

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19591
Docket Number CL-19823

Frederick R. Blackwell, Referee

(Brotherhood of Railway and Airline Clerks, Freight
{ Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: {

(Union Pacific Railroad Company - Eastern **District**

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7110)
that:

(1) Carrier violated the Rules **Agreement, effective** May 1, 1955, and amended July 15, 1967, particularly **the discipline rules** when it imposed discipline of dismissal from service **upon Mr. Alan M. Williams**, Auto Truck/Tractor Operator, Kansas City Store, Kansas City, Kansas, Store **Department** Roster 37, on July '20, 1970.

(2) Mr. Alan M. Williams should he restored to service of the Carrier with all rights **unimpaired.**

(3) He should be compensated for each work day, **commencing** on July 20, 1970 and **continuing** until adjusted, in addition to any and all overtime he would have worked **had** he remained in the employ of the Carrier, subject to a check of Carrier's **records**, and 9% or the **prime interest** rate for the Kansas City Area on any monies that have **been** or will he deprived him account his improper dismissal from the service of the **Carrier.**

(4) All Agreement rights should be restored, including the premiums for Travelers Group Insurance Policy GA-23000 and the Union Pacific Railroad **Employees' Hospital** Association. He should be **reimbursed** for any medical **expenses** accruing to him and his dependents while so improperly removed from Carrier's **service.**

(5) His record should be cleared of any disciplinary action taken as a result of Notice of Hearing dated July 20, 1970 or resulting from the unfair, partial, biased, discriminatory, unjust hearings held on July 24 and 27, 1970.

OPINION OF BOARD: This is a discipline case under agreement between the parties effective May 1, 1955, amended July 15, 1967. Claimant, **Mr. Alan** M. Williams, with seniority date of November 23, **1968**, held the position of Auto Truck/Tractor Operator, with duties predominately consisting of supplying cabooses on outbound trains at Kansas City, Kansas.

Following hearing held on July 27, 1970, claimant "as dismissed on August 6, 1970 for rendering false and misleading reports and inserting thereon derogatory remarks directed toward Local Supervision and Railroad Management in general. The defense at the hearing, inter alia, was that Carrier had **disregarded** the safety of employees engaged in supplying and servicing cabooses.

The evidence in the record of the July 27, 1970 hearing is sufficient to justify Carrier's findings of guilt on the charges. However, in Carrier's handling of this case, both in the hearing and in the appeal, some procedural irregularities occurred which this Board cannot condone.

Claimant's representative sought to cross examine Carrier's witness Hill on the subject of Carrier's unsafe practices in the supplying of cabooses. The hearing officer restricted this line of questioning to the particular cabooses involved in the charges, which precluded questions about cabooses generally. Later in the hearing the hearing officer, himself, put into evidence a Carrier bulletin which concerned safety procedures and which applied to all cabooses "on through trains in yard, or live track". Thus the hearing officer first ruled to limit the scope of cross **examination** and then chose **not** to follow his **own** ruling. More importantly, though, it was clear that claimant's representative sought to establish a defense, explanation, or other connection between unsafe practices and the conduct of claimant which lead to the charges; therefore, it was inappropriate for the hearing officer to limit the cross examination in the first instance.

The irregularity in the appeal is even more serious. **On** August 5, 1970, several days after the July 27 hearing had closed and, one day before Carrier's letter of dismissal on August 6, Carrier initiated further inquiries concerning some of **the** facts on which evidence was taken in the hearing. On the night of August 5 Storekeeper A, **C. Petersen** questioned an employee whose letter of complaint about poor conditions in servicing cabooses had been entered into the hearing **record**. In Mr. Petersen's **presence** another Carrier official asked questions about **the** letter and then Mr. **Petersen** asked if the employee "had anything against" the claimant. Mr. **Petersen** was one of the officers in the line of appeal of this case and he participated in these inquiries **before he** had heard the appeal.

The full **import** of the August 5 inquiries became apparent during the appeal of the claim on the property. In a letter declining the appeal, dated January 13, 1971, Mr. E. L. **Cochran** stated in pertinent part:

"A further check on August 5 and 6, with Assistant Terminal Superintendents T. L. Watts and P. D. Hare, who **are** in charge of the Kansas City Yard the second and third shifts, had their assurance that it was not possible, and they did not on the day in question pull the cabooses at **5:15** P.M., not was Mr. Williams requested to service these six cabooses in the yard, as he testified on page 16 of the transcript. Also, Mr. Watts and **Mr. Hare** said they had never requested caboose supplymen to service cabooses on moving trains, nor had they ever used foul language to these **employees**. Mr. M.S. Bowers, Road For- of Engines, also denied that he had requested the six cabooses be serviced in the yard the night of July 16th.

"A check of records in the General Car Foreman's Office revealed that Caboose UP-25242 was placed on a train at **7:25** P.M., and the train departed **7:50** P.M., July 16; Caboose UP-25610 was placed on a train **7:30 P.M.**, departed **8:40** P.M., July 16th; Caboose NW-562812 was placed on a train **8:30** P.M., departed **9:25** P.M. July 16th; Caboose UP-25265 was placed on a train 9:00 P.M., departed **9:55** P.M., July 16th; Caboose UP-25442 was placed on a train **4:35** A.M., departed **5:40** A.M., July 17th; Caboose UP-25503 was placed on a train **1:30** A.M., departed **1:50** A.M., July 17th. Head Watchmen **R. L. Hill** was notified these cabooses were still on the caboose servicing track at **5:55** P.M. on July 16, 1970.

It is obvious from the foregoing that **Mr. Williams** falsified his caboose report forms on the evening of July 16, 1970, and that the charges against him were sustained.

Would also advise you that with reference to page 19 of the transcript where **Mr. Williams** stated that he advised **Mr. Petersen**, both verbally and written, that he was supplying cabooses without proper protection, having reference to blue flag protection out in the yard, **Mr. Petersen** has never received such information, either verbally or in writing.

With regard to **Mr. Williams** contention on page 19 that men come down and knock the switch lock off with a knuckle pin to let the engine out, check revealed that in the past five years only one Stores Department padlock was issued as a replacement at the caboose track. The lock replaced was later found in a mud puddle some distance from the switch stand. It was not broken and there was no evidence of it being knocked off with a knuckle pin."....

The foregoing brings into the appeal record statements from four witnesses (Watts, Hare, Bowers, and Petersen) who did not testify in the July 27, 1970 hearing. Yet their statements bear directly on the factual issues raised at the hearing. Not having been subjected to claimant's rights of cross examination at the hearing, these statements should not have been considered by Carrier in determining claimant's appeal. Obviously the statements were considered.

Thus we have a case where, although the evidence in the hearing record is sufficient to sustain the finding of guilt in the first instance, serious procedural irregularities are manifest of record and cannot be ignored. The irregularities, in sum, are as follows: (1) the hearing officer improperly limited the scope of cross examination on the subject of safety; (2) an appeal officer participated in inquiries made outside the hearing record and before he had heard the appeal on the hearing record; and (3) statements not subject

to cross examination in the hearing were considered in denying claimant's appeal. These irregularities, in combination, tend to approach - but do not reach in this case - the point at which the Carrier's action might be set aside for lack of due process; however, the **irregularities** pass the point at which a mere admonition would suffice. We **believe** therefore that it is appropriate to take cognizance of the procedural irregularities caused by Carrier by reducing the measure of discipline. Accordingly, we shall sustain the claim to the extent of reinstatement of claimant with **all** rights unimpaired, but we shall deny the claim for compensation of **wage** loss.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim **sustained** to the **extent** indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. G. Kellum
Executive Secretary

Dated at Chicago, Illinois, this 14th day of February 1973.