Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12320
SECOND DIVISION Docket No. 12261-I
92-2-91-2-59

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

PARTIES TO DISPUTE: (John M. Hamlin
(
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

1. That, under the current and controlling agreement, I, Electrical Railroader, John M. Hamlin, S.S. No. 007-54-2264, was unjustly dismissed from service on September 4, 1990, following an investigation/hearing held on date of August 23, 1990. An appeal conference was held with the Director of Labor Relations, Mr. R. E. Dinsmore, on date of November 15, 1990. The appeal was denied on date of November 28, 1990, as I could not agree to his offer to reduce the dismissal to a six (6) month suspension, on a leniency basis, as full and final settlement of this case.

2. That, accordingly, I, Electrical Railroader, John M. Hamlin, be restored to service with Guilford Transportation Industries, be made whole for all lost time, with seniority rights, vacation, health and welfare, hospital, life and dental insurance, all unimpaired. Be paid effective, September 4, 1990, the payment of ten percent (10%) interest rate be added thereto and my personal record expunged of any reference to this dismissal from service.

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 employed as an Electrical Railroader in Carrier's Waterville, ME shops, where he had been employed for 16 years. On July 6, 1990, Claimant had been asked to bring Unit #66 across the turntable and into

the shop. During this move, Engine #66 came off the track and its draw bar went through the engine house wall. On July 9, 1990, Carrier issued Claimant with a notice of Hearing for July 9, 1990, charging him with negligence in the performance of duty while operating a locomotive. The Hearing was rescheduled and eventually held on August 23, 1990. At the Hearing the Claimant was represented by the International Brotherhood of Firemen & Oilers (IBFO). Following the Hearing, the Carrier dismissed Claimant for negligence in the performance of duty. Following an appeal conference held on November 15, 1990, Carrier offered to reduce its dismissal to a six-month suspension, on a leniency basis, in full and final settlement of the grievance. On December 11, 1990, the Claimant refused this offer and filed an appeal with the Board seeking final adjudication.

Claimant's position is that the Investigation Hearing held on August 23, 1990, was not a fair Hearing as required by the terms of the controlling Agreement and that the Carrier's action in dismissing him was unjust, arbitrary, and capricious. In support of his contention that the Hearing was unfair, Claimant cites Rule 31(a), entitled "Discipline." He also states that the charging officer in this case, should not have been allowed to remain at the Hearing following his giving of testimony (i.e., before other witnesses for the Carrier testified). With respect to the merits of the case, Claimant's position is that Engine #66 failed on the date in question because of debris in the air line and not because of his negligence.

The Carrier's position is that the Claimant testified that he had been properly notified of his Hearing, that he was afforded the opportunity to have representation and was represented, and that he was willing to proceed. The Carrier states that Claimant objected that the Hearing had not been held in accord with the Maine Central Firemen & Oilers' (MEC/F&O) Agreement, but indicates that only the Springfield Terminal/UTU Agreement was in effect on this property at the time in question and cites portions of the "Discipline" clause of that contract to counter the Claimant's procedural objections to the Hearing. With respect to the merits of the case, the Carrier regards the Claimant's position on debris in the airline as speculation and that the post-accident Investigation on the property, plus the testimony at the Hearing, reveal negligence on the Claimant's part.

The Board has examined the entire record, including the transcript of the Hearing, and all of the arbitration awards cited by both parties in support of their positions. The Carrier gave evidence to show that Claimant had had 19 accidents between 1974 and 1989 and that in November 1989, following a Hearing conducted on November 1, 1989, and a review of injuries sustained by him on the fuel stand, he had been restricted to duties inside the engine house rather than on the service track.

The Carrier stated that the Second Division did not have jurisdiction of this dispute because, among other reasons, Claimant was doing hostler work on the date of the incident that gave rise to this dispute and that this case should be under the jurisdiction of the First Division. The Carrier also stated that because the Claimant had cited Rule 31(a) for the first time at the time of his Submission to the Board, and because Rule 31(a) does not exist, this case should be dismissed.

Jurisdictional questions may be raised at anytime. See Third Division Awards 27575 and 26953. However, this employee is classified as an Electrical Railroader, which classification falls under the jurisdiction of the Second Division. Moreover, there is nothing in the record challenging the accuracy of this classification. The Board therefore finds that the case at bar falls under the jurisdiction of the Second Division.

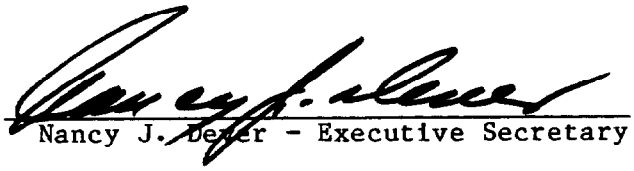
Even if we assume that Rule 31(a) does not exist, and even if we acknowledge that it was brought up for the first time in the Claimant's appeal to the Board and thus may not be considered, the Board will not dismiss this case on this basis. The gist of Claimant's argument, as made on the property and in his appeal, is that he was denied a fair Hearing, and this contention must be addressed by the Board. In this connection, this Board finds no procedural impropriety either with the notification process or the actual conduct of the Hearing and therefore dismisses the unfair Hearing contention on the ground that it is not supported by evidence of record.

The Board also finds, based on the evidence of record, that the Carrier met its burden of proof and finds that the Claimant was guilty of negligence for the accident that took place. In short, the facts brought forth by the Carrier outweigh the speculation offered by the Claimant and his representative. That, coupled with the Claimant's prior record of accidents, was sufficient to support the Carrier's decision to discharge the Claimant. That the Carrier had made an "offer of settlement" after the discharge in order to avoid further proceedings cannot be viewed as the Carrier's acknowledging that it had made an error in judgment either in its evaluation of the Claimant's negligence as the precipitating factor in causing the accident or in its choice of discipline. We accordingly affirm the discharge action.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of May 1992.

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
SECOND DIVISION AWARD 12320, DOCKET 12261-I
(Referee Fibish)

We fully concur with the Findings insofar as the Award upheld Carrier's right to dismiss Claimant for running an engine through a wall while working as a Hostler, but we protest the Majority's Findings that the Second Division has the authority to resolve a dispute involving an employee who was hostling engines at the time of the incident and who was, likewise, identified as a hostler during the on-property handling.
Seizing upon a title to justify jurisdiction, flies in the face of previous authority flowing from various Divisions of the Board.

The Carrier refers to all of its employees as "railroaders." In First Division Award 24019, Carrier challenged the the jurisdiction of the First Division to adjudicate a dispute involving an employee titled "Railroader" who, at the time of the incident, was running an engine. It was stated therein:

> "...Regardless of what Carrier elects to call its employees, the fact remains that claimant was working as an Engineer and, consequently, the claim was appropriately advanced to the First Division...."

In Third Division Awards 28726, 28727, 28767, 28768, 28791, 28816, 28872, and 28873, Carrier challenged the jurisdiction of the Third Division to adjudicate claims involving employees titled "Railroaders." In all but one case, the Third Division accepted jurisdiction affirming the Findings as stated in First Division Award 24019.

Third Division Award 28767 is typical. Therein the Board held:

> "...regardless of what Carrier elects to call its employees, the fact remains, and the record of this case supports, that claimant was employed as a maintenance-of-way man at the time of the incident here involved...." (Underscoring added.)

In Third Division Award 28872, the Majority was unable to determine the class or craft of the Claimant and, therefore, properly refused to accept jurisdiction.

Section 153, First (h) of the Railway Labor Act provides:

> "...First Division: To have jurisdiction over disputes involving train and yard service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers..." (Underscoring added.)

Titles are immaterial. Organization representation is immaterial. When jurisdiction is challenged, the only determination to be made is what capacity the Claimant was employed in at the time of the incident. If a Roundhouse Laborer, who was qualified as a Hostler, was working as a Hostler on the date of the incident, and was identified in the on-property handling as a Hostler, then he must have been a Hostler. Only the First Division, pursuant to the Railway Labor Act, has jurisdiction to resolve disputes involving Hostlers.

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