dehart had previously recorded the car numbers in his train book. He had noted that the car with the missing pad was NYC 905228. This was the number he and Lilly observed stencilled on the right side of the car’s brake end.

Yard Clerk Toliver placed the list of defective cars on the Yardmaster's desk. He did not check the numbers against the switch list. Relief Yardmaster R. E. Bradbury subsequently received a message from Trainmaster Stewart that one of the eight cars could not be found on the switch list. According to the Yardmaster, nothing was done about the missing car. Normally, under such circumstances, the switching crew finds the missing car, but on this occasion they did not. Moreover, according to the Yardmaster, it has been the practice for conductors to observe shop tags which were applied to the North sides of cars and switch them out (although he is not required to look the cars over for this purpose).

The cars inspected by Lilly and Dehart were used in making up an Extra 822 which departed Elmore on January 23. After reaching McCoy, Virginia, about 80 miles away, the train was wrecked, resulting in derailment of fifteen cars and equipment damage estimated at \$55,000. The derailment was attributed to a wrung journal on NYC Car 905281. A shop card was found attached to the car with Lilly's indication that a lubricator pad was missing.

Carrier affirms that Lilly and Dehart, by recording and reporting an incorrect car number, must share the responsibility for the derailment of Extra 822. A ten day record suspension was therefore appropriate. In similar proceedings in the Transportation Department four other men (Yard Conductor, Yardmaster and two Brakemen) received comparable discipline, Carrier states.

Petitioner, on the other hand, contends that:

1. Claimants were denied right of "first appeal" under Rule 34(c) since General Car Foreman Davis (the officer to whom "first appeal" is made) rendered the disciplinary decision.
2. Claimants were denied their 34(a) rights to a fair hearing since they were never apprised of any specific charges against them.
3. The investigation itself disclosed no violation of rules or instructions.
4. Other persons who were actually capable—such as the Trainmaster—went free of blame.

* * * * *

Petitioner's procedural claims are without merit, in our judgment. Claimants were not prejudiced by Management's failure to pinpoint the exact misconduct alleged. They were obviously aware of the fact that a particular bad-order car was involved and were able to defend themselves properly. Significantly, no protest on this matter was voiced at the hearing.

There is no cited rule or controlling practice which bars men in General Foreman Davis' position from serving as hearing officers.

What, then, of the discipline imposed on Claimants? It does appear that they erred in recording a car number, although the question they raised at the hearing concerning the possibility that the car in question had two different numbers (as sometimes happens) was never really resolved. The issue here is whether that improper recording made them responsible for the derailment, as Management charged, and merited the record suspension.

It seems clear that the incorrect recording, in and of itself, had no direct connection with the derailment. The cause of the accident was the presence on Extra 822 of a bad order car. Who was responsible for that? Those who were in charge of making up that train and those in charge of placing bad order cars on the proper track.

The Claimants' job was to inspect and mark bad order cars. This they did. Significantly, there is no regular requirement at Elmore that car inspectors report the numbers of all bad order cars. Note this colloquy at the hearing:

"Mr. Lawrence: Has it been the practice . . . that you didn't turn bad order numbers in. They switched by the tags on the hill or North side?

Mr. Dehart: Yes sir, it has.

Mr. Lawrence: Is it true taht we look upon this thing as a courtesy to the Yardmaster to turn these numbers in and we have in the past been told by Car Foreman, Mr. Forbes, to not turn in these numbers?

Mr. Dehart: Yes sir."

The record further reveals that, prior to this accident, no Car Inspector had ever been disciplined or even reprimanded for mistakenly giving the Yardmaster the wrong bad order car Number.

It is apparent, moreover, that on the night in question the Yardmaster's office was alerted to the fact that one of the eight bad order cars tagged by the Claimants was "missing". Both the Yardmaster and Trainmaster were aware of the possibility that a bad order car might end up on an outgoing train. Despite this, as Mr. Bradbury testified, nothing was done about the missing shop car, nor were Claimants even contacted to recheck the numbers.

Accuracy in reporting and recording is certainly to be desired, and Claimants evidently made a mistake. But since their reporting of numbers was not a requirement of the job they cannot be charged with dereliction of duty. Even without a report from them it was the responsibility of other men to set out the tagged bad order cars and insure that no such cars left on a new train. Under the circumstances it must be held that the charges against Claimants were not proved and, consequently, the discipline was improper.

A W A R D

The ten day record suspensions of W. B. Dehart and A. C. Lilly shall be withdrawn and their records cleared.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February, 1970.