

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4769

**BROTHERHOOD RAILWAY CARMEN OF
THE UNITED STATES AND CANADA**

and

NORFOLK AND WESTERN RAILWAY COMPANY

(Revised)
AWARD NO. 15
DOCKET NO. 18

John C. Fletcher, Chairman & Neutral Member
R. P. Wojtowicz, Organization Member
T. R. Malloy, Carrier Member

Hearing Date - April 25, 1990

Statement of Claim:

1. That the N & W Railway Company violated the controlling Agreement of June 1, 1939, as subsequently amended, when on November 4, 1988, Carman J. Hector was given a formal investigation which resulted in his dismissal effective December 30, 1988.
2. That the investigation was improperly arrived at and represents, inequitable, arbitrarily, capricious and unjust treatment within the meaning and intent of Rule 3 of the current controlling Agreement.
3. That because of such violation and unjust action, the Norfolk and Western Railway Company be ordered to delete discipline assessed in its entirety and reinstate Carman D. J. Hector to service with all seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired, with compensation for all lost wages, plus 5% annual interest and reimbursed for all losses sustained account coverage under Health and Welfare and

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Life Insurance Agreements during the time held out of service until reinstated retroactive to December 30, 1988.

Findings:

Public Law Board No. 4769, upon the whole record and all of the evidence, finds and holds that the Employee and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that this Board has jurisdiction over the dispute herein; and, that the parties were given due notice of the hearing thereon and did participate therein.

On September 26, 1988, Carman David Hector injured his neck while working outbound Train 182 in the train yard at East Decatur, Illinois. He reported this injury as required by Carrier regulations. On October 4, 1988, Mr. Hector was cited for an investigation on the injury. The investigation notice alleged a presistence in following unsafe work practices in sustaining nine personal injuries in nine years of service. The injuries listed were:

Date	Type of Injury
5-17-80	Bruised back of left leg and left elbow
12-14-80	Bruised palm of right hand
7-30-81	Hit index finger of left hand
12-04-81	Bruised left hand
12-01-82	Bruise on upper right hip
5-29-84	Bruised big toe left foot
7-15-85	Pain in middle back
10-05-87	Bruised right index finger
9-26-88	Pain in neck

At the investigation, conducted on November 4, 1988, Carrier adequately developed Claimant's initial responsibility for the injury reported on September 26, 1988. It also introduced statistical evidence on injury experience of five employees above and below Mr. Hector. This evidence, it is argued, demonstrates that Claimant refused to work safely and has a chronic pattern of laxity, carelessness and negligence. Carrier contends that if Hector is allowed to remain in service and continue in his negligent and reckless ways, it would be simply a matter of time before he seriously injured himself or a fellow employee.

Matters connected with the triggering incident, the September 26, 1988, neck injury, were not seriously disputed by

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the Organization. However it did contend that this injury and all of the others listed on Claimant's personnel record were minor, to say the least, and are of the type that Carmen experience routinely as a result of the nature of the work Carmen are required to perform. It has not been shown that any of the listed injuries were caused by carelessness or negligence on Claimant's part, it is argued.

It is the view of this Board that statistical data, of the type developed in this case, may be useful in demonstrating that one individual has experienced more instances of personal injury than other employees located near him on the seniority roster, but, without more, the data is insufficient when, standing alone, it is used as the primary basis for the administration of discipline or dismissal on a charge of persistence in following unsafe work practices, which in our opinion seems to be the case here.

For example, the charges placed against Carmen Hector read in part:

"You are hereby notified to report ... for a formal investigation to determine your responsibility in connection with your carelessness and negligence ... while working as a Carmen, you struck your hard hat against a train line bracket, injuring your neck, while bending forward to inspect a draft gear, and your persistence in following unsafe work practices as evidenced by your service record ..."

(Underscoring added.)

Much of the investigation was devoted to development of evidence on Hector's accident experience in comparison with the experience of several of his "peers." The way this was done was to tabulate all of Hector's injuries and those of the group he was being compared with. The seriousness of each injury was not distinguished nor is their cause known. Critically, though, there was no real development of evidence that any of Hector's previous injuries resulted from a "persistence in following unsafe work practices," the foundation of the second aspect of the charge under review at the investigation.

The failure to develop evidence on "[Hector's] persistence in following unsafe work practices as evidenced by [his] service record" causes a critical aspect of the investigation to be fatally flawed. This in turn requires the discipline assessed to be modified. Discipline for the September 26, 1968 injury is appropriate but discipline for persistence in following unsafe work practices is not appropriate. Accordingly,

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a thirty day suspension shall be assessed for the September 26, 1988 matter. No discipline shall be assessed for the unsafe work practices charge.

Mr. Hector is to be returned to service, within thirty days of the date of this Award, with seniority and other rights unimpaired. He shall also be compensated for all wage losses incurred during the time out of service beyond thirty calendar days from the date of dismissal, less deductions for any outside earnings received during that time.

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Claim Sustained. Mr. David J. Hector shall be returned to service within thirty days of the date of this Award, with full seniority and other rights unimpaired. He shall also be compensated for all wage losses incurred during the time out of service beyond thirty calendar days from the date of dismissal. Carrier may deduct from the payment due an amount equal to that of any outside earnings Claimant received while out of service. Claimant's service record shall be noted accordingly.

O R D E R

Carrier shall comply with this Award within thirty days of the date indicated below.


John C. Fletcher, Chairman & Neutral Member


R. P. Wojtowicz, Employee Member


T. R. Malloy, Carrier Member

Dated at Mt. Prospect, IL., this 20th day of November, 1990