Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12323
SECOND DIVISION Docket No. 12289
92-3-91-2-81

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

PARTIES TO DISPUTE: (International Brotherhood of Firemen and Oilers
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

1. That under the current and controlling Agreement Laborer R. W. Mock, I.D. No. 174017, was unjustly suspended from service of the CSX Transportation, Inc., on March 12, 1990, through March 16, 1990, both dates inclusive, by Mr. J. W. Wheeler, Plant Manager, Locomotive Running Repair, after an investigation was held on February 27, 1990, conducted by Mr. C.W. Delettre, Plant Manager-Administration.

2. That accordingly, Laborer R.W. Mock be compensated for five (5) work days at the pro rata rate of pay and any overtime Laborer Mock was deprived and stood available to protect during the above listed days and his personal record expunged of any reference to this suspension 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.

On January 2, 1990, Claimant was operating Units 5541 and 2159 as a Hostler at Carrier's Waycross, Ga. facility. The Claimant and his ground man had received instructions from their Foreman to move two engines beyond the east end of Track T51 onto the T50 lead in order to allow Unit 3257, being operated by another Electrician as a Hostler, and his ground man, to follow to the east end of Track T51 and return westbound to Track T50 to the Service Center. Without elaborating on all the details involved in the execution of this maneuver, at one point the Claimant began moving his two units westbound which resulted in a hard coupling of these two units into Unit 3257 and which also resulted in a personal injury to the Hostler in Unit 3257.

On January 10, 1990, the Carrier charged the Claimant with violation of portions of both Rule 1 and Rule 12-A of the Safety Handbook and set a Hearing for January 16, 1990, to ascertain the facts and responsibility for the injury. After two postponements of the Hearing it was held on February 27, 1990.

On March 8, 1990, a five-day suspension was assessed Claimant. On March 21, 1990, the Carrier agreed to the Organization's request for an amendment of a portion of the Claimant's testimony at the Hearing, to wit, that the words "I thought" be deleted from the following sentence, "At that time, I seen, I thought a signal . . . ." and the record of the Hearing was so amended. On March 28, 1990, the Organization appealed the Carrier's assessment of the five-day suspension to the General Plant Manager, which appeal was denied. Following further appeal of this disciplinary suspension on the property up to and including the highest Carrier representative designated to hear such appeal, the Organization filed an appeal with the Board.

The Organization's position is that the Claimant was denied a fair and impartial Investigation and that the Carrier has not sufficiently satisfied the burden of proof in this case. The Organization contends that Carrier's Rule 12-A stipulates that both the Hostler and the Hostler Helper were jointly responsible for the movement of the locomotives in question and that, for the Carrier to charge only the Hostler and not the Hostler Helper, manifests a predetermination of the guilt of Claimant by the Carrier. The Organization cites the conflicting evidence given by the Claimant and his Hostler Helper at the Hearing about whether the Hostler Helper did or did not give the Claimant a signal to move the units, which movement resulted in the injury to another employee, and states that conflicting testimony is not a preponderance of creditable evidence needed to assess discipline.

The portion of Rule 1 and the portion of Rule 12-A which were cited in the charge against Claimant and which were subsequently cited by both parties in the record on the property are:

> "Rule 1: Employees must exercise care to avoid injury to themselves or others."
>
> Rule 12-A: When movement is being controlled by hand signals, employees in train and engine service, yard service or others concerned must keep a constant lookout for signals.

> Hand signals must be given in such a way that they cannot be misunderstood. If there is any doubt as to either the meaning or the intended receiver of the signal, the signal must be regarded as a stop signal.
>
> Hand signals to the engineer must be given to correspond with the direction in which the engine is headed."

The Carrier denies that the Claimant did not receive a fair and impartial Hearing and states that, based on the evidence brought out at the Hearing, the Claimant was properly found to be at fault. It further states that the discipline assessed was not excessive, in light of the serious nature of the incident, which resulted in an injury (strained back) to a fellow employee which, at the time of the Hearing in this case at bar, had already cost that employee 41 days of lost time.

The Board has reviewed the entire file, including the testimony of the Hearing and the supporting arbitration decisions cited by both parties. With respect to the Organization's first claim, that the Claimant did not receive a fair and impartial Hearing and that, in charging only the Claimant and not the Hostler Helper, the Carrier was "prejudging" the Claimant, the Board finds this contention to be without merit. The charging officer testified that he had inspected the area of the accident, and reviewed the accident report submitted by the injured employee the day after the accident, and that he had charged the Claimant because he was operating the units involved in the coupling to Unit No. 3257. The fact that the Claimant was charged, but not his Hostler Helper, does not, in and of itself, constitute prejudgment. The Hearing was held to ascertain what responsibility the Claimant had, if any, for the accident. Nor is there anything in the record of the Hearing to suggest that the conduct of the Hearing was not fair or impartial.

The Organization's second major point that the Carrier had not adduced sufficient probative evidence to find the Claimant guilty hinges on the conflicting evidence given by the Claimant and the Hostler Helper at the Hearing as to whether the Hostler Helper had or had not given the Claimant the signal to proceed westbound. The Claimant stated that his Hostler Helper had given him a signal to proceed; the Hostler Helper said he had not. As has been established in various decisions of the Board involving disciplinary proceedings, the Board cannot and will not weigh conflicting evidence, attempt to resolve conflicting evidence, or reverse a finding merely because of the presence of contradictory testimony. See Third Division Awards 19493, 19696, PLB No. 2917, Award 5; Second Division Award 4981; and First Division Award 16848.

The Organization contended, in its appeal on the property, that the Carrier has the responsibility to prove "without a doubt" the charges placed against the Claimant. However, several Board Awards have established that substantial evidence or a preponderance of evidence is all that is required

to sustain the Carrier's decision. See Third Division Awards 24637, 24593. Also, unless there has been a demonstrated abuse of discretion on the Carrier's part this Board will not set aside the Carrier's finding in disciplinary matters. At any rate, the Board finds that the Carrier met its burden of proof.

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 12323, DOCKET 12289
(Referee Fibish)

We fully concur in the Majority's Findings that Carrier's act of discipline in this dispute was warranted. We do however, protest the Second Division accepting jurisdiction in this case and remaining mute as to Carrier's jurisdictional argument.

From the Findings, it is clear that Claimant was moving engines, that the Majority readily identifies Claimant as a Hostler and that he was working with a Hostler helper. If Claimant is qualified as a Hostler, is identified as a Hostler, and is working as a Hostler, then he must be a Hostler.

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.)

Regardless of titles, regardless of representation, jurisdiction is determined as stated in First Division Award 24019 and affirmed in Third Division Awards 28726, 28727, 28767, 28768, 28791, 28816, 28873.

Note Third Division Award 28767:

> "...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.)

The First Division of the Board is the only division that has the statutory right to adjudicate Hostler claims.

Jurisdiction should never have been accepted. To that aspect, we do dissent.

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R. L. Hicks

M W Fingerhut
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P V Varga
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James E. Yost
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