

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32015
Docket No. CL-32542
97-3-95-3-220**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Alton & Southern Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11141) that:

1. Carrier violated the Agreement, expressly Rule 10 contained therein, when on the date of September 12, 1994, it issued discipline of fifteen (15) days deferred suspension to Clerk, Mr. Dwight S. Gherardini, East St. Louis, Illinois following formal investigation held on Wednesday, September 7, 1994 with such discipline being excessive, harsh, unwarranted and bordering on an abuse of discretion due to the facts and circumstances brought forth throughout the course of the investigation.

2. Carrier shall now be required to remove the discipline assessed Mr. Gherardini for fifteen (15) days deferred suspension from his personal record and; additionally, the record of hearing held Wednesday, September 7, 1994 and all references thereto be removed from Mr. Gherardini's personal record.”

FINDINGS:

The Third 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.

Claimant established seniority as a Yard Clerk in July 1987. At the time this dispute arose, he was assigned to the position of Abstract Clerk, hours of 11:00 P.M. to 7:00 A.M., Monday through Thursday at Carrier's East St. Louis Yard.

On August 28, 1994, Claimant was responsible for checking car numbers on incoming trains, including incoming Union Pacific Train #NPAS-26. Following Claimant's visual check of NPAS-26 against a preprinted list furnished by the Union Pacific, the 75 car train proceeded to the crest of the yard for processing through the humping operation. When approximately 39 of the cars had been processed through the hump, the Conductor on duty in the tower noticed that the 40th car in the cut was not noted on Claimant's list. Carrier had "no information" on the car, which was eventually routed to the hold track. The car was later identified as one which had come in on the incoming Train NPAS-26.

As a result of the incident, Carrier Superintendent F. E. Cooper issued a Notice of Investigation to Claimant for his alleged failure to properly perform his duties. The Investigation was held on September 7, 1994, during which Assistant Superintendent C. Miller served as the Hearing Officer. Carrier witness, Crest Operator R. Habermehl, on duty and in charge of the humping operation on the morning of August 28, testified regarding his discovery of the unlisted car.

For his part, Claimant testified that:

"Q. Mr. Gherardini, on the night in question, did you have occasion to check an inbound train, the NPAS-26?

A. Yes sir, I did.

Q. Mr. Gherardini, I'm going to hand you a paper and ask that you identify it?

A. Okay, that is the carbon copy of the train that came in, the NPAS-26. It came in on the morning of August 28, and it hit the window about 5:00 a.m., and I was in a position to check the train. Yes this is the list.

Q. And is that your initials on the tope (sic) right hand?

A. Yes sir, it is. I did check it.

Q. Were you able to, was this, or was this car located before you actually humped any cars behind it, which caused misroutes?

A. Yes sir, that's correct, it was.

Q. It was caught by the switch crew then, is that correct?

A. That's correct."

On September 12, 1994, Superintendent Cooper apprised Claimant of the following:

"The investigation developed that you failed to properly check the inbound Union Pacific train, NPAS-26, at approximately 5:00 a.m., Sunday, August 28, 1994.

The above action constitutes a violation of Rule 607(2) of the Safety, Radio and General Rules for All Employees.

Your personal record is assessed with fifteen (15) days deferred suspension for the above rule violation."

The Organization protested the discipline, premised upon the following:

1. **Carrier's action was excessive, harsh, unwarranted and bordering on an abuse of discretion due to the facts and circumstances brought forth at the Investigation.**

2. The transcript of the Investigation clearly reveals that Claimant was "completely honest and open" in his testimony that he had "apparently missed" checking one car in a train of more than 60 cars. The employees have only five to seven feet of vision to check car numbers before the cars "disappear behind the walkway."
3. The lighting provided by Carrier to illuminate the cars going by the walkway window, consists of two flood lights and one of these flood lights, at the time of the alleged missed car, was out of adjustment allowing approximately only a car or car and a half to see car numbers and to record them. Testimony showed the train being checked by Mr. Gherardini was moving approximately 10 to 12 miles per hour, which is a "little fast" to check a train. Following the incident, the lights were readjusted to where an additional car length of room to check trains now exists.
4. Additionally, Mr. Gherardini's Representative attempted to bring forth the working history of Claimant which would have shown that in a railroad career of more than 24 years, Claimant had never been subject to a discipline hearing either on his previous employer, the CSXT, or his present employer. The record shows that the hearing officer restricted such questioning.
5. The week prior to this incident, Claimant, while checking a CSXT train, found 3 extra cars near the end of the train making the necessary corrections and saving the Carrier the added expenses.

In related correspondence, the Organization alleged "due process" violations in Superintendent Cooper's "multiple" roles in the disciplinary machinery:

- "1. You were the Carrier Officer who preferred the alleged charge against Mr. Gherardini by letter dated August 29, 1994.
2. You were the Carrier Officer who assessed the discipline to Mr. Gherardini on your own charge by letter dated September 12, 1994.
3. Now, you are the Carrier Officer to whom the Organization is forced to present the first level claim and appeal."

Carrier responded that the Organization failed to demonstrate how Mr. Cooper's "admitted duplicitous (sic) roles" compromised the Claimant's due process "in any way." Carrier denied the merits of the claim, contending that:

"Mr. Gherardini was charged with failure to properly perform his duties when he failed to properly check an inbound train. The investigation developed from the testimony of the Crest Operator that there was an extra car in the train when it was shoved to the hump. You do not dispute these facts in your appeal, but merely try to cloud the issue with unsupported and self serving testimony."

In final correspondence, Carrier maintained that Claimant had been afforded a "fair and impartial investigation"; that the charge was sustained by "more than sufficient" testimony and evidence; and that the discipline assessed was not excessive, harsh or arbitrary. With regard to the quantum of discipline assessed, Carrier noted that the Claimant's "clean" record, in addition to his forthright testimony, had been considered when deciding upon an appropriate quantum of discipline. At the Board hearing, Carrier also urged that the recently adopted award of the Third Division in another case involving the same type of violation by a different employee was binding precedent regarding the quantum of discipline assessed Claimant in this case. See Third Division Award 31775.

At the outset, we address the Organization's due process objections to Superintendent Cooper's "duplicitous" roles in this dispute. Numerous Awards of various Boards have consistently held, over a period of many years, that an accused has an unquestioned fundamental right to an impartial and unbiased investigatory proceeding. Multiple roles of managers, such as those played by Superintendent Cooper in this case, raise an inference, but not necessarily a presumption, of unfairness. Such duplication of roles should best be avoided, but appear to be endemic to the discipline process in this industry; requiring this Board to carefully determine, in each such case where timely objection is raised, whether the individual employees rights have, in fact, been violated. In this particular dispute, a careful review of the record fails to convince us that Superintendent Cooper's multiple involvement actually compromised or prejudiced Claimant's right to a fair and impartial investigation.

Turning to the merits of this dispute, Crest Operator Habermehl's unrefuted testimony, in addition to Claimant's frank admission, establish persuasively that

Claimant was negligent in his assigned duties as Abstract Clerk, on August 28, 1994, regarding Train NPAS-26. Thus, the only matter remaining for determination, is whether the penalty assessed was unreasonably harsh, excessive or disparate. Finally, Carrier's argument that this decision should be premised upon a recently decided dispute on the same property is not persuasive. Each discipline matter must be decided on its own unique and individual set of facts, as evidenced by the foregoing decision. The argument that the decision of the Board in a case involving a different employee and a similar violation, is stare decisis on the issue of appropriate penalty, is misplaced. Quantum of discipline for a proven violation is not amenable to determination by precedent, since such matters must be decided on the unique and individual set of facts in each case, including nature of the offense, length of service, prior discipline record and other mitigating factors.

While it is commendable that Claimant "found" three cars prior to the date of this incident, that does not negate the fact that Claimant "overlooked" a car on the date at issue. Given the nature of the offense, and despite Claimant's exemplary and lengthy employment record, a 15 day overhead suspension cannot be deemed unreasonably harsh or excessive.

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 Third Division

Dated at Chicago, Illinois, this 6th day of May 1997.