

Referee Arthur T. Van Wart

PARTIES TO DISPUTE: American Railway Supervisors Association
Consolidated Rail Corporation

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

1. Respondent Carrier violated the Agreement, particularly Rule 17 when it assessed discipline in the form of an Actual Suspension to Mr. Mearl Summey, Assistant Track Supervisor at Jackson, Michigan, as a result of an Investigation held on August 19, 1977.
2. Carrier rescind the discipline assessed and be required to reimburse Mr. M. Summey for all Wages Lost during the period of Suspension from August 2nd, 1977 up to and including August 28th, 1977. Further that all mention of this Suspension be removed from his record.

OPINION OF BOARD: Claimant, on August 1, 1977, was assigned on a first trick Assistant Track Supervisors, Production Gang ST-531, headquartered at Jackson, Michigan. He requested and received Track Car Permit Form "M" - authorizing the movement of two (2) track cars on track No. 1 between Ypsilanti and Wayne, Michigan. The track cars, under Claimant's instructions, were placed on track No. 2 at Ypsilanti. The Operators thereof were told by Claimant to proceed to Wayne. He omitted to instruct them to proceed as authorized by Form "M" on track No. 1 or to show them the Form "M". Claimant left with the Form "M" and the cars commenced their movement on track No. 1 to Wayne.

Claimant encountered the Track cars on track No. 2 at Willow Run, an intermediate point. He corrected the situation by crossing over said track cars from track No. 2 to track No. 1 at Roosevelt Crossover. However, Claimant failed to obtain permission for such movement.

Claimant received written notification, dated August 2, 1977 reading:

"Please arrange to attend a hearing to determine your responsibility, if any, in connection with the following:

1) placement of Track Cars UMC 5005 and UBR 1141 on track #2 between Ypsilanti and Willow Run on August 1, 1977, from approximately 12:45 PM until 1:15 PM, without authorization of the Train Dispatcher or Operator.

2) Failure to show Track Car permit Form M to Operators D. Van Nuys and K. Ringe, who operated UMC 5005 and UBR 1141 on August 1, 1977, over Main Line Track between Ypsilanti and Willow Run Track #2, from approximately 12:45 PM until 1:15 PM.

This hearing will be held commencing at 9:00 AM on Tuesday, August 9, 1977 in the office of the Division Engineer, Amtrak Passenger Station, 501 E. Michigan Ave., Jackson, Michigan.

You may bring representation or witnesses of your own choosing, without expense to Con Rail."

Claimant was removed from service August 2, 1977, pending the holding of an investigation. He was called into the Assistant Superintendent's office August 3, 1977, at which time he was interrogated concerning the August 1st incident.

Claimant's Hearing commenced August 9th as scheduled. Claimant's Representative protested the last sentence of the Notice of Investigation concerning witnesses being had at no expense to the Carrier. He also protested the removal of Claimant from service alleging that it constituted discipline and that it was a violation of Rule 17(e). Said Representative protested the August 3rd meeting had with Claimant in the Assistant Superintendent's office, alleging that such constituted a hearing held for the same purpose as the instant hearing and that Claimant did not have representation there. Additionally, he protested that the Block Operator, Train Dispatcher, the Track Car Operators were also charged but that they were having separate investigations. The Track

Operators appeared at Claimant's hearing as witnesses while Claimant's name appeared on their Notice of Investigation as a witness. Lastly, Claimant's Representative asked that the hearing be cancelled and that Claimant be restored to service without loss of wages.

The Hearing Officer took a recess to permit him to confer with his superiors. He returned therefrom reconvened the Hearing and advised Claimant that his removal from service was not any disciplinary action against him and after giving a few more answers to the questions of Claimant's Representative, on that subject, announced that:

"At this time, conducting Officer Stevenson will cancel this hearing, which was set to determine, if any, your responsibility in connection with the follow as quoted. And that is all this hearing was set up for was a form to determine responsibility. At this time we will cancel this hearing.

CANCELLED."

Claimant was thereafter given a notice, dated August 10, 1977, to attend a hearing on August 12, 1977 charged as follows:

"Alleged violation of Rules 804, 805, and 513 of the Book of Rules for Conducting Transportation, which alleged violation occurred on #2 Track between Ypsilanti and Willow Run on August 1, 1977, from approximately 12:45 PM until 1:15 PM."

The Block Operator, Train Dispatcher, and two (2) Machine Operators were requested to appear at the August 12, 1977 hearing as witnesses. Said hearing was postponed at the Employees request. It was re-scheduled and held on August 19, 1977. Claimant's Representative again entered a protest as to holding this August 19, 1977 hearing on the basis previously set out, to wit - Claimant was disciplined when removed from service, contra Rule 17, that he attended a Hearing August 3rd and was not afforded a representative, that the Hearing of August 9th was cancelled and not postponed and that Claimant was given notice to appear as a witness at two investigations August 9 and 11, while four (4) of the witnesses were principals in the three investigations at which Claimant was a witness.

As a result of the August 19th Hearing Claimant was notified, August 13, 1977, that he was guilty as charged and that he was being disciplined by a 26 days' suspension, time held out of service to apply.

Rule 17 (e), in pertinent part, provides:

"Suspension in unusual circumstances pending a hearing shall not be deemed a violation of this rule."

Here, there were unusual circumstances present to properly permit suspension of Claimant pending the holding of a hearing. The fact of Track Motor Cars operating on main line track without authority represented a safety hazard to all concerned. The cause thereof needed to be determined by a formal investigation. A preliminary inquiry indicated that Claimant most possibly had a primary role therein. However, to have continued Claimant in service under such circumstances would have represented a potential hazard to Carrier's safety of operations. Hence, Claimant was withheld from service.

It has been long recognized and held that such Carrier action of withholding an employee from service pending an investigation in serious cases, as here, does not constitute discipline. See our Awards 2760, 3380 and 3484. Also, First Division Award 16 344, among others.

We also hold that it was not procedural error because Claimant had been asked to come to the Assistant Superintendent's office on August 3rd. It has been long held that pre-trial interviews, no matter how otherwise euphemistically phrased, of parties involved in an incident, which is the subject matter of investigation, is permissible and not a violation of discipline rules like that herein. Award 207 was among the first issued on this principle and it has been generally followed since.

However, as to the procedural objection of double jeopardy raised, concerning the August 19, 1979 Hearing, it is found to be with merit and will be upheld.

Claimant was given notice of a Hearing to be held on August 9, 1977. He was properly charged. The Hearing on such charge opened, on August 9th, and testimony in connection therewith commenced to be taken. Consequently, at that point in time jeopardy to Claimant had attached. It is concluded on the record established, that, the Hearing Officer, upon motion of Claimant's Representative to cancel the Hearing, chose to act affirmatively thereon. He cancelled, not recessed, that Hearing. Having done so the charges that bottomed the purpose for which that Hearing was held, were, at that point, laid to rest. ~~Cancel~~, in

its ordinary useage, means to void or invalidate. Thus, in such circumstance as here the Claimant could not be again charged, tried and disciplined on the same charges. Consequently, the Board is impelled to find that the Hearing held on August 19, 1977, from which discipline ensued was improper, the latter hearing represented double jeopardy.

In view of the conclusion reached it will therefore not be necessary to reach and pass upon the other questions raised.

FINDINGS:

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

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

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:

Executive Secretary
National Railroad Adjustment Board

By: 
Assistant Executive Secretary

Dated at Chicago, Illinois, this 9th day of May 1979