Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8053
Docket No. 8716
2-WFE-CM-'82

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
(Western Fruit Express Company

Dispute: Claim of Employes:

(a) That under the controlling agreement, the Carrier improperly held Carman, R. T. Adams, out of service from November 14, 1977, through November 18, 1977. (Five (5) working days)

(b) That accordingly, the Carrier be ordered to compensate Carman R. T. Adams for all lost wages during the aforesaid time, plus any and all other benefits due under the current agreement.

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 August 16, 1977, Claimant, a Carman at Carrier's Hillyard Shop, Spokane, Washington, was observed by his supervisor, L. H. Smith, Mechanical Refrigeration Foreman, wearing a safety hat which allegedly was in a "mutilated" condition. On the following day, Claimant was interviewed by Supervisor Smith and H. P. Walker, Acting General Foreman, and, at that time, Claimant's hard hat was found to be in the following condition: the bill of the plastic hat was bent upward and affixed to the crown with a bolt; the safety liner was out; holes were drilled into the sides of the hat; and Claimant's initials, striping, a "T", and a heart were painted on.

Pursuant to this interview, the supervisors concluded that the hat had been "mutilated" and was not proper safety equipment, and Claimant was "... given an option to pay for the ... hat, sign for another hard hat and return to work" or "... leave the premises as (Walker) would not allow him to go to work without proper safety attire and proper hard hat". In addition to the foregoing, Claimant was also directed to sign a form which read as follows:

"I hereby agree to pay $3.00 for the mutilation of my BN owned hard hat. I will either pay $3.00 in cash or will authorize Disbursement Accounting, St. Paul, to deduct $3.00 from my pay check. Dated August 17, 1977."

Claimant initially refused to pay the money or sign said form but later he did so, and "... was then issued another hard hat, signed the form for the issuance of another hard hat and returned to work" (Supra).

On August 25, 1977, Claimant was instructed to attend an investigation "on August 29, 1977, for the purpose of ascertaining facts and determining your responsibility regarding mutilation of a Hard Hat issued to you as personal protective equipment". As a result of said hearing Claimant was adjudged guilty of violating Carrier Safety Rules No. 660 and 664, and General Rule "A", and was assessed a five (5) day disciplinary suspension which was to be served after Claimant was recalled to duty from furlough.

As to the merits of this case, Carrier argues that substantial evidence exists in the record to support Claimant's guilt as charged, and that, as such, Carrier's action in assessing discipline was neither arbitrary or capricious and therefore should remain undisturbed (Second Division Awards 6443 and 3081). Carrier further argues that Claimant's mutilation of his hard hat adversly affected its structural safety and that Claimant had no right to deliberately deface and mutilate Carrier property.

Regarding Organization's contention that Claimant was disciplined twice for the same infraction, Carrier maintains that Claimant's required payment of $3 for a new hard hat was not "discipline" but was instead the cost of replacing Claimant's hard hat which was rendered unsafe by Claimant's mutilation thereof. Carrier also asserts that the instant claim is restricted to whether Carrier acted arbitrarily or capriciously when it suspended Claimant for five days and that the matter of the $3 assessment is now beyond the jurisdiction of this Board.

Carrier lastly argues that Claimant had knowledge of, or should have had knowledge of Carrier's safety rules which applied in the instant case and that any claim to the contrary is unsupportable.

Organization argues that Carrier's action herein was "arbitrary, capricious and unjust ... as well as an abuse of managerial discretion". In support of its position Organization charges that Claimant was disciplined twice for the same infraction and thus Carrier is guilty of "double jeopardy" in this matter. Moreover, Organization asserts that Carrier's demand that Claimant leave the premises or pay $3 and sign the letter which was prepared by Supervisor Walker was itself a violation of Rule 27 because "... carrier had judged the claimant guilty

and disciplined him prior to the notice of investigation". Thus Organization posits that Carrier could not "... provide a fair and impartial hearing, as called for in the agreement, after they had forced the claimant to sign a statement admitting guilt".

Though Organization offers no apparent defense in the record regarding Carrier's assertion of the late appeal of this matter, Organization does, however, offer its own procedural contention in the form of an objection to Carrier's submission of Exhibits 2-A, 2-B and 2-C (photograph of Claimant's hard hat; photocopy of Claimant's acknowledgement that he understood Safety Rule 644 and he assumed responsibility for the care of the hard hat he received; and a photocopy of Claimant's acknowledgement of receipt of a copy of Safety Rules Form 15001). In this regard Organization contends that said exhibits are "new material" and were not provided to representative of Claimant prior to Carrier's submission of the issue to this Board. Accordingly, Organization charges that such action was in violation of NRAB Circular No. 1.

Responding to this post-submission objection, Carrier maintains that both acknowledgements were read into the record at the August 29, 1977 investigation and thus the information contained in Exhibits 2-B and 2-C cannot now be considered as being "new material"; and that, for obvious reasons, Claimant's hard hat itself could not accompany Carrier's submission and a photograph of same had to suffice under the circumstances.

The Board has carefully read and studied the complete record in this matter and, from the outset, is compelled to conclude that the totality of the parties' procedural arguments as presented herein are unpersuasive, and thus this dispute must be resolved solely upon the merits of the case itself.

The rationale for the above posited conclusion is as follows:

First, while Organization correctly argues that Carrier may not inject into its submission any new material which was not included when the issue was discussed on the property, the record clearly shows that the sum and substance of Carrier's Exhibits 2-A, 2-B and 2-C was, in fact, discussed in the investigation hearing which was held on August 29, 1977; and, more importantly, said exhibits were presented simply to serve either for documentation for Claimant's acknowledgements which were made at the hearing or because there was only one such piece of evidence and it was not reasonable or practical to include same in Carrier's submission.

Having decided the two major procedural issues which have been raised by the parties, our attention next turns to the merits portion of this dispute. In this regard, the Board is of the opinion that neither side is completely blameless in this matter and the remedy which will be directed as a result of this award will be reflective of this determination and the following factors are considered as being of significance therein: (1) there is sufficient evidence in the record to conclude that Claimant willfully damaged/mutilated his hard hat as charged; (2) upon a sufficient showing of proof for such an infraction, it is clearly within Carrier's managerial authority to assess appropriate disciplinary action against a guilty employe; (3) in the instant case, Carrier's assessment of a $3.00 replacement fee, withholding Claimant from service until he had secured a proper hard hat, and the demand that he sign a form acknowledging his actions, cannot be considered as being "discipline" in the normal sense of the word and thus Organization's "double jeopardy" argument must fall; and lastly (4) given the nature and the extent of the offense with which Claimant is charged, Carrier's

assessment of a five day disciplinary suspension without pay does appear to have been a harsh penalty to have imposed under the circumstances. Because of this latter finding it is determined that, absent any more evidence than that which is present in the record, the extent of Carrier's assessment of discipline against Claimant for his proven infraction is deemed to have been "unreasonable and excessive" and, therefore, improper. In remedy thereof the Board directs that Claimant's five day suspension without pay shall be rescinded and replaced instead with a three day supension without pay.

A W A R D

Claim is sustained to the degree and in the manner as indicated hereinabove.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April, 1982.