

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13198
Docket No. 13137
98-2-96-2-37**

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union**
PARTIES TO DISPUTE: (
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

- 1. That; the Montana Rail Link, Inc., violated the terms of Article 13, when they arbitrarily suspended Carmen John Higgins, Dennis Besel, and Eugene V. Tuka from service for a period of three (3) working days as a result of a Fact Finding Session held on April 4, 1995.**
- 2. That; accordingly: the Montana Rail Link, Inc. be ordered to compensate Carmen John Higgins, Dennis Besel and Eugene V. Tuka in the amount of eight (8) hours pay each at the straight time rate of pay for each of the three (3) days they were suspended from service.**
- 3. That; accordingly, the mark of discipline, concerning the transcript of the fact Finding Sessions and letters and all material used in the Fact Finding Sessions be removed from the Claimants personal files and 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 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 were given due notice of hearing thereon.

By letter dated March 15, 1995 Claimants, Carmen at the Laurel, Montana car shop facilities, were instructed to attend a fact finding session to ascertain their responsibility concerning three specified defects discovered on freight cars PTLX 14450 and CNW 91317 on March 9, 1995 by an Association of American Railroads (AAR) Inspector. As a result of an Investigation held on April 4, 1995, Claimants were charged with failing to change air hose gaskets on the cited freight cars in violation of Safety Rule 530 and AAR Interchange Rule 3 (B)(6), and were given the choice of serving a three day suspension or attending ten hours of formal training on their own time pursuant to Article 13, paragraph G of the Agreement. Claimants opted for the suspensions, which are being protested by the instant claim.

A review of the transcript of the Investigation reveals that the AAR Inspector conducted routine inspections at Laurel on March 9, 1995. The Mechanical Foreman accompanied the AAR Inspector on his inspection. At the Investigation the AAR Inspector was not called to testify, but the Mechanical Foreman was. The Mechanical Foreman stated that the AAR Inspector took exception to three defects on freight car PTLX 14450, one of which was that the air hose gaskets had not been changed, and noted one exception on freight car CNW 91317 concerning excessive anti-creep A and B. These exceptions are noted on the side margin of the Original Record of Repairs (ORR) of each car. With respect to the air hose gaskets, the Mechanical Foreman testified that the air hose gaskets appeared not to have been changed since the outer edge of the gasket showed wear giving the appearance of it being an older gasket. Claimants did not dispute that they understood the requirement that air hose gaskets had to be removed and changed before doing an air hose test. The ORRs reveal that Claimants performed rip track air tests (RTAT) on both cited freight cars. The Mechanical Foreman did not remove the old gaskets; he assigned two day shift employees to replace them with new ones. The Mechanical Foreman was unaware of whether the AAR Inspector cited Carrier for AAR violations on this date, and testified

that he was told at the time that a letter would be sent stating the defects found. No copy of such letter was produced during the Investigation.

Carrier argues that Claimants failed to comply with AAR Rule 3 (B)(6) requiring the application of new gaskets at the time of air brake testing, of which they were aware. It contends that it proved such non-compliance by clear and substantial evidence and that strict adherence to these safety rules is required, meriting the discipline imposed.

The Organization raises procedural objections concerning the conduct of the Hearing Officer during the Investigation, relying upon Second Division Awards 7283 and 7284. The Organization also argues that Carrier's failure to call the AAR Inspector to testify or verify whether the gaskets were removed or defective negates its ability to meet its burden of proving that Claimants were guilty of the charges against them, and notes that Carrier cannot rely upon hearsay evidence to sustain its charges, citing Second Division Awards 11941 and 11942.

A careful review of the record initially convinces the Board that the Organization's procedural objections are without merit. We also conclude that Carrier has offered first hand evidence that Claimants' failed to change the air hose gaskets on PTLX 14450. While it is true that the AAR Inspector did not testify as to the results of his inspection, he did make handwritten notations in the margins of the ORRs about the exceptions he found. These were placed into evidence. Most importantly, the Mechanical Foreman accompanied the AAR Inspector on his inspection on March 9, 1995 and testified as to what he saw himself. The Mechanical Foreman testified that the gaskets he saw during the inspection appeared to be older ones, and were sent back to be changed.

It is true that Carrier did not establish that the gaskets in question were actually removed and found defective or old. Such evidence would have been helpful, especially in light of the fact that one of the other exceptions found on the freight car during the inspection was later determined to be in error, and the other was admittedly not substantiated during the Investigation. However, the Board is unable to find that the absence of this evidence is fatal to Carrier's case, since the record contains substantial evidence that these air hose gaskets appeared not to be new and were sent back to be changed. As the Mechanical Foreman was later advised that the side bearing clearance defect was in error, it is reasonable to assume that he would have been informed if the air hose gasket defect was similarly unfounded. No such evidence was offered in this

record. Claimants were unable to testify categorically that they changed the air hose gaskets in question. Accordingly, the Board is of the opinion that Carrier has met its burden of proving that Claimants failed to comply with AAR Rule 3 (B) (6) and Safety Rule 530 by failing to change the air hose gasket on PTLX 14450.

There is no similar evidence with respect to CNW 91317. Neither the Mechanical Foreman's testimony nor the handwritten notations of the AAR Inspector on the ORR for CNW 91317 reveal any defect concerning air hose gaskets. According to the record, the only defect found on that car was "anti-creep A and B excessive." Claimants were not cited for this defect in their May 2, 1995 disciplinary notices. Thus, Carrier failed to establish that Claimants violated any rules with respect to the inspection conducted on March 9, 1995 on car CNW 91317.

While the Board has found that Carrier has not substantiated the charges against Claimants with respect to CNW 91317, we do not believe that the penalty assessed against Claimants for the safety rule violation it has proven with respect to PTLX 14450 is excessive. Under the circumstances, we find not basis to modify the three day suspensions imposed herein.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 11th day of February 1998.