Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7788
SECOND DIVISION Docket No. 7712
2-EJ&E-CM-'79

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

Parties to Dispute: (System Federation No. 6, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Elgin, Joliet and Eastern Railway Company

Dispute: Claim of Employes:

1. That as a result of an investigation held on August 17, 1976 Carman E. Cardenas was suspended for a period of forty-five (45) working days. Said suspension is harsh, unreasonable, excessive and in violation of Rule #100 (old Rule #35).

2. That the Carrier be ordered to compensate Carman E. Cardenas, hereinafter referred to as Claimant, for eight hours at the pro rata rate for each of the forty-five days that he was suspended from service, plus an additional eight hours pay at the pro rata rate for each time Mr. Cardenas was not allowed to work his turn on the overtime board during the forty-five day suspension period.

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 charged with causing damage to company equipment, as a result of which he was suspended for 45 days. The basis of Carrier's charge is that a Wreck Truck driven by Claimant was damaged by a Condola Car because Claimant had parked the truck too close to the track.

The Organization's defense is that Carrier submitted no substantive evidence that the truck was actually foul of the track before the accident; that prior to the investigation a Carrier official discussed the claim with another employee and indicated the degree of discipline that would be imposed; and that Claimant did not receive a fair hearing in that the Hearing Officer acted in multiple roles by making a preliminary investigation, preferring the charges, conducting the investigation, rendering the decision, and denying the claim upon appeal.

With respect to the Organization's claim of insufficient evidence that the truck was too close to the track, the transcript of the hearing held August 17, 1976 includes the following exchange between Mr. Reed (Hearing Officer) and Mr. Cardenas (Claimant):

"Q. Did you check to see of this truck was in the clear before leaving for the derailment on 31 hump?

A. At the time that I, before I left, I looked from the back of the platform and I seen I was clear. I didn't pay no attention to the front end. I assumed that the front end was clear also.

Q. Then you looked from the platform at the rear of the truck---

A. Yes, sir.

Q. --but did not look at the front end of the truck, and assumed that you were in the clear.

A. Yes, sir.

Q. Did you make any provisions to block 33 Hump so cars could not be switched in?

A. No, sir.

Q. Mr. Cardenas, how long have you been the truck driver of Truck 142?

A. About three or four years.

Q. Three or four years?

A. Yes, sir.

Q. Do you often check only one end of your truck to see if it's clear of the track before abandoning it?

A. No, sir.

Q. Would you explain why you didn't check the front end of your truck on this particular day.

A. I don't know why I didn't check it. I don't know."

The following discussion at the investigation also bears on the issue of the quantum of evidence. The Hearing Officer questioned Witness Knapp, General Car Foreman:

"Q. Mr. Knapp, are you familiar with the incident under investigation?

A. Yes, sir.

Q. Would you describe your knowledge concerning this incident.

A. ----I arrived at the west end of Hump 33 at approximately 10:25 a.m. and discovered that Truck 142 was fouled on Track 33 Hump and had been struck on the right side by ATSF 75684, gondola, causing estimated damage of $1900 to Truck 142.... I measured the distance from the rail to the front tire of Truck 142 which was 25 inches.... I went to the switch on 33 Hump at the west end and found that the track was not blocked by a switch block or had no blue flag on the track.

Q. Mr. Knapp, did you state Truck 142 was left foul of 33 Hump?

A. Yes, sir.

Q. What do you mean by foul?

A. The truck was not parked in clear of rail and too near for any car to be kicked or switched into that track.

Q. You testified the right front wheel was 25 inches from this rail. What would be a safe distance to prevent this truck being struck by cars moving past?

A. Normal way to find out if clearance, if you have clearance on an adjacent track, is stand against the track, reaching out with your opposite arm, which is approximately three foot.

Q. Are you stating this damage was caused by Truck 142 being left too close to the rail on 33 Hump?

A. Yes, sir."

Neither Claimant nor his representative questioned Mr. Knapp regarding these statements. Claimant's representative, in fact, although contending that the switch crew bore some responsibility for the accident, since they had a clear view of the area, stated at the hearing that "if Transportation is not going to take charge of their responsibility then they cannot expect employees of the Car Department to be penalized for their contributory negligence." (underlining supplied)

At another point during the investigation, the Organization's representative commented:

"... I believe there is some dual responsibility here, or I'll say that, I'll allege that there is some dual responsibility here. I'm not saying that, uh, Mr. Cardenas (Claimant) has not done anything wrong but I know that the switch crew should have looked down the track too."

Claimant alleged at the investigation that:

"I have been told, not by management but by all personnel, that the punishment is already to be dealt with, that I will be given a 30 day suspension...."

Neither Claimant nor his representative called any witnesses to substantiate this assertion.

The Organization has also charged that Claimant did not receive a fair hearing, referring to the multiple roles of the Hearing Officer cited above. We have carefully reviewed the Awards called to our attention. We have carefully studied the transcript of the investigation. We find no evidence in the record before us that Claimant was denied due process by the statements, actions, or conduct of the Hearing Officer.

The preponderance of the evidence reveals that Carrier has sustained the charge against Claimant so as to justify the discipline assessed. It is not this Board's function to disturb Carrier's findings unless some arbitrary action can be established. No such arbitrary or capricious action has been shown. We must, therefore, deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By _____
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of January, 1979.