

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

Parties to Dispute: { International Association of Machinists and  
                          { Aerospace Workers  
                          { Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement and the Burlington Northern schedule of rules, the Carrier unjustly censured and suspended Machinist Steven E. Thackeray from service for a period of five working days from March 5, 1979 through March 9, 1979, inclusive.
2. That, accordingly, the Carrier rescind its censure of Machinist Thackeray and compensate him for all wages lost as a result of said suspension.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 January 22, 1979, Claimant was assigned to travel to Essex, Montana, to repair Locomotive Units 6394 and 6412 for safe movement to the Havre Diesel Shop, a distance of 205 miles. The units had been damaged at Essex and the Claimant, along with sheet metal worker L. Jasinski, was instructed to repair them so they could be safely moved.

On January 23, 1979, the Claimant inspected the units and found, among other things, a fracture in the draw bar on the front part of the Unit 6394 front end coupler. He opted not to repair the draw bar and advised General Foreman J. F. Smith by telephone that the units could be safely moved. The units were then dispatched for the Havre Diesel Shop and began to follow a piece of snow removal equipment toward their destination. The temperature was about zero degrees Fahrenheit, winds were gusting approximately 60 to 70 m.p.h., and there were heavy drifts across the tracks. The snow dozer turned off at Blackfoot, Montana, leaving the units to fend for themselves. Sometime thereafter, around Pardue, Montana, the engineer stopped the train due to what he thought was a derailment. Upon inspection of Unit 6394 he found that part of its front end draw bar had broken loose and punctured holes in the fuel tanks.

The Claimant was charged with a violation of Rule 667, which states in pertinent part: "Employees must comply with instructions from the proper authority." An investigatory hearing was held on February 12, 1979 and, as a result, the Claimant was advised by a March 5, 1979, letter that he was being assessed an entry of censure in his record and a five-day suspension.

The Organization objects to the Claimant's censure and suspension on the following grounds: (1) the hearing officer played multiple roles in the matter and, therefore, could not possibly have conducted a fair and impartial investigation. (2) The alleged date of the incident was inaccurately identified in the Carrier's statement of charges and the local chairman did not receive a corrected statement of charges prior to the hearing. (3) The local chairman's request to exclude from the hearing all witnesses except the one testifying was denied by the hearing officer. (4) Statements of persons not present at the hearing were read into the record. (5) The evidence in the record does not sustain the charges against the Claimant.

Allegations 1-4 above are procedural and careful study of the record reveals that all were raised in at least some fashion by the Organization during the hearing. The allegation relating to the hearing officer's alleged multiple roles will be considered first. General Foreman W. H. Zachau served not only as the hearing officer, but also as the officer who preferred the charges against the Claimant and the one who signed the March 5 notice of discipline. The relevant question here is whether such a multiple role set violated Rule 35, quoted in pertinent part below:

"Rule 35 (a). An employee in service more than sixty (60) days will not be disciplined or dismissed until after a fair and impartial investigation has been held."

Nothing in Rule 35 specifically restricts the Carrier's selection of the hearing officer. However, the Carrier is charged with providing a "fair" and "impartial" investigation, and the selection of a biased hearing officer would cast serious doubt as to whether such charge had been met. Accordingly, the Board has scrutinized the record for evidence that Zachau's role in the merits of the case may have influenced his conduct of the hearing. We find no evidence that his conduct of the hearing prejudiced the Claimant's case. Both the Claimant and the Organization were allowed ample opportunity to present evidence and argument in support of their position, and both were permitted to question all witnesses. The Board acknowledges the local chairman's concern during the hearing that Hearing Officer Zachau briefly attempted to testify. However, the Board also notes that upon the local chairman's objection Zachau stopped. Furthermore, the nature of his comments were of little probative value to the outcome of the case. The Board has concluded that while the multiple roles of Mr. Zachau did create the initial appearance of partiality, close inspection of the record revealed that his conduct during the hearing did not result in an unfair or partial investigation.

The Organization's second procedural objection to the investigation concerns a typographical error originally made in the statement of charges to the Claimant. The date of the incident was apparently cited as January 24 instead of January 23. Although this error was corrected in subsequent correspondence to the Claimant, the local chairman asserts he received no copy of the corrected statement of charges. The Board has considered the local chairman's expressed concern, but finds that the

nature of the typographical error was not of sufficient consequence to detract from a fair and impartial investigation under the terms of Rule 35. The facts in the case were undisputed, and both parties clearly understood that the charges were connected with the breakdown of Unit 6394 en route to the Havre Diesel Shop.

Third, the Organization holds that the hearing officer's denial of its request to exclude from the hearing all witnesses except the one testifying was a violation of Rule 35. The Board does not agree. Nothing in the record suggests that the simultaneous presence of witnesses at the hearing resulted in an unfair or partial investigation.

The Organization's fourth procedural objection relates to statements from persons not present at the hearing being read into the record. One such statement was reportedly submitted by G. E. Collins, Assistant General Foreman. The record reveals that Mr. Collins was on vacation at the time of the hearing. Furthermore, his statement is merely a description of facts not in dispute. Two telegrams from a G. A. Newell, Chief Dispatcher, were also read into the record. Again, both telegrams are descriptions of facts not in dispute. Accordingly, and absent any contractual prohibition to the admissibility of such statements, the Board has concluded that their inclusion in the instant case did not violate Rule 35 (see Second Division Award 8379).

In summary, the Board has concluded that the investigation in this matter was fair, impartial, and not in violation of Rule 35. We now turn our attention to the merits of the case. The focal question here is whether the Claimant failed to comply with his supervisor's instruction to render the units safe for movement, thereby violating Rule 667. After careful study of the record the Board has concluded that he followed that instruction to the best of his ability, using what appears to be sound reasoning and prudent judgment. It is therefore not reasonable to hold him responsible for the breakdown of Unit 6394. As support for this conclusion we cite the following circumstances:

1. Weather conditions that day were severe and drifted snow across the tracks was packed hard enough to cause derailments. In fact, the Engineer on Unit 6394, Mr. Potter, testified that hardened snow had derailed an engine several years prior to this incident at about the same spot where the draw bar broke.
2. The Carrier argues that the Claimant should have anticipated packed drifts, but it must be recalled that Unit 6394 left Essex behind a snow dozer. Nothing in the record indicates the Claimant knew the dozer would turn off prior to completion of the trip to the Havre Diesel Shop. Furthermore, it is not unreasonable to speculate that the draw bar would have remained intact were it not for the dozer turning off.
3. Testimony of Engineer Potter is also instructive. He was present at both the site where the Claimant inspected Unit 6394 and the place where the draw bar broke. He stated: "I personally think that these men (the Claimant and Sheet Metal Worker Jasinski) did give a real examination of that draw bar. There might have been a hidden fracture of that draw bar and those drifts were so hard that it was really instrumental in causing this. That sliver or whatever came off, it was probably hanging by something and I took exception to the fact that they turned the dozer at Blackfoot."

4. Both the Claimant and Sheet Metal Worker Jasinski were aware at the Essex location that the draw bar was fractured, but in their best judgment it would not disrupt safe movement of the Unit. Furthermore, there is nothing in the record to indicate that the Claimant's training or judgmental ability was inadequate. On the contrary, there was some testimony suggesting that he is very well qualified to perform his job and that he has a reputation for completion of assigned tasks with much attention to detail.

On balance, the record does not support the Carrier's allegation that the Claimant violated Rule 667. The Board has concluded that the evidence in large part suggests that failure of Unit 6394 to safely reach the Havre Diesel Shop was beyond the Claimant's control. Accordingly, the censure shall be removed from his record and he shall be compensated for any wage loss suffered from the suspension in accordance with Rule 35(g).

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 11th day of August, 1982.