Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7237
SECOND DIVISION Docket No. 7105
2-SOU-CM-'77

The Second Division consisted of the regular members and in addition Referee C. Robert Roadley when award was rendered.

Parties to Dispute: (System Federation No. 21, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Southern Railway Company

Dispute: Claim of Employes:

1. That under the current Agreement Carman W. H. Turner, Macon, Georgia was improperly suspended from service January 2, 1975 to February 1, 1975.

2. That accordingly, the Carrier be ordered to pay Carman W. H. Turner for all time lost from January 2, 1975 to February 1, 1975.

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.

Claimant was suspended from service for a period of four (4) weeks, following formal investigation held on December 27, 1974, for his failure to comply with instructions contained in Bulletin No. 48, dated April 29, 1974, concerning the securing of chains on freight cars, loaded or empty, for train movement. The pertinent portion of Bulletin No. 48 reads as follows:

> "In the future, any surplus chain not required to secure a load will be placed in the pocket provided or secured to the car or trailer in a manner that it cannot come loose and drag."

The remainder of the bulletin deals with procedure in the event of empty cars or trailers that are chain equipped or where no pocket is available. In the instant case the car (Sou 114383) was loaded with lumber and was chain pocket equipped. The chains that were alleged to have been improperly secured were not used in the chain-down load.

Claimant was employed as a Car Inspector at the Carrier's Brosnan Yard, Macon, Georgia, and is the employee whose duty it was to inspect the chain-down load on the subject car and who filled out and attached tag Form 1033 certifying that he had inspected the load and approved the shipment for train movement. The car was inspected and certified on December 11, 1974. On December 14, 1974, when the subject car arrived at Charlotte, N.C. (approximately 350 miles distant from point of inspection), it was reported that a chain was dragging on the "B" end left side which damaged six (6) switches between Charlotte Junction, MP 380.8, and Charlotte Yard, MP 376.5. It is significant to note that the damage to the switches is not the motivation behind this dispute.

Petitioner has averred that the claim should be sustained on the grounds that the carrier failed to meet the burden of proof, i.e. it failed to prove by probative, objective evidence that the claimant did, in fact, commit an infraction and that punishment was warranted. The rule is that there must be substantial evidence in support of the Carrier's action.

It was pointed out in Second Division Award 6419 that the substantial evidence rule was set forth by the Supreme Court of the United States when it stated:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Consol. Ed. Co. vs. Labor Board 305 U.S. 197,229)

Further, this Board, in First Division Award 12952, stated:

> "It must be true that the evidence at least must have sufficient substance to support a reasonable inference of fact as distinguished from a possibility or an unsupported probability."

The Carrier cited Second Division Award 6396, involving the same carrier and Organization as the subject case, as being illustrative of the situation at hand and urged a denial of the claim on the same principle as in that case. The following statement appears in the Findings in Award 6396:

> "The Carrier established that the load, authorized for movement by the claimant, was not properly secured in accordance with the loading rules knowledgeable as part of his job. He should have ordered the car cut out of the train until the load thereon had been secured in accordance with the rules. Failure to do so constituted dereliction of duty, warranting severe punishment, according to the Carrier."

It is noted that the "severe punishment" assessed by the Carrier against the employee in Award 6396 for his alleged "dereliction of duty" was a two week suspension without pay, as opposed to the four weeks suspension here.

In the subject case the claimant was not charged with having authorized for movement an improperly loaded car, he was charged with having improperly secured an unused chain on car Sou 114383. The question as to whether the car had been properly loaded in accordance with the Open Top AAR Loading Rule was raised during the investigation but the matter of whether the car had been properly loaded was not the subject of the charge against claimant, a fine line of distinction perhaps but distinguishable nevertheless.

The entire Carrier case is predicated on the assumption that had the subject chains been properly secured at the point of origin (Macon) they would have still been so secured at the point of inspection (Charlotte), some 350 miles distant. (See Carrier's rebuttal statement, pages 3 and 4, in the record)

Carrier letter of May 27, 1975, to the Organization, contains the following statement:

> "Evidence submitted at the investigation, which was not refuted by representative of your organization, indicated that Mr. Turner, the Carman charged with failure to properly carry out his duties, had determined that the car was loaded properly by attaching a valid Form 1033 to the car. The fact that Mr. Turner attached the card to the car without having determined that the car was loaded properly constituted a failure on his part to properly carry out his duties."

There is nothing in the record before us of "sufficient substance" to support the statement that "... Mr. Turner attached the card to the car without having determined that the car was loaded properly ....." (emphasis added). On the contrary, the only statement in the entire record as to the claimant's actions at the time of the original inspection is the statement of the claimant himself, made at the investigation, when he said "..... these chains were secure on this car and I did my job properly performing the inspection."

Second Division Award No. 6419 stated, in part, as follows:

> "We have afforded to management extensive leeway in dealing with employees who malfunction or misfunction in the hopes that they will respond and, thereby protect the industry; thus, preserving their own and their fellow workers jobs and avoid injury to themselves and the public. (Awards 1575, 2996, 3081, 3430, 3874, 6346.) However, this authority must be exercised with due regard to the rights of the workers and in a manner consistent with the terms of Agreements with organizations representing them. This requires that disciplinary penalties imposed must be fair and just.

"The many Awards of this Board concerning imposition of discipline have established certain basic guidelines as to what the record before us must disclose to satisfy the above stated prescription. The burden is on the carrier to prove by probative, objective evidence that the allegedly aggrieved employee did, in fact, commit an infraction and that punishment was warranted."

Based upon a thorough review of the entire record in this case, particularly the transcript of the investigation, it is our opinion that the record does not meet the standards of substantial evidence, as quoted in the Findings herein, to prove that the claimant committed the infraction for which he was disciplined. Therefore, the discipline assessed cannot be held to be fair and just.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of March, 1977.