

The Second Division consisted of the regular members and in addition Referee Robert O. Harris when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ Division of TCU
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(Union Pacific Railroad Company

STATEMENT OF CLAIM:

1. That the Union Pacific Railroad Company (hereinafter "carrier") violated Rule 31 of the Controlling Agreement between Transportation Communications International Union and Missouri Pacific Railroad Company (Union Pacific System) (revised September 1, 1981) on June 2, 1989, when it suspended carman Carl Hickerson (hereinafter claimant) for thirty (30) days on account of alleged violation of the Blue Flag Rule 4026.

2. That the carrier violated Rule 31 by failing to apprise claimant of the precise charge against him prior to the investigation; violated rule 31(f) by failing to furnish to the union, before the investigation, copies of all documents proposed to be used at the investigation; violated Rule 31 in failing to afford claimant a fair and impartial investigation; violated Rule 31 in refusing to allow the union to tape record the investigation; and violated Rule 31 because the evidence brought forward in the investigation showed no rule violation by the claimant, no substantial evidence supported the assessment of any penalty by the carrier, and no imposition or discipline of any kind was justified.

3. That accordingly, the carrier be ordered to clear the record of claimant Carl Hickerson of the above charges; that he be allowed compensation for 30 days and all other time lost as a result of his unjust suspension; that he be made whole for vacation rights; loss of health and insurance benefits, pension benefits including Railroad Retirement and unemployment insurance, and any other benefit of employment he would have earned during the period of his unjust suspensions; and that the carrier allow claimant an additional amount of 6% annum compounded annually on the anniversary date of the claim.

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 working as a car inspector on April 23, 1989, and was alleged to have violated blue flag rules by beginning to inspect a group of cars prior to being informed that the other end of the cars had also been blue flagged. On June 2, 1989, Claimant was assessed a thirty-day deferred suspension.

Before discussing the merits of this dispute, it is necessary to rule on several procedural objections which were raised by both parties. The Organization alleges that Rule 31 was violated in that precise charges were not set forth in the notice of Hearing; that not all documents were furnished to the Organization prior to the Hearing, and that the Carrier refused to allow the Organization to tape record the Hearing to check the transcription which was made by the Carrier. The Carrier alleges that since the Claim asks for compensation for the time lost by Claimant and since no time was lost as the suspension was deferred, the Claim is defective.

The charge against Claimant was,

"... your responsibility, if any, in connection with your alleged violation of Rule 4026 of Safety, Radio and General Rules for all Employees, while working as Carman at Lesperance Street Yard approximately 3:15 PM, April 23, 1989."

These charges were specific enough to allow Claimant to defend himself and he so admitted at the Hearing.

The Organization asked for copies of several exhibits which were to be used at the Hearing. All except two were furnished. One exhibit, the Car Foreman's Audit Report had been handed to Claimant on April 23. The second, a written summary, by the Car Foreman, of the events in question was not furnished. However, the Organization never asked to inspect it, which is all that is required by Rule 31(f). Clearly, the Organization did not avail itself of the rights it already had and it cannot now complain about its own failures.

Finally, the Organization wanted to tape record the Hearing in order to check the reported version of the Hearing. The Organization did not cite a contractual provision which gives it such a right and Award 25 of PLB No. 4599 involving the same parties did not find that the Organization had such a right under a similar request. This Claim of procedural error must also be denied.

The Carrier contends that the Claim before this Board asks for a remedy which is not appropriate since the suspension was deferred instead of actual. The Claim is that Rule 31 was violated, that a fair Hearing was not given Claimant, because Claimant did not violate Blue Flag Rule 4026. Carrier was not misled by the Statement of Claim. It is for this Board to determine whether the penalty assessed was appropriate and Carrier's procedural objection is without merit.

The facts are really not in dispute. Despite testimony which was contradictory by one witness, both the Foreman and Claimant agreed on the basic facts. Claimant was to begin car inspection after he was notified that the far end of the track was blue flagged. The only matter in dispute was whether Claimant was actually inspecting the cars before he knew that a blue flag had been placed at the south end of the train.


While Claimant denied he had begun inspecting the train, both the Foreman's contemporaneous statement and his Audit Report indicated that he had. Since Claimant did not protest the Audit Report when it was handed to him, the Carrier determination of credibility cannot be overturned. Accordingly, the facts as found by the Carrier must be considered to be correct. If that is true, then the assessed penalty should not be overturned. The Claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of January 1992.