Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9415
Docket No. 8945
2-ICG-CM-'83

The Second Division consisted of the regular members and in addition Referee John Phillip Linn when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Illinois Central Gulf Railroad

Dispute: Claim of Employes:

1. That Carman R. B. Mixon was unjustly removed from his position as truck driver on September 4, 1979, Johnston Car Shop, Memphis, TN.

2. That Carman R. B. Mixon was unjustly suspended from the service of the Illinois Central Gulf Railroad for a period of thirty (30) calendar days beginning September 26, 1979.

3. That the investigation held on September 11, 1979 was unfair, unnecessary, and without good and sufficient reason.

4. That accordingly, the Illinois Central Gulf Railroad be ordered to:

(a) Compensate Carman R. B. Mixon for all lost time including all overtime that he was deprived of beginning on September 4, 1979, account being removed from the truck job, up to September 26, 1979.

(b) Compensate Carman R. B. Mixon for eight (8) hours each day at the pro rata rate beginning on September 26, 1979 including all over-time that he would have been entitled to during his suspension, up to Friday, October 26, 1979, at which time he was to return to 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.

Claimant R. B. Mixon has been employed by the Carrier for approximately twenty-seven years. On the date giving rise to the instant claim, Claimant was employed as a truck driver.

By letter dated September 4, 1979 Claimant was advised of a formal investigation to be held on September 11, 1979 to determine whether Claimant had reported an accident to the truck (MD4016) he was assigned to drive on August 31, 1979 and whether he left that truck unattended without proper clearance of the Piggyback Lead. After the investigation, Claimant was advised by letter dated September 26, 1979 that he had been found guilty of the charges and, consequently, was suspended from service for a period of thirty calendar days without pay beginning September 26, 1979.

Believing the discipline assessed to be unjust and a violation of the controlling Agreement, the Organization processed a claim through the appeal and conference procedures, and ultimately to this Board.

It is the position of the Organization that the evidence adduced in the hearing did not prove beyond a reasonable doubt that Claimant was guilty of the charges resulting in his removal from the truck job and suspension from service for thirty calendar days. The Carrier's conduct, it is asserted, violated Rule 39 of the existing Agreement, which reads:

> "No employe shall be disciplined without a fair hearing by a designated officer of the Carrier. Suspension in proper cases pending hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe shall be apprised of the precise charge against him. The employe shall have the right to be there represented by the authorized committee. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from such suspension or dismissal."

It is the Organization's contention that the Carrier's Hearing Officer at the investigation hearing expanded the charges set forth in the charging letter by including "failing to fill out properly executed accident form," and raising Rules 638 and 638(g) of the Safety Rules.

The referenced safety rules read as follows:

> "638. If you are involved in an accident, no matter how trivial the accident or damage may appear, you are required to stop at once. If necessary, protect the area by placing warning signals about the vehicle."

> "638(g). Report the accident as soon as possible to your immediate supervisor and complete the necessary report forms. Remember that any accident, no matter how trivial, must be reported. Where damage exceeds the limit set by state law concerning reporting accidents, proper report is to be made to the appropriate state law enforcement agency."

The Organization asserts that the language of these Safety Rules are clear in referring to accident forms involving highway accidents, which forms would be totally irrelevant in the instant accident occurring on Company property and in the train yard. The Carrier contends that the safety rules have application when an accident occurs anywhere.

Rule 23 of the Superintendent's Bulletin reads:

> "Employe whose duties include operating Company vehicles must exercise precaution to prevent accidents or damage to vehicle. State and local traffic laws must be obeyed."

The Organization contends that this Rule 23 was improperly introduced at the hearing by the Hearing Officer, expanding the charges against Claimant and failing to afford him a fair and impartial hearing. At the same time, the Organization contends that Claimant did exercise precaution to prevent damage to the vehicle and that the accident did not involve state or local laws under Rule 23.

Assistant Master Mechanic W. C. Campbell offered the charging letter, served as the Hearing Officer at the investigation, and signed the letter imposing the disciplinary suspension upon Claimant. The record also reveals that it was Campbell, as Hearing Officer, who first questioned concerning whether Claimant had made a written report of the damage to vehicle MD4016 and referenced Safety Rules 638 and 638(b) and Rule 23 of the Superintendent's Bulletin. However, it is the conclusion of the Board that this conduct by Campbell did not expand the charges against Claimant, but was intended to establish the duty of Claimant to make report of the accident incurred to the vehicle he was driving on August 31, 1979.

The conclusion of Mr. Campbell that Claimant was found guilty of both charges against him and, accordingly, should suffer a thirty-calendar day suspension without pay is not supported in the record of this case. Clearly, the evidence pertaining to the charge of leaving the truck unattended without proper clearance of the Piggyback Lead is not sufficient. Claimant and Carman Shelton, who was assisting Claimant on the day in question, both testified that Claimant did not get out of the truck and both were of the opinion that there was enough clearance. There was no eyewitness to this alleged incident. The only other testimony concerning it came from General Car Foreman H. L. Smith, as follows:

> "Q. Mr. Smith, was Mr. Mixon in the truck when this accident occurred?
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> A. Well, on Monday morning I called Mr. Mixon into the office to talk to him about the accident when I found out the truck had been damaged and I asked him how it happened and he stated that he was coming from between the 'A' Yard lead at the 'Hump' and the 'C' Yard lead at the 'Hump' where there is a little crossing for trucks to cross and wanted to get across the switching lead before a cut there had him blocked into the train yard because he had another job that he wanted to go to and so there

> was a cut on the Piggyback Ramp lead and he had to cross the 'C' Yard switching lead and pulled up close to this car in an effort to try to clear between the two tracks and he said he had gotten out of the truck. I am not sure but I believe he went to check the rear to see if it would clear and when they shoved back into the Ramp lead one of the cars hit the left front fender. I asked him if he reported it and he said he had talked to a group of carmen and supervisors - that they were discussing the damage and I asked him again did he report the incident and he said 'naw' - not as such."

Even if Smith's testimony is credited over the denials of Claimant and Shelton, that testimony does not establish that Claimant left his truck unattended. There is no showing of more than that Claimant got out of the truck to check the rear to determine with greater certainty that there was proper clearance. Such conduct cannot reasonably be characterized as leaving one's truck unattended because Claimant was then, in fact, attending to the truck in a manner reasonably called for under the circumstances.

The charge that Claimant failed to report the accident to vehicle MD4016 on Friday, August 31, 1979, is found supported in the record of the investigation. The charge is not covered by the language of the Carrier's Safety Rule 638, but is covered by Rule 638(g). That rule is not explicitly limited to accidents occurring on public roadways although such accidents are obviously included in the rule. All accidents, no matter how trivial, are to be reported to one's immediate supervisor. Claimant made no effort to report this to his immediate supervisor. Indeed, he testified that he did not even know who his immediate supervisor was on August 31, 1979. Although it is found that Claimant did not attempt to hide the accident and that there were supervisors (none of whom were Claimant's immediate supervisor) and others to whom Claimant indicated that his vehicle had been involved in an accident, and who viewed the damage to the right front fender of the vehicle, Claimant was not excused thereby from reporting the accident to his immediate supervisor.

There is no evidence in the record to show that Claimant was required to make any additional report to "Special Agents" as implied by questions propounded by the Hearing Officer in the investigation.

Under all of the circumstances of this case, wherein Claimant made no effort to conceal the fact that damage was done to his vehicle on August 31, 1979 and readily admitted such fact to Carrier supervisors on that date; and wherein the damage was relatively minor to property only and resulted from what management recognized as merely "poor judgment"; and wherein one of the charges against Claimant has not been proven and the remaining charge is in the nature of an unintentional but technical rule violation; it is the determination of this Board that the thirty-calendar-day disciplinary suspension was an unreasonably severe form of punishment.

Claimant, an employe of the Carrier for approximately 27 years, could well have been expected to respond to a much less severe disciplinary suspension. Consequently, the Board will order that the disciplinary suspension be reduced

to one calendar week beginning September 26, 1979 at 7:00 a.m. with other remedial orders as forth in the Award.

A W A R D

The claim is sustained to the extent that the Carrier is ordered to reduce the thirty-calendar-day disciplinary suspension to a seven (7) calendar day disciplinary suspension, as set forth above, and is ordered to pay Claimant for all lost wages resulting from the excessive suspension from October 2, 1979 at 7:00 a.m. forward with his seniority rights unimpaired.

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 March, 1983.