

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: (System Federation No. 42, Railway Employees'
(Department, A. F. of L. - C. I. O.
(Carman
(
(Seaboard Coast Line Railroad Company

Dispute: Claim of Employees:

1. That under terms of the controlling agreement, Carman H. R. McClure was unjustly deprived of his rights to service October 1, 1971 to November 1, 1971.
2. That accordingly, the Seaboard Coast Line Railroad Company be ordered to compensate him for eight (8) hours each day, October 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, 1971, at pro rata rate and all overtime he may have made between October 1 and November 1, 1971 and that he be made whole for all other benefits he may have lost during the period he was deprived of his rights to service.

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 waived right of appearance at hearing thereon.

Claimant H. R. McClure has been an employee of Carrier since 1949. The record shows that for approximately half of the time he has been employed by Carrier he has worn a short Van-Dyke beard. In July 1971, apparently for the first time since he began wearing the beard, he was told by Carrier's Master Mechanic, one F. A. Gray, to remove the beard. On August 23, 1971 Gray sent Claimant the following letter:

"This refers to conference with you and Carman J. T. White, July 28, 1971, wherein it was pointed out to you with Carman J. T. White present, that your appearance as an employee is a vital part of the Company image; however, your present appearance does not

"reflect creditably on that image. At that time you were requested to comply with requirements which were outlined in our discussion.

You have failed to do as requested; therefore, this confirms verbal instructions which were given to you on July 28, 1971, that is, if you expect to remain in the employment of this Company, you must improve your personal appearance by removing your beard and this must be done prior to working hours August 26, 1971."

Four days later, on August 27, 1971 Gray sent Claimant a Notice of Investigation charging him with insubordination as follows:

"For failing to comply with instructions and Company policy, you are hereby charged with that part of Rule 12 of Rules and Regulations of the Mechanical Department, reading ...insubordination...' and also that part of Rule 1, reading:

'The rules and regulations as well as general and special orders issued from time to time are designed to insure the proper care of the Company's property and the interest of the Company and its employees. Every employee is expected to yield a willing and cheerful obedience thereto. To enter or remain in the service is an assurance of willingness to obey the rules...'

You are hereby instructed to report to the office of Master Mechanic, Tampa, Florida, 9:00 a.m., September 1, 1971, for formal investigation to develop the facts and place responsibility in connection with charges placed against you. You may have present any witnesses who have personal knowledge of this matter under investigation and duly authorized representative of System Federation No. 42."

Master Mechanic Gray, who filed the charges against Claimant, served as the Hearing Officer at the investigation held on September 8, 1971. The Organization, on behalf of Claimant, requested Gray to disqualify himself which request was refused by Gray in the following exchange:

"Q. Mr. Gray, I am going to have to ask you to disqualify yourself from further conducting this investigation on the grounds that you are vitally interested in this, this can't be a fair and impartial investigation with you being instrumental in these charges being filed against Mr. McClure, further that you will or are acting as prosecutor, you will use transcript of this investigation to be the jury, the judge and you are acting in a dual or triple capacity?

"A. The transcript of the investigation will not be judged by the investigating officer. The investigating officer's duty is to record all facts, the degree of responsibility of the principal party will be determined based on the transcript of the investigation and not by the investigating officer nor this office. Additionally, the instructions with regard to personal appearance and beards will be made part of this investigation and is to be made part of this investigation now, it will be read and attached to the investigation as Appendix 3."

Notwithstanding the foregoing, Gray reviewed the record of hearing, made a determination of guilt and assessed a thirty (30) day suspension against Claimant. Claimant was returned to service on November 1, 1971 with his beard still intact. It is worth noting that on October 18, 1971 Carrier's Vice President, Personnel - Labor Relations issued a memorandum substantially modifying the grooming requirements of the Carrier as follows:

* * *

"The prescribed guidelines and standards should be applied to those employees who come in direct visual contact with the public in transacting company business. Appropriate exceptions may be made where local communities are having festivals or celebrations and citizens are encouraged to wear beards during such events; but even under those circumstances, beards should be kept neatly trimmed and removed promptly at the end of the event. Such exception should be limited to employees whose work is confined to the immediate geographic area of the festival or celebration and does not require travel into other areas.

'The policy is further modified so that employees working in shops, yards, on roadway and signal forces and elsewhere on jobs not involving direct visual contact with the public in the transacting of company business may work with longer hair styles and beards, provided the hair and beards are kept neatly trimmed and do not jeopardize safety.

'Please see that these modifications and exceptions are clearly understood and properly applied by sub-department heads and key supervisory personnel."

Upon review of this record we find that each of the parties has raised numerous arguments and counter-arguments, including Constitutional issues, questions of managerial prerogative, societal standards and public relations, and administrative and Court decisions. As we see this case, we can reach none of these questions because of the procedural irregularities in the Carrier's handling of the investigation on the property.

It appears that Claimant may not have been faultless in failing to comply with a regulation of Carrier. On the other hand, there is some evidence of record to suggest that the rule was not promulgated officially nor enforced in a non-discriminatory manner. The general principle in these cases is that an employee is required to obey directions of management unless they present a danger to his health or welfare and to file a grievance if he believes the order unreasonable or violative of his collective bargaining agreement. But we similarly do not reach this question in the instant case because of the fatal procedural defect by which Carrier utilized Gray as accuser, hearing officer, reviewer of his own hearing record, assessor of discipline and appeals officer. We are aware of Awards going both ways on the issue of Carrier officers performing more than one role in disciplinary matters and each such case apparently must turn on its individual facts. We have no doubt in this case, however, that the personal involvement of Gray at every phase of the disciplinary process rendered it impossible, both in appearance and in fact, for Claimant to receive a fair and impartial investigation. As we stated in Award 5223: "If discipline hearings prescribed by collective bargaining agreements are to possess any meaning, they must be conducted impartially and in line with elementary standards of fair play, no matter how informal the proceedings may be." Because of the defects mentioned supra, the discipline imposed cannot be upheld on the record developed in this case.

In sustaining the claim on procedural grounds we intimate no view with respect to the merits of the charge of insubordination. No basis for recovery of overtime pay has been shown on this record, therefore recovery is limited to eight hours at the pro rata rate for the dates listed in the claim.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of April, 1976.

RECEIVED

MAY 4 - 1976

G. M. YOUHN'

DISSENT OF CARRIER MEMBERS
TO

SECOND DIVISION AWARD 7032, DOCKET 6682

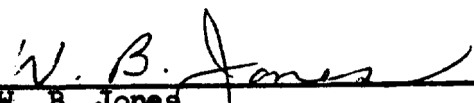
Award 7032 is in serious error in sustaining the claim on the basis that claimant did not receive a fair and impartial investigation.

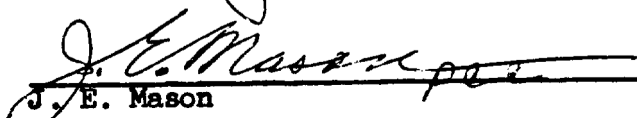
The Master Mechanic was the ranking mechanical officer on the Division and it was entirely proper for him to conduct the investigation. The Agreement contains no provision as to who will prefer charges, conduct investigations, or render decisions. Awards are legion to the effect that the same officer preferring the charges, conducting the investigation, and rendering the decision does not constitute a violation of the Agreement or deprive the employee charged of a fair and impartial hearing. See, for example, Second Division Awards 6196, 6004, 5855, 5360, 4211, 4001, 1795 among others, as well as Third Division Awards 20673, 16268, 14573, 10355, 9322, 8179. As stated in Second Division Award 6004:

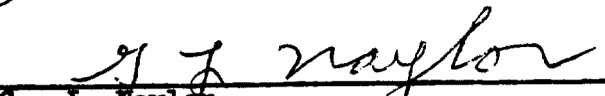
"*** the basic test for determining due process is how was it [the investigation] conducted - not who conducted it."

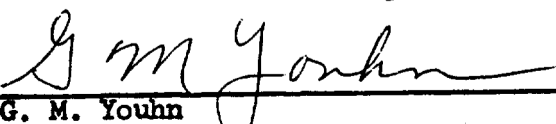
Award 7032 is not supported by the Agreement, by the record before the Division, or by case law of the National Railroad Adjustment Board. We must, therefore, register our vigorous dissent.


P. C. Carter


W. B. Jones


J. E. Mason


G. L. Naylor


G. M. Youhn

CARRIER MEMBERS