Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31774
Docket No. MW-32260
96-3-95-3-67

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood that:

(1) The dismissal of Vehicle Operator/Acting Camp Car Attendant D. M. Pool for his alleged:

'... FALSIFICATION OF FACTS SURROUNDING THE INCIDENT REPORT DATED AUGUST 17, 1994, ON BEHALF OF YOURSELF FOR THE INCIDENT OF AUGUST 15, 1994, AT SANDUSKY, OHIO.

... FALSIFICATION OF INFORMATION PROVIDED IN A STATEMENT BY YOU ON AUGUST 15, 1994, CONCERNING THE FACTS SURROUNDING THE INJURY REPORT SUBMITTED FOR GARY N. ELLIS WITH THE DATE OF ALLEGED INJURY BEING AUGUST 15, 1994, AT SANDUSKY, OHIO.'

was arbitrary, capricious and on the basis of unproven charges (System Docket MW-3488-D).

(2) The dismissal of Camp Car Cook G. N. Ellis for his alleged,

'... FALSIFICATION OF INFORMATION PROVIDED IN A STATEMENT BY YOU ON AUGUST 15, 1994, CONCERNING THE INJURY REPORT SUBMITTED BY YOURSELF ON AUGUST 15, 1994 AT SANDUSKY, OHIO.

... FALSIFICATION OF INFORMATION PROVIDED IN A STATEMENT BY YOU ON AUGUST 17, 1994, CONCERNING THE FACTS SURROUNDING THE INCIDENT REPORT SUBMITTED FOR DUANE MILTON POOL ON AUGUST 17, 1994 WITH THE DATE OF INCIDENT BEING AUGUST 15, 1994, AT SANDUSKY, OHIO.'

was arbitrary, capricious and on the basis of unproven charges (System Docket MW-3487-D).

(3) As a result of the violation referred to in Part (1) above, Claimant D. M. Pool shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage and benefit loss suffered commencing August 18, 1994.

(4) As a result of the violation referred to in Part (2) above, Claimant G. N. Ellis shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage and benefit loss suffered commencing August 18, 1994."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On August 15, 1994, the crew of a switch engine was in need of additional gondola cars and decided to take one that was attached to the camp cars. Although the switch was spiked and the flag was raised, the track foreman failed to notify the employees in the camp cars of his intent to hook up to the gondola car. The impact of the coupling led to Claimant Ellis filing a personal injury claim for injuries sustained to his back. The track foreman received a suspension for his actions.

In their statements, both Claimants maintained that they were inside the camp car at the time of the impact and that both fell to the ground as a result of the impact. The track foreman, however, maintained that Claimant Pool was outside on the steps of the car. Thus, both Claimants were alleged to have falsely reported Claimant Pool's location at the time of the impact.

The Organization maintains that Carrier failed to provide the Claimants with a fair hearing because someone other than the hearing officer issued the discipline. Furthermore, the Organization maintains that the findings of guilt were not supported by substantial evidence.

Carrier argues that it proved the charges by substantial evidence. Carrier further contends that nothing in the Agreement required that the hearing officer issue the discipline and that the Claimants were afforded their due process rights.

On August 30, 1996, Claimant Ellis, in consideration of $125,000.00, signed a general release which expressly included "any labor claim he may have arising out of his dismissal . . . " This release rendered Claimant Ellis' claims moot and deprived this Board of jurisdiction to consider them. Accordingly, Claimant Ellis' claims must be dismissed. See, e.g., Third Division Awards 26345, 23932.

Turning to Claimant Pool's claims, we must first address the procedural issue raised by the Organization. The hearing officer was not the person who issued the discipline and there is no indication that the hearing officer made any findings of fact or was otherwise involved in the decision to dismiss Claimant Pool. In evaluating whether this procedure is fatal to the discipline imposed, we must first look to the language of the Agreement. We find no language expressly requiring that the hearing officer issue the discipline.

Nevertheless, the Agreement guarantees the employees a right to due process and a fair and impartial investigation. The question thus posed is whether having someone other than the hearing officer make the decision to dismiss Claimant Pool deprived him of due process. Such an action does not amount to a due process violation per se.

However, considering all of the particular facts and circumstances in the instant case, we conclude that Claimant's due process rights were violated.

The track foreman and the jimbo operator each testified that they observed Claimant Pool outside the camp car on the steps just prior to the impact. The jimbo operator's written statement, however, indicated that the track foreman told him that the individual on the steps was Claimant Pool. Thus, it is not clear whether the jimbo operator's testimony identifying Claimant Pool was based on personal knowledge or on information provided by the track foreman.

Claimants Pool and Ellis each testified that Claimant Pool was inside the camp car putting pop in some coolers at the time of the impact. Thus, the question of Claimant's guilt required the finder of fact to evaluate the relative credibility of the testimony from each key witness.

Of particular importance to resolving this credibility conflict was the testimony of the second shift cook. Initially, he testified that he placed the pop in the coolers. However, on cross examination he corrected himself, stating that usually he would place the pop in the coolers but on August 15, 1994, Claimant Pool placed the pop in the coolers. Either the second shift cook was prompted by the questions on cross examination to realize his mistake and honestly corrected himself, or he was prompted by the questions of cross examination to realize how his initial testimony could damage his coworker and was motivated to change his testimony to protect the Claimants. It is impossible to tell from the bare transcript which scenario is more likely. Such an assessment requires that the finder of fact have actually observed the demeanor of the second shift cook and his interactions with Claimants' representative during questioning.

An additional hotly contested issue which bears directly on credibility concerns whether the track foreman had a clear line of sight to the steps of the camp car. This issue involved not only the distance between the foreman and the camp car at the time he allegedly saw Claimant Pool on the steps, but also the angle at which the switch engine was positioned relative to the camp car. A diagram was introduced to aid the witnesses' testimony, Several witnesses referred to the diagram but nothing in the record of the investigation shows any markings on the diagram to reflect the references in the witnesses' testimony. [1] Here too, it strikes us as crucial to making accurate credibility determinations that the trier of fact have actually presided at the hearing and observed the witnesses.

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1 The Organization did include such a marked up diagram in its submission, but we are precluded from considering that document because it was not part of the record developed on the property.

As an appellate body, we generally defer to credibility determinations made on the property. This is because the hearing officer, having observed all of the witnesses, is in the best position to make such determinations. However, in the instant case, there is nothing to indicate that the hearing officer made any credibility determinations. Thus, faced only with a discipline notice issued by someone other than the hearing officer, we have nothing to which we can defer. Under these circumstances, we find that the failure of the hearing officer to find the facts and evaluate the relative credibility of the various witnesses deprived Claimant Pool of a fair investigation. Our finding is consistent with prior decisions of this Board under similar circumstances. See Third Division Awards 30015, 13180.

AWARD

Claims 1 and 3 sustained.

Claims 2 and 4 dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of November 1996.

Carrier Members' Dissent
to Award 31774 (Docket MW-32260)
Referee Malin

This decision is simply wrong. The disposition that has been made rests not on the facts and evidence of record but on the Majority's misplaced and aberrant perception that Claimant in some fashion has been denied proper contractual due process.

On the property the question of the Hearing Officer's determination was hardly raised at all. The record substantiates that the decision rendered in this case was based on the record that was made. On the record the track foreman saw Claimant Poole standing on the car platform. It was with this same individual that the track foreman had a brief but heated conversation immediately after the collision. It is also significant that over the next several hours nothing was said by either Claimant that they had fallen when the car was coupled or that either of them had sustained an injury. Further, the testimony of record was that the jimbo crane operator not only identified Claimant Poole as the individual standing on the platform, but also identified Claimant Poole as that same individual when directly challenged in the Investigation. The attempt to characterize these positive identifications as lacking in substance simply ignores the facts.

Second, the testimony of the second cook concerning the events of the day are at best the ASSUMPTION of the Majority as to why his story was different. It wasn't that this individual was "motivated to change his testimony to protect the Claimants" - there certainly is no credible evidence for this ASSUMPTION - but while it is muddled as to who put the pop in the coolers, the record as provided by Claimant Poole's testimony was that if he had loaded the pop it was done some 20 minutes prior to the collision and does not support his assertion that he was inside the car and not on the car platform at the time of

the coupling. It is the Claimant's own testimony of his activity that is not credible.

The Majority states that it was "hotly contested" whether the foreman had a clear line of sight. While the Organization asserted that the foreman could not see Claimant Poole, nothing was placed in the record to support their assertion. As is noted, the marked up version of the track diagram was not a part of the record made on the property and it was properly contested before the Board as New Material. Obviously, absent a clear showing that Claimant Poole could not have been seen at the time, we are left with the clear testimony of two witnesses that it was Claimant Poole on the platform. To do otherwise is *to ignore the on-property record.*

As an appellate forum it is this Board's responsibility to review the record that has been made. It is not appropriate to formulate other scenarios that are more to its sense of which is right. Such ignores the record and that is what has happened here.

Finally, the Majority admits that there is no contract provision that requires what is being imposed in this case. What is clear is that this decision seeks to cull out of the record only that which it finds suitable for its position and ignores everything else.

We Dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik