Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8938
Docket No. 8742
2-NRPC-MA-'82

The Second Division consisted of the regular members and in addition Referee Elliott M. Abramson when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(National Railroad Passenger Corporation

Dispute: Claim of Employes:

1. That under the current controlling agreement, Machinist Harry Gouck, Redondo Junction, California, was unjustly dismissed from the service of the National Railroad Passenger Corporation on January 31, 1979.

2. That accordingly the Carrier be ordered to reinstate Claimant to his former position with all service rights, seniority and pay for all time lost from Carrier service retroactive to January 31, 1979.

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.

When Claimant reported for work at 7:00 A.M. on January 21, 1979 he requested he be allowed to leave early in order to pick up his son at a hospital from which the latter was being discharged. (There is conflict in testimony as to whether Claimant indicated he had to leave work at 11:00 A.M. or whether he had to leave work in time to be at the hospital at 11:00 A.M.) In any event, permission to leave early was granted. Claimant was assigned to all pick up work which remained to be done on Unit 521. The latter task was not completed at the time of the 9:00 A.M. coffee break and at this time Foreman Hall told Claimant that when No. 1's power came in he was to underneath lube this unit. The Foreman testified that at this point Claimant said: "F--- 1's power. I'm not going to do it." Claimant admits that he said something which indicated recalcitrance respecting performing this assignment but asserts that it was in the nature of joking with this Foreman with whom, he testified, he frequently bantered. No. 1's power was due in at about 9:30 A.M. but did not arrive until approximately 10:15 A.M. At this point Foreman Hall paged Claimant over a loudspeaker but Claimant was still attending to the 521 Unit. Claimant testified that he did not hear the loud speaker pages (Foreman Hall testified that there were four of them) because he was in the engine room of the 521 unit where, as admitted by Hall, one would not have been able to hear such pages. At this point Foreman

Hall and General Foreman Bruno, who Hall had told of Claimant's response to Hall's 9:00 A.M. order to underneath lube No. 1's power, walked toward 521 to find Claimant. Claimant testified that when met by Hall and Bruno he was on his way to get something which he needed in order to finish his assignment on the 521 unit. Claimant also testified that he wished to finish up his work on the 521 before he left to pick up his son, and Hall's testimony acknowledged that the work on 521 had not yet, then, been finished. At this point General Foreman Bruno instructed Claimant to perform an underneath lube on No. 1's power and acknowledges that he told Claimant something to the effect that he had 35 minutes to lubricate the locomotive. Claimant declined to do so and said that he was leaving.

On January 22, 1979 Claimant was charged with violations of Rules I and K in that he absented himself from his assignment after being denied permission to do so by his Foreman and in that he refused to perform an inbound inspection and underneath lubrication as directed by a Foreman. The Notice of Formal Investigation, which recited those charges, advised Claimant to report for such investigation on January 26th. Claimant was also suspended from service pending the investigation. Pursuant to the investigation then conducted Claimant was advised by notice, dated January 30th, that he was dismissed from service effective January 31st.

In this case there is no question that Claimant was granted permission to leave his assignment somewhere around 11:00 A.M. for the purpose of picking up his son at a hospital, nor is there question that at approximately 9:00 A.M. Claimant was instructed to underneath lube No. 1's power when it came in. Had the latter came in at 9:30 A.M., as scheduled, and had Claimant then failed to underneath lube it, there is no question that Claimant would have failed to follow a legitimate order of his superior.

However, it is acknowledged that this unit did not come in until approximately 10:15 A.M. The evidence in the record is also consistent with the Claimant, at this point, being in the engine room of 521 seeking to complete the work he was there assigned. The record also shows that Foreman Hall admitted that if Claimant was in the engine room he would not have been able to hear a loud speaker call. In any event, Hall and Bruno did not, it is acknowledged, speak to him together until approximately 10:25 A.M. at which time Claimant was again instructed to underneath lube No. 1's power. Foreman Hall's testimony acknowledged that Claimant had not yet completed his work on unit 521 when Hall and Bruno spoke to him at approximately 10:25 A.M. This is consistent with Claimant not having sought to yet determine whether No. 1's power had come in - not having yet completed his originally assigned task on 521 he was not yet ready to begin work on the underneath lube job.

Testimony in the record from both supervisors and Organization members indicates that the time for doing the jobs which Hall and Bruno indicated Claimant should do at 10:25 A.M. ranges from one half hour to one hour. On cross-examination Foreman Bruno admitted that if servicing the journal boxes were included in the interpretation of the task that such task might take 50 minutes. In any event, the minimum time mentioned for doing the job was thirty minutes. It also seems that these time estimates do not include the time which would have been consumed by Claimant picking up the tools he had been using

to service the 521 unit, sign off the work sheet and move across the yard to a new work location.

Thus it would appear that taking the interpretation most favorable to Carrier and according to the minimum possible to do the underneath lube job, viz; 30 minutes, and putting it together with the most favorable interpretation to the Carrier as to when Claimant had been given permission to leave viz; 11:00 A.M., the instruction he was given at 10:25 A.M. respecting the underneath lube job was cutting it perilously "thin" vis a vis; the time at which Claimant had been granted permission to leave. If time for moving from one job to another as well as some personal clean up time for Claimant is added in, even on those interpretations most favorable to Carrier if Claimant had undertaken to complete the underneath lube job he would not have been able to get away, at the time promised, to pick up his son at the hospital. His inability to do so is, of course, accentuated if any of the above interpretations, most favorable to the Carrier, are even slightly modified in favor of interpretations more supportive of Claimant's position.

Additionally, Foreman Bruno stated that at approximately 10:25 A.M. he told Claimant that he had 35 minutes to do the lubrication job and admits that he did not indicate that Claimant could leave at 11:00 A.M. if, by then, Claimant had not finished the job.

The Carrier asserted that even if it became clear that Claimant would not be able to leave at approximately 11:00 A.M., if he was to complete the lubrication job, Claimant would have informed the hospital or his son that he would be leaving later than expected but would arrive at the hospital sometime before 12:00 Noon. Carrier asserts this would have represented but a minor inconvenience. Such a characterization seems too glib in a situation where a man has advised his (presumably) young son that he will be at a hospital at a certain time to take him home and seems not to accord sufficient responsiveness to the emotional pressures on both father and son in such a situation.

Thus, in substance, when Foreman Hall and Bruno assigned Claimant the lubrication job at 10:25 A.M. Claimant was, essentially, put in the position of knowing that his son was waiting for him at the hospital but being told that he might not well be able to leave work in time to pick the boy up as scheduled.

In this situation, having been promised that he would be able to leave in time to pick his son up, and not having been given any contrary indication since 7:00 A.M., when he'd begun work, it does not seem unreasonable that Claimant, possibly feeling that a supervisor had reneged on his word, in a matter of importance, chose to leave to insure that he would indeed be able to pick his son up at the hospital at the time the son believed he would be picked up.

Carrier asserts various previous Board decisions to the effect that its determination of Claimant's wrongdoing may not be upset by de novo consideration by this Board. In Award No. 22711, Third Division the Board stated: "The principle that we may not substitute our judgment for that of the Carrier when there is conflicting testimony has been established for many years. Since the record contains adequate evidence to sustain the Carrier's action ... The claim will be denied." Also, in Third Division Award No. 13179, the Board stated:

> "In discipline cases the Board sits as an appellate forum. As such our function is confined to determining whether ... the finding of guilty as charged is supported by substantial evidence...
>
> We do not weigh the evidence de novo. If there is material and relevant evidence, which ... supports the finding of guilt, we must affirm the finding."

Similarly in Award No. 21442, Third Division, the Board commented: "... our function in discipline cases is not to substitute our judgment for the Carrier's ... but to pass upon the question whether, ... there is substantial evidence to sustain a finding of guilty."

Our problem in this case does not stem from sharply conflicting testimony as to significant facts. There is, instead, rather a high degree of agreement on what the important facts are. The problematical aspect of the case arises from the need to determine an appropriate interpretation to be placed on those facts. Claimant was charged with absenting himself from his assignment and refusal to follow instructions. However, to meaningfully prove Claimant's wrongdoing, respecting such matters, it is necessary for Carrier to show that Claimant engaged in such acts unjustifiably; it must demonstrate that Claimant had a wrongful or "malicious" state of mind when he refused to follow instructions and when he absented himself from his assignment. But since given the background facts, as outlined above, when Claimant refused, at approximately 10:25 A.M. to perform the lubrication job and essentially left his assignment, he believed he was acting in accordance with the commitment that Foreman Hall had given him that he might leave his assignment early so as to be able to pick his son up at the hospital. Accepting that substantial proof of wrongdoing is the relevant standard the Carrier did not demonstrate by substantial evidence that when Claimant engaged in the acts objected to he was acting with the intentionally wrongful state of mind necessary to proof of the charges cited against Claimant. In other words, the Board finds that Carrier has failed to carry that burden of proof it must meet to be considered to have proved, by substantial evidence, the charges it brought against Claimant.

For example, in Award No. 6580, Second Division, Claimant was charged with failing to perform his duties as lead man since he did not notify his immediate supervisor that there were two trailers to be serviced and inspected for outbound movement. However, the Board found that Claimant had been informed, shortly prior to Claimant's leaving work, that these trailers were not to be loaded out that night. The General Foreman had been given information about 30 minutes after Claimant left that the two trailers were, in fact, to be outbound that night. In the context of these facts the Board stated:

> "... There is no evidence ... that Claimant knew the trailers were scheduled for outbound movement... In short the, transcript of the investigation does not contain evidence in support of the charge.

It is clear and long established that in discipline cases the burden of proof is on the Carrier and the investigation must demonstrate clearly that the employee is guilty of the particular charge levelled against him." (Emphasis supplied)

Also, point to Rule 24 of the Agreement, which in substance, states that employees may be held out of service pending an investigation only if retention in service could be detrimental to themselves, another person or the railroad, the organization had contended that Claimant should not have been held out of service, pending investigation, since his actions, even as interpreted by Carrier supervisors, did not demonstrate him as detrimental in the sense that Rule 24 requires. This could well have been a point well taken even had the substantive charges against Claimant themselves been upheld. But as we do not sustain the charges themselves then surely suspension pending trial of them was improper.

Consequently Claimant should be reinstated to his former position with all fringe benefits, e.g. vacation rights, insurance and pension payments that would have been accorded him had he never been suspended and dismissed. He should also be fully compensated for any difference between the wages he would have normally earned during the period in which he was suspended and dismissed and any wages he in fact earned during that period.

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 3rd day of March, 1982.