

NATIONAL RAILROAD ADJUSTMENT BOARD**FOURTH DIVISION**

Referee Jacob Seidenberg

PARTIES TO DISPUTE:**THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION****CHICAGO AND NORTH WESTERN RAILWAY COMPANY**

STATEMENT OF CLAIM: It is the claim and request of the Petitioning Organization that:

1. The Respondent Carrier has violated Rule 20 — Investigation and Discipline — by their arbitrary and capricious dismissal of Mr. James R. North on August 28, 1965.

2. Claimant, James R. North's dismissal from the services of said Carrier shall be revoked, he shall be returned to Carrier's service and his record shall be cleared. His seniority and other rights shall be protected. Mr. North shall be paid for all monetary loss suffered on account of Carrier's violative action.

OPINION OF BOARD: The Claimant was removed from his post as Assistant Foreman for alleged failure to perform his supervisory duties properly on the third shift of the nights of August 12 and 13, 1965. Originally after the investigative hearing the Carrier dismissed the Claimant from its service, but after 12 days had elapsed, it restored him to its service as a journeyman electrician without any back pay for the time missed from work. The Organization seeks by this action to have the Claimant restored to his supervisory position and be made whole for any monetary loss he may have suffered as a result of the discipline imposed.

The substantive charges levelled against the Claimant by the Carrier are that on two separate occasions, he permitted locomotives to leave the shop which were not in proper operating condition. The specifics of the first charge are that on August 12, 1965 he did not personally check to ascertain whether the leads on Traction Motor No. 4 of Locomotive 1104 had been properly connected but had left this physical inspection to be done by the hostler and hostler helper. The failure of the Claimant to make a rotation check resulted in his failing to detect the improper hookup of the leads, causing said locomotive to suffer a power failure that morning in the yard. The locomotive had to be brought back to the shop causing a delay of about one and a half to two hours. The second charge levelled against the Claimant was that he dispatched Locomotive unit 1109 with the left hand motor switch in the cut off position causing it to have a power failure while it was in the yard.

The Carrier states that it removed the Claimant as Assistant Foreman because it is convinced that he is not capable supervisor. It adds that it has on

two previous occasions had to demote him from Assistant Foreman to journeyman and on one previous occasion also investigate and reprimand him. It states that on all three prior disciplinary occasions he failed to perform as a supervisor properly. The Carrier sums up its case by maintaining that the Claimant's record as a supervisor is not a good one and as a supervisor he left much to be desired.

The Carrier denies the Organization's allegation that the investigative hearing was not conducted in a fair and impartial manner. It states that the Organization's characterization of the hearing officer's alleged conduct during the hearing indicates that it is grasping at straws in order to overturn the properly assessed discipline. The fact that the hearing officer stated that he would not permit questioning or statements about matters not concerned with the two specific incidents being investigated, was to prevent the General Chairman from discussing irrelevant material such as the Claimant's family and making a general plea for leniency. The exclusion of such matters from the transcript was entirely proper.

The Carrier also argues that the Organization's objections to the conduct of the hearing were not timely made and therefore must be considered to have been waived. The record indicates that the Claimant stated at the conclusion of the hearing that he had a fair and impartial hearing and the General Chairman by his silence indicated that he agreed with the Claimant.

The Organization, on the other hand, contends that the Claimant's procedural rights were grossly violated by the conduct of the hearing officer as well as by the failure of the transcript to record the several objections made by the General Chairman in the course of the hearing. The Organization further contends that the evidence does not substantiate the substantive charges levelled against the Claimant and in any event the extreme penalty of dismissal as a supervisor is not warranted by the offense.

In developing its procedural objections to the investigative hearing, the Organization states that the conduct of the hearing officer manifested gross prejudice against the Claimant and thus denied him the fair and impartial hearing that he is contractually entitled to receive under Rule 20 of the existing collective agreement. The Organization points out that the hearing officer stated at the opening of the investigation that the only information that would be shown in the transcripts would be dealing directly with the matter of whether the Claimant had failed to check the rotation of unit 1004 and the cut out switch of unit 1109. The Organization adds that the hearing officer also stated that he was not interested in any reasons why the Claimant had not performed his duties. The Organization stresses that despite the fact that it protested this ruling, it was not noted or shown in the transcript. The Organization also protests the conduct and demeanor of the hearing officer because during the course of the hearing he slumped in his chair, swivelled around in his chair, and turned his back toward the Claimant during the time that the Claimant was being questioned as well as read a manual during the questioning period.

The Organization further contends that the Carrier's unfairness is shown by the fact that it held no investigation with regard to the journeyman electrician who was directly responsible for the improper hooking up the leads on unit 1004, nor of the General Foreman, to whom the Claimant reported, and who was also on duty at the time of the incidents.

The Organization, in discussing the substantive aspects of the charges

filed against the Claimant, contends first that there were considerable mitigating circumstances which explained why the Claimant did not check personally the rotation of the traction motor on unit 1004. It states that the Claimant's work load was so heavy that the Claimant had to perform duties which were outside the scope of his supervisory job. He functioned that night for a good part of his time as journeyman electrician because it was the only way he could get the work out of the shop for the next morning. The Organization states that the Claimant exercised his supervisory judgment as to what were the most important jobs that had to be done, and in doing them, he had to delegate to others, the formal checking as to determining whether work had been properly done.

With regard to the matter of not cutting out the switches on unit 1109, the Organization maintains that the Claimant stated at the investigation that he personally checked the unit and the cut out switches were placed in the "in" position. It adds that since the switches were not sealed, as stated in the transcript, it would have been possible for some other individual to have tripped them. But the only evidence of record shows unrefutedly that the Claimant properly checked the switches.

The Board is compelled to conclude from the record before it that the Claimant was not accorded a proper investigation in accordance with the provisions of Rule 20 of the Schedule. The apparent refusal of the Carrier's hearing officer to incorporate into the transcript the protests made by the General Chairman was a material defect. The Claimant is contractually entitled to a fair and impartial hearing and to a transcript that completely represents what took place at the hearing. To say this is not to say that the hearing officer may not properly exclude irrelevant and immaterial data. But when and if the Organization takes issue with the ruling of the hearing officer, the transcript must accurately reflect the noted objections of the Organization. This must obviously be so because the transcript is not only the basis of the original discipline, but it is also the only basis for prosecuting an appeal from the original determination. It is true that at the oral hearing before the Division the Carrier stated that only minor details were omitted from the transcript, but what may be minor to the Carrier could well be major to the Organization. This sort of transcript is not designed to inspire confidence as to its completeness.

The Carrier does make a seeming telling point in its contention that the Organization failed to make a timely protest about the conduct of the hearing and therefore must be considered as having waived any objections it had to the proceedings. But when an essential element of the Organization's protest devolved about an incomplete transcript, the Organization is entitled to review the transcript before it can effectively protest. It is difficult in this sort of a factual situation to know with any degree of exactitude whether the Organization did or did not file a timely protest. However, the chronology of events dealing with the Organization's appeal, as reviewed by the record, favors the Organization. The chronology shows that the investigative hearing was held on August 26, 1965. It apparently took a few days to transcribe the notes of testimony because the transcript was not received by the General Chairman until the afternoon of September 3, 1965. However, he filed his letter of protest concerning the alleged omissions from the transcript on the very same day. In light of these facts the Board must hold that the Organization's protests were timely made.

The Board further finds that the Carrier's efforts to denigrate, but without refuting, the Organization's plea that the hearing officer comported himself

in a manner completely at variance with his function as a finder of fact, is not well founded. Included into the totality of the components which go to make up or constitute a fair hearing, is embodied the fundamental concept that the hearing officer will attempt to act as a finder of facts, good or bad, for and against, the employe charged. At no time should he occupy an adversary role toward the involved employe. The board can only conclude that if only part of the Organization's allegations concerning the conduct of the hearing officer were true, then there was such a gross breach of the Claimant's contractual rights to a fair and impartial hearing that the hearing must be considered null and void. The hearing officer, not only by his conduct but also by his manner, cannot convey his lack of interest or belief in the Claimant's case.

In view of the foregoing findings, the Board does not find it necessary to review the substantive aspects of this case. The discipline imposed cannot be sustained because the hearing officer's total conduct at the proceedings breached the provisions of Rule 20.

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

The carrier and the employe 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.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois, this 28th day of November, 1966.