

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: ( System Federation No. 16, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carman)  
(  
( Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That under the provisions of the current working agreement Carman J. M. Frederick was unjustly assessed five (5) day actual suspension which was served from May 26, 1975 through May 30, 1975, inclusively.
2. That accordingly, carrier be ordered to compensate Mr. Frederick for his net wages lost account five (5) day actual suspension, make him whole for his seniority rights and remove such discipline from his service record.

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, a carman, is a long service employee and acknowledged to be a good worker. This case arises out of an incident at the carrier's Toledo Homestead yard, Toledo, Ohio on May 14, 1975 at 3:25 a.m. when claimant was allegedly asleep on duty.

The facts here are contested and at the hearing under Rule 13(D) of the applicable agreement, held on July 2, 1975, carrier produced two witnesses who were supervisory employees who had personal knowledge of the incident. They gave clear and persuasive evidence to the effect claimant was sleeping on duty and had to be awakened. Claimant, for his part, denied the charge but failed to produce evidence, other than his own testimony, to that effect. When this Board is presented a contested issue it must look to the evidence to determine whether the party bearing the burden of proof has presented substantial evidence in support of its position. If such evidence is presented the determination of the carrier

will not be disturbed. Here we must conclude the carrier was justified in reaching the conclusion it did and such conclusion should not be disturbed by this Board absent a showing the carrier was arbitrary, capricious or unreasonable. There is no such showing here. See Award 4981 (Weston).

We turn to the procedural aspects of the case insofar as various allegations are made to the effect the claimant was denied a fair and impartial hearing in accordance with the rule.

At some point during the hearing the Hearing Officer objected to the taking of notes by the secretary to Mr. Klintzak, Secretary to the General Chairman. The official notes of the hearing were taken by Ms. J. A. Rex. Thereafter, Mr. Klintzak phoned the carrier's offices and obtained by phone, permission to continue taking notes. This incident involved a minor disruption at the hearing but it did not entail any deprivation of rights of the claimant and we do not view it as a defect.

In addition the Hearing Officer requested the claimant's representative to "slow down" because his interrogation was moving too fast for the official stenographer. We do not see this as a defect either. This is, more or less, the normal occurrence when the rapid fire questioning gets beyond the official reporter's ability to take notes.

The record also reflects that claimant was sent a letter of notice of investigation on May 16, 1975 on this matter. Thereafter, the Local Chairman requested a postponement of the hearing to June 5, 1975, by letter dated May 20, 1975. The postponement was granted by letter of that same date by the General Foreman. By further letters on May 21, 1975 he rescinded his earlier letter and by separate letter imposed discipline for sleeping on duty by five days suspension effective May 26, 1975. Thereafter, on June 4, 1975 the Local Chairman made a formal request for hearing. On June 9, 1975 the General Foreman wrote the Local Chairman to advise him the request for a formal hearing was made on June 4, 1975 outside the 10-day period required under Rule 13(D) and without prejudice to carrier's position a formal investigation was scheduled for June 18, 1975. Subsequent letters confirmed that a hearing was requested and scheduled for June 19, 1975. The General Foreman, by letter dated June 14, 1975 advised claimant to report for a hearing on June 19, 1975 to consider the above charge. Thereafter, the hearing was postponed until July 2, 1975 and the hearing was held on that date. It would have been preferable to have a clearer record of the postponements but we deal with the record as it is and we find no prejudicial error involved. The organization's contention is that the carrier's objection to the Rule 13(d) 10-day requirement was not made on the property and cannot be made for the first time before this Board. If the organization's assertions were correct it would be well taken. However, the review of the record on the property does not bear this out. Carrier's June 9, 1975 letter reserved its rights to protest this specifically although it expressed a willingness to hold the formal hearing. Under these circumstances it cannot be said the Carrier waived this

defect. We do not find it necessary to rule on this aspect of the claim. It is sufficient here to point out Carrier had reserved its rights on this matter while on the property.

With respect to the organization's contention that carrier attempted "to schedule investigation without prior disciplinary action" in violation of Rule 13(D) it is sufficient to point out Carrier's earlier letter was rescinded and new letters were sent dated May 21, 1975. In effect, carrier corrected this notice and there is no evidence that claimant was prejudiced by this change.

The organization also contends the imposition of discipline by the accusing officer prior to the hearing manifested a pre-judgment of the issues and treatment of the subsequent hearing as a mere formality. This is a serious charge and would be entitled to appropriate consideration if it was backed with more than unsubstantiated allegations. It is not, and we do not conclude the prior imposition of discipline is conclusive proof of pre-judgment. Moreover, other aspects of this case indicate the hearing was not a mere formality.

The organization, through the Local Chairman, Mr. LaFaver, made a more serious protest during the course of the hearing, as follows:

"Mr. D. R. LaFaver: I would like to protest this hearing on the basis that the stenographer during the first recess was going over her notes with Mr. Reed and Mr. Orinenga (the two carrier witnesses) to verify this. My witnesses are Larry Weaver and Warren Wells."

Mr. Weaver and Mr. Wells were listed as committeemen who were present during the hearing. Thereafter, the organization did not call them as witnesses although the Hearing Officer took note of "serious charges" regarding the conduct of the hearing and just prior to the conclusion of the hearing asked:

"Does anyone have any further statements to make before closing."

The General Chairman made further statements but nothing additional was developed by the organization on the matter of impropriety by the carrier's witnesses and Mr. Weaver and Mr. Wells were not called as witnesses. It follows that this record reflects that unsupported charges were made by the Local Chairman on this point. Mere allegations cannot be afforded the weight of evidence by this Board. It is not necessary to proceed further with this matter save to say a showing of such activity would raise questions of fairness and impartiality as to the hearing, particularly where the Hearing Officer saw fit to sequester witnesses at the outset and that was done without objection. There is no adequate showing of unfairness here, however.

Based upon a thorough review of the claims and the transcript of the hearing we conclude the hearing met the requirements of Rule 13(D). We are constrained to point out here, however, that this case illustrates the kind of situation that can develop where the issues are hotly contested and the representatives manifest the kind of exhuberance concerning their respective positions that spills over into contests on procedural matters which needlessly protracts the hearing and frequently confuses the basic issues. It is apparent the parties on both sides could do well to meet in a detached atmosphere, away from contested issues, and seek an appropriate modus operandi that will achieve a better atmosphere for future hearings under Rule 13. With mutual effort and goodwill this can be achieved. Nothing we say here implies criticism of the conduct of the hearing by the Hearing Officer based on this record.

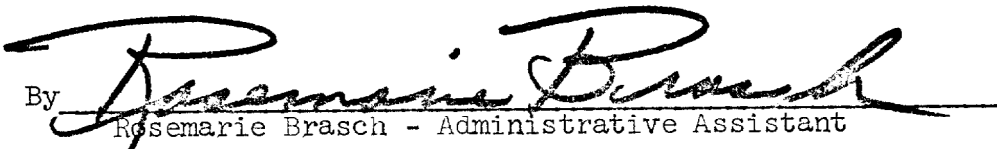
A W A R D

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 14th day of April, 1978.