

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. The assessment of a sixty-day (60) day suspension upon Machine Operator Earl Hicks was without just and sufficient cause and in violation of the Agreement. Carrier's File (D-11-17-366)
2. Claimant Earl Hicks shall be allowed the remedy prescribed in Rule 19(d).

OPINION OF THE BOARD:

On October 18, 1980, the Carrier directed the Claimant to attend an investigation on the following charge:

"Your responsibility, if any, in connection with your violation on October 13, 1980, at approximately 10:00 a.m. of Rules 7, 11 and 12 of the Chicago and North Western Transportation Company's General Regulations and Safety Rules effective June 1, 1967."

Rule 7 reads:

"Employees are prohibited from being careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or conducting themselves in such a manner that the railroad will be subjected to criticism and loss of good will, or not meeting their personal obligations."

Rule 11 reads:

"Playing practical jokes, scuffling, wrestling or fighting while on duty or on Company property, as well as throwing of tools, materials or other objects is prohibited."

Rule 12 reads:

"Employees must not enter into altercation with any person, regardless of provocation, but will make note of the facts and report such incident in writing to their immediate superior."

The charges were made in connection with an alleged altercation between the Claimant and Assistant Foreman S. Springs.

The Organization argues that the charges were not proven and that the hearing officer prejudiced the Claimant when he failed to call and hear testimony from four witnesses who were present when the incident occurred.

The Carrier argues that the charges were proven and the discipline was warranted. In regard to the allegation that a fair hearing was not afforded, they make several points which will be discussed below.

In regard to the issue of failing to call witnesses, we make the following observations. It is well established that it is the responsibility of the Carrier hearing officer to provide a fair hearing. This responsibility includes, as is well noted, the duty to develop all material facts both for as well as against the employee. The investigation is not an adversary process but its function is to develop the facts regarding an alleged rule violation. It is not just an exercise in prosecution. In this case, the Carrier called to the hearing but did not ask to testify four employees who were present in the vicinity of the altercation. One of these witnesses was Foreman Chavez who allegedly separated Claimant and Springs. As noted at the hearing, the Organization objected to the failure to ask these witnesses to testify. The hearing officer held fast in his refusal to ask the employees to testify. The only witnesses

who had testified at this point were Assistant Foreman Springs, the Claimant and an Assistant Roadmaster who was not present when the incident occurred. It is noted the testimony of Springs and Hicks conflicted significantly. The hearing officer then offered to allow the Organization to call the witnesses and they declined. The Carrier argues in their submission that the hearing officer determined that the testimony of the other witnesses was not necessary and that because the Organization failed to call the witnesses when they had an opportunity to do so precludes them from arguing that the Claimant was denied due process.

It is our opinion that the failure to ask questions of witnesses called is not a per se violation of the Claimant's right to a fair hearing. The Carrier's obligation to question witnesses ends when a prima facie case is established. The Carrier is not obligated to question witnesses who have nothing material to offer. However, when a hearing officer refuses to question available witnesses and closes the hearing before a prima facie case is established and further concludes the employee under charge is guilty, the judgment of the hearing officer is highly suspect. In this case, the Carrier did not establish a prima facie case based on substantial evidence before concluding additional witnesses were not necessary. As a result, it cannot be said the Carrier has sustained the necessary burden of proof. The fact that employees, who were eye witnesses, were not called, distracts from and casts significant doubt on the nature of the evidence. In the face of contradictory and conflicting evidence, the hearing officer failed to utilize available evidence

that would have in most probability shed light on what really happened. Without the testimony of these employees, we cannot come to any meaningful conclusion as to what really happened. The hearing officers conclusion of guilt based on insufficient testimony was in error. Our finding should not be interpreted as substituting our judgment for that of the hearing officer. The Board as an appellate body is to review the evidence as a whole and make a determination as to whether his conclusion is supported by substantial evidence. In this case, there is not enough evidence to support his conclusion that it was not necessary to call other witnesses. The error could have been avoided by questioning the material witnesses already called to the hearing by the Carrier.

In coming to the above conclusion, we have rejected the Carrier's argument that the Organization waived its right to object to the Carrier's failure to question the witnesses. It is true that the Organization declined to question the witnesses. However, this does not change or modify the Carrier's burden to present substantial evidence in support of the charge. The burden to question witnesses and present a defense doesn't shift to the Organization until the Carrier has established a prima facie case. We do not believe by not questioning the Carrier witnesses that the Organization waived its right to have the charges supported by substantial evidence. It is our opinion that a prima facie case based on substantial evidence was not established, therefore, the discipline must be overturned as it is not supported by substantial evidence.

AWARD

Claim sustained.
Carrier ordered to comply within 30 days.

Gil Vernon
Gil Vernon, Chairman

J. D. Crawford
J. D. Crawford, Carrier Member

H. G. Harper
H. G. Harper, Employee Member

Date: March 25, 1982