

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

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

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company unjustly assessed discipline against the service records of Carmen G. E. Wright and D. G. Rayls on September 17, 1980, as a result of investigation held on August 20, 1980, at Frankfort, Indiana.
2. That the Norfolk and Western Railway Company be ordered to rescind discipline assessed Carman G. E. Wright in letter dated September 17, 1980, and compensate him for all time lost as a result of being required to serve a thirty-five (35) calendar day suspension, beginning at 7:00 A.M. on Monday, September 22, 1980, and ending on Sunday, October 22, 1980, at 4:00 P.M., conclusive, as mentioned in carrier's letter dated September 17, 1980, and make him whole for all contractual benefits, including seniority and vacation rights, holiday pay, health and welfare benefits, that he may have lost during the period of unjust suspension from work.
3. That the Norfolk and Western Railway Company be ordered to remove the ten (10) day deferred suspension assessed Carman D. G. Rayls in carrier letter dated September 17, 1980.

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 Carrier maintains a freight car repair facility, locomotive servicing track and extensive transportation yard at Frankfort, Indiana. Claimants G. E. Wright and D. G. Rayls are employed as carmen at the car repair facility.

On July 6, 1980, tank car GATX 72530 was set out of train 1 FB96 at Vernon, Indiana some sixty-nine miles away from Frankfort, because of a hot box at the L-2 location. Inspection of the car at Vernon revealed that the cause of the hot

box was a pitted journal at the L-2 location. It was further determined that this car had been released from the repair track at Frankfort, Indiana on the previous day, July 5, 1980.

On July 9, 1980, the Carrier charged Carman D. R. Fulwider, G. E. Wright and D. G. Rayls with:

"... improper performance of duty in your failure to detect and repair pitted journals on GATX 72530 on July 5, 1980."

Carman D. R. Fulwider admitted his responsibility concerning the July 9, 1980 charge by stating in a July 18, 1980 letter that:

"I hereby waive my rights to a formal investigation and accept five (5) actual calendar days suspension for my improper performance of duty in my failure to detect and repair pitted journals on GATX 72530 in Frankfort Shop on July 5, 1980.

I fully realize that since I am currently on probation due to a twenty (20) day deferred suspension account of the formal investigation held on May 6, 1980, that I will have to serve that 20 calendar days as actual suspension days.

Signed: D. R. Fulwider, Carman"

A formal investigation in connection with the charge was scheduled and held on July 22, 1980, but "due to malfunction in tape" the Carrier reconvened the investigation on August 20, 1980.

Following the investigation Carman G. E. Wright was advised by the Carrier on September 17, 1980, that:

"As a result of the investigation held on August 20, 1980, a five (5) day actual calendar day suspension will be assessed against your service record.

However, since you failed to maintain a clear record during the probationary period of discipline assessed as a result of the investigation held on April 18, 1980, you will be required to serve that discipline in its entirety.

Consequently, this actual suspension will be a thirty-five (35) calendar day suspension, beginning at 7:00 A. M. on Monday, September 22, 1980; and ending on Sunday, October 26, 1980, at 4:00 P. M., conclusive."

Carman D. G. Rayls was advised by the Carrier on September 17, 1980, that:

"As a result of the investigation held on August 20, 1980, a ten (10) day deferred suspension will be assessed against your service record."

We believe from the limited evidence before us that the transcript is accurate. The Organization has not made the Carrier or the Board aware of specific testimony that was left out of the transcript. We find no prejudicial error in the transcript.

We have reviewed pages 17 and 18 of the transcript and find that Mr. Camp's statement which the Hearing Officer ordered to be stricken from the record, and which statement was marked-out but a legible part of the transcript before this Board, is not prejudicial error. Mr. Camp was allowed to pursue his question on how men start out their assignments at 7:00 A.M. with Mr. Herman; and Mr. Herman did not agree with him. Also the tank car in question was not the first assignment; Mr. Camp had not called himself as a witness; and he was not present on the morning of the incident in question.

The Organization contends that Acting Assistant Car Foreman Herman could not positively identify Carman Wright as working on GATX 72530 at a time during the work day. The argument is contrary to the record. Mr. Herman's testimony on pages 7, 14, 15 and 18 indicate that he assigned Mr. Wright to repair GATX 72530; and that he was positive that Mr. Wright was on 2 track between 7 and 8 in the morning having worked the first two cars. Mr. Herman disagreed with the testimony of Mr. Wright and Mr. Fulwider that Mr. Wright did not work on the car in question.

We can understand the General Chairman's vigorous objection to the Carrier's finding that Mr. Wright was responsible for failure to detect and repair pitted journals on the car in question when Mr. Wright testified that he did not work on the car but was working on No. 1 track with Fred Williams; and Mr. Fulwider also testified that Mr. Wright did not work with him, but worked with Fred Williams. Contrary to the testimony of Mr. Wright and Mr. Fulwider, Mr. Herman testified that he assigned both Mr. Wright and Mr. Fulwider to make repairs to GATX 72530; and he also testified that the "Daily Schedule Control" which showed both men to have worked on the car was accurate. Mr. Herman also testified as to the small crew assigned on that day. This Board does not make credibility determinations. The Hearing Officer, Mr. Hill, had the high judicial responsibility of making fair and impartial credibility determinations. While recognizing that evidence existed contrary to his decision, substantial evidence of record, including Mr. Herman's complete testimony as well as the Schedule Control record of work that day, supports Mr. Hill's finding that Mr. Wright was responsible. We point out that Mr. Wright had the right to call witnesses on his behalf. The testimony of Mr. Herman had been given at the previous hearing where the tape recorder had malfunctioned and he was well aware of Herman's position. Mr. Wright testified that he was working with Fred Williams. Fred Williams was not called as a witness. Mr. Rayls was inspecting and marking up cars on the 2 and 3 tracks; he did not testify as to where Mr. Wright was working.

We must find, based on the credibility determination of the Hearing Officer, which was based on substantial evidence of record, that the Carrier's finding that Mr. Wright was responsible for the offense charged must be sustained, and the claim on behalf of Mr. Wright is denied.

Mr. Rayls admitted that it is the responsibility of the checker to certify the repairs that are billed. His testimony indicates that he did not do so. He explained that he did not have a chance to further inspect the car, because there were more cars on the two and three tracks that he was inspecting and marking up, and the car in question was worked and shoved out while he was on the two and three tracks. Also he testified that he was not notified by the carman that anything was wrong, which is the usual practice.

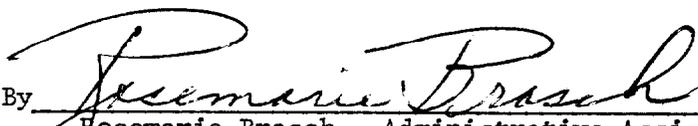
The record indicates that Mr. Rayls did not inspect the car while it was on the repair track to certify the repairs that were billed. The car had been inspected and chalked, and the bill had been "headed up" on July 3 by another checker the day before the holiday; and it was sitting on the repair track at the start of work at 7:00 A.M. on July 5, 1980. The work on the car was completed at 9:00 A.M. on July 5, 1980. It was Mr. Rayls' responsibility to manage his time to certify the repairs that are billed. Since he did not do so, he was properly subject to discipline. We cannot find that the ten day deferred suspension was either arbitrary, capricious or excessive. We must deny Mr. Rayls' claim.

A W A R D

Claims denied.

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 15th day of June, 1983.