

The Second Division consisted of the regular members and in addition Referee William O. Hearn when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

1. That in violation of the governing Agreement the Burlington Northern Railroad Company arbitrarily suspended Shop Electrician K. D. Rice of Alliance, Nebraska for thirty (30) days following an unfair investigation held on April 7, 1988.
2. That the hearing was not fair or impartial as required by Rule 35(a) of the controlling agreement.
3. That a preliminary hearing was held by the Investigating Officer with Claimant's accusers in this dispute at which Claimant was not in attendance, nor was his Representative advised of the hearing.
4. That accordingly, the Carrier be ordered to make Claimant whole for the thirty (30) days suspension and remove all reference of the discipline from his personal 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 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.

On March 23, 1988, the Claimant was instructed to attend an Investigation on April 8, 1988, for the purpose of:

"*** ascertaining facts and determining responsibility in connection with your allegedly sleeping in cab of BN 7199 at approximately 6:00 A.M. March 22, 1988."

The Investigation was rescheduled for April 7, 1988 and was held on that date.

The record reveals that Claimant had been employed by the Carrier for eight (8) years and six (6) months without any record of wrong doing. After the Investigation, Claimant was suspended from service for thirty (30) days for violation of Carrier Safety and General Rule 569.

The Organization took the position that because the Hearing Officer discussed the case with their witnesses, that this was in violation of Rule 35 of the controlling Agreement. We have studied Rule 35 and we are unable to find any language that would preclude the Carrier or the Organization from interviewing their witnesses prior to the Investigation. The Board finds no Rule or practice that would prevent either party to discuss the case with their witnesses.

The Organization for the first time in their Submission took the position that the Hearing Officer performed multiple rolls in the Investigation; that is he called the Hearing, held a pre-trial Investigation, served as neutral and assessed the discipline and in support of their position they quoted part of Second Division Award 7119. We have reviewed the correspondence of record several times; other than taking issue with the officer for holding a pre-trial Hearing, the issue of him being judge-jury and prosecutor was never handled during the correspondence on the property. For that reason it cannot now be considered.

We do find there is a conflict in the testimony of Carrier's two witnesses.

A Supervisor testified on page 5 of the transcript that:

"I found Mr. Rice in a slouched position in the cab of the 7199 on the west end of four track at the Alliance Diesel Pit with his eyes closed on the fireman's side of the cab."

The Supervisor further testified that he was not aware of Claimant's whereabouts for approximately 45 minutes to an hour previous to 6:00 A.M. He also stated Claimant was assigned the assignment he was on at approximately 5:00 A.M. On page 6 of the transcript, the Supervisor testified he observed the Claimant a minute or two minutes.

On page 7 of the transcript, the Supervisor testified:

"The locomotive 7199 was facing west on the west end of four track of the diesel pit. Mr. Rice was sitting in the rear seat on the left hand side of the locomotive, the fireman's seat, with his feet on the seat directly in front of it, next to the fireman's entrance door on the locomotive. His feet were laying across the seat in front of him. He was leaned back in a slouched position and his head was leaned forward with his eyes closed."

This same Supervisor testified further on page 7 of the transcript that it would have taken Claimant 10 to 15 minutes to make an inspection provided he did not encounter any problems.

On page 9 of the transcript Carrier's second witness testified in part:

"At approximately 6:00 A.M. I walked up on the fireman's side of the BN 7199 and observed Mr. Rice in a slouched position with his eyes closed. I observed him from 6:00 A.M. to 6:02 A.M. at which time he opened his eyes and stood up ***."

Another Carrier witness testified:

"Q. So, if we have Mr. Rice's head tilted forward, you could see his eyes from the position you was outside the locomotive cab?

A. Yes he was sitting upright with his head tilted forward."

It would be noted that the first Supervisor testified that Claimant was leaned back in a slouched position. The second Supervisor testified the Claimant was sitting upright with his head tilted forward which he contended was a slouched position. Therefore, you can really see the conflict in the witness's testimony.

The second Supervisor also testified on page 11 of the transcript of the Investigation that it would take 15 to 20 minutes to inspect the consist of four locomotives. The first Supervisor testified if no problems were encountered the locomotives could be inspected in 10 to 15 minutes.

The Claimant testified on page 13 that there were several lights throughout the consist that he had to change. Most of them in the toilet compartment and cab lights and changed some light bulbs. By Claimant's own testimony there was work to be performed on the consist.

It will be noted from the testimony of the first Supervisor, Claimant was assigned the job of inspecting the locomotives at 5:00 A.M. and it takes 15 to 20 minutes to make the inspection if no problems were encountered. The Claimant testified he had to change several lights throughout the consist. This same Supervisor testified he looked for Claimant for 45 minutes, if this was the case then Claimant was working throughout the consist changing lights. From all appearances Claimant was assigned to do a job at 5:00 A.M. and within 15 minutes his Supervisor started looking for him even though it took under normal circumstances 15 to 20 minutes to make an inspection. The Claimant stated he encountered some problems such as replacing several lights in the toilet compartment and cab lights.

We did find a conflict in the testimony of Carrier's two witnesses. However, on page 15 of the transcript of the Investigation Claimant testified:

"Q. Mr. Rice, Mr. Schwanke and Mr. Angler both testified that you was in a slouched position in the cab of BN 7199. Is this a correct assumption?

A. I would say the cab seat, I had my head leaned forward."

Further down on page 15 of the transcript Claimant asked:

"Q. Mr. Rice is the testimony of Mr. Angler and Mr. Schwanke correct of the incident under investigation here?

A. Fairly accurate yes."

In Second Division Award 4981 it was stated:

"Carrier is entitled to rely on the observations of its supervisory employees....It is not this Board's function to resolve conflicts in testimony and we will not disturb discipline case findings that are supported by credible, though controverted, evidence."

We adopt the further language in Second Division Award 6408 which states:

"The principle that we may not substitute our judgement for that of the Carrier when there is conflicting testimony has been established for many years. Since the record contains adequate evidence to sustain the Carrier's action and the punishment was not excessive, the claim must be denied."

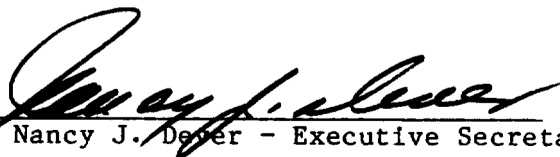
Particularly so when Claimant agreed that Carrier's two witnesses' testimony was fairly accurate.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois, this 16th day of May 1990.