

Referee Harold M. Weston

PARTIES TO DISPUTE: The American Railway Supervisors Association
Penn Central Transportation Company
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

1. On December 17, 1968, Mr. D. O. Childers, Car Foreman at Gibson Car Shop, Hammond, Indiana, was dismissed from service of the company in violation of Rule 18.
2. Car Foreman Mr. D. O. Childers shall be restored to his position as Foreman with all his seniority, vacation, health and welfare rights and benefits unimpaired, that Mr. D. O. Childers be paid for all monetary loss suffered by him, that this claim begin December 17, 1968, and continue until this unorthodox and violative action by the Carrier is corrected.

OPINION OF BOARD: Petitioner contends that the dismissal of Claimant, a car foreman, for negligence was in violation of the applicable Agreement. Carrier's findings of fact are supported by the testimony of three carmen who were working under Claimant's supervision at the time and site of the accident. They testified that Claimant neglected to warn the carmen that the rip tracks had been opened for switching and were to be pulled. Their testimony is credible and positive and, although Claimant testified that he did notify the carmen and his testimony was corroborated to some extent by another employe, well established principles of all Adjustment Board Divisions make it clear that we are not free to weigh conflicting evidence or set aside findings of fact that are supported by credible, though controverted, evidence. See Fourth Division Awards 901, 978, 1354, 1714, 2055, 2153 and 2227, First Division Awards 15032, 16343 and 16848, Second Division Awards 1831 and 2200 as well as Third Division Awards 9046, 10791, 12074, 13168 and 14391.

Petitioner's objections to the notice of hearing, preliminary investigation and hearing also are not persuasive. The notice was specific as to time and place and identified the occurrence for which Claimant's responsibility would be determined sufficiently clearly to enable him to prepare his defense and prepare his case. The fact that the notice was addressed to seven employes in addition to Claimant does not render it defective or detract from its clarity.

While Claimant was interviewed by Carrier's Safety Inspector and Claim Agent before charges were preferred against him, there was nothing invalid or prejudicial in that procedure. It is a normal and reasonable investigatory measure to examine witnesses preliminarily to determine whether sufficient reason exists for proceeding further in the matter. See First Division Award 16124 and Second Division Award 4156. We are satisfied that Claimant was not subjected to double jeopardy or otherwise prejudiced by this procedure and that he received a fair opportunity to present his case and cross-examine adverse witnesses at the hearing held in this matter.

We also find no merit in Petitioner's additional point that Carrier must have prejudged the case since it could not have read and evaluated the 362 page hearing transcript between the time it was first received on the morning of December 17, 1968, and the time Claimant was dismissed (about 2:30 p.m. the same day). Without additional evidence to substantiate its position, we are in no position to uphold the contention. Carrier did have several hours to sift through the transcript and we will not engage in conjecture regarding this matter.

There is no sound basis for disturbing Carrier's findings as to negligence but the record is not free of defect to the extent that it can validly support Claimant's discharge. After the hearing had been held and decision rendered, Claimant appealed to the first step in accordance with Rule 18(c) of the Agreement and Carrier's own schedule of the appellate steps to be followed. He never received a reply from that officer but instead Master Mechanic Papa of the Locomotive Department, who had already issued the dismissal decision, intervened and denied the appeal. This clearly deprived Claimant of the independent de novo consideration of his case that he was entitled to receive at each appellate level. Papa had no place in the case at the appellate stage.

In view of that procedural defect, we will direct Carrier to offer Claimant immediate reinstatement to the position he occupied at the time of his discharge with all rights restored but without back pay. The defect in appellate handling is not sufficiently persuasive in the light of the entire record to require complete reversal of Carrier's decision particularly since Petitioner itself failed to comply with all aspects of the appeals procedure (it did not, e.g., process the case to the second step although it did go on to the final level).

In arriving at the above decision, we have taken into consideration the gravity and tragic consequences of the accident involved and of Carrier's enormous responsibility for safety. In cases of this type, it is also important that an employee under charges receive full procedural protection.

FINDINGS:

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

The carriers and the 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.

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

The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim sustained to the extent indicated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Muriel L. Humfreville
Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois, this 13th day of October, 1970.