

Award No. 5572
Docket No. 5369
2-LV-CM-'68

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Carmen)**

LEHIGH VALLEY RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That Carman John Dougher, Coxton, Pa. Car Department, was unjustly dealt with when he was given two (2) days' actual suspension, September 22 and 23, 1965.

2. That accordingly the Carrier be ordered to compensate Carman John Dougher for sixteen (16) hours at the applicable rate of pay for September 22 and 23, 1965 and his service record cleared accordingly.

EMPLOYES' STATEMENT OF FACTS: Carman John Dougher, hereinafter referred to as Claimant, is regularly employed as such by Lehigh Valley Railroad Co., hereinafter referred to as Carrier, and regularly assigned to car inspector position. The Claimant was notified to appear August 25, 1965 in accordance with the following letter dated August 24, 1965:

"In accordance with Rule 37 of the current agreement between System Federation No. 96 and the Lehigh Valley Railroad Company, you are hereby notified to report for a hearing and investigation in connection with, Burnt off journal at Rummerfield, due to hot box on CNJ 60642 location R No. 1 South Side or River Side causing derailment to train JB 1.

To determine your responsibility if any, in this matter.

The hearing and investigation will be held 1 P. M. D.S.T. August 25, 1965 in the office of C. W. Draper, General Foreman, Coxton, Pa.

Should you desire to have a representative and/or witness present, please arrange for their presence at the above hearing and investigation.

/s/ D. E. Regan
Master Mechanic"

could not be ignored. It resulted in a most serious train wreck causing extensive damage to freight resulting in heavy claim payments, serious delays to highly competitive freight, serious and costly damage to track and equipment, all with a resultant loss of revenue.

For the record, if the carrier was guilty of anything, it was guilty of assessing too light a discipline for the seriousness of the derailment which occurred. Strict compliance by employes with the rules and instructions is of paramount importance. Carrier is therefore fully justified in expecting its employes to assume the obligations of their positions and perform efficiently the work assigned to them for which they are paid.

In the absence of some showing of arbitrary or capricious action on the part of the Carrier, or a showing of bad faith, none of which is here present, the claim must be denied and the disciplinary action of the Carrier upheld.

(Exhibits not reproduced.)

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.

This is a discipline case arising out of the derailment of Carrier's train JB-1, which resulted from a burned off journal on a particular car inspected by Claimant two days prior to derailment. On August 24, 1965, Claimant was notified by letter to appear the following day for a hearing and investigation in accordance with Rule 37 of the current Agreement between the parties.

The pertinent language contained in the notice received by Claimant reads as follows:

"In accordance with Rule 37 of the current Agreement between System Federation No. 96 and the Lehigh Valley Railroad Company, you are hereby notified to report for a hearing and investigation in connection with, Burnt off journal at Rummerfield, due to hot box on CNJ 60642 location R No. 1 South Side or River Side causing derailment to train JB-1.

To determine your responsibility if any, in this matter."

Subsequent to the hearing and investigation, Claimant was advised by letter dated August 31, 1965, that a two day suspension had been imposed in accordance with the following findings by Carrier:

" * * * * *

On the basis of the inspection of the car at the scene of the derailment and your hearing and investigation, wherein you personally

inspected Car CNJ 60642 prior to dispatchment and failed to make repairs and service to the car, which includes lubrication, you will be disciplined to the extent of two (2) days actual suspension.

/s/ C. C. Treese
Supt. Car Equipment"

Petitioner seeks to set aside the two day suspension as violative of Rule 37 of the current Agreement because Claimant was not notified of the precise charge against him prior to the investigation. Petitioner also contends that Carrier has failed to establish through competent evidence that Claimant was either derelict in performing his assigned duties or that the derailment of train JB-1 was a direct result of faulty inspection and service by Claimant on Car CNJ 60642.

As to the disputed notice, Carrier contends that Claimant was specifically advised with respect to the nature of the inquiry concerning his responsibility, if any, for the defective condition of Car CNJ 60642. Furthermore, Carrier contends that Claimant effectively waived possible objection to said notice at the conclusion of the hearing when he agreed that the investigation had been conducted in a fair and impartial manner pursuant to the Agreement. The record reflects that Claimant was fully aware of the facts or events under investigation as evidenced by his testimony, and that he was neither deceived nor misled as to the nature of the charges against him. Thus, we must conclude that the disputed notice was sufficiently precise to meet the requirements of Rule 37 of the controlling Agreement.

The remaining issue for determination involves Carrier's burden of establishing through probative evidence that Claimant's alleged dereliction of duty was directly responsible for the condition of car CNJ 60642 on the date of the derailment.

Claimant testified that he inspected the defective car, including the journals at Coxtton on August 21, 1965 in accordance with the Power Brake Law and instructions of Carrier, and Carrier has offered no evidence rebutting Claimant's testimony. It is undisputed that the derailment occurred two days after Claimant's inspection at Rummerfield, which is approximately sixty miles from Coxtton.

Carrier's General Foreman testified that he inspected Car CNJ 60642 with Carrier's General Car Inspector on August 23, 1965, which revealed that there was no free oil in the journal boxes on either side of the car, and that a couple of brake shoes were worn. However, the lack of free oil does not necessarily mean that the lubricator was dry, and the lubricator was destroyed in the accident. Carrier's General Foreman categorically testified that the derailment was caused by the burned off journal, but he merely expressed an opinion as to the actual cause of the burned off journal based upon an assumption that the missing lubricator was dry.

Thus, we must weigh the unrefuted testimony of Claimant that he had made the necessary inspection of the journal boxes on the defective car two days prior to the derailment some sixty miles distant from the point of inspection against the conjecture of Carrier's General Foreman that the burned off journal was caused by insufficient oil in the missing lubricator. Carrier's hypothesis as to the cause of the burned off journal does not constitute clear

and convincing evidence that Claimant was guilty of committing an offense in light of Claimant's unchallenged testimony. Accordingly, we must find that Carrier has failed to meet the burden of establishing through competent evidence that Claimant was responsible for the burned off journal because of dereliction of duty. The claim will be sustained.

AWARD

Claim is sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November, 1968.