

Award No. 4536

Docket No. 4500

2-RDG-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Jacob Seidenberg when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 109, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—C. I. O. (Carmen)**

READING COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1 — That under the current agreement Car Inspector Robert A. Dorsheimer was unjustly suspended three (3) actual days work June 22, 23 and 24, 1962.

2 — That accordingly the Carrier be ordered to make Robert A. Dorsheimer whole by reimbursing him for the three (3) days work lost; also that his service record be unimpaired.

EMPLOYEES' STATEMENT OF FACTS: Robert A. Dorsheimer, hereinafter referred to as the claimant, has been a car inspector, Rutherford Yards, since December 21, 1954.

On May 31, 1962, general foreman, R. E. Houser directed a letter to the claimant citing him for investigation at 1 P. M. (EDST), June 1, 1962, on a charge of "failure to detect retaining Cotter missing from brake shaft and Placard and Placard Holder missing, Fireman's Side, UTLX 90598, resulting in exceptions being taken by ICC Inspector at Abrams May 25, 1962."

The hearing was held on Friday, June 1, 1962.

Under date of June 16, 1962, General Foreman R. E. Houser, Jr., wrote the claimant advising him he was given three (3) days actual suspension, June 22, 23 and 24, 1962.

The agreement effective January 16, 1940, as subsequently amended is controlling.

POSITION OF EMPLOYEES: It is submitted that the claimant was unjustly dealt with when he was given three (3) days suspension from the service effective June 22, 23 and 24, 1962, and that he is subject to the protection and benefit of the agreement, which for ready reference, reads in pertinent part:

“Rule 34 — Grievances and Discipline

- (a) Should an employe subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, the case shall be taken * * *
- (b) No employe shall be disciplined without a fair hearing by designated officer of the Carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised in writing of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. An employe shall be given a letter stating the cause of any discipline administered; if suspended, the suspension shall date from time taken out of service. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal, such loss being the difference between the amount earned if otherwise employed and the amount he would have earned in his regular assignment.”

Rule 34 of the agreement provides for, among other things, a fair hearing, which was not granted the claimant. The carrier's General Foreman R. E. Houser preferred the charges against the claimant. Mr. R. E. Houser was the prosecutor at the hearing. Mr. R. E. Houser was the jury and judge. Most certainly the procedure of the carrier was highly improper and does not constitute a fair hearing or fair treatment. The claim of the employes therefore is subject to be sustained.

An unbiased examination of the hearing record will reveal that it contains nothing of a nature as to warrant discipline, especially since Mr. Houser, states that “The purpose of this investigation is not for assessing discipline, * * *” The carrier's action was arbitrary and capricious and a violation of faith, and in view thereof the claimant is entitled to be made whole by being compensated for the three (3) days work lost and service record be corrected by having the discipline removed from same, and your honorable board is requested to so find by sustaining the employes' statement of claim.

CARRIER'S STATEMENT OF FACTS: Claimant Dorsheimer is employed as car inspector on the first trick at carrier's large classification yard at Rutherford, Pa. During his tour of duty on May 24, 1962, he allegedly made an inspection of freight car UTLX 90598 and noted no defects thereon. Car UTLX 90598 was then placed in symbol freight train HD-2 and advanced to Abrams, Pa., a distance of 89 miles from Rutherford, Pa. Upon arrival of train HD-2 at Abrams, car UTLX 90598 was again inspected by an I. C. C. Inspector, who noted and took exception to missing brake shaft cotter key from the brake shaft, which was in violation of I. C. C. and Safety Appliance Laws.

In accordance with agreement rules in effect with the carmen's organization, Car Inspector Dorsheimer was summoned to hearing and investigation to determine his responsibility, if any, in his failure to detect the missing cotter key from the brake shaft and, as a result thereof, was assessed three (3) days actual suspension and notation to that effect placed on his service record.

The claim here before the board, presented and progressed by the organization in behalf of Car Inspector Dorsheimer, is for three days' pay June 22, 23 and 24, 1962 and removal of the notation from his service record, based on the contention that the claimant did not receive a fair and impartial hearing, which claim and contention carrier denied.

Agreement between Reading Company and System Federation No. 109, Railway Employes' Department, AFL-CIO, Shop Crafts, is on file with the Board and by reference is made a part of this submission.

POSITION OF CARRIER: At the outset, carrier desires to point out to the board that claimant Dorsheimer is an experienced car inspector and has been continuously employed in that capacity at Rutherford, Pa., for a period of thirteen years. He is familiar with inspection of the various types of rolling equipment as required by A. A. R., I. C. C. and Federal Safety Appliance Laws. He is aware that in all inspections particular attention is directed to brake connecting pins and cotter or split keys to assure that they are intact and properly opened to prevent loss. In the instant case, the car he alleges to have given a Class "A" inspection was a tank type car with the brake staff and wheel and all its connections fully exposed to open view and within easy reach from the ground.

In the handling of the case on the property, carrier's director of personnel received letter from the general chairman of the organization dated September 24, 1962, reading as follows:

"Under date of July 9, 1962, Local Chairman J. N. Dolo, presented the following to General Foreman R. E. Houser:

'Please consider this a protest of the 3 day suspension rendered Mr. R. A. Dorsheimer as a result of a hearing held 6-1-62.

'This discipline is contrary to what the transcript of the investigation denote in the 3rd question of page 3.

'Therefore, I am requesting that Mr. Dorsheimer be compensated for the three days served by him, also that his service record be unimpaired.

signed — J N Dolo.'

"Question 3, page 3 of the hearing reads as follows:

'Q. The purpose of this investigation is not for assessing discipline, but to bring out immediate corrective action where Safety Appliance defects are involved. Is this understood by you?'

"If the purpose of the investigation was not for assessing discipline, certainly, the assessment of discipline was a violation of faith on the part of the management.

We feel there is merit to Local Chairman Dolo's claim in behalf of R. A. Dorsheimer, and we request that it be honored as presented.

You will note that the facts in this matter are, one, that General Foreman Houser, served the notice for hearing on Mr. Dorsheimer, gave the hearing, and served the notice giving discipline, signed by him.

Relative to the notice of discipline rendered, Mr. Fister states that Houser handled the MP 1115 form, after he and Mr. Dattner approved of same. We contend that Mr. Houser did not only handle the MP 1115 form, he also shows as the officer signing same, approved by Messrs. Fister and Dattner. In the handling of Form 1115, Mr. Houser had no reason to sign same unless he was the discipline assessing officer.

You will also note, two, that there was an element of doubt concerning the cotter key, i.e., whether it was missing from the brake shaft at the time Dorsheimer inspected the car at Rutherford. For Houser to say that, because there was no report made regarding this fact by supervisor Kelly, one must assume that it was missing at the time Dorsheimer inspected the car, certainly is no valid reason for giving Dorsheimer three days suspension. He should have been given the benefit of the doubt as requested by Local Chairman Dolo in his statement, which is a part of the hearing record.

"You will also note, three, that Mr. Houser's having served the Notice to appear at the hearing, and make charges against Mr. Dorsheimer, for his answering, then Mr. Houser conducts the hearing, and lastly, assess the discipline, does not constitute a fair and impartial hearing in accordance with the rules, and we again request that you honor the claim as presented by Local Chairman Dolo in his July 9, 1962 letter.

Request a conference for the discussion of this claim, if you see fit to deny same."

Carrier's director of personnel replied to the above letter under date October 19, 1962, as follows:

"Referring to your letter September 24, 1962, relative to claim in behalf of Inspector R. A. Dorsheimer, Rutherford, account discipline assessed account his failure to properly inspect and note defects on UTLX 90598 on May 24, 1962:

I have carefully reviewed the facts in this case, also the transcript of hearing and investigation, and find that same was properly held and the discipline assessed was commensurate with the offense. Claim is denied.

In accordance with your request, will arrange to further discuss at meeting, Thursday, November 1, 1962, at 10:00 A.M."

The meeting of November 11, 1962 was rescheduled and held on November 11, 1962, and in confirmation of such meeting carrier's director of per-

sonnel again wrote to the general chairman of the organization on November 30, 1962 in part as follows:

“Referring to your letter of September 24, 1962, submitting claim in behalf of Car Inspector R. A. Dorsheimer, Rutherford, for payment of three days discipline assessed account failure to properly inspect and note defects on UTLX 90598 on May 24, 1962:

The foregoing claim was denied in my letter of October 19, 1962. During conference in connection with this claim on November 11, 1962, it was your position that Mr. Dorsheimer did not receive a fair and impartial hearing for the reason that General Foreman Houser served notice to appear for hearing, conducted the hearing and assessed discipline. You further stated that during hearing claimant was asked:

‘Q. The purpose of this investigation is not for assessing discipline, but to bring out immediate corrective action where Safety Appliance defects are involved. Is this understood by you?’

It was your contention that on the basis of above question no discipline should have been assessed.

It was pointed out to you that under our practice of conducting hearings and investigations it is not improper or even unusual for a supervisor to act in a dual capacity so long as the employe charged is given a fair and impartial hearing and the supervisor in charge protects the employe’s rights to submit evidence in his behalf and does not conduct the hearing in a capricious or prejudicial manner. In the instant case the transcript indicates that claimant was afforded a fair and impartial hearing under the rules of your agreement. With respect to the question asked claimant, quoted hereinabove, this question has been included in virtually every investigation conducted with employes under your agreement involving circumstances similar to those in the instant case. The question is customarily phrased that the purpose is not ‘solely for assessing discipline’ which was either inadvertently omitted or was omitted due to typographical error in the instant case.

As advised during discussion, I feel that claimant received a fair and impartial hearing and that the discipline assessed was warranted and justified on the basis of the evidence developed during the hearing.

Your claim is therefore without merit and is, accordingly, denied.”

Carrier submits the hearing and investigation afforded claimant Dorsheimer clearly established that he was obviously lax in his inspection of car UTLX 90598 and in the considered judgment of carrier’s officers responsible for the safe and efficient operation of the railroad the assessment of three (3) days suspension was warranted and justified. Furthermore, it is the position of carrier that claimant Dorsheimer was fully apprised in writing prior to the hearing and investigation of the charge against him and he admittedly received a fair and impartial hearing in connection therewith.

Carrier maintains, therefore, that the carmen's brotherhood here requests the Second Division to set aside the considered judgment of the officers of the carrier who are responsible for the safe and efficient operation of the railroad and who passed on the evidence and approved the discipline in this case and substitute therefor the judgment of the carmen's brotherhood.

The board has, on many occasions, properly held that the assessment of discipline is a matter within the discretion of the carrier. Carrier maintains that in the instant case there was no abuse of discretion in the discipline assessed Car Inspector Dorsheimer and that such discipline was warranted and justified. The discipline was not assessed arbitrarily, capriciously or without sufficient cause and your board has previously held that where the carrier has not acted arbitrarily, unreasonably and without just cause the judgment of the carrier would not be disturbed.

The board should note that in the handling of this grievance on the property the claimant, when questioned during hearing and investigation as to whether he could have missed the cotter key at the time of his inspection, answered in the affirmative. Further in the transcript of the hearing and investigation, Car Inspector Dorsheimer was questioned as follows:

"Q. Is there anything further you would like to say in connection with this case which has not been developed through questioning?"

"A. I inspect many cars during my tour of duty, however, being human and subject to human error, I could have overlooked this condition. I have always felt that I make a thorough inspection of cars and overlooking this particular defect for me is an exception rather than a rule."

In addition to the facts set forth herein, carrier submits that at no time during the hearing and investigation was question raised by claimant or his representative as to the procedural aspects of the hearing, and when asked in closing the transcript of the hearing and investigation if it was conducted in a fair and impartial manner and in accordance with schedule requirements, they both replied that it was.

Under all the facts and circumstances, carrier submits the discipline assessed Car Inspector Dorsheimer was not excessive or without sufficient cause and was warranted and justified and carrier respectfully requests the Board to so find and deny the claim in its entirety.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Division, upon a review and analysis of the record, finds that the investigation hearing did not conform to, and was violative of, Rule 34 captioned "Grievances and Discipline". The Rule in its relevant part, states:

“No employee shall be disciplined without a fair hearing. . . .”

The record of the case discloses that the same General Foreman preferred the charges, presided at the hearing, proffered and discussed the evidence, and finally made the determination of guilt and assessed the measure of discipline against the claimant.

The Carrier offered no witness. The only evidence against the claimant was introduced and analyzed by the presiding officer. This case is not comparable to those cases where it is the **Office of the General Foreman** who prefers charges and the General Foreman presides at the hearing, but the evidence against the Claimant is proffered by a staff member within the Office of the General Foreman. (See for example Award No. 4211). In the instant case, the entire matter was initiated, conducted and concluded by one and the same official.

The Division finds that a course of conduct such as revealed by the facts of this case vitiates the protection inherent in the contractual guarantee for a fair trial. The basic concept of fairness is nullified when the same official is complaining officer, judge, witness and jury. The defect in the proceedings is not cured even if the official personally was not arbitrary in his conduct at the investigation.

Because the Division finds that Rule 34 was violated by the specific facts of this case, the Division deems it unnecessary to make any determination as to whether the proceedings were also materially defective by virtue of the presiding officer's statement at the hearing that “the purpose of the investigation is not for assessing discipline but to bring out the immediate corrective action where Safety Appliances defects are involved. Is that understood by you?”

In light of the entire record of this case, the Division has no recourse but to sustain the claim because of the violation of Rule 34.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of June, 1964.