

PROCEEDINGS BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 235

AWARD NO. 1875
CASE NO. 5381

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

STATEMENT OF CLAIM: "Request on behalf of Trainman T. M. Berry, Wisconsin Division, for the removal of discipline from his personal record and that he be paid for all time lost while attending and as a result of an investigation held on December 28, 1972. Claim being submitted under provisions of current UTU Rule 83."

FINDINGS: This Board upon the whole record and all the evidence, finds that:

The carrier and the employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

Two Carrier witnesses, a special agent and a traveling engineer-trainmaster, testified respectively at the investigation that they saw Claimant climb through the cars of a moving freight train near the Fire Road crossing at Proviso on December 7, 1972, at "approximately 10:40 a.m." and at "approximately 10:43 a.m.".

During cross-examination of the trainmaster, who was the second witness, Claimant's representative produced unrefuted evidence that Claimant was attending an investigation at Chicago which began at 10:30 a.m. on the same date, and thus could not have been at Proviso at the time specified. The trainmaster responded that he might be mistaken about the time but he was sure that he saw Claimant climb through the train on the morning in question. When asked whether he could not be mistaken in his identification of Claimant just as he was mistaken as to the time, he repeated that "if there is a mistake on the time let that be", but that he was positive of the identification; he supported this testimony by an independent recollection of having seen Claimant at the office at Proviso earlier that morning.

Claimant, on the other hand, when asked if he had been at Proviso earlier on the morning in question, testified that he could not recall - that it was possible that he had been there. Asked whether he had cut through the cars on that date, he responded, "I don't recall doing that, no, Sir." He also could not recall whether he drove or took a train from Proviso to the Chicago investigation.

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Obviously, Claimant felt that establishing that he was not at Proviso at the precise time he was alleged to have crossed through the train was a complete defense to the charge, and that he need not concern himself about his presence there or crossing through the train at an earlier hour. The Board cannot agree with him. On the one hand, the record contains two positive identifications of Claimant, and the insistence of the trainmaster that his identification was correct even if his time was wrong. On the other hand, it contains an admission by Claimant that he could have been at Proviso earlier in the morning, and something less than an unqualified denial by Claimant that he crossed through the train on the date in question. On this record, we cannot hold that there was not substantial evidence on which a reasonable man could conclude that Claimant did in fact cut through the train on the morning of December 7, 1972.

Perhaps the Board might be permitted a general comment at this point on an attitude and course of conduct which it has noted in a number of investigation transcripts, of which this case is an example. It is an attitude indulged in by both Carrier and Organization representatives on occasion that might be described at the Perry Mason complex. Its essence seems to be that the investigation process is a game or competition in which the object is not to discover all the facts about the matter under investigation, as many Boards have supposed and stated, but to obscure, twist and restrict the facts and to indulge in supposed legal stratagems, technicalities and techniques to confound the other party and thus win the day. Both parties would be well-advised to leave this kind of activity to television drama and to bend their efforts to the real-life task of using the investigation procedure to get at the truth, so that a just decision can be made in the first instance by the Carrier, or, if that decision is thought unjust by the Organization, on later review by this Board.

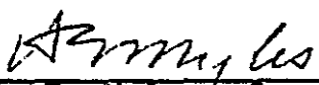
Having concluded that the record supports a finding that Claimant did violate Carrier safety rules by crossing between the cars on the date in question, the Board is faced with the remaining question of whether a fifteen-day deferred suspension was excessive discipline in this case. We believe it was. The trainmaster testified that after he saw Claimant violate the rules, he determined to issue a Form 1111 reprimand to him but was unable to do so because "before an 1111 is issued you have to speak to the person and correct him on the rule"; however, he had no opportunity to speak to Claimant because he disappeared from the scene. The trainmaster also testified that it was within his authority to make the decision whether to issue an 1111. No explanation appears in the record as to why the initial decision to issue a Form 1111 was changed to a decision to formally charge Claimant and proceed to investigation. Claimant has some 14 years of service and his record shows no prior violation

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of these or other safety rules which would warrant more than minimal corrective discipline for this first offense. Since the trainmaster testified that he would have disciplined Claimant by speaking to him about his violation of safety rules and issuing him a Form 1111 reprimand if Claimant had remained on the scene, we conclude that that would have been the proper discipline. Accordingly, the fifteen-day deferred suspension will be removed from Claimant's record and will be replaced by a Form 1111 reprimand.

AWARD: Claim disposed of in accordance with Findings.


F. D. Tuffley, Employee Member
A. E. Hyles, Carrier Member
H. Raymond Cluster
Neutral Member and Chairman

Chicago, Illinois
October 24, 1974