Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7975
SECOND DIVISION Docket No. 7665
2-BNI-MA-'79

The Second Division consisted of the regular members and in addition Referee Arthur T. Van Wart when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. J. L. Corey, Machinist Inspector, Lincoln, Nebraska, was unjustly suspended from service from June 27 to July 1, 1976.

2. Machinist J. L. Corey be compensated for all time lost while suspended from service from June 27 to July 1, 1976, inclusive; and that the entry of censure placed on his personal record file be removed.

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.

Locomotive unit BN-1847 arrived at the Freight Pit, Lincoln Diesel Shop, Lincoln, Nebraska at 8:35 p.m. on May 13, 1976. The locomotive Engineer thereof advised the Pit Foreman, W. K. Pike, that during the course of his trip that day, a fire had occurred in the air intake filter of Unit BN-1847, that he had extinguished same by use of the fire extinguishers on that unit, thus leaving the extinguishes with the seals pulled and their CO^2 cylinders thus discharged and empty. In addition said locomotive Engineer reported the fire and the use of the fire extinguishers on Form 15043 which Form was left in the work report holder on diesel Unit 1847 to be available for the engine inspector to remove and trascribe the information on to Form 15033.

Five days later on May 18, 1976, said BN diesel unit 1847 was utilized in the consist of Train 21686. During the tour of duty of Train 21686's locomotive Engineer noticed smoke under the rear traction motor. Upon inspection he found that it was coming from the cab of diesel Unit 1847 and that there was a fire in the electrical compartment thereof. Said Engineer and his two brakemen, in attempting to extinguish the fire in said compartment discovered that the three fire extinguishers on Unit 1847 had been discharged and were therefore inoperable. They acquired fire extinguishers from other units of their locomotive but because of the elapsed time the fire in diesel unit 1847 had gotten out of control. They were unable to contain the fire until they received assistance from the David City Fire Department.

Claimant machinist, on May 13, 1976 was working on the second shift as Engine Inspector at the Freight Pit, Lincoln Diesel Shop. Claimant was notified, on June 3, 1976, as follows:

> "Attend an investigation in the Assistant Master Mechanic's Office at the Lincoln Deisel Shop, at Lincoln, Nebraska, 10:00 AM, June 9, 1976, for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged failure to transfer reported items from Locomotive Performance Notation Sheet for 15,000 043 completed at Lincoln, Nebraska, on May 13, 1976 by Engineer R. I. Morrison, to the Locomotive Service and Inspection Report, Form 15033, specifically those items reported pertaining to fire extinguishers of Engine 1847 when you made your inspection of Engine 1847 as Engine Inspector at about 8:50 PM, May 13, 1976 at the Lincoln Diesel Shop, Lincoln, Nebraska resulting in Engine 1847 receiving excessive fire damage to the electrical cabinet on May 18, 1976 due to inoperative fire extinguishers...."

As a result of the investigation held on June 9th Claimant Machinist received the following from the Assistant Master Mechanic:

> "This is to advise you that an entry of censure is being placed upon your personal record and you are hereby suspended from the service of the Burlington Northern Inc. from June 27, 1976 to July 1, 1976, inclusive, for violation of General Rule J and Rule 667, the Burlington Northern Safety Rules for your failure to properly inspect diesel unit 1847 and complete necessary forms in connection therewith, resulting in fire damage to this unit due to inoperative fire extinguishers...."

The Employees aver that no evidence was developed at the investigation to show that Claimant Machinist Corey was derelict in the performance of his duties on May 13, 1976, so therefore was not amenable to discipline. They

further contend that the notice of investigation was defective in that it was imprecise and that Carrier was remiss in not giving the Local Chairman a copy of said notice of investigation as required by Rule 35(c).

The crux of the Employee's contention, on the merits of the case, is that the Freight Pit Foreman assigned Claimant as Freight Pit Inspector of engines and that the locomotive Engineer had informed the Foreman of the condition of the fire extinguishers on BN-1847, on May 13, 1976, and that said Foreman instructed Claimant not to make a normal 203 inspection and the Foreman so admitted at the investigation.

Carrier contends that one of the duties of an Engine Inspector includes transcribing information verbatum from Form 15043 to Form 15033. Form 15043--"Locomotive Performance Notation Sheet"-- is the form on which the locomotive engineer reports locomotive malfunctions and defects occurring during his tour of duty. Form 15033--"Locomotive Service and Inspection Report"--provides a record of FRA Rule 203--"Inspections". Hence, when a Rule 203 inspection is performed said Form 15043 must be removed from the locomotive unit and all items reported by the locomotive engineer thereon transcribed verbatim, to the Form 15033. The items thus transcribed are then worked off by the employee making repairs, and it is his responsibility to sign the report for the repairs made. Claimant, according to Carrier, failed to make sure that the fire damage including the use and exhaustion of the fire extinguishers on Unit BN-1847 were transcribed from Form 15043 to Form 15033.

Rule 35--Investigations--paragraph (c) reads:

> "c. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative and for presence of necessary witnesses if he may desire. The notice must specify the charge for which the investigation is being held."

Close analysis of the record impells the conclusion that the employee's procedural contentions are without support. Claimant and his representative both testified they received the notice in a proper form, Claimant was represented and there is no rule requirement that requires the inclusion of charges of specific rule violations. In fact, Third Division Award No. 20238 (Eischen) on this property, in connection with such contention, held:

> "We have examined the notice in question, the applicable contract language and numerous awards cited by the parties. We adhere to the well established principle that the fundamental purpose of the notice is to provide the employee with an opportunity to prepare his defense against the accusation of his employer. Awards 11170, 11783, 13969, 16154 and others. In this connection we have said that the formulation of a charge and the giving notice thereof need not be in the technical language of a

"criminal complaint. It is sufficient if it appears that the one charged understood that he was being investigated for the dereliction of duty set forth in the notice. See Awards 3270, 12898. By these standards we must conclude that the notice was precise and comphrehensive enough to place Claimant on notice as to the matter under investigation, and was not in error as alleged by the opposition."

Such is held to be equally true and applicable here.

There was sufficient, competent and credible evidence adduced to support Carrier's conclusions as to Claimant's culpability. Foreman Pike, at page 9 of the transcript, testified:

"Question: Did you tell Mr. Cory to just check the bottoms and you would take care of the tops?
Answer: Yes and no. I told him to take care of the bottoms and make sure the fire damage was written up on the work report." (Underscoring supplied)

Obviously, this testimony conflicts with the testimony of Claimant, which was to the effect that the Freight Pit Foreman had only told him to inspect the couplers and trucks and as a result he did not hold a complete inspection of the unit. Hence, it was for that reason that Claimant did not fill out the 203 Inspection Form to that extent.

"Q (by A. J. Jaeb) Mr. Cory I ask you to review the 203 inspection form that you made out.
A (J. L. Cory) I did, sir.
Q (A. J. Jaeb) Nowhere on this 203 Inspector Form does it say that you did not make a full inspection, is that correct?
A (J. L. Cory) That's right.
Q (A. J. Jaeb) Then how did you comply?
A (J. L. Cory) I complied with what I was told to do from my foreman. If I would have done any other thing, I would have been held insubordinate under Rule 661. I could have been held responsible."

The Board will not resolve the conflict in testimony as that is the function of the trier of the facts. Here, Carrier chose to believe the testimony of the Freight Pit Foreman. Claimant was the Engine Inspector on duty at the Pit. He was aware that the responsibility of transcribing the information contained on Form 15043 to Form 15033 was his. Claimant failed to do so, even knowing that the fire extinguishers had just been discharged in containing a fire on said BN Unit 1847 on May 13, 1976. A second fire did occur on the same BN Unit 1847, on May 18, 1976, and when the fire

extinguishers were utilized in an attempt to extinguish the second fire they were inoperable. Such failure created a hazard to life, limb and property. Claimant admitted non-compliance with General Rule J.

Although Claimant admitted that it was his duty to transfer the information from one form to the other form and he admitted that he had not done so, on May 13, 1976, he chose to place the blame therefor on other than himself. In that connection this Division, in its Award 6538 (Lieberman), on this property and between the same parties, held:

> 6538 - Lieberman
>
> "Petitioner argues that the responsibility for the mishap was properly that of the foreman rather than that of Claimant. The transcript of the hearing clearly indicates that Claimant, by his own admission, instructed the hostler helper to move the engine in question and also that he did not tell him that the air brakes were cut out. Perhaps others, including the foreman and the hostler were derelict in their duties, however, each employee is responsible for the performance of his duties and his failure cannot be excused because others may also have been at fault (Award 1716). Over the years, in all divisions, we have ruled consistently that employee responsibility cannot be avoided by shifting of blame to supervisors or other employees (for example see First Division Award 12 160, Second Division Award 4521 and Third Division Award 6307)." (Underscoring supplied)

We find that the assessment of a five day suspension from service was neither discriminatory, unreasonable, arbitrary or capricious. It clearly did not represent an abuse of managerial discretion. This claim will be denied.

A W A R D

Claim denied.

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 20th day of June, 1979.

LABOR MEMBER'S DISSENT TO

J. W. GOHMANN AWARD NO. 7975, DOCKET NO. 7665

The majority in Award No. 7975 has reached a conclusion that is not understandable, even handed nor supported by the facts of record.

This decision quotes Foreman Pike out of context from page 9 of the hearing transcript as testifying:

> "Question: Did you tell Mr. Cory to just check the bottoms and you would take care of the tops?
>
> Answer: Yes and no. I told him to take care of the bottoms and make sure the fire damage was written up on the work report."
> (Underscoring supplied)

What kind of an answer is "Yes and no"' especially when compared to this foreman's next immediate testimony:

> "Question: But you definitely told him just to inspect the bottoms?
>
> Answer: Yes."

Keeping this testimony in mind it should be measured against the Employes' unrefuted and repeated statement:

> "xxx after being instructed to inspect only the bottom of the unit involved, which assignment did not, nor was never intended, to include the duties associated with inspecting the tops. The duties include, when inspecting the tops, filing reports and transferring information from the Engineers' Report to the Daily Inspection Forms".

When the foreman split his inspection forces to handle "tops" and "bottoms" then each inspector only handled items in his assigned area. So where is the Engineers Report kept? Naturally in the cab, i.e. "tops"! Where are the fire extinguishers located? Certainly not down on the trucks or couplers, i.e. "tops"!

Again keeping all of this in mind let us return to Foreman Pike's testimony on hearing page 8:

"Question: Did Mr. Corey make a normal inspection on the 1847?

Answer: Not his normal, no

Question: Why not?

Answer: All he checked for was just the bottoms, just checked the trucks, the couplers, like he was instructed." (Underscoring supplied)

So here is an Employe following instructions and a so-called neutral sustains discipline against him for doing so! What a perversion of justice and common sense in this forum set up by Federal Law to render and afford justice to railroad employes!

The subsequent dicta, on employee responsibility not being avoided by attempting to shift blame, is nothing more than "smoke" put forward trying to screen this perversion. At no place in the record was it the Employees position other than that the Claimant was innocent of any wrongful or derelict act. If therefore, somebody was guilty then this was up to the Carrier to handle and dispense with.

The record of this majority has to be suspect when viewing its' previous Award No. 7566 wherein discipline was sustained for in effect signing for an inspection not made on an item and in the instant case upholding discipline for not signing for an inspection not made under a supervisor's order not to do so! What management oriented training and/or thinking could lead to such a contradictory rationale? One quotation aptly describes this posture when stated as:

"Poison has permeated the fountain of justice".

This mockery of justice demands dissent.

G. R. DeHague
Labor Member