Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12088
SECOND DIVISION Docket No. 11810
91-2-89-2-97

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ Division of TCU
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. Carman Larry Harris was erroneously charged with failure to comply with instructions from his supervisor and threatening conduct on April 25, 1988.

2. Carman Larry Harris was unjustly assessed five (5) days suspension effective May 5, 1988 following investigation held May 2, 1988.

3. That the Chicago and North Western Transportation Company be ordered to compensate Carman Larry Harris in the amount of eight (8) hours pay per day for the five (5) days discipline, and eight (8) hours pay per day for the seven (7) days he was held out of service pending investigation, (for a total of twelve (12) days), plus all benefits to which he is entitled in accordance with Rule 26 of the controlling agreement, effective July 1, 1984.

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.

Review of the Investigation transcript in this matter dictates two compelling reasons why the discipline assessed cannot be allowed to stand. First, the conduct of the Investigation was flawed so as to deny Claimant the fair and impartial Hearing required by the Agreement. Second, insufficient evidence was developed to establish Claimant's guilt on the charges placed against him, which were:

> "... failure to comply with instructions from your supervisor and your threatening conduct at approximately 7:40 A.M. on April 25, 1988."

At the Investigation Claimant's Representatives attempted to develop certain background facts concerning Claimant's relationship with the Supervisor which he felt may shed insight into the incident and indicate ulterior motive on the part of the Supervisor in placing Claimant under charges. The Hearing Officer refused to allow testimony on this aspect of the matter. For example he characterized the defense as a "wild goose chase" even though he stated that he "... didn't know where [the Representative was] going with this, ..."

On another occasion the Hearing Officer ruled: "I will instruct [the Supervisor] not to answer the question. We are not here to investigate [the Supervisor]. Mr. Harris is under charge and I think you should remember that."

On yet another occasion the Hearing Officer stated his belief that "... it is my obligation to insure that Mr. Harris has a fair and impartial Investigation and I'm not going to allow a lot of testimony that has nothing to do with the charges to be entered in."

These three items, (and there are more), clearly demonstrate that the Hearing Officer had preconceived notions on the scope of the Investigation. He unduly limited testimony which may, (as will be pointed out below), have explained the development of an incident, so as to unfairly impede Grievant's defense. It is recognized that there are occasions when extraneous testimony is entered and irrelevant material clutters the record. In such instances it would be proper to exercise judicious restraint and keep the matter on track. This though, had ought not be done before positive indications are developed demonstrating that the material is unsuited. The standard followed should adopt the notion that it is better to receive too much testimony rather than too little.

When this defect is considered with the fact that Claimant's Representative objected unsuccessfully to two strangers being allowed as "observers" in the Hearing room, manifest prejudice openly surfaces. On this latter point, it is noted that at the start of the hearing Claimant's Representative protested the attendance of the Supervisor's General Chairman and Carrier's Captain of Police. He argued that the presence of the Police Captain was intimidating and that the General Chairman had no business there because the Supervisor was not under charges, he was a witness. Both were allowed to remain during the entire Hearing. Then, notwithstanding the fact that witnesses were sequestered, when the Supervisor was testifying his General Chairman was passing him notes.

The entire case against Claimant was based on the Supervisor's version of the incident. The Supervisor's report to the Manager of the Car Department triggered the charges. It is an affront to elementary considerations of fair play, to say nothing of the breach of sequestration protections, to have the Supervisor's testimony "perfected with crib notes" from his General Chairman.

With regard to the merits of the charge, the whole incident took but a minute or two. The Supervisor approached the Claimant, not with instructions on his work but with questions on remarks exchanged between the two at

the conclusion of the previous day's work, (which incidentally the Hearing Officer adamantly attempted to keep out of the record). When the Supervisor's question:

> "What did you say to me yesterday? You going to be man enough to say it or are you going to act like a woman."

did not provoke a response, instructions where given to Claimant to move a truck of a car he and his partner were working on so that a wheel inspection could be made. (Incidentally the car was not in the shop for wheels). These instructions generated additional conversation concerning the necessity of moving a different car to clear the work area and placement of a horse under the car that was being worked on as a safety precaution. While this conversation was going on, Claimant's partner, working on the other side of the car, perceived that the Supervisor was provoking an incident, moved the wheels so that they could be inspected. The whole incident was over with in a matter of seconds.

In our judgment, the situation was not a matter of failure to comply with instructions. It most certainly didn't develop into insubordination. The Claimant was in the process of complying with the request but expressed a desire to exert more safety precautions than the Supervisor, in his present state of mind, believed were required. There is no testimony in the record suggesting that Claimant's safety concerns were not justified or that they were a ploy to avoid following instructions.

The second aspect of the charge was "threatening conduct." Careful study of the Investigation transcript fails to develop any evidence that threatening conduct obtained in the incident under review. A expletive, "Cut out the B___S___," by itself is not threatening conduct, especially in the context in which it was made in this instance.

The Supervisor testified that a threatening gesture was made and that he felt threatened. This was denied by Claimant and his partner testified that he did not see any threatening gestures or hear any threatening remarks. Accordingly, the record does not support a finding that threats were made. Moreover, the Supervisor's contemporary conduct was not that of an individual who felt that he was being threatened by a subordinate assigned under his direction.

The flawed Investigation and the evidence on the charges do not support assessment of discipline. Accordingly, all reference to the matter must be removed from Claimant's service record and he shall be paid for all wage losses sustained including the time held out of service pending the Hearing.

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 24th day of July 1991.