

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13561

Docket No. 13462

00-2-99-2-61

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(International Brotherhood of Electrical Workers
(System Council No. 16)**
PARTIES TO DISPUTE: (
**(Burlington Northern Santa Fe Railway Company
((former Burlington Northern Railroad)**

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, Rule 35 in particular, Electrician Richard Glassburn was unjustly levied a Level 1 formal reprimand by the Burlington/Santa Fe Railroad Company following an investigation held on January 5, 1998.**
- 2. That the issuance of the Level 1 formal reprimand was unjust and unwarranted; and**
- 3. That, accordingly, the Burlington Northern/Santa Fe Railroad Company should be directed to set aside such discipline and remove all record of it from Electrician Glassburn’s personal file.”**

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The Claimant was cited for failing to show up for an overtime assignment and later engaging his supervisor in a truculent discussion about the incident. Following the usual Investigation and Hearing, he was found guilty of the charges and assessed a Level 1 formal reprimand.

In this timely appeal from that action, the Organization first argues that the Claimant was deprived of a fair and impartial Hearing, rendering the subsequent discipline unjust and invalid. With respect to that contention, it cites primarily the Carrier's failure to summon the individual who actually did the overtime calling on the date in question.

Upon review of the record, we conclude that the absence of the overtime caller did not interfere with the Claimant's right to the "fair and impartial Investigation" guaranteed by Rule 35. The Hearing transcript on balance reveals proper notice, a through, competent and even-handed Hearing Officer and generous time afforded to the Claimant and his representatives to present evidence of their choosing and cross-examine the Carrier's witnesses in the process of making their case. While the Carrier unquestionably is required to summon those witnesses who are critical to its burden of proof, given the issue at the heart of the dispute it appears clear that the caller was not a crucial witness since he was considerably removed from the important questions and would not have been in a position to contribute anything of a dispositive nature. Lastly, had the Organization thought otherwise, it had the well established right to secure the attendance of this witness itself if it thought the witness would have been beneficial to its case.

With respect to the merits, the Organization emphasizes that the Claimant's testimony is at odds with General Foreman Ben Gavne's account of this exchange - that Gavne kept after the Claimant, "rattling on," until finally the Claimant told him, "You keep it up with me, I will not come in at all." The Organization further stresses that names have appeared by mistake on the overtime calling list in the past, and the signature on the list on the day at issue was not that of the Claimant but of the overtime caller.

The record reflects that the Carrier's overtime signup sheet reflected the Claimant's name as indicating he would come in for an eight hour shift commencing at 7:30 A.M. on Sunday, December 20, 1997, a period of heavy overtime use going into the

holidays. After he had neither appeared nor called in by 10:00 A.M., Foreman Gavne began to track him down, ultimately connecting with him by phone at a local Hardee's restaurant. Gavne says he asked him why he had not come to work at 7:30 A.M., and the Claimant indicated that he was on his way. Gavne repeated the question, and the Claimant replied, "If you're gonna give me shit, I won't come in at all." When Gavne pressed the question, the Claimant hung up.

With respect to the marginal differences in the parties' versions of the key telephone discussion, the Board is bound by the Carrier's credibility determination that Gavne's account is the more reliable. With respect to the possibility that the call list may have mistakenly reflected the Claimant's name, while that argument is well grounded, it is off target. The gravamen of the Carrier's charge is that the Claimant did not raise that possibility in his telephone conversation with Gavne but instead simply refused to explain his failure to show up at 7:30 A.M., told Gavne not to "give me any shit," and hung up on him. Under those circumstances, that the call list is not necessarily always accurate; that he never signed up for eight hours; and that he was not in the habit of working eight hours are all basically irrelevant to the question of whether the Claimant was uncivil in his dealings with Gavne on the morning of December 20, 1997.

Based upon consideration of the record as a whole, the Board concludes that the Claimant was quarrelsome and discourteous in his discussion with his supervisor. The reprimand issued as a result was not arbitrary or capricious and must be upheld.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 27th day of October, 2000.

Labor Member Dissent

To

Award Number 13561

Docket Number 13462

Referee James E. Conway

The majority completely ignored the facts presented in this case. As in any formal investigatory proceedings, the Carrier, as the charging party, bears the burden of proof. However, in this dispute Referee Conway completely disregarded the facts of the record and instead chose to rule based solely on what Referee Conway determined to be the narrow and restricted thought that:

...

"...The Board is bound by the Carrier's credibility determination."

...

The facts were that the Claimant was not scheduled to come in on overtime at 7:30 a.m. on the date in question. The Claimant stated for the record that it was the rare exception, rather than the rule for him to work a full eight (8) hour overtime shift. It was the overtime caller who made a mistake and placed the Claimant on a list to work a full shift. It is obvious that if the claimant were untruthful in his answers in regard to his previous overtime shifts, the Carrier would have exposed it. The Carrier, as the keeper of the records, would have these facts available to them.

Whether the call list is incorrect, whether the claimant signed up for eight (8) hours overtime or whether the Claimant was in the habit of working an eight (8) hour overtime shift are not irrelevant as the Majorities erroneous decision reveals.

At the time of the phone conversation between Foreman Gavne and the Claimant, a third of the eight (8) hour overtime shift had elapsed. When questioned by Foreman Gavne as to why he was not at work at 7:30 a.m., the Claimant advised Foreman Gavne that he was on his way into work.

However, the record is clear, Foreman Gavne was a man on a mission and his mission was a demand that the Claimant explain his alleged absence for duty, obviously a conversation that should have taken place at a later time. It is just as obvious that Foreman Gavne was confrontational in his questioning. Instead of being relieved that the position was going to be filled and the work accomplished during this heavy overtime holiday season, Foreman Gavne is not satisfied, and demands an answer to a question that at that point was moot. Foreman Gavne was more concerned with why the Claimant was not already there rather than if he was coming in at all.

In the final analysis, the Board ruled that everything in the record was “. . . irrelevant to the question of whether the Claimant was uncivil in his dealings with Gavne. . .”

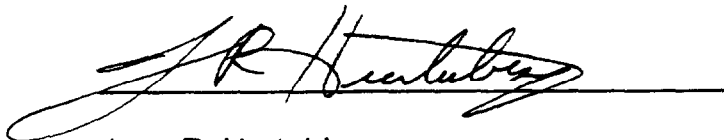
The Carrier has not shown, through a preponderance of evidence elicited at the investigation, that the claimant was guilty of the charges levied against him. The Claimant did admit that he told Foreman Gavne that “if you keep it up, I won’t come in at all”, and that he did hang the phone up on Foreman Gavne. As far as the Claimant knew, and as the record clearly reveals, the Claimant was not late for work. The Claimant had stopped at a local restaurant on his way into work when he received the confrontational call from

Foreman Gavne. While the Carrier may wish to extend its coverage and influence over its employees while they are off of duty and off of Carrier property, the fact is that this attitude is not Agreement supported in that there are no "subject to call provisions" applicable to the claimant. While one hopes that everyone is courteous in their dealings with one another. In the instant case, it was Foreman Gavne who set the tone of the conversation with his first demanding question.

The question before the Board was straight forward and the facts were clear, however it is apparent that this Board took the path of least resistance. It ignored the facts of the record and has attempted to extend the Carrier's alleged rights and jurisdiction into the personal private time of its employees.

Based on the foregoing, Second Division Award Number 13561 is erroneous and holds no precedential value whatsoever.

I dissent

A handwritten signature in black ink, appearing to read "JR Hurtubise", written over a horizontal line.

Jean R. Hurtubise