Award No. 6229
Docket No. 6040
2-C&O-CM-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Chesapeake District)

DISPUTE: CLAIM OF EMPLOYES:

1. That Carman V. M. Moore was unjustly disciplined by receiving thirty (30) days actual suspension as result of investigation held April 10, 1969. The charges were not proven, the transcript of investigation was inaccurate and the Car Superintendent filed the charges, conducted said investigation and rendered the discipline in violation of Rules 35 and 37.

2. Accordingly V. M. Moore is entitled to be compensated eight (8) hours at Carmen's applicable straight time rate of pay April 22, 25, 26, 27, 28, 29; May 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 1969 and the entry should be removed from Moore's service record.

3. Additionally, that claimant be further compensated for any and all overtime lost account said violation.

EMPLOYES' STATEMENT OF FACTS: The Chesapeake and Ohio Railway Company, hereinafter referred to as the carrier, owns and operates a large facility located at Russell, Kentucky, known as the Russell Terminal, consisting of diesel house, shop track and transportation yards, where cars are inspected, switched, repaired, classified and cars are interchanged from other roads to the C&O lines, 24 hours a day, 7 days each week, where a large number of carmen are employed and hold seniority under Rule 31 of the shop crafts agreement.

Carman V. M. Moore, hereinafter referred to as the claimant, holds regular assignment on Russell Repair Track, first shift, 7:00 A. M. to 3:00 P. M., workweek Friday through Tuesday, rest days, Wednesday and Thursday.

Claimant received letter from Carrier's Car Superintendent, R. L. Perkins, dated March 31, 1969, instructing claimant to arrange to attend investiga-

The statement of Car Foreman Darnell, the statement of Gang Foreman Maddy, the statement of Gang Foreman Morris, the statement of Car Repairer Tingler, the statement of Carman Dewey Nolan, and claimant's own statement commencing on page 29, all conclusively prove Claimant Moore's guilt. Attention is called to the following question and answer of the claimant:

"RLP Did you refuse to Hi-ball extra westbound coal train called for 12:00 Noon, on March 30, 1969?

VMM I refused to Hi-ball train, yes."

Thus, we have a clear acknowledgment of the guilt in behalf of the claimant. Attention is again called to the fact that the issue in conference with the employes was not the claimant's guilt, but whether or not the investigation was fair and impartial. A review of the investigation will clearly and conclusively show that carrier's officer conducting the investigation was most patient and fair in his conducting of the investigation.

Since the charges were proven there really would be only one question to be resolved, and that is whether or not the discipline rendered was excessive considering the circumstances. The employes have not claimed, however, that the discipline was excessive, so the only question to be resolved by this Board is whether or not the investigation was a fair and impartial investigation conducted in accordance with the agreement rules. The applicable agreement rule having to do with investigations is Rule 37, and is hereby quoted for the convenience of the Board:

"No employe will be disciplined by suspension or dismissal without a fair hearing by a designated officer of the company. Suspension in proper cases pending a hearing, which shall be prompt, and in cases not requiring discipline as severe as dismissal, shall not be deemed a violation of these rules. At a reasonable time prior to the hearing, the employe shall be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented by his duly authorized representative. If the judgment be in his favor, he shall be compensated for the wage loss, if any, suffered by him."

Carrier submits that this rule has been complied with in every respect in the handling of the Moore investigation, and urges that the claim of the Employes be denied 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.

Claimant was advised by letter dated March 31, 1969 from Carrier's Car Superintendent in part as follows:

> "Arrange to attend investigation to be held in General Car Foreman's office Tuesday, April 8, 1969 at 9:30 A. M.
>
> You are charged with insubordination on March 30, 1969 in that Car Foreman E. P. Darnell gave you instructions and you refused to O.K. for movement an Extra West Coal train at approximately 12:00 Noon."

After hearing, Carrier found claimant guilty as charged, and assessed a thirty (30) day temporary suspension against him.

The Claimant contends that the stenographic report of the investigation did not reveal a true picture of what transpired during said investigation; that Claimant's witnesses were not given opportunity to testify in some instances; that the charges were unjust and not proven; that Claimant was charged with insubordination in that Car Foreman Darnell gave instructions and Claimant refused to O.K. for movement an extra west coal train at approximately 12:00 Noon, but that said train could not have been O.K. for movement at 12:00 Noon as Form L-265 indicates that said train was called for 12:00 Noon, Engine No. 3885 was not placed on Track No. 42 until 1:00 P. M., was doubled to No. 41 track at 1:10 P. M. and air test completed at 1:35 P. M., and, therefore, Claimant did not refuse to perform his assigned duties and did not cause any delay on said train; that the discipline rendered by Carrier was excessive in that Claimant did not have a blemish on his service record during twenty-five (25) years' service with Carrier; that Claimant did not receive a fair hearing because Carrier's Car Superintendent Perkins filed the charges, conducted the investigation, and rendered the discipline.

In regard to Claimant's contention that Claimant did not receive a fair investigation at the hearing because Carrier's Car Superintendent filed the charges, conducted the investigation, and assessed the penalty against claimant, a review of the record shows that Claimant was afforded a fair hearing.

As was said by this Board in Award No. 6057:

> "The circumstances that the Master Mechanic served in multiple capacities in filing charges, conducting the investigation and assessing discipline, does not in and of itself constitute reversible error where, as here, it appears from the transcript of investigation that the Claimant was afforded a fair hearing. See National Railroad Adjustment Board Awards 5855 and 5972 (Second Division) and 16678 (Third Division)."

We further find that the record does not disclose that the transcript was not a complete and accurate copy of the transcript as taken at the investigation and as contended by Claimant. Carrier's Superintendent, R. L. Perkins, in his letter to Local Chairman G. C. Watkins of July 10, 1969, stated, in part:

> "* * * The transcript has been checked and is correct. There was, of course, some discussion during the investigation which was not made a part of the transcript as these were statements made on an off-record basis, and were not pertinent to the charges in connection

with the investigation. As to your allegation that a photostatic copy of Form L-265, attached as part of the transcript, was not available to you as representative of Mr. Moore during the investigation is unfounded. A check of the transcript reveals that the only reference made by you in connection with the L-265 was in your questioning of Foreman Darnell. You asked Darnell if he had a copy of the L-265, and Darnell stated that he did not. Although Darnell did not have a copy of this form, same was in the hands of the officer conducting the investigation, and was available for your perusal had you so requested."

The record shows that Claimant referred to Form L-265 as stated by Superintendent Perkins.

As to the merits, the record clearly indicates that claimant refused to obey a direct order of a superior officer in the instant case. Car Foreman Darnell, Claimant's supervisor, testified that Claimant told him, after he ordered Claimant to Hi-ball the train, that he was not going to Hi-ball the train because of a sill step penalty defect on C&O 145890. Gang Foreman Morris testified that he heard Claimant tell Foreman Darnell that the air was O.K., but there was a penalty defect in the train, and that was as far as he would go with the train. Freight Car Repairer James Tingler testified that he also heard Claimant refuse to Hi-ball the train, saying he couldn't assume responsibility of running a shop car with a penalty defect. Freight Car Repairer Bert Gavin testified that he heard Claimant say that he would O.K. the air, but he would not accept the responsibility for the shop that was in it.

Further, Foreman Darnell testified that he advised Claimant that he would assume responsibility of okaying the car for movement. Gang Foremen Maddy and Morris, as well as Freight Car Repairer Tingler, all testified that they heard Foreman Darnell tell Claimant that he, Darnell, assumed responsibility for okaying the defect on the C&O car.

Claimant, in this instance, was not justified in refusing to obey his superior officer in regard to Hi-balling a train, even if he felt that the train had a penalty defect. Claimant was relieved of responsibility by his foreman's own admission to him that he was solely responsible in the event something went wrong. Further, Gang Foreman, H. B. Maddy, testified that when he inspected the sill step in question, he did not find it to be a penalty defect.

Thus, Carrier proved by substantial evidence Claimant to be guilty as charged. Further, we do not find the penalty excessive under all the circumstances then and there existing.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1971.

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