Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13599
Docket No. 13479
01-2-99-2-81

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

"1. Springfield Terminal Railway Company violated Rule 15 of the controlling Agreement, effective June 1, 1995, as amended, when by letter dated September 15, 1998, the Carrier arbitrarily, capriciously and unjustly suspended Machinist Phil Davis for five (5) working days after an Investigation/Hearing held on August 17, 1998.

2. Accordingly, the decision should be reversed, Machinist Davis exonerated of the charge(s), his record and personnel files cleared of any reference thereto. And he be made whole for any and all losses suffered as a result of Carrier's arbitrary, capricious and unjust actions, including but not limited to, time spent at formal Investigation/Hearing of August 17, 1998."

FINDINGS:

The Second 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.

By notice of Hearing dated July 24, 1998, the Claimant was instructed to attend a Hearing:

> "... to develop the facts and place your responsibility, if any, in connection with the incidents outlined below:
>
> Misrepresentation of abilities and qualifications as a locomotive inspector to a Company official resulting in the unwarranted hardship and expense to the Carrier (i.e. disruption of scheduling and production).
>
> Specifically, on July 13, 1998, while employed as a machinist at the East Deerfield Engine House, you verbally and in writing disqualified yourself as a machinist to your immediate supervisor. You claimed you were unfamiliar with the requirements of inspecting locomotives. Subsequently you were reassigned to other less technical tasks until further evaluation could be complete.
>
> On Monday, July 20, 1998, in accordance with Rule 14 of the controlling agreement, you were field tested in the presence of a Carrier official and the local committee. Based on this test and a corresponding written exam it was determined that you were in fact qualified to inspect locomotives to the specifications of the Code of Federal Regulations.
>
> Due to the proficiency by which you passed the aforementioned testing and the over 1 ½ years experience performing locomotive inspections, I feel that an unnecessary loss of crucial man hours and undue overtime have been incurred as a direct result of your actions."

The Investigation, initially scheduled for July 31, 1998, and postponed by mutual agreement, was held on August 17, 1998. Following the Investigation and Hearing, the Claimant was notified that the charges had been substantiated and that he was assessed a five-day suspension.

The record of the Hearing shows that the Claimant was the subject of a prior Investigation Hearing on July 8, 1998 for failing to properly perform his duties while

inspecting a locomotive. On July 13, 1998, the Claimant was again assigned to inspect locomotives. When given this assignment, the Claimant informed his Supervisor, Mr. Walsh, that he did not think he was qualified to inspect locomotives. Supervisor Walsh testified that he concluded that the Claimant was "grandstanding" by making this statement in front of his co-workers rather than speaking privately with him. According to Supervisor Walsh, this was "a way to retaliate against myself and the Company."

At Supervisor Walsh's request, the Claimant made a list of machinist duties for which he felt he was not qualified. The Claimant requested and received a copy of the FRA regulations in order to study and review federal standards.

The Claimant subsequently took a written test and then a field test to measure his qualifications. The Claimant passed the written test and performed the field inspection test properly.

The Carrier contends that the Claimant was qualified to perform his duties and that he deliberately misrepresented his abilities in order to exact retribution against the Carrier. The Carrier argues that the discipline in this case was properly issued to correct the Claimant's attitude. In the Carrier's view, the Claimant's actions were disruptive, dishonest and placed an undue burden on the Carrier's resources. The Organization disputes those contentions and argues that the Carrier retaliated against the Claimant for expressing concern about his job abilities. Therefore, the discipline should be overturned.

As in any disciplinary case, the Board's function is to review the record to determine whether there is substantial evidence to support the guilty finding and the discipline imposed. After examining the record in the instant case, we find that the evidence failed to establish that the Claimant intentionally misrepresented his qualifications and abilities to retaliate against the Carrier. On the contrary, the record supports the conclusion that the Carrier disciplined the Claimant for expressing concern about his job qualifications.

The Board's conclusion is based on several key points. First, it must be remembered that on July 9, 1998, only one day after the Investigation Hearing pertaining to the charge that the Claimant had failed to properly perform his locomotive inspection duties, the Carrier posted the following notice:

"As a reminder, no employee will be expected to perform any duties for which they are not qualified. Any employee who feels they cannot perform their job assignment safely and efficiently will be expected to bring this matter to their supervisor's attention immediately.

Supervisors will assess and recommend corrective or instructive measures for the employee to be qualified in performing the duties in question. This may include assignment to work with a senior, more experienced employee or informational literature . . . "

Second, Supervisor Walsh testified at the Hearing that employees who felt they were in need of additional training were informed that they could report the matter to supervision without fear of retribution. That is what the Claimant did. The Carrier cannot now impose corrective action where it has expressly directed employees to come forward with their job concerns and has promised that no discipline will result when an employee has been forthcoming.

The Carrier clearly mistrusts the Claimant's intentions, the Board recognizes. However, we will not impute improper intent or deliberate misrepresentation on the basis of the evidence adduced on this record. The Claimant had legitimate concerns about his abilities on the job after being brought up on charges for failing to properly conduct an inspection. There is no Rule or policy that has been cited by the Carrier which would have required the Claimant to raise those concerns privately. Moreover, the fact that the Claimant passed the Carrier's tests after having the opportunity to review the code of federal regulations is cause for satisfaction, not corrective action.

AWARD

Claim sustained.

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 Second Division

Dated at Chicago, Illinois, this 3rd day of May, 2001.