Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8185
Docket No. 7995
2-BNI-EW-'79

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That in violation of the current working agreement, System Electrician "Wireman," James M. Berg of Portland, Oregon was unjustly suspended from service of the Burlington Northern Inc., from October 7, 1977 to October 16, 1977 inclusive, a period of ten (10) days.

2. That, accordingly, the Carrier be ordered to compensate System Electrician "Wireman" Berg for the ten (10) working days at pro-rata rate, the record of suspension be removed from his personal record, together with restoration of any lost vacation time, railroad retirement benefits, holidays, sick day or hospitalization benefits and any other rights, privileges or benefits he may be entitled to under schedules, rules, agreements or law.

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.

Following an investigative hearing, the Claimant received the following disciplinary penalty:

> "This is to advise that an entry is being placed upon your personal record and you are being suspended from the service of Burlington Northern Inc. from October 7, 1977 to October 16, 1977, inclusive, for violation of Safety Rules 535 (b), (e) and 536 (d) resulting in unsafe driving and accident with company vehicle and violation of Washington State law while working as electrician about 1:40AM, August 26, 1977, near Wishram, Washington, as disclosed by investigation accorded you you September 20, 1977."

In the accident referred to, the vehicle driven by the Claimant went off the road and overturned. While in an overturned position, it was struck by another vehicle passing by. Based on a report completed after the accident and the fact that the Claimant pleaded guilty to a civil citation for negligent driving, the Carrier undertook the investigative hearing and thereafter issued the ten-day disciplinary suspension.

The Organization raises two procedural matters in this dispute.

The first is that the Carrier improperly required the Claimant to be the initial witness in the investigative hearing, rather than presenting its own evidence as to Claimant's alleged guilt and then permitting the Claimant to defend himself against such evidence. It is clearly the usual procedure in disciplinary matters for the Carrier to present testimony and evidence at the outset. But the Organization pointed to no rule which makes this a rigid requirement. Further, in this instance, the Claimant's testimony was the only first-hand information which could be brought to the hearing.

The second procedural objection has to do with the Carrier's citing of specific safety rules during the hearing and in its subsequent notice of disciplinary action. The objection is on the grounds that the rules do not apply to Claimant's class of employes and also that they were not included in the notice given to him for the investigative hearing. The Board is satisfied that the record shows that the cited safety rules apply to all the Carrier's employes. As to their omission from the notice of hearing, the Board finds the notice more than adequately precise to meet the requirements of Rule 30 when it referred to a hearing concerning "your responsibility in connection with accident with company vehicle near Wishram, Washington, about 1:40 AM, August 26, 1977". Such notice gave the Claimant and the Organization ample grounds for defense even without specifying the particular safety rules applicable to such an occurrence.

As to the merits of the dispute, however, the Board finds that the Carrier improperly disciplined the Claimant based on any of the findings of the investigative hearing. The Carrier had in hand the accident report acknowledged by the Claimant that he "fell asleep" while operating the vehicle while on duty. Assuming this to be a fact, it is reasonable that the Carrier would pursue the matter through an investigative hearing to determine if this involved operating a vehicle in an unsafe manner. What, however, did the investigation show? The Claimant testified that he simply "did not know" if he had fallen asleep, despite his signing the accident report admitting same. Under the circumstances, there could be no independent finding to show that Claimant was asleep. Other circumstances make it seem doubtful. He suffered a blow on his head in the accident, which could have confused his recollection. He had traveled only one mile when he went off the road. There was much testimony about the condition of the truck, including repeated instances of brake trouble. Testimony by another employe found skid marks on the road which showed both that the driver had applied his brakes and also that the brakes on the left and right side of the vehicle did not apply evenly.

The Carrier properly conducted a hearing to investigate the matter. It must, however, give full weight to what such investigation develops and not simply rely on the single preexisting evidence in the accident report prepared just after the event. Many inferences can be drawn from a review of the hearing record. One which does not come through with any clarity is a picture of an employe falling asleep while driving on duty to the extent of losing complete control. He did apply the brakes approaching a curve in a vehicle in questionable condition. Did he, just at or prior to this moment, fall asleep? The proof is insufficient.

A W A R D

Claim sustained, but the remedy is limited to that provided in Rule 30 (g).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of November, 1979.