NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 SECOND DIVISION Award No. 12689
Docket No. 12632
94-2-92-2-183

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers
(
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"1. That in violation of the governing Agreement, Mechanical Department Electrician G.J. Perez of Tulsa, Oklahoma was unjustly suspended from service of the Burlington Northern Railroad Company for a period of 5 days following an unfair investigation held on April 4, 1991.

2. That the investigation was held on April 4, 1991 was not a fair and impartial investigation as required by Rule 35 of the governing Agreement, and that the discipline assessed was unjust and unwarranted and should be set aside.

3. That accordingly, the Burlington Northern Railroad should be directed to compensate Electrician G.J. Perez for the 5 days of wages lost during his unfair suspension and to restore all rights, benefits and privileges of which he has been deprived in addition to removing the entry of investigation and discipline from his personal record."

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 employe 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 March 12, 1991, Claimant was employed as an Electrician at Carrier's mechanical facility in Tulsa, Oklahoma. On this date the Federal Railroad Administration (FRA) was conducting an inspection of the mechanical facility. Carrier's Diesel Shop Supervisor and an FRA Inspector were looking over the locomotive consist for Train 176, which had been built and tested on the east house track. A defect was found in the lead unit of the consist and Claimant was instructed to disconnect the MU cable between the lead unit and unit BN-7086 so that the lead unit could be removed and a replacement unit coupled to the consist. Claimant disconnected the MU cable and draped it over the lift pin of unit 7086. Shortly thereafter, a second FRA inspector drove by unit 7086 and noticed the placement of the MU cable. As a result, Carrier was cited by the FRA for violation of CFR 49 229.89.

Claimant was notified to appear at an investigation and hearing scheduled for March 27, which was postponed by agreement of the parties and rescheduled by Carrier for April 4. As a result of the investigation, Claimant was found guilty of violating safety rule #576 of Carrier's safety and General Rules and assessed an actual suspension of five (5) days. Rule #576 reads, as follows:

> "Employees must comply with instruction from proper authority."

The Organization seeks to have the discipline of Claimant set aside on several grounds. First, the Organization argues that its Local Chairman agreed to postpone the investigation and suggested two dates for rescheduling the investigation. Carrier selected neither date and instead rescheduled the investigation for April 4, 1991. The Organization contends that the parties must agree to the date upon which a postponed investigation is rescheduled and that Carrier violated Rule 35 of the Agreement which states:

> "Section A - The date for holding an investigation may be postponed if mutually agreed upon by the Carrier and the employee of his duly authorized representative. . ."

We believe that the above rule requires mutual agreement for postponement of the investigation, but the rule makes no such requirement for mutual agreement on the date for the rescheduled investigation. In the same manner that Carrier unilaterally sets the initial date for an investigation, it may also set the date for a rescheduled investigation, subject to another request for postponement by the Organization if the date is not convenient to them. In the instant case, the Local Chairman made no request for an additional postponement and the Local Chairman was, in fact, present for the investigation on April 4. Under the circumstances,

there was no violation of Rule 35 simply because Carrier did not select one of the Local Chairman's preferred dates.

The Organization also contends that Claimant was denied a fair and impartial investigation because two witnesses he had requested to be present did not attend the investigation, thereby denying Claimant his right to fully defend himself. The record shows that one of the requested witnesses was hospitalized on the date of the investigation and the other witness was attending a probation hearing. While the Organization objected at the outset of the investigation to the fact that these witnesses were not present, no request was made at that time or prior to the conclusion of the investigation for a continuance to allow these witnesses to testify; nor did the Organization show that these witnesses had first hand knowledge of the events leading up to the incident. We find that the failure of these witnesses to be present at the investigation did not prevent Claimant from receiving a fair and impartial investigation.

As to the merits, it is the Organization's position that Claimant did not violate either Carrier's rules or FRA regulations. The Organization contends that although Claimant draped the MU cable over the lift pin, he remained with the unit to protect the cable until the replacement unit was coupled to the consist and the MU cable was reconnected. The Organization argues that the FRA was incorrect in citing Carrier for a violation of FRA regulations and that Carrier erred in not challenging the FRA's citation. This Board is not empowered to interpret or enforce State or Federal regulations. Our authority is limited to interpreting or applying agreements between Carriers and their employees. (Second Division Awards 11628, 7434, 6462; Third Division Awards 24348, 20368, 19790.)

Finally, the Organization contends that Carrier's supervisors have given instructions to its employees which allowed an exception to Carrier's written rules. Witnesses testified that supervisors had told employees that when one unit was being switched out and immediately replaced with another unit, it was not necessary to place the end of the MU cable into a dummy receptacle, as long as the employee remained at the unit to guard the cable. This, they argue, had been discussed with Carrier supervisors and was an accepted practice. While Carrier does not deny that some of its supervisors may have permitted this practice, it argues that its current Mechanical Foreman at the Tulsa facility had verbally instructed electricians to either remove MU cables when not in use or to connect them to the dummy receptacle, thereby superseding any previous supervisory instructions to the contrary. The Board notes that on March 20, 1991, eight days following the FRA citation, Carrier's General Foreman, Mechanical issued a letter "To Whom It

May Concern" stating that all so-called hip pocket agreements and instructions from present or past supervisors which are not in compliance with F.R.A. regulations or BN standards are null and void and that Tulsa diesel shop employees will comply with any and all of these regulations and standards.

Claimant was charged with failing to secure the MU jumper cable on Locomotive BN 7086, resulting in an F.R.A. Defect Violation. The Board must conclude from the record that sufficient testimony was entered into the investigation record, including Claimant's own testimony, to support Carrier's finding that Claimant did not secure the MU cable in a dummy receptacle or remove the cable from the unit, but instead draped the cable over the lift pin.

Finally, the Board must determine whether Carrier's assessment of a five day actual suspension was reasonable. Claimant had been employed by Carrier for fourteen years and the record discloses no previous disciplinary entries on his personal record during that time. There is ample testimony in the record to conclude that one or more of Carrier's supervisors have in the past condoned the handling of MU cables in the manner which Claimant did in this case. We believe Carrier recognized this and acted responsibly in issuing the March 20, 1991, notice to employees that these types of hip pocket agreements, which did not comply with Federal regulations or BN standards were null and void. This properly put all employees on notice that in the future compliance with all regulations and standards would be required, notwithstanding any prior supervisory instructions to the contrary. The Board believes that Claimant was entitled to the same notice as his fellow employees before being subjected to a disciplinary suspension. This Board held in Second Division Award 1178:

> "This Board has therefore stated that it hesitates to interfere in cases of discipline; however, we do not find, considering all the facts and circumstances in connection with this case that the discipline was just and reasonable."

Under the circumstances involved in this case, the Board must conclude that Carrier's assessment of five day actual suspension was unreasonable and excessive and it will therefore be reduced to a written warning. That portion of the Claim requesting lost wages during the five days in which Claimant was suspended is sustained; the balance of the Claim is denied.

A W A R D

Claim sustained in accordance with Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 20th day of April 1994.