

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37555
Docket No. MW-37944
05-3-03-3-376

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The thirty (30) day suspension assessed Foreman J. W. Perkins for his alleged failure to receive the proper permission from the IHB dispatcher, while piloting various pieces of track equipment on the High Speed track, to proceed past the MC Connection Interlocking in Hammond, Indiana at approximately 4:15 P.M. on October 21, 2002 (Carrier's File MW-02-016).
- (2) Foreman J. W. Perkins shall now be exonerated, reinstated with full seniority and compensated all wages, credits and benefits commencing October 22, 2002 and continuing until the matter is properly resolved.”

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.

On October 21, 2002, Claimant J. W. Perkins, a Foreman holding seniority from April 14, 1980, was in charge of moving several pieces of on-track equipment to a new storage location. The process required the Claimant to communicate by radio and telephone with Dispatcher Weyhe to obtain authorization for his movements. Weyhe gave the Claimant a Form D authorizing him to travel west to the MC Connection Interlocking in Hammond, Indiana. After further radio communication with Weyhe, during which some transmissions were "cut out" or "walked on" by others using the same channel, the Claimant moved the equipment past the MC Connection Interlocking.

By letter dated October 22, 2002, the Carrier notified the Claimant that he was being removed from service pending a formal Investigation, for allegedly failing to receive proper permission from the Dispatcher to proceed past the MC Connection Interlocking. The Carrier notified the Claimant by letter dated October 23 that an Investigation would be held on October 29 to determine the facts and the Claimant's responsibility, if any, in relation to the October 21, 2002 incident. Following the Hearing, by letter dated November 7, the Carrier advised the Claimant that he was suspended from service for 30 days, beginning October 22 and continuing through November 20, 2002.

The Organization appealed the Carrier's decision, and the Carrier denied the appeal. Failing to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

As a threshold matter, the Organization asserts that the Claimant's right to a fair and impartial Hearing under Rule 25 of the Agreement was violated because of improper conduct by the Hearing Officer. Upon review of the Hearing transcript, the Board agrees that the Hearing Officer engaged in conduct at the Hearing that was inappropriate and deprived the Claimant of the Agreement due process and fair Hearing to which he was entitled. The Hearing Officer exhibited an obvious attitude of pre-judgment toward the Claimant and the October 21 incident being investigated. Moreover, the Hearing Officer's lack of impartiality prevented the record in the instant case from being fully and fairly developed.

The issue presented by the October 21, 2002 incident and purported to be under investigation at the Hearing was whether or not the Claimant had traveled through the MC Connection Interlocking without Dispatcher permission. The Hearing Officer's leading questions to witnesses demonstrated his preconceived conclusion that the Claimant had not received the required permission (E.g., "Okay, it is my understanding at that time Mr. Perkins continued past the MC Connection without a Form D, or verbal permission from the dispatcher?"). The Hearing Officer went even further in offering what amounted to conclusory testimony on his part, before the Organization's witnesses had even testified:

"[T]he whole point here is not what he could have done, the point is . . . [the dispatcher] did not give him permission through the MC Connection. That's the whole gist of this investigation. And communications might have been poor, the communications might have been sketchy, but there was no time any permission was given to go through the MC Connection."

In addition, on several occasions during the Hearing, the Hearing Officer demonstrated impatience with the Claimant that could only have had a chilling effect on the Claimant's determination to press his defense, an example of which is the following exchange:

"Hearing Officer: If you have a question, form it in the form of a question. I will not allow this to go on.

Mr. Perkins: . . . I didn't interrupt you. Let me make my point.

Hearing Officer: I'm going to interrupt you because I am the hearing officer.

Mr. Perkins: Okay.

Hearing Officer: Mr. McLean, I'm going to ask you to hold Mr. Perkins down to ask him a question.

Mr. Perkins: I'm sorry.

Mr. McLean: Well, let me ask a question.

Hearing Officer: . . . (unintelligible) . . . I will have him removed."

Although the Hearing Officer asked the Claimant at the end of the Hearing whether the Claimant felt that he had been "coerced or intimidated" by the Hearing Officer, an intimidated claimant is hardly likely to answer such a question in the affirmative.

Most troubling to the Board, however, is the Hearing Officer's refusal to play a tape of the radio conversations between the Claimant and Weyhe that constituted the crux of the issue presented by the Investigation. Several times during the Hearing the Claimant challenged the accuracy of the Carrier's transcript of the conversations. The Claimant also asserted that he had not heard some of what the Dispatcher had said to him on the radio because their conversation was stepped on by others using the same channel. The best evidence of the conversation between the Claimant and the Dispatcher, as well as the extent to which the conversation was stepped on, was the tape. The Hearing Officer stated at the Hearing that he had the tape in his possession. Nevertheless, he refused the Claimant's request to listen to the tape:

"Hearing Officer: Mr. Perkins, let me tell you that this is a signed affidavit of what was on the tape, okay? This is how it come through on the tape.

Mr. Perkins: I'm just saying ... that I know, like I know the hand that I'm holding up right here, this gentlemen told me, after the second time after I started the machines and stopped them and asked him again, 'Do I have permission through the. . . .'

Hearing Officer: Again, this is what come across on the tape. If it's on the tape, it's there.

Mr. Perkins: Okay. Where does it say that he told me, 'I told you let me know when you're stopped.' I don't see that.

Hearing Officer: It doesn't say that, Jerry, because it's not on here. It's not on the tape.

Mr. Perkins: Where's the tape at?

Hearing Officer: It's right here.

Mr. Perkins: Let's listen to it.

Hearing Officer: We're not going to listen to it now. We have a signed affidavit of the transcript. . . .

Mr. Perkins: Are we going to listen to it today, though?

Hearing Officer: No, we're not going to. The people that do the discipline on this will listen to it. That's what this affidavit is. . . .

Mr. Perkins: Well, shouldn't I be allowed to listen to it . . . ?

Hearing Officer: Mr. Perkins, this is the affidavit that we're going by right now, and we will continue that. . . ."

The Board finds that the Hearing Officer's conduct at the Hearing prevented the record from being fairly and fully developed in the instant case, and that therefore, the record cannot properly be relied upon by the Carrier in making a finding of guilt on the Claimant's part. The Carrier's cited arbitral precedents to the contrary are not persuasive. In the instant case, the Hearing Officer's conduct went far beyond the asking of a few leading questions that was at issue in the cited cases. The Claimant was not afforded the fair and impartial Hearing to which he was entitled, and the discipline that the Carrier assessed on the basis of that Hearing cannot be upheld.

Because the Board has found that the Claimant was not provided a fair and impartial Hearing because of the Hearing Officer's conduct, it is unnecessary to address the Organization's other Agreement due process arguments or to reach the merits of the instant case.

The Carrier will be required to pay the Claimant backpay covering the 30-day suspension period, and to expunge from his personnel record all reference to the discipline resulting from the incident on October 21, 2002.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of July 2005.