Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10047
Docket No. 10325
2-BN-CM-'84

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Burlington Northern Railroad Company

Dispute: Claim of Employes:

1. That the Burlington Northern Railroad Company unjustly suspended Carman J. Winters, St. Louis, Missouri, from service on December 23, 1981 and subsequently dismissed him following an investigation conducted on December 30, 1981, in violation of the controlling agreement.

2. That the Burlington Northern Railroad Company failed to provide a proper notice of investigation, depriving Mr. Winters of a fair and impartial investigation.

3. That Carmen J. Winters be restored to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired.

4. That Carman J. Winters be compensated for all time lost, plus six percent (6%) annual interest.

5. That Carman J. Winters be reimbursed for all losses sustained that are a provision of the agreement between the Burlington Northern Railroad Company and the Brotherhood Railway Carmen of the United States and Canada.

6. That Carman J. Winters' record be cleared of the charges.

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 employes 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 at the time of investigation had approximately fifteen (15) years of service with Carrier. On December 23, 1981 he was suspended pending investigation of an incident on the property on the same date, and received his notice of investigation which provided in pertinent part:

> "Arrange to attend investigation in the office of the General Car Foreman, 7000 Fyler, St. Louis, Missouri at 1:30 p.m. on December 30, 1981 for the purpose of ascertaining the facts and determining your responsibility, if any, for your alleged careless and unsafe act of operation of repairing Car Number BN 965055 which resulted in total fire destruction of Vehicle No. 74422.
>
> Arrange for representation, and/or witnesses, if desired, in accordance with governing provisions of prevailing scheduled rules."

Claimant was subsequently dismissed from the services of Carrier for violation of safety and general rules 1 and 501. Rule 1 reads:

> "Safety is of the first importance in the discharge of duty. In case of doubt or uncertainty, the safe course must be taken. Employees who persist in unsafe practice to the jeopardy of themselves and others will be subject to discipline even though the act or acts do not violate a rule."

Rule 501 provides:

> "Keep fire away from gas tanks, gasoline containers, and all explosives."

The Organization takes the position that Claimant's suspension pending investigation was not proper under Rule 35, that the charge was improper, that the hearing was not fair and impartial, and that the charge was unproven. The Carrier argues that suspension was proper, notice was sufficient and that both the burden of proof and discipline were fully met by the evidence upon the record presented at a fair and impartial hearing.

The Board is of the opinion that Claimant's suspension pending investigation was proper as the charge involved a serious infraction of the safety rules: a total destruction of a Carrier vehicle by fire. The investigation was promptly held within the ten (10) days required by the controlling agreement in the case of an employee held out of service for a serious infraction.

Other contentions of the Organization are without merit. The Claimant received notice of investigation on the same day as the incident. The precise car and vehicle numbers were referenced, along with the circumstances at issue, i.e. the "total fire destruction" of Carrier's vehicle. The Organization cites no provision of the controlling agreement requiring recitation of a specific rule in the notice of charge. Although citation to a specific rule would be preferable, this Board finds that in the absence of such a contractual requirement, that the notice of charge in this case is sufficient to allow Claimant to prepare his defense, and meets minimum standards of due process.

A review of the record demonstrates to this Board that the hearing was fair and impartial, and that sufficient credible evidence established that Claimant violated Rules 1 and 501. Claimant admitted that he could have parked the truck further away from the car upon which his co-worker was using an acetylene torch. Claimant positioned the truck between 3 and 4 feet from the car where Claimant's co-worker was using the acetylene torch. Carrier's witness who observed the accident scene testified that Claimant could have placed the truck in a safer position, and that at 4 feet there was a great chance of catching the truck on fire. The truck was in fact placed by another witness at a distance of only 3'8" away from the grab iron that Claimant's co-employee was cutting with the acetylene torch.

The issue of sequestration of witnesses at investigation hearings has been raised many times before this Board. While it has often been stated that an obligation to sequester not contained in the parties' agreement will not be compelled by this Board, (Second Division Award Nos. 8356, 9285, 9372), the duty to provide a fair and impartial investigation is required.

The record and all the evidence establish that the fire centered on the truck's gas tank, and that the torch was being used close to four feet from the truck. Testimony of witnesses showed that there was sufficient hose for the cutting torch that the vehicle could have been moved farther away. Although the Organization maintained the origin of the fire was unknown as the fire department listed the cause of fire to be "undetermined", the record contains sufficient credible evidence by Carrier's careful investigation which established that hot metal was blown by the torch straight toward the truck in the vicinity of the vehicle's gas tank.

While the Board is fully cognizant that the acts of Claimant were not intentional, Claimant was grossly negligent and careless in maintaining safety in the discharge of his duties. The need for safety particularly in those situations where fire may come in contact with gas tanks or containers cannot be overemphasized. The discipline administered in this serious matter was neither arbitrary, unreasonable, nor capricious.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1984.