

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

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(of System Federation No. 6 - Railway Employees'
(Department, A.F.L. - C. I. O.
(
(The Belt Railway Company of Chicago

Dispute: Claim of Employees:

1. That Cleveland Whalum, employed as a Stationary Engineer by the Belt Railway Company of Chicago, was unjustly given four days' actual suspension beginning at 3:59 P.M., March 23, 1974, and ending at 4:00 P.M., March 27, 1974.
2. That accordingly the Belt Railway Company of Chicago be ordered to compensate Stationary Engineer Cleveland Whalum in the amount of eight (8) hours per day at the applicable Stationary Engineers' rate of pay of \$5.55 per hour for each of the dates of March 23, 24, 25 and 26, 1974.

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.

This case is related to our earlier Award 7137 in that the Claimant in this case, Cleveland Whalum is the Local Union Representative of the Organization and represented Mr. Harris in the handling of the earlier case. Reference to the other Award will show that among points at issue was the time when a steam compressor was shut down on March 1, 1974. Mechanical recording devices prepare charts which monitor the operations of that compressor and which can be read after the fact to indicate running and shut down times. The instant case arises out of a search of the whereabouts of the chart of March 1, 1974, which turned up missing on March 5, 1974, when the

Chief of Motive Power began his investigation into the bearing burn-out on the steam air compressor. The facts of record herein are not disputed.

The charts in question usually are kept on a spindle on a table in the Powerhouse. On March 5, 1974, the chart for March 1, 1974, was missing and Chief Engineer Flanagan reported same to V. L. Smith, Carrier's Chief of Motive Power. Smith instructed Flanagan to contact Cleveland Whalum, Claimant herein, when the latter came on duty at 4:00 P.M. on March 5, 1974, and asked the latter where the records were. The ensuing events are best described by verbatim quotation from the investigation transcript as follows:

"Q. Mr. Flanagan, did I instruct you to contact Mr. Whalum when he came on duty the afternoon of March 5, 1974, to ask Mr. Whalum where these records were?

A. Yes, you did.

Q. Mr. Flanagan, what did Mr. Whalum tell you or say to you?

A. He told me that he knew where the charts were and I said well Mr. Smith wants them back and he said he would get them back when he was through.

Q. Mr. Flanagan, did Mr. Whalum tell you where the charts were?

A. No, he did not.

Q. Mr. Flanagan, did Mr. Whalum offer any explanation for his action?

A. No, he did not.

Q. Mr. Flanagan, when did you next see the chart records of March 1, 1974?

A. I saw the March 1, 1974 charts on the morning of March 6, 1974.

Q. Mr. Flanagan, where did you find these particular chart records?

A. I found the charts over where we keep those records over on the table.

Q. When you asked Mr. Whalum if he had the charts and he replied that he did not but he knew where they were, did you ask him where they were?

A. No, I didn't.

Q. Mr. Harris, on the morning of the 6th of March, 1974 did Mr. Flanagan ask you if you knew where the charts were?

A. Yes, he did.

Q. And what did you reply?

A. I told him yes.

Q. Did you show him where the charts were?

A. No. I told him that they had been up there in the drawer and I put them back up on the spindle.

MR. SMITH: Q. Mr. Harris, you stated that the charts were in the drawer. Is this the proper place where we file the charts?

A. No.

Q. Mr. Harris, do you know how these charts got into this particular drawer?

A. I had been looking over the charts because I was coming up for an investigation and I was looking over the charts to determine when the steam driven air compressor was shut off on March 1, 1974. And by mistake I just put them in the drawer because I was going to look at them the next night. So when I came back the next night, I looked them over, and when I finished with them, I put them back on the spindle, so the following morning of the sixth Crenshaw and myself was in the washroom. So Mr. Flanagan, came into the washroom and he asked me did I know anything about the charts. So I said, Yeah, they were there all the time. So I put them back on the spindle. And that was all he said to me.

Q. Mr. Whalum, what do you have to offer as evidence in your behalf?

A. I have already stated that I did not have the charts that I presumed that what I said I knew where they was at, that Mr. Harris was looking them over, because he said to me that he wanted to study the charts carefully to determine what time that the compressor was shut down. And that is all the knowledge that I have of the charts."

Thereafter, Mr. Whalum received a notice dated March 6, 1974, reading as follows:

"Mr. C. Whalum
c/o Powerhouse with Receipt

Dear Sir:

Please arrange to be in my office at 8:30 A.M. Friday, March 15, 1974 for investigation to determine your responsibility, if any, for unauthorized possession of certain powerhouse chart records, making them unavailable to the Company on March 5, 1974. This is a violation of Rule "S", Belt Railway Company Book of Rules.

If you desire representation, please arrange.

Yours truly,

/s/

V.L. Smith
V.. SMITH
Chief of Motive Power"

Rule "S" reads as follows:

"RULE S -

Unauthorized possession of any article of freight, company material, or any other property is prohibited.

Unauthorized removal or disposal of an article of freight, company material or any other property from railroad property or property served by the railroad is prohibited."

Following a rescheduled hearing on March 20, 1974, Claimant was issued a Notice of Discipline dated March 20, 1974, assessing an actual suspension of four (4) days from March 23 - 27, 1974. Claimant served the suspension and on April 22, 1974, initiated the instant claim for reimbursement of lost wages. Following denial of the appeal by Mr. Smith a further appeal was denied by Carrier's Director of Personnel on June 5, 1974, as follows:

"I have your letter dated June 3, 1974, appealing the claim for four days pay for Stationary Engineer Cleveland Whalum who, you allege, was improperly disciplined by four days suspension from service following the investigation held on March 20, 1974, for the purpose of ascertaining Mr. Whalum's responsibility, if any, for unauthorized possession of certain powerhouse charts. (Emphasis in original)

In the second paragraph of your June 3rd letter you state that you can find nothing to indicate that the Carrier proved Stationary Engineer Whalum was guilty of the charges, stating further that the charges "being that he had unauthorized possession of certain powerhouse documents on March 5, 1974." If you will reread the investigation and particularly the notice of investigation, Mr. Whalum was not charged with having unauthorized possession but as you point out, the investigation proves that someone had unauthorized possession of them and it further points out that Mr. Whalum was aware of such unauthorized possession and having such knowledge failed to fulfill his obligation, not only as an employe but as an employe representative.

There is no valid basis for this claim and it is declined."

The facts of record herein cannot be read in a vacuum but must be considered together with the facts addressed in our Award 7137. Taken together these facts produce a highly unique situation which must be treated as such. Several points stand out regarding March 5, 1974, 1) Whalum was acting as representative of Harris who already had been brought up on charges regarding the bearing burn-out; 2) at no time did Whalum have actual physical possession of the chart but he knew that Harris had taken them from the spindle to study them. There is no evidence that Whalum knew Harris had placed them in a drawer; 3) Flanagan never asked Whalum directly where the charts were even though Whalum had said he knew where they were. Whalum did not volunteer any knowledge he had relative to Harris' possession; 4) Flanagan asked Harris directly where the charts were, received an answer and took possession of the charts on March 6, 1974; 5) There is no showing that the incident impeded the investigation of the bearing burn out or prejudiced Carrier's presentation at the Harris investigation on March 11, 1974.

We find that the issue in this particular case narrows to a determination whether in the unique circumstances and facts here present, Claimant's failure to volunteer knowledge of Harris' possession amounted to his own unauthorized possession of certain powerhouse chart records and making them unavailable to the Company in violation of Rule S. Careful consideration of all the facts and arguments compels us to conclude it did not. The overriding factors which compel this conclusion are the representative-client relationship between Whalum and Harris and the fact that Whalum was never asked directly where the charts were.

In so holding we do not imply approval of the removal of the Carrier's chart without permission nor do we license prevarication in the pursuit of representation. We hold only that in the particular facts herein Whalum's failure to volunteer information which would implicate his client without being asked directly was not tantamount to unauthorized possession or withholding Company property, the offense with which he was charged. Therefore, the charges against him were not proven on the record and the claim must be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

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Award No. 7138
Docket No. 6846
2-BRCofC-F&O-'76

Attest: Executive Secretary
National Railroad Adjustment Board

By: Rosemarie Brasch / bes
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 24th day of September, 1976.