Award No. 5360
Docket No. 5191
2-IC-EW-'68

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee James E. Knox when award was rendered.**

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## PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Electrical Workers)**

**ILLINOIS CENTRAL RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

1. That the carrier violated the current Agreement when they suspended Joseph Sarratore, Electrician Helper, prior to his investigation.

2. That the Carrier unjustly invoked too severe discipline when they dismissed him from service.

3. That the Carrier reinstate Mr. Joseph Sarratore with his seniority rights unimpaired, compensate him for all wage loss, vacation rights restored, and Health, Welfare and Death benefits premiums paid for.

EMPLOYES' STATEMENT OF FACTS: Mr. Joseph Sarratore, hereinafter referred to as the Claimant, was employed by the Illinois Central Railroad Company, hereinafter referred to as the Carrier, as an Electrician Helper, on September 10, 1947.

The Carrier suspended Claimant at 2:30 P. M., on March 3, 1965, prior to the investigation.

Carrier notified Claimant on March 8, 1965, to arrange to appear at an investigation on March 12, 1965. (This letter is attached and marked as Exhibit A.) This investigation was held on the appointed date. Since the Carrier has reproduced the investigation record, the Employes will not burden the Board's files by duplicating that record. However, should the Carrier for some reason fail to supply the Board with the hearing record, the Employes will do so.

The Local Chairman protested the Carrier's notice that the Claimant's past record would be reviewed, as this is not a precise charge. (See attachment marked as Exhibit B.)

Moreover, the company has pointed out that the secondary issue posed by the Union questioning the propriety of the suspension was as empty as its charge that Mr. Serratore was unjustly dismissed.

All data in this submission have been presented to the employes and made a part of the question in dispute.

Oral hearing is not desired unless requested by the Employes. Opportunity to make written reply to the Employes' submission is hereby requested.

(Exhibits not reproduced.)

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

The carrier or carriers and the employe or 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.

Parties to said dispute waived right of appearance at hearing thereon.

The claimant was first suspended and then, after a hearing, discharged for failing to follow the instructions of his immediate supervisor on the afternoon of March 3, 1965, and for being insubordinate to his immediate supervisor and the general foreman when they attempted to discuss this failure with him.

The Employes make four contentions on the claimant's behalf: (1) This was not a "proper" case for suspension pending a hearing. (2) The claimant was not given a "fair hearing" because the same official of the Carrier signed the notice of the charges against the claimant, conducted the hearing, read into the hearing record a previous similar incident involving the claimant, and signed the notice of his discharge. (3) The claimant was not given a "fair hearing" because the statement in the notice of the charges against him that his "past record" would be reviewed was not sufficiently precise. (4) Discharge was too severe a discipline for the alleged charges in light of the claimant's age of 60 years and more than 17 years of service.

The Carrier denies the validity of these claims and in addition argues that the objections to the conduct of the hearing were waived by the admission by claimant and the Employes at the hearing that they had no objections to the manner in which the investigation had been conducted.

These contentions are governed by Rule 39 of the Shop Crafts Schedule which reads as follows:

> "No employe shall be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe will be apprised of the precise charge against him. The employe shall have reasonable opportunity to secure the presence of

necessary witnesses and shall have the right to be there represented by the authorized committee. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from such suspension or dismissal."

This was a proper case for suspension pending a hearing. Suspension prior to hearing should be used to protect the public, the employes, or the carrier, not to inflict immediate punishment upon the suspected wrongdoer. It was for the Carrier, not this Board, to determine whether the circumstances dictated a protective suspension. The consequences of a mistaken suspension can be substantially undone by the Carrier. It may not be possible to rectify the consequences of a mistaken failure to suspend. The question for this Board is whether the suspension was imposed for discipline reasons or for protective reasons. In the absence of contra evidence, this Board cannot conclude that a prehearing suspension was imposed for other than protective reasons if the circumstances show a reasonable possibility for the need for protective action.

There is no indication in this case that the Carrier's action was not protection oriented. The circumstances show a reasonable possibility that suspension was necessary to afford protection. The evidence against the claimant was clear. He had shown himself to be antagonistic to his superiors. Such an attitude or temperament not only in itself bodes trouble in the future, but is such a major infraction that the employe knows his continued employemnt is doubtful, and even an employe whose attitude has previously been satisfactory may undergo an unfavorable change in light of such knowledge. Insubordination in particular and major infractions in general have been found in previous awards to be proper cases for prehearing suspension. E.g., Award 2–3310 (Bailer); Award 2–3001 (Whiting); Award 2–3828 (Doyle).

The second and third claims raised by the Employes relate to the manner in which the investigation was conducted. The Employes and the claimant are precluded from raising these objections by their failure to raise them at a time when the Carrier could have acted upon them. E.g., Award 3–13953 (Coburn). While prior to the hearing the Employes did raise the matter of reviewing the claimant's previous record, they questioned the pertinency of that record, not the sufficiency of the notice stating the record was going to be reviewed. Moreover, at the hearing both the Employes and the claimant stated that they had no objections to the manner in which the investigation had been conducted. Previous awards have held that such acknowledgment forecloses subsequent procedural objections. E.g., Award 2–3874 (Anrod).

Even if the procedural claims had not been waived, they are without merit. It was not improper for the same official of the Carrier to sign the notice of the charges against the claimant, to conduct the hearing, to read the claimant's previous disciplinary history into the record, and to sign the notice of the claimant's discharge. There is nothing inconsistent with the mixing of these functions and the holding of a fair hearing. On their face the mixing of these functions would not even be inconsistent with a criminal proceeding. However, if the hearing official actually participated in the formulation of the charges against the claimant of which there is no evidence

in this case, but which may be a reasonable implication from the fact of signing), such prehearing consideration of the evidence against the claimant would be inconsistent with the role of a judge in criminal proceeding. That such dual roles would be impermissible in a criminal proceeding does not mean that they are inconsistent with the "fair hearing" required by Rule 39.

In providing that the hearing is to be before an "officer of the carrier", Rule 39 recognizes that the complete detachment of the judge in a criminal proceeding is not going to be present in a hearing under Rule 39. There is a "fair hearing" within the meaning of Rule 39 when the employe is given an adequate opportunity to know the evidence against him and to present evidence in his defense before an officer of the Carrier who is not so personally involved in the dispute that he cannot view the matter objectively.

The framing of the charges against the claimant and the other acts performed by the hearing officer in this case did not deprive the claimant of the opportunity to know the evidence against him or to present evidence in his defense and did not so personally involve the hearing officer in the dispute that he could not view the matter objectively.

While there is some condemnation of participation by the hearing officer in framing the charge in awards of the Third Division, e.g., Award 3–8711 (Weston), this Division has held that such participation and the other acts performed by the hearing officer in this case do not significantly detract from the fairness of the hearing, e.g., Award 2–5223 (Weston); Award 2–4242 (Shake); Award 2–3613 (Stone); Award 2–1795 (Wenke).

It is by no means clear that an employe must be notified in advance of the hearing that his past record will be reviewed. His past record is not part of the charge against the employe, but is an element to be considered in assessing discipline if he should be found guilty of the charges against him. The specific requirements of Rule 39 that the employe "be apprised of the precise charge against him" is therefore not applicable. Nor is such consideration of an employe's past record so unexpected (indeed, such consideration may be mandatory, e.g., Award 2–1261 (Wenke)) that a failure to notify the employe of contemplated consideration would necessarily detract from the fairness of the hearing. But if notice is required, the notice in this case was sufficiently precise to inform claimant that he should be prepared to respond to the consideration of his past record. If claimant wanted to review his record in advance of the hearing, he should have raised the matter with the Carrier.

Discharge was not an impermissible discipline to impose for the claimant's misconduct. This Board can set aside a punishment as too severe only if it is so incommensurate with the misconduct viewed in light of the employe's previous record and the other surrounding circumstances that it appears that the Carrier must have been acting on the basis of personal animosity toward the offending employe. E.g., Award 2–5183 (Harwood); Award 2–4532 (Seidenberg); Award 2–3874 (Anrod); Award 2–3828 (Doyle); Award 2–3430 (Murphy). No such conclusion is possible in this case.

The undisputed evidence shows that claimant openly refused to commence a task when instructed to do so by his immediate supervisor and

used abusive and vulgar language when confronted with this failure by his supervisor. This defiance and abusiveness continued before the general foreman, who was called in by the supervisor. Upon being suspended the claimant cursed and threatened them. At the hearing the claimant first admitted his misconduct, then became evasive, and finally readmitted his guilt. The claimant was 60 years old and had been employed by the carrier for more than 17 years. Just a year and a half before this time the claimant had been given a 30 day "voluntary" suspension upon his admission that he had failed to follow the instructions of his supervisor, and had become insubordinate when confronted with this failure.

Insubordination is a serious offense which has been held to justify dismissal under circumstances more favorable to the employe than those of this case. E.g., Award 2–2897 (Abrahams); Award 2–3894 (Daugherty); Award 2–1542 (Wenke).

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1968.

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