

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4462
Docket Number 4432
Dana E. Eischen, Referee

PARTIES Railroad Yardmasters of America

TO

DISPUTE: Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Yardmaster J. B. Briton be paid for all time lost as a result of discipline assessed February 11, 1984 sixty (60) days actual suspension and disqualified as a yardmaster and that he be reinstated as a yardmaster.

OPINION OF BOARD: On January 29, 1984 Claimant was assigned as Yardmaster, Middle Yard, Proviso, Illinois, 11:30 P.M. to 7:00 A.M. Working with Claimant on that tour of duty was Clerk Alexander Hart, Jr. The Clerk's duties included checking cars as they were added to trains by Claimant.

During the course of the tour, Train PRGCA was made up by Claimant and departed the Yard at 1:59 A.M. After leaving the Yard, the Conductor of PRGCA found two (2) unchecked cars on his train, one of which was a tanker filled with liquid propane gas. He brought the train back in the Yard to obtain proper paperwork and then departed again at 2:59 A.M., one hour late.

Claimant's superior, Assistant Superintendent Thorsen, queried him after the train departed in the early morning of January 29, 1984, but the Supervisor did not discuss the incident at all with Clerk Hart. The next day, January 30, Carrier notified Claimant to attend a formal Investigation into charges reading as follows:

"Your responsibility in connection with your failure to properly perform your duties when you failed to notify proper clerical forces that CEWX 422 loaded propane and TTX 252073 were placed in Train PRGCA which resulted in delay of that train on January 29, 1984."

Following an agreed-upon postponement, the Investigation was held on February 2 and 10, 1984. After reviewing the Transcript of Hearing and Claimant's prior disciplinary record, Carrier found him guilty as charged and assessed disciplinary penalties of a sixty day suspension without pay and a disqualification as Yardmaster.

Claimant and RYA filed a timely appeal of the discipline, protesting mainly upon grounds that Carrier failed to prove Claimant's culpability and moreover, that the record shows that fault lay with the Clerk who

was responsible to check the two cars. Carrier insisted throughout handling on the property that a credibility question was presented on the record regarding Claimant's credibility and that credibility conflict has been resolved against him, leaving this Board with no jurisdiction to overrule the credibility resolution.

Carrier correctly cites a long line of precedent involving the proper handling of credibility conflicts in arbitration, but those cases do not govern the present matter. A close review of the record persuades us that there was no credibility conflict in the testimony and that Carrier failed to show by a preponderance of the evidence that Claimant was guilty of failing to notify the Clerk that the two cars would be added to the train.

Assistant Superintendent Thorsen's testimony establishes only that Claimant did not "specifically tell" the Clerk to check those two individual cars. That testimony is not contradicted by Claimant's statement at the Hearing that he told Clerk Hart that he was adding the two cars to the train and that the Clerk was sitting beside him as the cars were added to Train PRGCA:

"Q. Mr. Birton, did you instruct the yard clerk to take a check of the two indicated in the charges in this investigation?

A. When you say instruct, no I didn't tell him directly to take a check of these two cars in those words. I did tell him I was taking an LP gas off of 1 in Yard 1 and a 46 short pig off 14 in Yard 1 and they were going to be on 383. Those were the words that I used when I told him. He observed these two cars being coupled together and pulled by the yard office at which time I was on the telephone and I thought he had written down the numbers and done what he was supposed to do which is call the cars in. I also told him at that time when I got off the phone, I say, along with these two cars, we were waiting for 596 and he's supposed to have eight autos and we'll close the train up with him. The same job, Job 38, that got these two cars out of the yard and set them on 5 Main across from the office is the same job I told to go and get me a waycar and we'll be in position when 596 comes in and we'll close it up. Like I said, I assumed that he had called those cars in. That was another reason why I got the waycar early so he could call the waycar into them. They would in fact have a check of the train 596 before we would but he still had to call the cars in to let them know that they had been placed on the train.

Nor was the foregoing testimony by Claimant refuted or contradicted by Clerk Hart, who testified that he was not able to recall whether Claimant had given him the information regarding these two cars or not. The sum and substance of the Clerk's testimony is that Claimant may have done so or may not have done so, but the Clerk was not able to recall whether he did so at the time of the Hearing.

The evidence of record regarding Claimant's culpability is at best in a state of balance or equilibrium. There is no preponderance of probative record evidence that Claimant was guilty as charged. This failure of proof must go against Carrier which has the burden of persuasion in the disciplinary case. Suspicion, surmise and conjecture cannot be used to fill the evidentiary gap. See National Railroad Adjustment Board First Division Award 20471; Second Division Award 6713; Third Division Award 20766; Fourth Division Award 3633. Nor can Claimant's prior discipline record, which admittedly appears to be deplorable, be used to justify the present disciplinary action against him in the absence of independent proof that he was guilty of the instant charged offense. That prior record, if accurate, certainly would justify the imposition of severe discipline if he had been proven guilty of the present charged misconduct. But in the absence of persuasive evidence on the critical question of instant culpability, the past record is without relevance or materiality to this case. Based upon all of the foregoing, we have no alternative but to sustain this claim.

FINDINGS:

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

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 thereon.

A W A R D

Claim sustained.

Q. Mr. Briton, after you placed those two cars and you got the waycar, was it necessary, after you told the clerk what your intentions were, moving the LP and the piggyback, you stated you told the clerk that you were going to add 596 - is that correct?

A. Correct.

Q. Now when Job 38 went against 598 with that waycar, did you have to instruct the clerk again to take another check of 598 or did he do that on his own also?

A. Well, I told him we were going after those cars off 596, and he said okay I see that and I'll copy them as they go by.

Q. But you didn't specifically have to tell him to check those particular cars?

A. No.

Q. ...to check those particular cars, correct?

A. No, his understanding from a conversation we had the previous night was that he was supposed to check everything that comes by the shanty. On occasion, the agent would call him and tell him to check trains that were going down 44 main.

* * *

Q. He was with you when you placed the two cars on 5 Main?

A. Yes, he was.

Q. Where did you get the rear end of the train, the eight cars? Were they out of Yard 1 or were they on a Main?

A. He came up 6 Main.

Q. Where was the clerk at when the cars were pulled by the shanty?

A. Sitting to my right.

Q. In other words, he didn't bother to go outside to check the cars, he got them from inside?

A. That's right.

Q. When you got the tank car off of 1 in Yard 1 and the piggyback in yard 1, when you pulled them by, was his vision obstructed so he couldn't get the two cars?

A. No."

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:



Nancy J. Bever
Executive Secretary

Dated at Chicago, Illinois, this 17th day of July 1986.