

The Second Division consisted of the regular members and in addition Referee Edward M. Hogan when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Carman Apprentice T. J. McManus was unjustly assessed five days actual suspension plus an additional five days which had been previously deferred on October 9, 1980.

2. Carman Apprentice T. J. McManus was erroneously charged with negligence while operating Company equipment on September 26, 1980.

3. That the Chicago and North Western Transportation Company be ordered to make whole Carman Apprentice T. J. McManus, with all seniority rights, vacation rights, holidays, sick leave benefits, and all other benefits that are a condition of employment unimpaired, and compensate him for all time lost plus 6% annual interest on all such lost wages in accordance with Rule 35.

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.

Claimant was assessed a 5 day suspension (which actuated a previously imposed additional 5 day deferred suspension) on October 9, 1980, following a formal investigation which was held on October 2, 1980. Claimant had been informed on September 29, 1980, that he was to appear for a formal investigation on the charges of:

"Your responsibility in connection with your negligence while operating Company equipment namely, Pettibone Crane, on September 26, 1980, at approximately 11:30 AM while employed as a Carmen Apprentice at Marshalltown, Iowa."

The Organization contends that the Claimant did not receive a fair and impartial investigation and that the Carrier failed to prove the charges as alleged. The Carrier denies the allegations of the Organization.

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Our review of the records indicates that on September 26, 1980, the Claimant was operating a moveable crane. In short, during his operation of the crane, the crane ran over an obstacle (i.e., a car horse), the result of which caused a punctured tire.

One of the contentions of the Organization involves an alleged procedural defect in the handling of this claim in that the Claimant did not receive a full five days warning prior to his formal investigation. However, our examination of the record indicates that, while the Claimant properly noted his objection on the record, the Hearing Officer also properly offered to postpone the formal investigation. The Claimant indicated that he did not wish to postpone the formal investigation. With other factual circumstances, we may be inclined to agree with the position as advocated by the Organization in raising this procedural objection. However, where the record clearly indicates that the Claimant waived his right to the five day notice by his declination of the offer to postpone the investigation, we find that there has been a waiver of this requirement on behalf of the Claimant. (See also Second Division Award 9260; also, Third Division Awards 22703 and 22723.)

We also cannot agree with the position of the Organization that the Carrier has failed to prove the charges against the Claimant. Long-standing precedent of this Division and other Divisions of the National Railroad Adjustment Board has consistently held that this Board is not a trier-of-fact, and that absent arbitrary, capricious or discriminatory behavior or an abuse of managerial discretion, this Board will not upset the findings as adduced at the formal investigation. We find no such conduct on the part of the Hearing Officer to support our overruling of the findings made by the Hearing Officer. Further, the record indicates that the Claimant admitted that he had run over a car horse and that the tire on the new crane (approximately one month old) was punctured. Given the admission of the Claimant and other facts as adduced at the formal investigation which we have thoroughly reviewed, this Board can reach no other conclusion.

Lastly the Organization argues that the participation at the formal investigation of Mr. Maybee was improper. The Organization cites in their submission Award 7119 of this Division:

"We have reviewed the conflicting awards cited by the parties on the question of multiplicity of roles by the Carrier officers in discipline cases. We continue to adhere to our early general opinions that Carrier combines such functions 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 elements. ..."

Although the Award cited goes on in detail in the submission of the Organization, we find the principles as annunciated above controlling. We do not find a similar set of circumstances which was present in the case involving Award 7119. In fact, the record before us contains an admission by the Claimant. Applying the precedent as annunciated in the above Award, we must review each case as to its own set of circumstances. In our thorough review of the instant case, we do not find that the participation of Mr. Maybee was such that we would be compelled to overturn the decision and findings of the Hearing Officer. Although we have seriously weighed the contentions of the Organization, we do not find such conduct present in this case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD - 1934
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1985.