

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Carman Welder Mark M. Hutton was unjustly assessed thirty (30) days suspension following investigation held October 17, 1978.
2. Carman Welder Mark M. Hutton was erroneously charged with violation of Rule #7 of the General Regulations and Safety Rules for insubordination to Foreman Koehler by refusing to follow working instructions.
3. That the Chicago and North Western Transportation Company be ordered to make whole Carman Welder Mark M. Hutton, with all benefits that are a condition of employment unimpaired, and compensated for all lost time plus 6% annual interest on all such lost wages, as per Rule 35.

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, a Carman Welder, was charged with "... violation of Rule #7 of the General Regulations and Safety Rules, specifically for insubordination to Foreman B. C. Koehler by refusing to follow his working instructions". Pursuant to an investigation of this charge, Claimant was adjudged guilty and was assessed a 30 day suspension without pay.

The record in this dispute shows that on October 11, 1978, Claimant and his foreman were involved in a confrontation of sorts. According to the Foreman, the incident arose when he ordered Claimant to climb into a hopper car and do some welding. Claimant at that point complained of the safety of such an assignment because he believed that he would be welding directly over another welder who was already working inside of the hopper car. The Foreman's reply to Claimant's complaint was, "Mark, don't give me that s---". Thereafter, Claimant asked the location of some other employees and the Foreman's reply to this inquiry was, "Don't worry about the other employees and get the hell in the car". At that

point, Claimant, who was on the first or second rung of the side-ladder of the hopper car, turned to the Foreman and said, "F--- you".

Claimant's version of the foregoing incident is almost identical to that of the Foreman and thus needs no iteration.

Organization's position in this dispute is that the discipline which was assessed was unwarranted, capricious and an abuse of managerial discretion because: (1) Carrier failed to prove its charge against Claimant; and (2) Claimant was deprived of a fair and impartial hearing.

Of the several arguments which Organization raises regarding the merits portion of its case, those of most significance are as follows: (1) Claimant's actions were motivated by his concern for the safety of his co-workers; (2) Claimant's remark was made in direct response to some equally offensive statements which were made by the Foreman to Claimant; (3) Claimant's actions were not insubordinate in the sense that he was refusing to perform the assignment because he was climbing up the hopper car side-ladder when he made his remark to the Foreman; and (4) Claimant's remark is more appropriately characterized as "shop talk" which the Foreman had provoked.

Regarding the procedural errors portion of its case, Organization asserts that (1) Carrier failed to provide Organization with notice of the investigation hearing as required by Rule 35 (c) of the parties' Agreement; and (2) Claimant was denied a fair and impartial hearing because the Hearing Officer held a multiplicity of roles therein and also because the Hearing Officer played an adversarial role in the hearing itself and was responsible for comments which demonstrated that he had prejudged Claimant's guilt in the matter.

Carrier's basic position in this dispute is that Claimant's insubordinate behavior is clearly evidenced in the record and that such an infraction is a serious violation of the rules. Related to the foregoing, Carrier further maintains that insofar as dismissal is the usual penalty for such an infraction, Carrier's imposition of a mere 30 day suspension without pay cannot be considered as being either arbitrary or unreasonable.

Turning next to Organization's contentions regarding the fairness and impartiality of the investigation, Carrier contends that the required 5 day notice was mailed to Organization and, regardless of Organization's claim in this regard, Claimant was properly notified and Organization's Local Chairman was present at the hearing and was conversant in the facts surrounding Claimant's charge. Regarding the Hearing Officer's conduct of the hearing, Carrier asserts that the hearing was conducted fairly and impartially; and that though said Hearing Officer may have played a multiplicity of roles at the hearing, such a situation is not improper because he did not have any prior knowledge of the incident and he did not enter any testimony into the record at the hearing.

The Board has carefully read and studied the complete record in this dispute and is dismayed to find that the parties themselves have not been able to dispose of this matter long before reaching this level because it is quite apparent that both Claimant and his Foreman were equally responsible for the

incident of October 11, 1978. While Claimant erred initially when he engaged in a debate with the Foreman regarding the propriety of a legitimate order which had been given to him when he could only hypothesize on the potential hazards which might arise and which might affect the other workers; the Foreman was also in error by responding to Claimant's inquiries with his own unique brand of inflammatory, bullying verbal bombast. Given these facts, the Board cannot condone the imposition of a penalty or the rationalization of the imposition of any such type of penalty which, at the same time, does not take into account the matter of the participants' "shared responsibility" which was the cause of the instant dispute. Insofar as Carrier, apparently, has chosen to ignore this element of the case and has chosen to place full responsibility for same upon Claimant, the Board is led to the inescapable conclusion that the 30 day suspension was an arbitrary assessment and, therefore, was improper (Third Division Award 21291). For this reason, the Board shall modify and will direct that the suspension be reduced to 15 days.

Having made the determination in this dispute on the basis of the merits of the case itself, there is no need to now comment on the various procedural questions which have been raised by the parties, save that of Carrier's contention that any backpay remedy which might be directed should not include any interest payment. Because the inclusion of such a payment is not specified in the parties' Agreement, the Board is without authority to provide.

A W A R D

Claim allowed in accordance with Findings.

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 3rd day of February, 1982.