

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Consolidated Rail Corporation

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Consolidated Rail Corporation (ConRail) violated the current agreement when Electrician Thomas Fay was capriciously, arbitrarily and unjustly suspended from service on July 11, 1979 and further action of suspension of twenty (20) days time out of service to apply.
2. That accordingly, the Consolidated Rail Corporation (ConRail) be ordered to compensate Electrician Thomas Fay, all wages lost during the time held out of service account of suspension and that the charge be cleared from his record.

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 Thomas Fay had approximately three years of service with the Carrier as an Electrician at the New York Harmon Shops at the time of the incident giving rise to the instant claim.

Claimant was removed from service on July 11, 1979 at 6:30 p.m. and notified under letter of the same date to appear for trial on July 18, 1979 on the following charge: "Your alleged insubordination on July 11, 1979 at approximately 6:30 PM, in Harmon Car Shop, failing to comply with directive from your Foreman, Robert Boyd."

Subsequent to the trial, Claimant was sent a Notice of Discipline assessing him a twenty (20) day record suspension with time held from service (61 hours) to apply as actual discipline.

The discipline was appealed and denied through all requisite steps preceeding submission of the parties' dispute to this Board.

It is significant to note that the form of insubordination contained in the charge was failure to comply with a directive from Claimant's supervisor. The offense, although not factually specific, was not objected to at any time prior to trial and claimant indicated at the outset of the hearing that he was ready to proceed to trial on the charge as stated. During examination of the Carrier's first witness, Foreman Boyd, it was determined that the directive given to Claimant was, "put your hard hat on and go into the office".

There was other evidence adduced at the trial of facts that might have constituted a basis for disciplining Claimant if they had been made a part of the charge against Claimant. Because they were not a part of the charge, they should not have been weighed by the Carrier in assessing discipline or in determining whether the discipline imposed was appropriate in light of the charged offense as shown.

Although the Organization has charged that Claimant was denied due process in that the charge against Claimant was not sufficiently specific, there was no such allegation made at the commencement of the hearing and it is the opinion of this Board that Claimant then waived his right to complain concerning the charge.

The Organization has further argued that Claimant was denied a proper trial when the Hearing Officer of the Carrier allowed Carrier witnesses to read written statements into the record going beyond the charge against Claimant. A majority of this Board agrees with the Organization in this regard.

Hearing Officer Foss submitted a written statement to Claimant's Foreman, Boyd, asking Boyd whether the writing was the statement Boyd made "on the charge" against Claimant. The Organization representative, Mr. Peloso, asked what statement it was. Foss did not tender a copy of this statement to Peloso but merely stated that Peloso would "get a chance to see it". Then Foss had Boyd read the statement into the record. Subsequently, Peloso objected to the hearing into which evidence concerning matters extraneous to the charges were submitted. Hearing Officer Foss recognized that Claimant had been charged with matters contained in only a part of the written statement, so Peloso moved that everything except that which went to the charge be stricken from the minutes. Foss indicated that Peloso's objection would be noted, but did not rule on Peloso's motion to strike.

It is the opinion of this Board that Hearing Officer Foss improperly introduced evidence into the record of the case in a manner that disallowed Claimant's representative to make specific objection prior to the introduction of such evidence, and later failed to rule on the Organization's motion to strike that which the Hearing Officer recognized did not go to the charge against Claimant. That conduct on the part of the Hearing Officer was clearly improper, manifesting an infidelity to the role of an impartial hearing officer.

It is further noted by the Board that while Hearing Officer Foss readily admitted damaging evidence against Claimant which did not go to any charge against Claimant, he disallowed Foreman Boyd to respond to a question concerning his physical or mental condition on the date in question when the incident

occurred after Boyd had been working continuously for twenty-six and one-half hours on the ground that such inquiry had nothing to do with the charge against Claimant and Boyd was not on trial. Clearly, Boyd was not on trial, but his perception of what occurred regarding the charge against Claimant was subject to examination and his physical and mental condition at that time was a relevant inquiry. The Board emphasizes this fact because it reflects an attitude of the Hearing Officer that permitted matters irrelevant but adverse to Claimant in the record while refusing to admit or weigh evidence that was clearly relevant.

The Carrier has argued that this Board should be bound by the factual determinations of the Hearing Officer and not substitute its judgment for that of the Hearing Officer. That argument would be persuasive where the record revealed complete impartiality by the Hearing Officer, but where partiality is manifested by the Hearing Officer this Board must weigh the record in its totality and give such weight to the evidence as it deserves. Where it is found that a hearing officer has acted improperly and without impartiality, this Board has no obligation to credit the determinations of that hearing officer. It is not the function of this Board to condone or approve the errors of hearing officers. The Board's duty includes the determination of the propriety of the investigatory hearing based on the record before it. Any lesser function would result in this Board serving as a rubber stamp, which clearly is not its purpose.

Claimant was allowed in presenting his case to show that his Supervisor was abnormally tired on the day in question, and it is the opinion of this Board that such evidence does not show that Foreman Boyd acted irrationally because of excessive tiredness.

What has been shown is that Claimant was told to put his hard hat on and was told to report to Boyd's office. The evidence as to whether Claimant complied with the directive to put his hard hat on is in conflict.

Carrier witness Boyd testified that he told Claimant to put his hard hat on but that Claimant did not do so. Carrier witness Hardman testified that he never heard Boyd direct Claimant to put his hard hat on, but that he did hear Boyd direct Claimant to go to the office which Claimant did not do. Claimant and two witnesses for Claimant testified that Boyd did direct Claimant to put his hard hat on and that Claimant complied with that directive, although Claimant admits in essence that he did so reluctantly because others not wearing their hard hats were not ordered to put their hats on as Claimant was. Obviously, the Carrier's representatives and the Hearing Officer chose to believe Foreman Boyd's testimony over that of Claimant and the two witnesses testifying on his behalf regarding the hard hat incident, although no explanation for that conclusion was given.

As to the matter of Claimant's alleged failure or refusal to comply with Boyd's directive to go to the office, both Boyd and Hardman testified that the directive was given and that Claimant did not respond. Hearing Officer Foss questioned Claimant as to whether Boyd had given him a directive to report to the Foreman's office and Claimant responded, "If he did I didn't hear him." Foss then asked, "Did you report to the office?" Claimant answered,

"I eventually got there, yes." Foss did not follow with any question to remove the ambiguity evidenced in Claimant's answer. This Board does not find Claimant's answer to be an admission that he had heard Boyd's directive to report to the office. The ambiguity in Claimant's answer leaves the entire matter in doubt, and should have elicited further question(s) from the hearing officer to establish why Claimant reported to the office at approximately 7:00 p.m., rather than at 6:30 p.m. Neither of Claimant's witnesses heard Boyd order Claimant to the office, although one of them stood only about five feet from Boyd and it is clear that Claimant was much further from his foreman than that when the alleged directive to report to the office was given.

As with the issue concerning the hard hat, the Carrier's representatives and the Hearing Officer chose to believe the testimony of the Carrier's witnesses over the testimony of Claimant and the two witnesses called by Claimant, but no explanation was given for the resolution of the conflicting testimony.

It is axiomatic that the Carrier carries the burden of proving the charges against an employee by the preponderance of the evidence. In the instant case, it is the determination of the majority of this Board that such proof was not made. The Hearing Officer's conduct of the case does not show him to have been impartial in the matter because he not only permitted, but submitted, evidence to be placed in the record prejudicial to Claimant which he admitted had nothing to do with the charge against Claimant, and he failed to ask those questions essential to obtain evidence to resolve issues of credibility. It appears clear that he was satisfied from the outset that Claimant was guilty of matters as set forth in the written statement of Foreman Boyd and that evidence presented by Boyd was credible irrespective of any conflicting testimony in the matter.

Given the manifested propensity of the Hearing Officer to secure only that evidence which he believed was adequate to establish the Carrier's case, the Board must now weigh all of the evidence in the case to determine whether there was a fair trial and whether the evidence substantially supports the determination that the charges against Claimant were proven. The Board specifically attaches no weight to other incidents that allegedly occurred but were not made the basis for any discipline. When that is done, as it should be, the evidence of record is not found sufficiently substantial to prove the Carrier's charge against Claimant.

Further, even if Claimant had not put his hard hat on when directed to do so under circumstances as described by Claimant, i.e., when other employees not wearing hard hats were not so directed, the offense would not constitute a major offense deserving immediate removal from service.

Important to this case is the fact that the Hearing Officer never recalled any witness to overcome the testimony of Claimant or Claimant's witnesses to show that others were not wearing their hard hats and were not ordered to wear them, and that Claimant never heard the directive to go to the Foreman's

office. A fair hearing in the matter dictated that such rebuttal evidence be sought and established. If Claimant did not hear the directive to go to the office, his failure in that regard could not be considered a "refusal" in the matter, and that alleged act of insubordination could not constitute a major offense to support immediate removal from service.

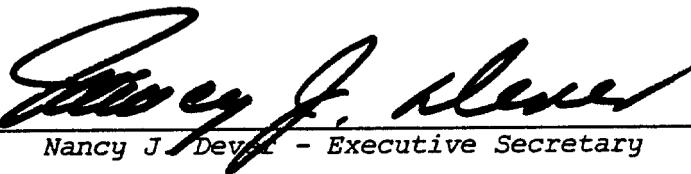
For reasons set forth above, this Board sustains the grievance and orders the Carrier to pay Claimant for all wages lost during the time he was held out of service account of suspension and to clear this matter from Claimant's record.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:


Nancy J. Devall - Executive Secretary

Dated at Chicago, Illinois, this 26th day of October 1983.