Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7300
Docket No. 7134
2-WP-CM-'77

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute:
(System Federation No. 117, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(
(The Western Pacific Railroad Company

Dispute: Claim of Employes:

That Carman J. D. Frazier be compensated by the Western Pacific Railroad Company for all time lost since his dismissal by letter dated February 21, 1975.

That accordingly Mr. J. D. Frazier be reinstated, made whole with seniority rights and all other benefits and rights unimpaired.

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.

In this dismissal claim, the Organization takes the position that the Claimant did not receive a fair hearing as required by Rule 36, particularly in that the Claimant was denied the representative of his choice at the Carrier's investigative hearing.

Rule 36 reads as follows:

"Rule 36. Discipline: An employe who has been in the service of the Railroad more than thirty (30) days shall not be disciplined without a fair hearing by the carrier. Suspension in proper cases (the proper case is one where leaving the man in service pending an investigation would endanger the employe or his fellow employes) 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 and the duly authorized representative will be apprised of the precise charge and given reasonable

"opportunity to secure the presence of necessary witnesses. 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 net wage loss, if any, resulting from such suspension or dismissal."

Claimant sought to be represented at the investigative hearing by his own attorney, who had no connection with the Organization. The hearing officer denied the Claimant the right to be represented by an outside attorney on the grounds that the attorney was not a "duly authorized representative" as specified in Rule 36 and on the basis of consistent past practice at such hearings. Upon such refusal, the Claimant and the attorney left the hearing, although representatives of the Organization remained and participated, while carefully leaving open for later review questions raised by the absence of the Claimant.

It is to be noted that Rule 36 reads, "such employe and the duly authorized representative" (emphasis added); it does not read, "such employe and his representative". Thus, "duly authorized" has to do with the basic relationship between the Carrier and the Organization as to the processing of claims. This is borne out by the earlier references to "duly authorized" in Rules 34 and 35.

Rule 34 refers to grievance processing by the "duly authorized local committee and/or their representative" (emphasis added). Rule 35, Section (a) reads:

"Should the highest designated railroad representative, or his duly authorized representative, and the duly authorized representative of the employes, as provided in Rule 34 fail to agree, the case shall then be handled in accordance with the Railway Labor Act."

Thus, this Board finds the same meaning follows through to Rule 36; namely, the representative involved is, quite logically, that of the Organization.

As indicated by the Carrier without contradiction, there has been a consistent practice of not permitting outside attorneys to represent employes at investigative hearings. (The record should show that the hearing officer offered to permit the attorney to be present as an observer.)

As stated in Award No. 6983 (Twomey): "The Claimant is entitled to be represented only as provided by the Agreement; and this does not include an attorney." In the cited award, the applicable rule is even stronger than that being considered by this Board, stating, "The employe may arrange for representation by a duly authorized representative."

As a consequence of being denied representation at the hearing by an outside attorney, the Claimant left the hearing. Representatives of the Organization remained. The hearing went forward, and the Board finds that a fair and impartial hearing was conducted, despite the fact that the Claimant absented himself against the direction of the hearing officer.

The Organization also alleges that the Claimant is in "double jeopardy", since criminal charges were made against him and had been dismissed by the Superior Court of the State of California. Discipline as the result of actions in an employment relationship and criminal prosecution for allegedly breaking the law are separate and distinct proceedings. One deals with the person's status as an employe; the other, his status as a citizen within society. It does not follow that the same standards apply in both instances, nor that the same issues are at stake. Most significantly, and as held in many previous awards, the outcome of a court proceeding does not inhibit an employer from carrying out the disciplinary actions, within the limitation of the terms of the applicable collective bargaining agreement.

As to the occurrence itself, Claimant was dismissed for "involvement in theft of articles of value" on the property of the Carrier. A review of the record shows ample support for the charge. There is no showing that the penalty was excessive or inappropriate. The Board will not interfere with the judgment of the Carrier in this matter.

A W A R D

Claim denied.

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 31st day of May, 1977.