

Award No. 6004
Docket No. 5782
2-WM-FO-'70

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Firemen & Oilers)**

WESTERN MARYLAND RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Locomotive Serviceman R. L. Thomas was unjustly suspended and withheld from service for a period of five (5) days, effective December 8, 1967.

2. That accordingly the carrier be ordered to compensate the aforementioned employe for all time lost.

EMPLOYEES' STATEMENT OF FACTS: On August 14, 1957, the carrier employed R. L. Thomas, hereinafter referred to as the claimant, as a Firemen and Oiler employe at Hagerstown, Maryland.

Under date of November 8, 1967, General Foreman W. M. Brewbaker, Jr., charged the claimant as set forth in letter of that date, and requested him to attend an investigation set down for hearing at 7:00 A.M. on November 16, 1967.

The investigation was held on November 16, 1967, as scheduled.

On December 5, 1967, General Foreman W. M. Brewbaker, Jr., advised the claimant he was given five (5) days' actual suspension for "alleged failure to perform his assigned duties servicing units 31, 41, 45 and 30 on November 8, 1967 on the Hagerstown Service Track."

This dispute has been handled with the carrier up to and including the highest officer so designated by the carrier, with the result that such officers have declined to adjust the dispute.

The Agreement effective August 1, 1966 is controlling.

POSITION OF EMPLOYEES: Rule 32 of the current Firemen and Oilers' Agreement with the Western Maryland Railway Company states, in

SECOND DIVISION AWARD 1041 (Referee Rudolph)

"It is well established that the action of the Carrier in discipline cases will not be disturbed unless the Carrier has acted arbitrarily, without just cause, or in bad faith. * * * Generally, the Board will not substitute its judgment for that of the Carrier on the question of the amount of discipline imposed by the management."

SECOND DIVISION AWARD 1597 (Referee Carter)

"Carrier has the prerogative of management to supervise the work in question. When its instructions are not followed, it has the unquestioned right to discipline those who react carelessly or indifferently to such instructions. Without such right, supervision would be meaningless."

THIRD DIVISION AWARD 5969 (Referee Douglass)

"This Board should not attempt to weigh the evidence of the investigation. As has been held before, we should not interfere with disciplinary matters in the absence of a showing that the Carrier's action was arbitrary, capricious, or without basis. In other words, when there is substantial evidence, if believed, to uphold the decision of the Carrier, we should not substitute our judgment for that of the hearing officer."

THIRD DIVISION AWARD 6232 (Referee Smith)

"It is well established by awards of this Division that a disciplinary action of a Carrier will not be disturbed if substantial evidence of probative value is adduced and (1) the investigation rules have been followed, (2) the action of the Carrier is neither arbitrary nor capricious, and (3) the penalty invoked is neither excessive nor unreasonable."

FOURTH DIVISION AWARD 835 (Referee Roscoe P. Conklin)

"A principle well established in this Division is that this Board will not disturb or interfere with a disciplinary action taken by a Carrier unless the record reflects definitely and clearly that such disciplinary action was unjust, lacking in good faith, unreasonable and excessive."

It is evident that the claimant was derelict and careless in the performance of his duties, and five day suspension was neither unreasonable nor arbitrary.

The railway company's submission in this case is made to the best of its ability without knowledge of the contents of the brotherhood's submission to the Board, and the carrier reserves the right to file additional data with the Board in rebuttal or reply to the brotherhood's submission.

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 procedural point, first raised by the Organization, is that in acting as accuser, trier of facts and jury, General Foreman W. M. Brewbaker, Jr. allegedly deprived claimant of the fair hearing to which he was entitled under Rule 32. It is urged that this defect is sufficient in itself to sustain the claim, without considering the merits.

However, the basic test for determining due process is how was it conducted — not who conducted it. On a review of the transcript of investigation it appears that the hearing was conducted fairly and impartially, and both the claimant and his representative were afforded every opportunity to present evidence, including examination and cross-examination of witnesses. Indeed, the claimant himself, at the conclusion of the testimony, allowed that the investigation had been conducted in a fair and impartial manner, and in accordance with schedule requirements. Accordingly, this objection must fail.

Claimant's principal contention is that in working alone on the service track it was impossible for one man to perform the duties of sanding, washing, fueling and watering upwards of fifty locomotives. Yet, this position argues all the more strongly for the fact that claimant should have reported the situation to his supervisor, and asked for relief. The fact that there were times in the past when engines were run through as quickly as possible does not remove from his superiors the responsibility for so doing in this instance. These short cuts in handling should have been the decision to be made by someone who was vested with authority to direct such action. Certainly, the claimant was not so endowed.

Claimant conceded that it was his duty to see that all sand boxes are filled unless ordered to do otherwise. He admitted that he had not filled the sand boxes to capacity, and had not performed certain other servicing functions on previous occasions in order to catch up on the service track. He also admitted that his supervisor had not directed him to omit the sanding of units 31, 41, 45 and 30, and that he was not authorized to assume the responsibility for these omissions on his own.

On the record in this case it must be concluded that claimant stands guilty as charged. Further, the five days actual suspension imposed may not be deemed an arbitrary or unreasonable penalty.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September, 1970.

Keenan Printing Co., Chicago, Ill.

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