

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
(Soo Line Railroad Company

STATEMENT OF CLAIM:

1. That Carmen J. E. Erickson, D. J. Schmaltz, J. L. Weinmann, L. D. Knudson and G. Steedsman were unjustly dealt with when they were suspended from service for a period of five days each subsequent to a formal hearing held on February 17, 1988.

2. That accordingly, the Soo Line Railroad Company be ordered to compensate the above identified Claimants for the time they had lost and to remove all reference to this hearing from their personnel records.

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.

A formal Hearing was held on February 17, 1988 to determine responsibility, if any, for failure to properly test air brakes. Carrier alleged that on January 12, 15, 16, 21, 1988, Claimants inspected five cars with an outdated test device in violation of FRA Rule 232.170 A1 and AAR Code of Test Instruction Pamphlet No. 5039-4 Sup. 1 paragraph 2.4. As a result of the Hearing, the Claimants were assessed a five (5) day suspension.

There is no dispute in this record on the following facts. The Claimants were working on the dates when charged and that work was performed by one of them on the specific cars listed in the record. Those cars were certified as having been properly tested, although the test devices were not in proper operating condition.

A consideration of the procedural issue before us, at the outset is rejected. In these circumstances we do not find that the Hearing Officer engaged in conduct which constituted "bias." The Organization's focus on the role of the Hearing Officer as an involved "principle" in this case has been seriously studied. There is no evidence substantiating that he failed to provide a fair and impartial Hearing. Under these circumstances, the Organization's procedural arguments do not warrant dismissal of the claim. Therefore, the Board proceeds to the merits.

On the merits, the Organization has argued that the Supervisor had been notified that the test devices were out of date. The Organization further argues that the responsibility to provide up to date properly calibrated testing devices rests with the Carrier and that the Carrier failed to furnish the requested equipment until after the FRA detected and noted the violations. Claimants had no knowledge of the dating system for the devices and such instruction occurred only after the dates of the charge. It is the position of the Organization that Claimants were not guilty of the charges in that they performed their responsibilities with out-of-date devices only after their reports had gone unheeded and no new devices were provided.

Our review does not support the Organization's position. On the merits, we find that these Carmen had four (4) years experience and admittedly were knowledgeable of the proper utilization of the equipment. The record indicates Claimants knew to check the date on the machine and it had been past practice to do so. Certainly the Supervisor was notified in September, 1987 that the device was out of date and he requested new ones. A discussion of procedures for testing a single car testing device occurred in October, 1987. There is no evidence of record to substantiate the new devices did not arrive or that after October, the Supervisor was informed again that the devices were not properly operational.

This record contains substantial probative evidence that Claimants were guilty as charged. None of the Claimants admitted that they performed the work or knew who performed the air test on each of the five cars. Yet they worked the cars and signed off as completed. The evidence is clear that they were the employees who had responsibility on those cars on the dates in question, knew of their responsibilities and failed to report the out-of-date equipment. It is the determination of the Board after careful consideration of the issues herein disputed that the Carrier has the needed proof.

There is in this record evidence that others may also have had responsibility for assuring the equipment was proper. The Claimants each shared responsibility for assuring up-to-date devices. Their failure to notify the Supervisor before the January tests failed to comply with the FRA Rule and AAR Code. Their failure cannot be nullified by the alleged or real failure of others.

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91-2-89-2-194

We find that the Carrier has sustained its burden of proof. The imposed discipline cannot be considered arbitrary, capricious or excessive. We will not disturb the Carrier's judgment.

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 25th day of September 1991.