

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(Burlington Northern Railroad Company

Dispute: Claim of Employees;

1. Under the current controlling Agreement, Mr. C. R. Lyman, Laborer-Power Plant Attendant, Spokane, Washington, was unjustly dealt with when suspended for a period of thirty days of service from the Burlington Northern, Inc., on September 13, 1979 to October 15, 1979.
2. That accordingly, the Burlington Northern, Inc. be ordered to compensate Mr. C. R. Lyman for all time lost at the pro rata rate and any reference to this incident stricken from his record.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 is employed as a Laborer-Power Plant Attendant at the Carrier's Hillyard Diesel Shop in Spokane, Washington. His regular work hours are 5:00 a.m. to 1:00 p.m. At the beginning of each shift he is required to start the shop boilers and compressors. At 7:00 a.m. he reports to his supervisor for further assignment as a laborer.

On July 7, 1979, after the Claimant had reported to him earlier in the morning, Supervisor C. Cuzzetto searched the diesel shop between 7:45 a.m. and 9:45 a.m. in order to assign him further duties. Foreman of Locomotives R. Newstrand assisted Cuzzetto in the search. Neither man could find the Claimant, who was not seen in the shop until approximately 9:45 a.m.

The next day, July 8, Cuzzetto assigned the Claimant to attend the small lye vat. At 9:30 a.m., after he had so assigned the Claimant, Cuzzetto came to the area where the vat is located and noticed that the Claimant was not there. A search of the shop area ensued until 10:15 a.m., when the Claimant was located.

The Claimant soon received from M. L. Varns, Shop Superintendent, a July 13, 1979, notice of investigation. It is quoted in pertinent part below:

"Attend investigation in the office of the shop superintendent at 10:00 a.m., on August 6, 1979, for the purpose of ascertaining the facts and determining your responsibility in connection with your alleged failure to be on the job from 7:45 a.m. to 9:45 a.m. on July 7, 1979, and from 9:30 a.m. to 10:15 a.m. on July 8, 1979, as assigned by your supervisor.

Arrange for representative and/or witness, if desired, in accordance with governing provisions of prevailing rules."

Superintendent Varns ultimately conducted the investigation on August 14, 1979, following a postponement request by the Claimant. At the investigation the Claimant testified that on July 7, 1979, he left his assigned area to "... fill in around the shop where I was needed with duties not assigned to me but more as regular routine..."

On September 12, 1979, Varns issued a letter to the Claimant informing him that he was being suspended for a period of thirty (30) days for violation of BN Rule 667.

The Organization appealed the suspension on October 18, 1979. The appeal was denied in an October 24, 1979, letter from Superintendent Varns.

The Organization argues that the Carrier did not meet its burden of proving the Claimant failed to be on the job. In fact, the Organization submits, he was working on various duties during the time Cuzzetto, Newstrand and others were looking for him. For example, on one of the days in question he cleaned three switch engines.

The Organization also argues that the Carrier's case is procedurally defective due to the multiple roles of the hearing officer. Shop Superintendent Varns proffered the charges against the Claimant, conducted the formal investigation issued the discipline, and denied the appeal. The Claimant had asked six different employees to appear and testify at the investigation. Prior to the hearing five people were called into Superintendent Varns' office and questioned. After that experience, none of the potential witnesses were anxious to testify on behalf of the Claimant.

The Carrier argues that it met its burden of proving the Claimant was absent from his assigned duties, particularly since he was vague concerning his specific activities during the periods in question. Also, the work of cleaning the three switch engines had been assigned to other employees. And the Carrier notes that credibility questions are properly determined on the property, not by this Board.

Finally, the Carrier argues that hearing officer multiple roles are not a per se violation of the requirement for a fair and impartial hearing. Nothing in the transcript indicates that Superintendent Varns conducted the investigation in a biased manner. Furthermore, there has been no proof that his questioning some employees prior to the hearing chilled their participation in any way.

The Board has carefully reviewed the awards cited by both parties concerning the multiple roles of Superintendent Varns. It is clear from the record that he issued the charges, did his own prehearing investigation, conducted the hearing, issued the discipline, and denied the Organization's appeal. While we understand that multiple roles are not, in and of themselves, a violation of employee due process rights, we also note that in this case the entire investigation and decision process appears to have been orchestrated by one man, Superintendent Varns.

We are particularly concerned with Varns' prehearing meeting with potential witnesses. As noted in Fourth Division Award 2158, the mere presence of a hearing officer in a prehearing meeting with witnesses (and, we could add, with potential witnesses) at which the case under consideration is discussed is incompatible with the role of a hearing officer. His job is one of objectively and impartially searching for the material facts from information presented during the investigation. He should not function as a party participant. It seems abundantly clear that the potential for development of bias is high when the fact-finder engages in his own investigation prior to the formal hearing he is charged with conducting in an impartial manner.

And Varns' dual decision-making role in issuing the suspension and in denying the Organization's appeal to that suspension is also problematical. We wonder how he could give independent and nonprejudicial consideration to an appeal of his own decision.

This Division has addressed the multiple roles issue many times before. One such instance is discussed in Award 7119:

"We have reviewed the conflicting awards cited by the parties on the question of multiplicity of roles by Carrier officers in discipline cases. We continue to adhere to our earlier general opinions that Carrier combines such functions in one individual at its own peril; that some minor overlapping of roles, while not to be encouraged, is not prima facie evidence without more of prejudicial procedural imperfections; that the greater the merging of roles the more compelling the influence of pre-judgment or prejudice and, that each such case must turn on its own merits. In the instant case we find that H. W. Sanders did not actually testify against Claimant in the hearing but that is literally the only function that he did not fulfill in this matter. He activated the investigation, proffered the charges, held the hearing, reviewed the record, assessed the discipline and denied the appeal. In so doing he fulfilled roles of investigator, prosecutor, trial judge and appellate judge. The disinterested development of appropriate penalty inherent in concepts of fair and impartial discipline cannot be accomplished with such egregious overlapping of functions. This was not a mere technicality but a substantial denial of Claimant's rights. We are left with no alternative but to sustain the claim."

It should be noted that such involvement alone is not sufficient to decide this case in the Organization's favor, nor is any other single aspect of Varns' multiple roles. But his entire pattern of involvement in the investigation, decision and appeals process has led us to the conclusion that Varns could not possibly have remained impartial throughout the entire claims process.

Accordingly, we must sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 5th day of October, 1983.