

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

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employees:

1. That the action of the Consolidated Rail Corporation (Conrail) was discriminatory, capricious and arbitrary when they dismissed Electrician Joseph H. Kruppenbacher from service on April 11, 1979 for alleged careless and improper workmanship during tour of duty on March 15, 1979.
2. That accordingly the Consolidated Rail Corporation (Conrail) be ordered to reinstate Electrician Joseph H. Kruppenbacher to his former position with seniority rights unimpaired and compensated for all time lost.

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.

On March 15, 1979, Claimant, an Electrician with 10 1/2 year's service at Carrier's Diesel Terminal, Selkirk, New York, was assigned by his immediate supervisor, J. Robinson, Foreman Electrical Running Repair, to remove the dynamic brake grids (resistors) from the "A" side of Engine 2562. As best as can be determined from the record, said grids consist of six (6) individual units which are rectangular in shape; are aligned in a row inside of the locomotive engine; and weigh approximately 50-60 lbs. each. This particular assignment was necessitated by the fact that while a repair crew was working on said engine (excessive vibration in the fan assembly) an air cleaner box which they were attempting to remove with a crane became wedged against the grids and, according to Carrier, the #6 end grid was damaged. Rather than continuing with the operation at that time, it was decided that the grids needed to be removed by an electrician and so Claimant was given the assignment.

According to Claimant, when he arrived at the scene and began the assignment he noticed that "... the Air Box was not being suspended by the Crane..." and that there were two (2) grids which were broken rather than only one (1) as Foreman Robinson had indicated. Additionally, Claimant maintains that while in the process of removing the grids that "... Air Box began to dislodge from the

point that it was hung up and completed its fall to the floor of the locomotive ..." which "caused damage to the other two dynamic brake grids". At that point Claimant contends that he removed each of the four (4) damaged grids and dropped them ("set them off") over the handrail 3½' to 4' onto the platform floor into a pile. For the remaining two (2) grids which were still in "good condition", however, Claimant alleges that he set them on the running board, got off the engine, lifted them from the engine, and then carefully placed them on the platform on top of each other. While in the process of placing these two (2) good grids on the platform, however, the weight of the top grid caused a corner of the bottom grid to break off.

As a result of this incident, which was observed by Carrier's Assistant Shop Manager, Claimant was suspended from service on that same day and charged with "(C)areless and improper workmanship during your tour of duty on March 15, 1979 resulting in willful damage to Company material, namely the destruction of dynamic brake grids removed from Locomotive 2562". Pursuant to an investigation which was held on November 21, 1979, Claimant was adjudged as being guilty as charged and was terminated. Said action is now the basis of the instant claim.

Organization's basic position in this dispute is that Carrier has completely failed to prove that Claimant is guilty of the charge of willful damage to Company material and that the resultant termination was discriminatory, capricious and arbitrary, and thus a violation of Rule 6-A-1(a) of the parties' Agreement. In support of its position Organization contends that Carrier's evidence regarding the amount of damage which was initially caused by the Air Box was conflicting and was based upon hearsay testimony. Additionally, Organization argues that Carrier witnesses failed to show that: (1) the brake grids were not damaged by the Air Box since Carrier officers **did not** examine the grids immediately after the Air Box became wedged in the grids; or (2) that the grids were not damaged beyond repair as Claimant maintains and that in order to protect himself he dropped them over the handrail and onto the shop floor when he removed them from the locomotive.

Continuing on, Organization next contends that the disputed damage to the grids was not caused by Claimant but instead was caused by the improper removal of the Air Box by the repair crew. Accordingly, Organization charges that Carrier officers knew that said grids were already damaged and beyond repair as evidenced by: (1) Foreman Sembrat's failure to act immediately when he heard the first grid strike the shop floor; and (2) Assistant Shop Manager's failure to intervene when he saw Claimant dropping the fifth of six grids over the handrail and onto the shop floor.

As its last major area of argumentation Organization charges that Carrier's removal of Claimant from service pending an investigation was improper and in violation of Rule 6-A-1(b) because the incident itself was not a major offense as specified in said rule. Further along this same line Organization also argues that Carrier's Shop Superintendent removed Claimant from **service** on the date of March 15, 1979, without even first attempting to ascertain Claimant's version of the incident.

The main thrust of Carrier's arguments in this dispute is that "... substantial evidence was adduced at the trial to conclusively establish Claimant's guilt of the offense with which charged and that the Carrier was justified in imposing the discipline it did". To substantiate the aforesaid, Carrier further argues that "substantial evidence" is a sufficient quantum of proof by which to determine an employee's guilt (Consol. Ed. Co. vs. Labor Board, 305 US 197, 229; First Division Award 20519, Second Division Awards 1809, 4753, 6084, 6372, 6489, 6512, 7237 and 7492; and Third Division Award 5032); and that once having established such a quantum, the Board may not now substitute its judgement for that of Carrier (Second Division Awards 6408, 6525, 6866, 7103, 7122, 7278, 7363, 7437, 7473, 7802, 8130 and 8201), weigh evidence or attempt to resolve conflicts in testimony or pass upon the credibility of witnesses (Second Division Awards 5167, 7148, 7202, 7363, 7542, 7680, 7812, 7912, 7985, 8207 and 8219).

In addition to the foregoing, Carrier also asserts that Claimant's trial was fair and impartial; and that Carrier's decision to remove Claimant from service on the date of the incident pending an investigation was proper and "... is not unusual in situations of this kind" (Second Division Award 8027). Lastly, Carrier asserts that Organization's insinuation that Claimant's hearing was improper ("~~tainted~~") is an argument which was not raised when the matter was handled on the property and, therefore, should not be considered by the Board at this point; and further that Claimant inhibited the initial investigation of this matter when he refused to explain his actions when questioned by Superintendent Otty on the morning of March 15, 1979.

Prior to delving into the various merits arguments which have been presented by the parties in support of their respective positions, there is but one procedural issue which is deemed to be of consequence in this analysis and that is the matter of Carrier's removal of Claimant from service pending an investigation. In this regard, Rule 6-A-1(b) specifies that such a removal may be instituted "(w)hen a major offense has been committed ..." (Emphasis added by Board). The instant dispute involves the alleged "... willful destruction" of approximately \$1258.00 of Carrier's property, and under these circumstances, the Board believes that such a type of incident is clearly encompassed within the category of a "major offense" such as was anticipated by the framers of said language (Second Division Award 8027).

Turning next to the merits portion of this dispute, the Board, after much study and careful deliberation of the various arguments which have been presented herein, is of the opinion that Carrier has failed to substantiate the specific charge which has been brought against Claimant.

Let there be no question that the Board is mindful of the appellate nature of this body and that its jurisdiction is indeed narrow in cases involving discharge and discipline. Furthermore, the Board is well aware of the significance of the many caveats which Carrier representatives have so articulately presented regarding those instances in which Carrier action may or may not be overturned. Be that as it may, however, the Board is convinced that Carrier has not produced evidence of a substantive nature which would be needed in order to support the specific charge which has been brought against Claimant; and for this reason Carrier's case must fall.

Stated simply, despite Carrier's contentions to the contrary, the record does not establish that Claimant "willfully damaged" the brake grids either in the manner or degree as Carrier alleges. While there can be no dispute that Claimant dropped four (4) grids over the handrail and onto the shop floor after removing them from Locomotive 2562 on the evening of March 15, 1979, Carrier's evidence does not in any way disprove Claimant's contention that said grids were already damaged "beyond repair" prior to his removing them; nor does the evidence indicate that Claimant dropped said grids with the intended purpose of destroying them as is indicated in the charge of "willful damage". Indeed it is Carrier's witnesses' own testimony which leads this Board to believe that more than one grid was damaged when the 2000 lb. Air Box became wedged against the grids and that some of the grids could have received additional damage during the removal process itself. If such were not the case, why would the evidence show that there were two (2) piles of grids; and, more importantly, why would Claimant willfully destroy said grids by tossing 50-60 lbs. of metal onto the floor knowing full well that other co-workers and supervisors were in the immediate area?

In this regard the following testimony is most enlightening:

Question by Mr. Wheeler - "Mr. Robinson you stated you initially went with Mr. Sembrat to look at the situation on the 2562?"

Answer by Mr. Robinson - "Yes."

Q. - "Did you inspect, as is normal standing on the dock?"

A. - "With a flashlight all grids were removed and I made a visual check to see."

Q. - "Standing on the platform outside the engine?"

A. - "I stood on the running board, A side of the locomotive."

Q. - "At that time, was the Air Box raised and wedged into the dynamic break grids, into the one grid?"

A. - "Yes."

Q. - "Air Box is a rather large piece of equipment?"

A. - "Yes." (Emphasis added by Board).

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Question by Mr. Wheeler - "How did the Machinists remove the Air Box by crane?"

Answer by Mr. Sembrat - "By crane, it is impossible to take out by hand."

Q. - "As they lifted the air box became wedged against the dynamic brake grids, true?"

A. - "True." (Emphasis added by Board).

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Question by Mr. Kruppenbacher - "Approximately how far was the air box still up in the air against the grids when it came down for the removal?"

Answer by Mr. Sembrat - "Contact was made right #6 grid. Told Machinist to stop so that he was able to get the grids out of the way."

Q. - "Mr. Sembrat, to the best of your knowledge, when it came down for the Electrician to remove the Air Box, was it in fact still in contact with one or more grids on the unit?"

A. - "I don't recall that."

Q. - "Your saying that no part of the air box was in contact with any grid?"

A. - "Not to my knowledge."

Q. - "To the best of your knowledge, you saw only one dynamic break grid before your summoned Mr. Robinson, is that true?"

A. - "That is true."

Q. - "In your own words, about how much time did it take for you to make your inspection before you summoned Mr. Robinson?"

A. - "Visual inspection from the floor."

Q. - "Did it take you one minute or 5 minutes?"

A. - "3 minutes."

Q. - "Was the inspection more of an inspection to ascertain any damage to another grid or was the inspection more to ascertain the need for the removal of the Air Box?"

A. - "The visual inspection from the floor noted no other breaks in the grids." (Emphasis added by Board).

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Question by Mr. Kruppenbacher - "Mr. Sembrat, after completing removal of brake grids was the Air Box any further back to the floor of the unit in question?"

Answer by Mr. Sembrat - "After the removal A side grids another inspection was made to remove the box but found deterioration of box. I returned to have B side grids removed." (Emphasis added by Board).

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Question by Mr. Kruppenbacher - "Mr. Campbell, in the process of trying to remove the Air Box from the Unit, you testified that to your knowledge one of the dynamic brake grids was broken in the process. Then, to the best of your knowledge, did you see any other broken brake grids at this time?"

Answer by Mr. Campbell - "No." (Emphasis added by Board).

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Question by Mr. Wheeler - "When you were summoned by Mr. Sembrat and went over to inspect the engine, you testified that you looked at the grids, is that true?"

Answer by Mr. Robinson - "Yes."

Q. - "You observed that the Air Box was impaled into one of the grids and damaged?"

A. - "Yes."

Q. - "Can you recall were these grids mentioned in pairs?"

A. - "No they were not, six in a row."

Q. - You have then testified that you glanced over the remaining grids?"

A. - "Yes."

Q. - "From the outside of the grids?"

A. - "I looked from the inside too, there is a door."

Q. - "So it is possible there could have been some cracks on the grids that you could not observe?"

A. - "That is a possibility." (Emphasis added by Board).

The import of the preceding transcript excerpts is significant for the following reasons: (1) the Air Box, though "impaled on one grid", was wedged against several grids; (2) most of the inspections of the grids were made from the "floor" and then only the first grid was viewed in any great detail, whereas Claimant removed each grid and inspected them individually; (3) the extent of the difficulty encountered in extracting the wedged Air Box apparently was no

small matter because the A side grids and later the B side grids both had to be removed in order to free the unit; (4) Carrier's contention that "... even if there had been some previous damage to the grids ... there was no justification for the Claimant to have damaged them further by throwing them on the floor", cannot be considered at this point because said grids, by Carrier's own account, were damaged "beyond repair" and Carrier, in its argumentation, has failed to support its position with any rule, policy or practice regarding the handling or salvaging of such materials; and (5) Foreman Robinson's accounts of his inspection efforts are not only contradictory, but therein he acknowledged that other grids could have been damaged in the manner as Claimant maintains.

Given the foregoing, the Board is of the opinion that Carrier's apparent failure to consider these areas of argumentation or to accord them any weight whatsoever when attempting to ascertain Claimant's guilt herein does, in fact, support Organization's contention that Carrier has failed to prove its specific charge against Claimant with a necessary amount of substantial evidence. For this reason, Claimant's dismissal was improper, and, therefore, will be overturned.

Before concluding this matter there are two (2) somewhat related issues which, because they impact upon the remedy which will be directed, are important and thus warrant further comment by this Board. Having determined that there is insufficient evidence to prove that Claimant was guilty of "willful damage to Company material", this finding does not fully absolve Claimant from the first part of the charge which was brought against him -- namely, "careless and improper workmanship". In this regard the Board notes that Claimant, by his own admission, did cause damage to two (2) grids when the unsecured Air Box dislodged from the grids and fell to the floor. Any electrician with 10½ years experience who would work in close proximity to an unsecured, one-ton Air Box or who would not have sought additional help or informed his supervisors immediately upon the onset of such difficulties, is indeed guilty of "careless and improper workmanship". Furthermore, Claimant's admitted refusal to state his defense or to offer any explanation whatsoever for his actions when questioned by Shop Superintendent Otty immediately following the March 15, 1979 incident is inexcusable and, no doubt, exacerbated the situation thus causing it to escalate unnecessarily. Regardless of whether the Shop Superintendent first removed Claimant from service and then asked if Claimant "... had anything to say in his defense" (a practice which the Board cannot support but which has not been proven in the record), such a technicality does not exempt Claimant from his responsibility to present an explanation of his actions as soon as possible when requested to do so by his superiors. Most assuredly, at a time when more communication, not less, was needed in order to help remedy this unfortunate situation, Claimant's perceived notions of "Perry Mason-like legalistic maneuverings" were not only misconceived and foolish, but they also were indeed most costly to him.

A W A R D

The claim shall be granted in part and denied in part. Claimant is not found to be guilty as charged and, therefore, his termination will be overturned with full rights and benefits restored. However, because Claimant's actions or lack thereof are deemed to have been partially responsible for the development of this situation, no back pay will be awarded.

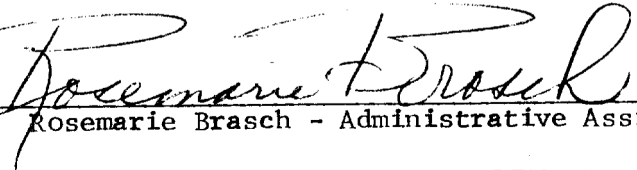
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Award No. 8916
Docket No. 8699
2-CR-EW-'82

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 17th day of February, 1982