

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

Parties to Dispute: (International Association of Machinists
(and Aerospace Workers
(
(Southern Pacific Transportation Company

Dispute: Claim of Employees:

1. That under the current Agreement and established policy Machinist R. G. Foster (hereinafter referred to as Claimant) was improperly suspended for a thirty (30) day period from October 16, 1975 to November 14, 1974, both dates inclusive.
2. That, accordingly, the Carrier be ordered to compensate Claimant for all wage loss resulting from thirty (30) day suspension.
3. Carrier violated the provisions of Rule 39 of the current controlling Agreement in conducting a joint formal hearing which involved employees of three (3) Shop Crafts.

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 employees 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 Organization disputes the procedural propriety of this 30-day disciplinary suspension on three grounds: (a) that it is a type of discipline not permitted under Rule 39; (b) that it is contrary to the Carrier's use of the demerit system; and (c) that the joint hearing held for the claimant and two other employees who were members of different crafts is also not permitted under Rule 39.

Rule 39 of the applicable Agreement reads as follows:

"No employe shall be disciplined or dismissed without a fair hearing by the proper officer of the Company. 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 employee shall in writing, be apprised of the precise charge against him, be given reasonable opportunity to secure the presence of necessary witnesses, and shall have the right to be represented as provided for in Rule 38. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal. Stenographic report of hearing will be taken if requested and employee's representative will be furnished with a copy."

As indicated by the Organization, Rule 39 specifically permits suspension "pending a prompt hearing." But this language is not all inclusive nor limiting; it makes clear that the Carrier has, "in proper cases", the right to suspend an employee even prior to a hearing. It would be a tortured interpretation to suggest that this, by inference, bars a suspension at any other time, i.e., after a hearing held simply for the purpose to determine if a suspension is warranted. The rule is entitled, "DISCIPLINE -- SUSPENSION -- DISMISSAL", and the Board finds that the rule does not inhibit the Carrier's right to impose a disciplinary suspension.

The Organization claims that the Carrier's long-standing use of a demerit system of discipline, unilaterally imposed, is a bar to the use of disciplinary suspension. The Board does not agree, for two reasons. First, the unilateral institution of the demerit system, outside the framework of the Agreement, does not prohibit use of the disciplinary procedure as agreed to between the parties in the Agreement. This was so held in similar cases in First Division Award No. 8275 and Third Division Award No. 16174. Secondly, the demerit system, as published by the Carrier (Employee's Exhibit Q) contains the following as its final paragraph:

"12. Such acts as disloyalty, dishonesty, desertion, intemperance, insubordination, willful neglect, gross carelessness, immorality, violation of rules, making false reports or statements or concealing facts concerning matters under investigation, etc., will, as heretofore, subject the offender to dismissal." (Emphasis added)

In this instance, the Carrier accused the employee of a rule violation and imposed a penalty less than dismissal. Even if the Carrier's right to impose a suspension is not inherent in the Agreement, it is in addition specifically retained in the quoted section 12 of the demerit system bulletin. Where the right to dismiss exists, logic would find also the right to impose a lesser penalty. As stated in First Division Award No. 17402:

"...the authority to dismiss by necessary implication carries with it the authority to assess lesser penalties."

In the instant case, the Claimant and two other employes of different crafts were the accused in a hearing held to consider their joint actions. The Board finds nothing in Rule 39 to prohibit this, nor does a study of the transcript of the hearing reveal that the rights of the accused were trammelled by a presentation of the evidence against and in defense of the three employes at a single hearing.

As to the merits of the disciplinary action, also contested by the Organization, the Claimant was disciplined with a 30-day suspension for violation of Rule 810 of the "General Rules and Regulations" which reads in part as follows:

"Employes must ... devote themselves exclusively to their duties during their tour of duty ... Employes must not sleep while on duty. Lying down or assuming a reclining position, with eyes closed, or eyes covered or concealed, will be considered sleeping ..."

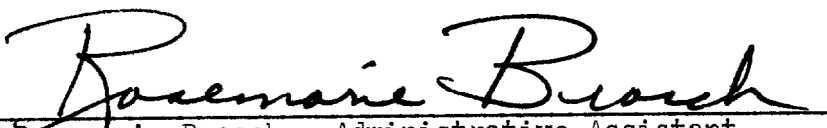
The penalty was imposed for the employe's "being asleep while on duty September 2, 1975, and not devoting yourself exclusively to your duties." Nothing in the hearing record is sufficient for this Board to substitute its judgment for that of the Carrier in imposing discipline well short of dismissal for violation of Rule 810. The Organization's argument that the Claimant was overcome by carbon monoxide in a truck, rather than sleeping, is not convincing; more important, it was not referred to any way when the employe was jarred to a wakeful state by the supervisor who had been observing him.

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 - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of September, 1977.

