

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 8

Carrier File No. DMWB 87-11-42
Organization File No. B-Y-358

STATEMENT OF CLAIM

1. The five (5) days' suspension imposed upon Sectionman T. A. Boehm for alleged violation of Rules 301, 307 and 333 of Safety Rules and General Rules, was arbitrary, on the basis of unproven charges, excessive and in violation of the Agreement (System File B-Y-358/DMWB 87-11-12).

2. The Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered, including the lost opportunity to perform overtime service during the period August 1 through August 5, 1987.

F I N D I N G S

Following an investigative hearing, the Claimant received the following notice of disciplinary action:

July 30, 1987, censured and suspended from the service of BN for five (5) days, commencing 8:00 AM, August 1, 1987, and ending August 5, 1987, for violation of rules No. 301, 307, 333 of Safety Rules and General Rules, by failing to

operate Boom Truck #8300 in a safe manner, resulting in an accident that involved the crane on Boom Truck #8300 coming in contact with and tearing down REC power line at MP 29.4 on Yellowstone Division 4th Sub., on June 8, 1987, at approximately 11:30 AM.

There is little dispute as to the facts in this matter, as evidenced by the text of the disciplinary notice. The Organization, however, raised several procedural matters during and subsequent to the hearing. These deserve review.

The Board finds that the notice for the disciplinary hearing was sufficiently specific to allow the Claimant and the Organization to prepare a full defense. This was not impaired by the failure to refer to specific rules in the notice. The Board finds further that there was not substantial impairment of the process in the incidental delay in providing the Organization with copies of the exhibits which were part of the hearing record.

The Organization contends that the Claimant did not receive a "fair and impartial investigation", as required by Rule 40. The Organization notes that the officer who conducted the hearing was the direct supervisor of the Claimant and thus obviously, was involved in the pre-hearing investigation of the incident. Further, this same officer issued the notice of hearing and the notice of discharge.

In support of its position, the Organization cites First Division Award No. 21046 (Daugherty) which stated as follows:

After studying the transcript of the investigation the Division is persuaded that petitioner's position is valid. At this late date there is little excuse for the managerial personnel of a carrier to ignore the principle that in a discipline case carrier is essentially, and must conduct itself like, a trial court. Among several things this means that the carrier official who conducts an investigation of a charge made by a carrier against an employee (1) should not normally have been involved in the occurrences leading up to the leveling of the charge and (2) should comport himself at the investigation, in his questioning of all witnesses (managerial as well as employee) in a truly objective and aloof manner, just as would an outside judge. If, as here, the evidence shows that the investigating officer did not so behave, then this Division, as a court of appeals, must find the trial court subject to procedural error and reversal.

On the other hand, the Carrier cited Public Law Board No. 4381, Award No. 30 (Miller):

The central argument presented by the Organization concerns the multiple roles served by Roadmaster L. R. Ross in this matter. Mr. Ross notified Mr. Myers of the charges, conducted the investigation and rendered the decision. Such multiple roles do not per se preclude a fair and impartial hearing. A determination as to due process in this matter rests on a consideration of the entire record.

There is no evidence of record to support the contention that the investigating officer prejudged the matter. To the contrary, the record is quite clear. Mr. Myers was late because his breakfast was delayed and he did not call in to advise his supervisor that he was on his way to work. Mr. Myers was not confronted with any emergency. Furthermore, although Mr. Ross was Mr. Myers' supervisor (to whom Mr. Myers reported after arriving late), the fact of Mr. Myers being late speaks for itself. This situation is not

analogous to a matter, such as insubordination, where the interaction between supervisor and subordinate should preclude that supervisor from serving as the investigative officer. We find that Mr. Ross' multiple roles did not deprive Mr. Myers of a fair and impartial hearing.

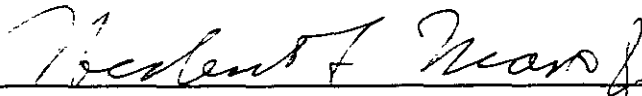
In the incident here under review, the Board finds that it would be preferable to have a hearing officer who is not the Claimant's supervisor. However, the hearing provided full opportunity for a full presentation on behalf of the Claimant. The hearing officer was not directly involved in the incident.

The record shows that the Carrier reasonably held the Claimant responsible for the boom of his crane not being in proper configuration and thus causing the boom to hit an overhead power line.

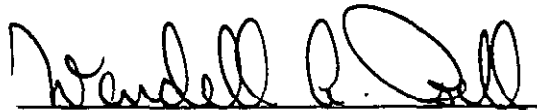
The resulting penalty of five days' suspension was not inappropriate and was generally in consonance with penalties given to other employees like situated.

A W A R D

Claim denied.



HERBERT L. MARX, JR., Chairman and Neutral Member



WENDELL A. BELL, Carrier Member



MARK J. SCHAPPAUGH, Employee Member

NEW YORK, NY

DATED: 8/17/90