Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10394
Docket No. 10072
2-SCL-CM-'85

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the
(United States and Canada
(
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employes:

1. That the Seaboard Coast Line Railroad Company violated the controlling agreement when Carmen D. H. Nail, W. C. Dubose, W. R. McClelland and R. L. Chapman were unjustly suspended from service beginning January 2, 1981 and ending January 6, 1981.

2. That the Company committed a procedural defect when they tried all four (4) men in the same investigation, since each man had been charged with different rule violations and each man had a different degree of involvement in the incident under investigation.

3. That the Company committed a procedural defect when Master Mechanic R. D. Brigman conducted the hearing and then also reviewed the record and assessed the discipline.

4. That according, the Seaboard Coast Line Railroad Company be ordered to compensate each of the aforementioned Claimants eight (8) hours pro rata rate of pay for each day held off their regular assignment, and in addition, to compensate them for the holiday pay they were deprived of as result of not being permitted to qualify for (New Years Day).

5. In view of the fact that all of the above mentioned employees were involved in the alleged incident to different degrees, we present this as one claim, requesting that each employee's individual alleged participation be considered as separate and apart.

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 employes 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.

At approximately 10:30 p.m., October 31, 1980, a power failure occurred at Uceta Repair Track, Tampa, Florida, resulting in loss of lighting in the Rip Track Building. Foreman D. W. Paris thereafter instructed Carman Nail, one of the Claimants herein, to heat an anglecock on a freight car on track 2 in order for it to be removed and replaced. Carrier witnesses testified that the work involved in this dispute had been performed frequently and safely at night outside the building, where lighting was similarly limited to illumination from torches and flashlights. It is undisputed that Claimant Nail heated the anglecock, though not to the point that it could be removed. According to Foreman Paris, Claimant Nail shut off his torch after Claimants McClelland, Chapman and Dubose approached track 2 and advised him that he did not have to work without lights, and Claimant Dubose stated, "OSHA says we don't have to do it and I've got papers in my locker that says we don't have to do it." Claimant McClelland also allegedly told Foreman Paris, "...if you don't quit messing with me, you're gonna get it". The Carrier contends that although there was sufficient light from Nail's torch and two flashlights, Claimant Nail did not complete his assignment.

As a result of the above incident, Claimants each received a letter advising them to report for formal investigation on November 13, 1980. Claimant Nail was charged with violation of Rules 7 and 12 of the Rules and Regulations of the Mechanical Department which state:

> "Rule 7:
> Each employee will be held responsible for the work assigned him, and see that the drawings and instructions are strictly followed."

> "Rule 12:
> Disloyalty, dishonesty, desertion, intemperance, immorality, vicious and uncivil conduct, insubordination, incompetency, wilful neglect, inexcusable violation of rules resulting in endangering, damaging or destroying life or property, making false statements or concealing facts concerning matters under investigation will subject the offender to summary dismissal."

Claimant McClelland was charged with violation of Rule 12; in addition, he and Claimants Dubose and Chapman were charged with violation of Rule 14 which states:

> "Rule 14:
> Employees must not unnecessarily interrupt, by conversations or otherwise, other employees in the discharge of their duties. Anything that may detract from the good order of the shops is prohibited."

The formal investigation which was originally scheduled for November 13, 1980, was postponed until November 25, 1980 at the request of the Organization. Each Claimant was subsequently assessed five days actual suspension from January 2, 1981, through January 6, 1981.

The Organization contends that the facts developed at the investigation show that Claimant Nail heated the anglecock just as he was instructed to do; that he shut off his torch because he was concerned about working safely in the dark; that the reason the anglecock was not removed was because Foreman Paris terminated the assignment. Moreover, the Organization avers that Claimant McClelland's testimony reveals that he merely cautioned Claimant Nail to be careful in accordance with General Rules 12 through 14 of the Safety Rules for Mechanical Department Employees, which state:

> "12. Employees must be alert for unsafe conditions and practices, and must correct them or report them to proper authority.
>
> 13. Employees must learn and follow safest methods and practices for their work.
>
> 14. Employees must help others to be safe and must accept such help from others."

As to Claimants Dubose and Chapman, the Organization maintains that they went over to the area where Claimant Nail was working on track 2 only because it was the only location in the shop that was lit. Any comments made by either of these Claimants, the Organization avers, were simply expressions of their fear of unsafe working conditions and did not interfere with or disrupt the good order of the shop. A review of the record clearly shows that the Claimants are innocent of all charges, and that the Conducting Officer had a "bone to pick" with these employes because of several incidents referred to by the Organization as "visits by the Merry Minstrel".

Several procedural violations are cited by the Organization in support of the argument that Claimants were denied a fair and impartial investigation, to wit: 1) the officer who conducted the investigation also reviewed the record and assessed the discipline; and 2) the four Claimants were improperly tried in the same investigation; 3) the Hearing Officer refused to sequester witnesses at the hearing. None of these contentions has merit in this case. The first because, although there are conflicting rulings as to whether there can be a fair and impartial hearing where the Conducting Officer participates in multiple roles throughout the proceedings, the Organization raised the issue de novo before our Board. Numerous prior awards have held that only the facts and arguments presented on the property may be considered by this Board, in accordance with Section 3, First (i) of the Railway Labor Act and Circular NO. 1 of the National Railroad Adjustment Board. See Second Division Awards 9372, 3061, 4605, 4926, 5013-14, 5248, 6555; Third Division Awards 17535, 20627, 13235. As to the second point, the Claimants were all involved in the same incident, and therefore a single investigation was proper and did not constitute a denial of fair hearing. See Third Division Awards 17241 and 18009. Finally, absent a controlling requirement for sequestration of witnesses under the agreement, failure to separate witnesses is not deemed a prejudicial procedural flaw. Fourth Division Award No. 3425; Second Division Award No. 9372.

With respect to the merits, Claimant's safety contentions are an affirmative defense; and, as such, the burden of proof is on the Claimants and Organization. See Second Division Award 9323. In this case, the Organization presented no explanation as to why Claimant Nail's assignment could be considered unsafe or hazardous. To the contrary, the evidence indicates that the illumination used to perform the work was similar to that routinely provided to other employees who perform the same type of work in the darkness outside the building at night. Moreover, the fact that Claimant Nail started to perform his assignment and did not raise any safety concerns until Calimants McClelland, Dubose and Chapman arrived at the scene suggests that the Hearing Officer could legitimately conclude that the work in question presented no safety problems. On this record, we find no basis for substituting our judgment for that of the Hearing Officer and the safety defense claim must be denied.

In reviewing the record in the instant dispute, it is apparent that there is also an issue of credibility concerning insubordination and disruption of the workplace. It is well-established that the Board does not resolve at the Appellate level pure conflicts of testimony or credibility. Instead, the Board inquires as to whether the evidence adduced at hearing reasonably supports a finding of Claimants' culpability. Second Division Awards, 9363, 9767 and 10067. Here, although the Organization makes reference to a "Merry Minstrel" incident which it claims caused the Hearing Officer to be biased against the Claimants, the assertion is argument, not evidence; there is in our judgment no showing of any unreasonableness, bias, prejudice or predetermination on this record to impeach the determination of the Hearing Officer that events transpired essentially as described by Foreman Paris. On the merits then, the Board is satisfied that there was substantial evidence to support findings of violation of Rules 7, 12 and 14. In consideration of the nature of the misconduct, we do not deem a five day actual suspension excessive discipline. Accordingly, the claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Nancy J. Dever
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of May 1985.