

PUBLIC LAW BOARD NO. 2333

Award No. 11

Case No. 30
File TR-BRS-81-21

Parties United Transportation Union

to and

Dispute Norfolk and Western Railway Company
(Former NKP-WLE District)

Statement

of Claim: Appealing the discipline of thirty (30) days actual suspension assessed Brakeman M. J. Chatterelli as a result of a formal hearing which commenced on February 3, 1981, reconvened on February 10, 1981 and concluded same date.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated January 25, 1979, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant, on January 17, 1981, was the rear brakeman on a train operating in short turn around service between Gambrinus and Brewster, Ohio. As a result of operating difficulties the crew was instructed to take their train in two pieces to Brewster.

Claimant was required to make a cut some twelve car lengths from the caboose. The weather was cloudy, the temperature 28 degrees, and there was 6 to 11 inches of snow on the ground. Claimant injured his ankle during the uncoupling process. He requested medical attention. Claimant was taken to the Massillon Community Hospital where he was examined, x-rayed and advised that he had suffered a sprained ankle. He was treated with an ankle wrap and ice packs. Claimant filled out the company injury report (CT-37) before being relieved.

Subsequently on January 21, 1981 Claimant was given a notice to attend a formal investigation to determine his responsibility, if any.

in connection with the January 17th incident, and also for persisting in unsafe practices as evidenced by his safety record and fifteen injuries sustained since 1955 were listed thereon.

The hearing, which had been postponed, was held on February 3, 1980 at 10:00 AM and concluded that day. When the tape was being transcribed it was discovered that the tape recorder had malfunctioned. Consequently, on February 6, 1981 another notice bearing the same charges and advising that:

"This hearing will be reconvened at 10:00 AM February 10, 1981... to complete testimony.

This necessity is due to mechanical failure of the recording device, which resulted in part of the testimony not being recorded..."

As a result of this hearing, Carrier concluded Claimant to be responsible and assessed thirty (30) days actual suspension as discipline therefor.

The Employees contend that there are a series of alleged procedural deficiencies which prohibit a review of the case on its merits. In sequential order they are:

1. The notices of January 21 and 22, 1981 reflect that Carrier had prejudged Claimant by determining that he was culpable.
2. Carrier unilaterally postponed the January 26, 1981 hearing without a valid reason therefor.
3. The hearing held February 3, 1981 was not timely in that it was held in excess of 10 days of the date of occurrence.
4. That other crew members were not present at the hearing.
5. That Carrier failed to provide complete transcripts of the hearing conducted February 3, 1981.
6. The investigation of past injuries violated the investigation rule.

The Board concludes that some of the objections raised by the Employees are sufficient to overturn the discipline assessed.

The two notices complained of do reflect prejudgement in that the injury received on January 17, 1981 was perceived by Trainmaster Williams

to have been Claimant's fault and was part of Claimant's "violation of operating and safety rules ... ~~and your persisting in unsafe practices~~ as evidenced by your safety record." He then cited fifteen (15) injuries recorded over a 25 year span.

When one looks to the actions taken subsequent to the notice for a determination of whether Carrier was being arbitrary and perfunctory in accommodating its actions to the obligations required of it by the provisions of Rule 31, the discipline rule, we find that Carrier violated Section 1(c) thereof reading:

"Employees or the company shall have the right to request postponement for valid reasons."

Here, Carrier made no "request" for a postponement. It belatedly in the line of appeal, offered a rationale for "valid reason" which appears to be an excuse and not a "valid reason."

We find no merit to contentions 4 and 5. Claimant it was acknowledged was injured by himself. Hence, Carrier had no compelling reason for calling in the rest of the crew. Such fact, obviously, did not deter the Employees had they so seen fit to call them in.

The malfunctioned recorder necessitated the reconvening of the hearing if Carrier were to provide a copy of the transcript to permit perfecting an appeal. There were circumstances so unique as to conclude Carrier acted in good faith thereon. No harm was shown by Carrier's required efforts to produce a transcript.

The record reflects that no investigations were ever held concerning the fifteen (15) previous recorded injuries. Hence, an untimely investigation and not a review took place. No one could reasonably be expected to remember the details of incidents spread over a 25 year span. This fact speaks for itself. Carrier's right to review does not give it a right to harass. Such action reflected a prejudicial attitude.

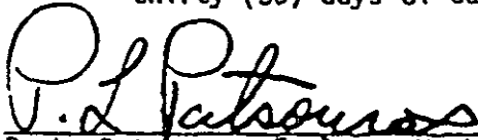
The discipline is reversed for procedural reasons.

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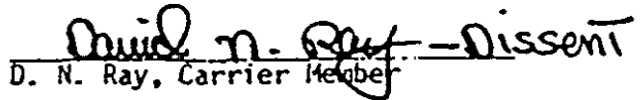
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Award: Claim sustained as per findings.

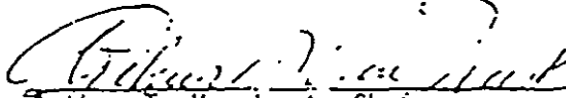
Order: Carrier is directed to make this Award effective within
thirty (30) days of date of issuance shown below.



P. L. Patsouras, Employee Member



D. N. Ray, Carrier Member



Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Wilmington, Delaware, May 17, 1982.