

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25118
Docket Number SG-25260

George S. Roukis, Referee

PARTIES TO DISPUTE: {
(Brotherhood of Railroad Signalmen
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Chicago and North Western Transportation Company:

(a) Carrier violated the current Signalmen's Agreement dated January 1, 1982, as amended, in that Mr. R. **Kulpa** charged Mr. R. **Haywood** with insubordination, as a foregone fact. Mr. **Crubaugh** the investigating officer on page 33 of **this investigation** tried to bring in the Carrier's book of General Regulations and Safety Rules, dated June 1, 1967. This is **another** violation of Rule 53 of **the current** agreement. This was not mentioned in the original charge notice, as Board Awards have held that they should be.

(b) Carrier now be required to remove said discipline from Mr. **Haywood's** record, and reimburse him for the 15 days **pay** he lost while being out of service. [General Chairman file: C&NW-G-AV-6, Carrier file: D-9-17-61]

OPINION OF BOARD: An investigation "as held on April 5, 1982 to determine whether Claimant "as insubordinate when he allegedly refused to carry out Signal Supervisor R. **Kulpa's** instructions on March 31, 1982. Based on the investigative record, Carrier concluded that Claimant failed to implement the instructions given to him at 7:00 A.M. on the aforesaid date which included bonding the fouling on the east side of the tracks at the **Searle** Avenue crossing, and he "as suspended from service for ten (10) days. Since Claimant had a previous five (5) days deferred assessed against his personal record, the instant suspension activated the deferred assessment and he served an actual fifteen (15) **days** suspension.

In defense of his petition, Claimant raises both procedural and substantive objections. Procedurally, he contends that the hearing officer did not conduct a fair and impartial investigation as evidenced by the type of questions posed to Carrier witnesses, and argues that the belated injection of a specific rule violation that **was** not referenced in the **Notice** of Investigation, de facto prejudiced his ability to prepare an intelligent and relevant defense. He contends that Supervisor **Kulpa** was harassing him for being an adverse witness in a matter involving another **employee** and avers implicitly that he "as inappropriately assigned to a maintainers position, notwithstanding his restriction to gang work. Moreover, he argues that he "as improperly removed from service prior to the investigation since he "as not a danger to Carrier's operations.

As to the substantive merits of the dispute, Claimant asserts that he did not perceive Supervisor **Kulpa's** instructions regarding the bonding at Searle Avenue as a direct order or as an explicit indication that it had exclusive work priority. He implies that he **was** performing work of an emergency nature **Jt Grayland**. By his own record testimony, he stated:

"He didn't give me any specific instructions. Even after I got off the phone, I even turned to the Assistant and said that I talked to Rich for fifteen minutes on the phone and I still don't understand him."
(Page 19 - Record Transcript)

He maintains that he would have performed the bonding work Later that day, but **was** prevented from **doing so** when he **was** removed from service.

Carrier contends that he **was** afforded an impartial investigation and **was adequately** informed as to the nature and focus of the hearing. In effect, it asserts that the Notice of Investigation clearly apprised him that his alleged **insubordination on March 18, 1982** would be the **subject** of investigation. It argues that the Agreement rule relating to investigation and discipline permits the employer to remove an **employee** from service pending investigation, and avers that his disregarding of the bonding instructions allowed an unsafe condition to exist. Carrier maintains that the record evidence **unmistakably** shows that he did not comply with Supervisor **Kulpa's** direct instructions and his behavior **was** a continuation of his past indifference to supervisory directives. It argues that **contrary to Claimant's assertion** that he **was** working to Correct an emergency situation at the **Grayland situs**, an emergency did not exist at **Grayland** and his sum total deportment **was** plainly insubordinate.

In our review of this case we concur with Carrier's position that he **was** provided an impartial investigation on April 5, 1982; and he **was** insubordinate on **March 31, 1982**. Careful analysis of the investigative record does not reveal that he was denied due process protections, **nor was** he disadvantaged when it **was** noted at the hearing that he violated Rule 7 of the **General Regulations** and Safety Rules. **This Carrier** rule relates to insubordinate conduct and the March 31, 1984 Notice of Investigation unequivocally noted that the hearing would center on determining his insubordinate actions. In fact, it specified his alleged failure to carry out his duties at Searle Avenue. Claimant **was** in no way precluded from conducting a thoughtful affirmative defense, **nor placed** in a precarious position.

Moreover, based on our assessment of the substantive arguments, we find that he **was** clearly insubordinate on March 31, 1982. The corroborative statements of Company witnesses D. Basile and R. Free, particularly **D. Basile's** testimony that he heard Supervisor **Kulpa** instruct Claimant that the first thing to do that morning before anything else, **was** the bonding at Searle Avenue, persuades us that an explicit order **was** given to him. Claimant had testified that he told his Assistant after the phone call with Supervisor **Kulpa** that he still did not understand Supervisor **Kulpa**, but this statement **was not further substantiated** Jt the hearing by the Assistant. This person, in fact, **JS** not called to testify Jt the investigation. When Claimant's testimony and account of his actions are weighed carefully against the record testimony of Supervisor **Kulpa** and the two other **Carrier** witnesses and this evidence is evaluated within the context of Claimant's past disciplinary record, **this** Board, of necessity, must conclude that he **was** insubordinate on **March 31, 1982**.

On the other hand, we are not convinced that his suspension prior to the investigative **hearing was** predicated upon defensible grounds since his continued presence did not pose **an** imminent danger to Carrier's rail operations or other employees. While Carrier has the right to remove **employees**, this right is not unrestricted and must be exercised with judgment and **balance**. It is not a license for peremptory removals. Accordingly, since we have found Claimant guilty of the insubordination **charge**, but we **have** found **Carrier's** removal action to be inconsistent with the intent and spirit of the Investigation and Discipline Rule, we will direct that his suspension from March 31, 1982 through April 4, 1982 be rescinded and **that** he be **made** whole for this time. The Board **will** uphold the **remainder** of the suspension. Claimant is warned **that** this Board **will not hesitate to affirm a disciplinary action taken for a** similar substantiated infraction.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and **all** the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, **as** approved June 21, 1934;

That this Division of the Adjustment Board **has** jurisdiction over the dispute involved herein; and

That the discipline **was** excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 9th **day** of November 1984.