

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

Parties to Dispute: { Brotherhood Railway Carmen of the United States
{ and Canada
{ Chicago and North Western Transportation Company

Dispute: Claim of Employes:

- 1. Carman Stacey Babiarz was unjustly assessed thirty (30) days actual suspension on June 28, 1979.
- 2. Carman Stacey Babiarz was erroneously charged with using a defective air jack resulting in a personal injury to himself on May 17, 1979.
- 3. That the Chicago and North Western Transportation Company be ordered to compensate Carman Stacey Babiarz eight hours pay per day for the thirty days of suspension, plus all benefits to which he is entitled in accordance with Rule 35.

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.

The Claimant, a carman, employed June 3, 1976, was given a thirty (30) day suspension for using a defective air jack on May 17, 1974, which resulted in injury to himself. Notice of an investigation to be held on June 8, 1979, was sent to Claimant. At his request, the investigation was postponed. Notice of the postponed hearing scheduled for June 15 was sent on June 8, 1979. Neither Claimant nor his designated representative appeared.

The position of the Organization is twofold: (1) the Carrier has failed to meet its burden of proof and has not proven the charge; and (2) the Claimant was deprived of his right to a fair and impartial hearing.

The first notice of investigation was sent by certified mail, which was returned with a note written on the bottom stating, "Representative of my choice will be on vacation. Must be postponed." The second notice was sent by certified mail dated June 8, 1979. This notice was not accepted by Claimant until June 26, 1979. On the day of the investigation, June 15, 1979, an attempt was made to call Claimant at this place of resident, but there was no answer.

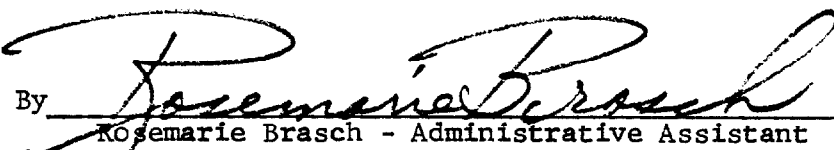
Contrary to the arguments of the Organization, the record does not establish the Carrier knowingly scheduled the investigation on a date which would prevent Claimant from appearance and representation. Claimant's note, in response to the initial notice of investigation, was, at best, vague. Claimant did not accept the second notice until eleven days after the investigation. There appears to be no explanation for not making himself available for delivery and acceptance. By his failure to appear, Claimant did not effectively utilize the rights available to him. Had he done so, the Hearing Officer would have been provided with a more balanced record incorporating the Claimant's response and explanation of the charge. The evidence in this matter is more than conjecture or suspicion. The wheel did come off the jack. The missing washer was found on the previous assignment and the cotter key was not to be found. Accordingly, the Board holds this circumstantial evidence sufficient to establish the correctness of the charge. Consideration of all circumstances leads the Board to the conclusion that the imposed discipline was harsh when related to the Claimant's conduct. The discipline imposed is to be reduced to a five (5) day suspension, and Claimant is to be paid for the wages lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.