

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13565

Docket No. 13475

00-2-99-2-76

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

**(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of Employee:

- 1. Consolidated Rail Corporation (Conrail) arbitrarily and capriciously dismissed Machinist H. C. Dorsey, following trial held on February 18, 1999. Subsequently, Conrail modified the discipline assessed Machinist H. C. Dorsey to time held out of service to apply as actual suspension.**
- 2. Accordingly, Machinist H. C. Dorsey should have his record cleared of any reference to the charges, as if the unjust discipline had not been imposed, be credited for any and all fringe benefits that would have accrued and be paid all time lost, including overtime, commencing from January 28, 1999 up to and including May 19, 1999.”**

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.

At the time of the incident leading to the discipline under appeal, Machinist Dorsey had been employed approximately 23 years and was working at the Carrier's Sterling Yard on the Dearborn, Michigan, Division. On January 26, 1999, while visiting Sterling Yard around noontime, FRA Inspector J. S. Yeager witnessed him working on Conrail Locomotive 1687 with the switch on the south end of the track unlocked and no blue flag protection being displayed. After speaking with the Claimant to confirm that he was in fact servicing an engine in violation of Blue Flag regulations, Yeager prepared a report citing him for the infraction. The Carrier immediately withheld the Claimant from service and following Investigation and Hearing dismissed him on March 17, 1999. On May 6, 1999, that action was converted to an actual suspension consisting of the approximately three months he had been held out of service.

By letter dated May 28, 1999 the Organization took exception to the Carrier's modification of the penalty and signaled its intention to progress the issue to arbitration. In this claim, it initially asserts several procedural arguments: that proper notice was not given; that the Claimant was denied a fair trial because the Carrier refused to provide the FRA report upon which the charges were based prior to trial; and that the Claimant was deprived of his right of cross-examination as a result of Yeager's inability to attend the Hearing. On the merits, the Organization argues that no evidence was produced to support the charges that Yeager observed the Claimant engage in any unsafe practices. Finally, it maintains that assuming the Carrier has met its burden of proof, the discipline imposed was excessive.

With regard to the issue of notice, Rule 6-A-3 (a) requires the Carrier to provide "reasonable advance notice, in writing" of the exact offense involved. The record reveals that the Carrier sent a certified letter to the Claimant on January 29, 1999 specifying the charges in detail and notifying him of the time and date scheduled for his Hearing. Although the Claimant did not pick up this notification, he did appear at the Hearing. The Board concludes that the record demonstrates neither any failure on the Carrier's part to comply with its obligations nor any prejudice to the Claimant resulting from non-delivery of the notice sent.

The Carrier's failure to supply the FRA's report in this instance prior to trial raises an issue addressed repeatedly over the years in rail cases involving this and other carriers. The principle distilled from those awards is succinctly stated in Award 10 of Public Law Board No. 2037 (Seidenberg):

"The board finds no valid basis for the organization to insist that it receive all carrier pre-investigation statements. There are no rules of discovery in arbitration proceedings as there are in the federal courts, and absent a special contract provision to that effect, the organization and the claimant have no legal or contractual right to 'see the contents of the carrier's desk.'"

Accordingly, while the Carrier's refusal to supply the document in question prior to trial may have fallen short of ideal, it did not abridge the Claimant's contractual rights and has not been shown to have interfered with his ability to mount an effective defense at trial.

Inspector Yeager did not appear at the Claimant's trial. While it is beyond question that the Carrier normally has the obligation to call material witnesses at the Investigation, in this case the Claimant's repeated admissions suggest that Yeager's appearance was not critical to establish the violation. His report indicates that the Claimant "worked on sanders on locomotive CR 1687 while switch on one end of track not locked and blue signal not displayed." The Claimant does not deny that he was the machinist approached by Yeager and referenced in his report and concedes the accuracy of the charge:

- "Q. Mr. Dorsey, do you have any idea why Mr. Yeager feels you violated the Blue Flag rule?
A. Yes.
Q. Could you tell us why, Mr. Dorsey?
A. Because he was letting me know that I wasn't supposed to do anything to the sanders unless both ends of the tracks were Blue Flagged.
Q. Mr. Dorsey, when Mr. Yeager approached you on this subject, did you have flags and locks on the south end of the track?
A. No, I just took them down. . . ."

Whether, in the face of that and other similar admissions, cross-examination of Yeager would have produced important exculpatory evidence is speculative at best. If, however, the Claimant believed Yeager's presence was imperative to his defense, as the well-established authority of this Division shows, it was his duty to take the initiative and produce him. Under the circumstances, the Board concludes the Claimant's right to a fair and impartial Hearing was not prejudiced by Yeager's absence.

Having dismissed the Organization's procedural arguments, the Board turns to the merits. Record evidence discloses that one month prior to this incident, in December 1988, the Claimant had attended a meeting at which the Rules governing the Blue Flag Rules and the importance of abiding by them were reviewed. Further, it is undisputed that in August 1998, the Claimant had received a 30-day suspension for failing to perform his duties as a Machinist. Accordingly, although a three month suspension is no laughing matter, we are unable to agree with the Organization that the discipline imposed was arbitrary and should be set aside.

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.