

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
{ Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated Rule 32 of the controlling Agreement when they unjustly, arbitrarily and capriciously dismissed Carman T. L. Avery, May 18, 1979 at Dupu, Illinois.
2. That the Missouri Pacific Railroad Company violated Rule 31 of the controlling Agreement when they failed to respond to our letter of appeal dated October 1, 1979.
3. That the Missouri Pacific Railroad Company be ordered to compensate Carman T. L. Avery as follows:
 - (1) Compensation for all time lost starting May 19, 1979 and continuing until he is returned to service with all rights unimpaired.
 - (2) Made whole for vacation rights.
 - (3) Made whole for loss of health and welfare and insurance benefits.
 - (4) Made whole for pension benefits including Railroad Retirement and unemployment insurance.
 - (5) Made whole for any other benefits he would have earned during the time he is withheld from service.
 - (6) In addition to the money amounts claimed herein, Carrier shall pay Carman T. L. Avery an additional amount of 6% per annum compounded annually on the anniversary date of the claim.

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 April 25, 1979, Claimant, a Carman at Carrier's Dupo Yards, Dupo, Illinois, with approximately five years service was assigned to work on the 3 p.m. to 11 p.m. shift. Although so assigned, on said date Claimant arrived for work at 3:15 p.m. and upon his arrival Claimant was instructed by his immediate supervisor, Car Foreman K. Lambert, to call and discuss the lateness with the General Car Foreman, E. Bolle. Claimant telephoned Mr. Bolle as instructed and informed him that he was late because he (Claimant) "... has been talking to people again about his court problem".

Following his conversation with Mr. Bolle, Claimant, assumedly, was to return to his regular duties. However, when Foreman Lambert later returned to his office in Yard A he found Claimant lying on a bench in "58 Shanty" and he proceeded to tell Claimant that "... there were cars to be inspected on Interchange ..." and that he (Claimant) was to perform the job alone. Regarding this particular aspect of the case, Claimant maintains that he "... was working at 58" when Mr. Lambert approached him and directed him "... to work (the) rear end of (the) train". According to Claimant, following Mr. Lambert's instructions, he (Claimant) "... drove (his) own car around there to the rear end and worked the train and got a set and release and got it out of town". Claimant maintains that, with this particular assignment completed, he returned to the Yard and then left work at approximately 10:20 p.m. Foreman Lambert maintains that at approximately 10:20 p.m. as he was returning to the Yard he observed Claimant "on (the) old Columbia Road going north" and when Claimant did not return by the 11 p.m. shift-end he (Lambert) checked Claimant's time card and discovered that he had filled out and signed his card for "3:15 p.m. time in 11:00 p.m. time out" for that day.

On May 2, 1979, Claimant was notified that a formal investigation was to be conducted on May 7, 1979 "... to determine facts and place responsibility, if any for your failure to report at appointed time, devote yourself to your duties, absenting yourself from duty without proper authority and falsifying your time card, April 25, 1979, while working as carman 3:00 p.m. to 11:00 p.m., Dupo Yard, Dupo, Illinois". Said hearing was postponed and rescheduled first for May 17, 1979 and then again for May 18, 1979, at which time the hearing was conducted. As a result thereof, Claimant was found guilty as charged and he was terminated effective May 18, 1979. Said termination is now the basis of the instant claim.

Organization's major contention in this dispute is that Carrier violated Rule 31 (c) of the applicable Agreement by failing to respond to Organization General Chairman's October 1, 1979 appeal letter within the sixty (60) day time limit as prescribed. According to Organization, Carrier's contention that such a response dated November 15, 1979, was sent to the General Chairman is unpersuasive since Carrier as the "sending party" shoulders the burden of proof in such a dispute and, in the instant case, Carrier has failed to adduce sufficient proof that Carrier's response was either sent or received within the specified time limit (Second Division Award 7902; Third Division Awards 17227 and 17291).

In addition to the foregoing Organization further argues that Carrier violated Rule 32 of the Agreement by failing to provide Claimant with a fair and impartial hearing as is required by said Rule. To support the latter contention

Organization posits the following: (1) the charge which was issued against Claimant was vague on several counts, and therefore, was improper; (2) Carrier erred by failing to allow Organization the opportunity to inspect relevant Carrier data and evidence prior to the investigation hearing; (3) it is apparent that Carrier had prejudged Claimant's guilt in this matter because the decision to discharge Claimant was made on the same day on which the investigation was held; (4) Carrier's Hearing Officer was unfair in his conduct of the hearing in that he failed to act on Organization's objections, he allowed an altered exhibit (Claimant's erased time card) to be entered as evidence, and he acted not as the trier of facts but rather as prosecutor; (5) Carrier's lax application of the rules and previously allowing Claimant to leave work early when his assignment was completed served to entrap Claimant into believing that he could leave work early on the evening of April 25, 1979; and (6) there was insufficient evidence in the record to support the discipline which was assessed.

Carrier's basic position in this dispute is that Claimant's dismissal was entirely proper and that there was no violation of Rule 31 or Rule 32 in the handling of Claimant's investigation, in the issuance of discipline, or in the handling of the pending claim.

In support of these contentions Carrier maintains that a response to General Chairman Daniel's October 1, 1979 appeal was sent to the General Chairman by Carrier's Director of Labor Relations, O. B. Sayers, in letter dated November 15, 1979. According to Carrier, said response was timely and thus in conformance with the applicable rule. In addition, Carrier further contends that Organization's arguments in this regard must be rejected because there is adequate evidence in the record to establish that Carrier sent said letter as stated; that Organization's arguments are inconsistent and contradictory; that Organization's cited comparison (D. L. Black Case) is factually dissimilar to the instant case; that Organization's assertion that Carrier has attempted to "cover up" its alleged procedural error has not been proven with any degree of probative evidence; and, Organization has failed to produce any "hard evidence", which was readily available, which could have supported its respective position.

Turning to the various procedural issues which have been raised by Organization, Carrier maintains that Claimant's statement of charges was sufficiently precise to satisfy the requirements of Rule 32 (Second Division Awards 5614 and 7560) and that neither Claimant nor Organization raised this particular issue in the initial processing of this matter. As to Organization's pre-hearing request for "... copies of witnesses' statements and any other material you (Carrier) have that is to be used in ... investigation", Carrier argues that, "(T)here were no written statements or other materials which could have been made available in advance", and further that "... neither Agreement rule nor practice required advance distribution of such materials even if they did exist" (Second Division Awards 7918 and 6638).

Carrier's next series of contentions is that a consideration of Claimant's past work record was proper because it was not used to determine Claimant's guilt in the instant case but merely "for the limited purpose of measurement of reasonable discipline" (Second Division Awards 5360, 5630, 5987 and 7348).

As its last significant area of argumentation Carrier asserts that sufficient evidence, including Claimant's admissions, exist in the record to prove Claimant's guilt of several serious infractions (falsification of time slip; lying down or loafing on the job; and leaving the job without permission). According to Carrier, each of these infractions would warrant severe disciplinary action, including discharge, in their own right (Second Division Awards 6638, 6909 and 7966; Second Division Awards 47, 1541, 1828, 1979, 5358 and 5161); and that when considered in combination and, in light of Claimant's history of similar offenses, Claimant's dismissal was proper and should not be rescinded or modified by the Board (Second Division Award 6196).

The Board has carefully read and reread the complete record in this perplexing case and has come to the conclusion that despite the significance of the timeliness question which has been raised by Organization, this particular issue is indeterminable. The evidence which has been adduced by the parties in support of their respective positions possesses a seemingly equal number of strengths and weaknesses, and therein lies the dilemma which is faced by this Board (Second Division Award 4208). While such a decision or lack thereof certainly will not please either side in this dispute, the Board believes that in such a situation it is best to proceed in a cautious manner rather than plunging blindly forward like the proverbial "bull in a china shop". Let there be no mistake, this decision should in no way be interpreted to diminish or detract from the commonly held tenets of labor-management relations in the railroad industry which establish that the sender/addressor of a letter bears the responsibility of proving that said letter was sent and received and that "... it is Carrier's responsibility to insure receipt of disallowances of claims" (Third Division Award 21088; see also Second Division Awards 4851, 6075 and 7902; and Third Division Awards 11505, 14354, 15517, 17227 and 17291). The Board wholeheartedly supports and endorses these tenets; however, given the facts of record as they exist in the instant dispute, such a determination cannot be made. In this regard, it would perhaps be helpful at this point to simply reiterate the frequently quoted expression which is used by seasoned jurists and arbitrators that "hard cases make bad law".

Turning next to various other procedural issues which have been raised by Organization, said objections for the most part, must be rejected. A reading of the record clearly establishes that Claimant's statement of charges was sufficiently precise; that the investigation hearing was conducted fairly and impartially by the Hearing Officer; and that Organization's request for pre-hearing disclosures (discovery) by Carrier of all data and evidence relative to the investigation cannot be substantiated either through contractual provision or through any cited practices which the parties might have entered into during the course of their relationship. As for the other procedural objections which have been posed by Organization, as well as the merits portion of the dispute itself, the Board is compelled to conclude that although Claimant is clearly guilty of the infractions as charged and must, therefore, assume the major share of the responsibility for the incident which occurred on the evening of April 25, 1979, it is equally clear that certain other factors were operative at the time which should have been considered by Carrier when assessing discipline but which obviously were not. In this context it is apparent that the instant case was either influenced by or was exacerbated by the lax and inconsistent enforcement

of the rules by first-level supervision at Carrier's Dupo Yard. While this fact does not excuse Claimant from his improper behavior on the evening in question, by the same token, it was, nonetheless, a contributing factor which should have been addressed and given consideration by Carrier at the time of penalty assessment. For some unknown reason, however, this fact was either purposely ignored or was not given any consideration whatsoever -- and such a failure on the part of Carrier is considered by this Board as being improper. Similarly, Carrier's belated reference to Claimant's arrest for a morals charge (which, incidently, is included on the very last page of Carrier's Submission) is so far removed from the facts of the instant case so as to make it appear that Carrier is either attempting to embellish the record with post-discharge material which has no bearing on the resolution of the case itself, or Carrier is attempting to taint Claimant even more grievously than he has managed to do by himself as evidenced by his activities on the evening of April 25, 1979, as well as by other improper employment related activities. In either event, Carrier's actions in this regard are considered by the Board to have been unwarranted and improper and, when considered in light of the entire record in this matter, some mitigation of Claimant's penalty is considered to be appropriate.

A W A R D

On the basis of the foregoing findings, Claimant will be reinstated to service with full rights and benefits restored in accordance with the provisions of the parties' applicable Agreement, but without back-pay.

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 23rd day of March, 1983.