NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20194
THIRD DIVISION Docket No. CL-20137

Irving T. Bergman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees of the Property of Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7267) that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of 21 days suspension on Claimant J. E. Desmore, Clerk at the 47th Street Trailer Van Terminal, Chicago, Ill., Chicago Division, Western Region.

(b) Claimant J. E. Desmore's record be cleared of the charges brought against him on October 12, 1971.

(c) Claimant J. E. Desmore be compensated for wage loss sustained during the period out of service, plus interest at the rate of 6% per annum compounded daily.

OPINION OF BOARD: Claimant had been in the Carrier's service nine years. On the date of the accident which gave rise to this matter, he had been assigned for four months to duties which included checking trailers and container locks and had been making inspections for four weeks. Claimant had inspected a container used for ocean shipments which was mounted on a chassis which in turn was on a flat car. Enroute from Chicago to Fort Wayne, Indiana, the container came loose from the chassis and blocked movements on an adjoining track. The Carrier's master mechanic when called to the scene of the accident concluded after investigation that the locking devices on three corners of the container were not secured so that the container worked loose from the chassis.

The Organization contended that the opinion of the master mechanic was not sufficient. The claimant testified that he had inspected, found the locks secured and so indicated on his inspection report. It was argued that the accident occurred 12 hours later, 125 miles from Chicago so that the container could have worked loose for some reason other than claimant's alleged improper inspection. The Organization also contended that claimant should not have been held out of service; that the exact offense charged was not proved; that the hearing was not conducted fairly and impartially; that the discipline imposed was not warranted; that the decision and discipline was improper because it was made by a supervisor who was also a witness against the claimant at the hearing.

The Carrier has contended that the claimant was properly held out of service according to Rule 6-A-1(a); that substantial evidence was adduced at the hearing to support the offense charged; that the hearing was fairly conducted and the discipline was not excessive under the circumstances. In addition, the Carrier objected to the contention in the employe's submission that it was improper for a supervisor witness to impose discipline because this argument was not made in the handling on the property.

We note that Rule 6-A-1(a) authorized the Carrier to hold an employe out of service pending a hearing, "if his retention in service could be detrimental to himself, another person, or the Company". Subdivision "h" of this rule provides that the employe will be reinstated and compensated for time lost if the hearing results in a decision in favor of the employe. We find that the Carrier did not violate this rule by holding the claimant out of service pending the hearing. The accident was serious enough to justify holding claimant out of service to prevent a possible re-occurrence of improper inspection by the claimant which could result in an accident detrimental to others and to the Carrier.

The transcript of the testimony indicates that the hearing was fairly and impartially conducted. Claimant answered that he received a proper notice, he was represented and produced witnesses to testify in his behalf. Claimant's witnesses gave no testimony relative to the inspection made by the claimant in this case. A question raised concerning the degree of training for the assignment and the beginning of a training program after the accident is not sufficient to overcome the claimant's report that he made the inspection and found all to be "O.K.". In this connection, Carrier's witness testified that a bulletin was issued in June, four months

before the inspection, with regard to this work; that the witness and three assistants did instruct and were available for advice while inspections were being made. Claimant did not testify that he was not sure of what he was doing or that he asked for assistance or advice when he made the inspection.

The master mechanic testified as an expert witness. He testified that he inspected the corner locks at the scene of the accident before the container was moved from its position where it came loose from the chassis. He explained in detail how the corner locks should be secured and the reasons why, in his opinion, they had not been secured on three corners of the container. In his opinion the locks if properly secured would not work loose in transit. The Organization conceded in its submission that speculation as to things that could have happened after the inspection, did not rule out a possible improper inspection by claimant. Speculation is not evidence.

We believe that the expert testimony of the master mechanic presented substantial evidence of improper inspection. We will not make a determination of the weight to be given the conflicting testimony. First Division Award 12072 in support of this determination, cited Third Division Award 890 which has been followed as policy, to wit: "Our function in this case is not to substitute our judgment for that of the Carrier, or determine what we might or might not have done had the matter been ours to handle. We are entitled to set aside the Carrier's action only upon a finding that it is so clearly wrong as to constitute an abuse of discretion vested in the Carrier." We do not find such abuse to be present in this case.

We have examined the record and do not find any statement made in the handling on the property that the decision made and penalty imposed was improper because it was made by a supervisor who was a witness. It cannot now be raised for the first time, Award 17424, 19746, 19977 and Awards cited therein.

As to the degree of the discipline imposed, it is a well settled policy of the Board that we will not interfere with the Carrier's discretion unless the discipline is arbitrary and capricious, Awards 16172, 19745, 19965. On the facts of this case, we do not find the penalty to be arbitrary or capricious.

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 Employes involved in this dispute are respectively Carrier and Employes 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

The Carrier did not violate Rule 6-A-1.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1974.