Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9125
SECOND DIVISION Docket No. 8723
2-BN-CM-'82

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Burlington Northern Railroad Company

Dispute: Claim of Employes:

1) That the Carrier violated the terms of the current agreement, particularly Rule 35, when Laurel Montana Carman W. H. Louis, was improperly and unjustly suspended from service September 2, 1978, to September 14, 1978, inclusive.

2) That accordingly, the Burlington Northern, Inc., be required to compensate Carman W. H. Louis for ten (10) days pay at the pro-rata rate of pay, restoration of all fringe benefits, and any other benefits that he would have earned during the period of time he was suspended from service.

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.

On August 14, 1978, Claimant, a Carman at Carrier's Laurel, Montana Coal Car Repair Shop, was assigned together with another Carman, R. K. Flagler, to perform routine car inspection duties in the train yard on the 11:59 PM to 7:59 AM shift. At approximately 12:05 AM on said morning Acting Foreman of Cars, Jack Kroll, contacted Claimant and Mr. Flagler by telephone and directed them to make lube inspections on four (4) cars which were in the yard. According to Foreman Kroll his instructions were "... to check (the) cars ... for worn out lubricators and apply new lubricators if required".

Claimant's and Mr. Flagler's versions of the specific instructions given to them vary somewhat with that asserted by Foreman Kroll. It is clear, however, that Claimant and Mr. Flagler were ordered to make lube inspections. Sometime later that same morning a worksheet detailing the aforestated assignment was submitted to Foreman Kroll, presumably by Mr. Flagler, which indicated, among other things, that lubrication pads had been replaced at the R3 and R2 locations on Cars GNX 4528 and CBQ 92665 respectively. Affixed at the bottom of the worksheet was a hand-written notation which read "Louis and Flagler".

While reviewing the worksheets for that shift, Foreman Kroll became somewhat suspicious of Claimant's and Mr. Flagler's worksheet because the specific cars identified thereon were C-6 hopper cars which could not be fitted with lubrication pads. Foreman Kroll confronted the two Carmen with his discovery and Claimant "... didn't deny or admit it and Mr. Flagler said, no, I didn't".

On the following day, August 15, 1978, Claimant and Mr. Flagler each were notified that they were to attend an investigation on "... August 21, 1978 for the purpose of ascertaining the facts and determining your responsibility in connection with your reporting on your work sheet of August 14, 1978 as performing repairs on GNX 4528 and CBQ 92665 and failing to do the repairs". Pursuant to said investigation, Claimant,[1] for reasons which will be discussed in greater detail hereinbelow, was adjudged guilty as charged and was assessed a ten (10) day suspension without pay effective September 2, 1978 through September 14, 1978. Said suspension is now the basis of the instant claim.

Organization's position in this dispute focuses upon the basic contentions that Claimant was not given a fair, full and impartial investigation as required in Rule 35 of the parties' Agreement Rules; and further that Carrier has failed to sustain its burden of proof in this matter.

Regarding its procedural contentions, Organization argues as follows: (1) Claimant's investigation notice was improper since it failed to specify the charge or cite the rule violation for which the investigation was being held and thus caused Claimant to be unable to properly prepare his defense; (2) Carrier's hearing officer preferred the charges against Claimant in this matter, conducted the hearing, reviewed the record, assessed the discipline and denied the appeal, and thus, by assuming such a multiplicity of roles, said hearing officer prejudiced Claimant's right to a fair and impartial hearing (Second Division Awards 4929, 6329, 6439, 6795, 7119 and 7886); (3) said "... hearing was not held in a fair and impartial manner, nor conducted on the principle of developing the facts to ascertain if any rule had been violated, but served only to convict the accused under the formality of the schedule agreement by assessing a predetermined discipline"; (4) Claimant's representatives made numerous timely and proper objections at the hearing which were merely overruled without consideration by Carrier's hearing officer (Second Division Awards 7286, 7606 and 7886); and (5) during said hearing the hearing officer further acted improperly by denying Organization representatives the right to proper confrontation of Carrier witnesses.

Turning next to the merits portion of its argumentation, Organization asserts that Carrier has completely failed to adduce any amount of reasonable evidence which might be necessary in order to support the charges which have been brought against Claimant. In support of this argument Organization contends that the

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[1] Subsequent to the conducting of said hearing and prior to the issuance of any disciplinary action by Carrier, Carman Flagler resigned from his position with Carrier and his portion of the claim, therefore, was withdrawn.

facts of record reveal that Claimant did not violate any Carrier rule nor did he fail to comply with any instructions which may have been given to him by Foreman Kroll. According to Organization, Claimant had nothing to do with the contested work sheet except to tell Foreman Kroll to tear it up which he refused to do; and, Organization continues, in this same regard, Carrier completely ignored the testimony of Mr. Flagler who did in fact admit to the infraction thereby exonerating Claimant. Further related to the foregoing, Organization also argues that Carrier has attempted to establish Claimant's guilt herein merely as a result of his association with Mr. Flagler; and that, by comparison, Carrier's entire case is Foreman Kroll's word against that of Claimant and Mr. Flagler and that such an evidentiary showing is insufficient proof of guilt in such matters (First Division Award 20471; Second Division Awards 1969, 3869, 4046, 4338, 4977, 6356, 6397, 6957, 6969, 7592, 7663, 7784, 7974, 8082 and 8097).

Simply stated, Carrier's position in this dispute is that Claimant's suspension was neither an arbitrary or capricious action on Carrier's part but instead was based upon substantial evidence; and further that Claimant's hearing was fair and proper.

Regarding the propriety of Claimant's hearing, Carrier maintains that: (1) the notice of investigation was sufficiently specific and "... reasonably permitted the claimant to properly prepare for his defense" and that Rule 35(c) does not require "... that a rule be set out in the notice of investigation" or "... include such details as the time of the incident, location in yards, train number involved with the cars, etc." as Organization contends (Second Division Awards 7936, 8194 and 8500;) (2) "Nothing in Rule 35 restricts the functions which an investigating officer can or should perform ..." at the hearing and "(T)here was nothing unfair to the claimant in the officer's actions" since the hearing officer's assumption of multiple roles is not a per se violation absent proof of a cause-effect relationship (Second Division Award 8367, 6538, 7196, 8103, 8219, 8272, 8342, 8537 and 7196; First Division Award 17304; Third Division Awards 12898 and 21241; and Fourth Division Award 3770); (3) said hearing was conducted in an objective manner and the hearing officer made every attempt to bring out all relevant facts; (4) Organization's representative could have requested a postponement of the hearing but instead asked that the hearing be cancelled which hearing officer denied since there was no basis to grant such a request; and (5) hearing officer's comments at the hearing did not interfere with Organization representative's right to proper confrontation of witnesses since "... the hearing officer had an obligation to conduct the investigation in an orderly fashion to bring out the facts" and since "... claimant's representative was attempting to frustrate that process and it was therefore in order for the investigating officer to speak to him about it".

Concerning the merits portion of this dispute, Carrier contends that there is substantial evidence in the record to establish that Claimant was a party to a fraud (Second Division Awards 3081, 4350, 4464, 6443, 6444 and 6878) and that there is no doubt that Claimant participated in the submission of an admittedly erroneous report which itself is a serious offense and which fully justified the discipline which was assessed (Second Division Award 4199). Related to the foregoing, Carrier further argues that there is no basis for Organization's contention that Carrier's witnesses' testimony was "cancelled out" by the testimony

of Organization's witnesses (Second Division Award 6372) and that the "... Board has held repeatedly that it is not its function to resolve conflicts in testimony and it will not disturb discipline findings that are supported by credible though controverted evidence" (Second Division Award 6955).

Upon carefully reading and studying the complete record in this dispute, the Board is convinced that both the merits portion and the procedural portion of Organization's argumentation as presented herein are unpersuasive, and the discipline which has been assessed, therefore, shall remain undisturbed.

Of the several procedural issues raised by Organization regarding the investigation which was conducted by Carrier in this matter, suffice it to say that none of these occurrences, either individually or in combination, deprived Claimant of his contractually protected right of a fair and impartial hearing. Claimant's hearing notice, though perhaps not as comprehensive or as specific as it could have been, was, nonetheless, sufficiently thorough enough to leave no doubt as to the nature of and reason for the scheduled hearing. Indeed, the effectiveness and thoroughness with which Organization's representative presented Claimant's case at the investigation hearing clearly bespeaks the fact that both Claimant and his representative were sufficiently apprised of the charges which had been brought against him and were prepared to offer a most proficient defense on Claimant's behalf. Similarly, the fact that the hearing officer may have assumed multiple roles in this matter or may have conducted said hearing in a somewhat less than ideal manner, albeit an invitation to the allegation of a due process infringement and better to have been avoided if possible, such action does not, in and of itself, constitute prima facie evidence of such procedural impropriety (Second Division Award 7119).

Having disposed of the various procedural questions which have been raised by Organization, our attention next focuses upon Organization's contentions concerning the merits portion of the dispute itself. In this regard it is quite apparent that these contentions are considerably less supportable than those which have been articulated hereinbefore. Thus an examination of the record clearly shows that while Claimant may not have "signed" or "submitted" the disputed worksheet, the record also shows that Claimant knowingly participated in a ruse to misrepresent that he and his co-worker, Mr. Flagler, had changed lubrication pads on two cars when, in fact, they had not. Perhaps more than anything else it is Claimant's very own testimony which is most damaging in this regard since said testimony ("We would like to enter it in the record that we did go out and look around") establishes that not only did Claimant and Mr. Flagler not change the lubrication pads as indicated on their worksheet, but that the report itself was a complete and utter fabrication in its entirety!

Given the dire consequences which could occur on a railroad as a result of the misreporting and misrepresenting of the servicing of a critical piece of equipment or function such as that which is involved in the instant dispute, Claimant's actions are reprehensible and unexcusable, and Carrier's "... right ... to take disciplinary action against an employe who has materially and substantially falsified work records is too obvious as to require discussion or explanation" (Second Division Award 4199). Additionally, Claimant's attempt to suggest that Foreman Kroll had directed Claimant and Mr. Flagler to engage

in some type of "make work scheme" on the morning of August 15, 1978, or that Foreman Kroll's directive itself was an unnecessary undertaking, is totally unsupportable because of the complete lack of the least bit of probative and/or substantive evidence whatsoever.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of June, 1982.