

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

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

Dispute: Claim of Employees:

1. That under the current agreement Carman T. P. Moody was unjustly suspended from the service of the Seaboard Coast Line Railroad Company, from October 14, 1975 through October 18, 1975, inclusive. This action was unjust, unfair, arbitrary, and capricious.
2. That accordingly the Seaboard Coast Line Railroad Company be ordered to compensate Carman T. R. Moody for five (5) days, eight (8) hours each day, at his Carmen's rate of pay. Also any overtime he may have made and other benefits accruing to his position that he may have lost.

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.

This is a disciplinary dispute in which Claimant received a five day suspension. Claimant was charged with and found guilty of engaging in other gainful employment while absent from his regular assignment on September 6, 1975. He was charged with violation of Rule 18(a), which provides as follows:

"(a) When the requirements of the service will permit, employees, on request, will be granted leave of absence for a limited time, with privilege of renewal. An employee absent on leave who engages in other employment will lose his seniority, unless special

"provisions shall have been made therefor by the proper official and General Chairman representing his craft."

The facts, not in dispute, indicated that Claimant requested and was granted permission to be absent from his assignment on September 6, 1975 for personal business reasons (unspecified). It was also undisputed that Claimant had engaged in a business of contracting for work on diesel engines for the IMC Company and other companies in the area.

Carrier based its conclusions in this case on two elements: a visit to the site of one of the private companies for which Claimant had been working on the morning of September 6th at which time two supervisors saw Claimant's pick-up truck, and a subsequent telephone conversation with a supervisor of the private company who verified that Claimant had been working there on the 6th of September. This was supplemented at the hearing by the introduction of a written (and slightly ambiguous) statement from the private company indicating that Claimant had worked there on September 6th. Petitioner argues that Claimant was not given a fair hearing and that Carrier did not sustain its burden of proof in this matter.

We are quite concerned with the manner in which this hearing was conducted. The transcript of the investigation reveals that Petitioner objected on at least two specific major aspects of testimony introduced by the hearing officer: the report of the telephone conversation and the introduction of the written statement originating with the private company. The record indicates that the hearing officer in both instances merely stated that the objections were noted for the record and proceeded to permit the testimony to be introduced. The objections went to the point that the testimony was hearsay on one issue and unacceptable and without the privilege of cross examination on both issues. The hearing officer is charged with the responsibility of conducting a fair and impartial investigation as required by Rule 32. While we recognize that investigatory hearings are not court trials in which formal rules of evidence are followed, it is incumbent on a hearing officer to do more than merely "note for the record" when serious objections are made to the questions and testimony offered. When the matter is merely recorded, the hearing officer is, in fact, denying the validity of the objections. In disputes such as this, some response to a fundamental question concerning the evidence was required; the hearing officer erred in ignoring the objections.

Implicit in this dispute was a question of credibility findings by the hearing officer. He found in behalf of the Carrier position, crediting hearsay testimony of a phone conversation and a written statement from the private company's supervisor rather than the direct testimony of three witnesses. Without questioning the right of the hearing officer to make credibility findings, it is clear that he relied heavily on the written statement objected to by Petitioner. The introduction of and the

weight accorded that document without the right of cross examination was per se highly prejudicial to Claimant (see Awards 6083 and 6463).

A careful review of the record of the investigation also reveals that Carrier did not present substantial evidence upon which to base its conclusion of guilt: Carrier has failed to sustain the burden of proof upon which the discipline was based (see Awards 4046, 6419 and 7172, among a host of others).

Our conclusion therefore is that the Claim must be sustained on three grounds: that the hearing officer erred in the conduct of the hearing; that Claimant was denied the right of cross examination on critical evidence, severely prejudicing his defense; and that the Carrier failed to sustain its burden of proof.


A W A R D

Claim sustained.

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 July, 1978.

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LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO
AWARD NO. 7606, DOCKET NO. 7539

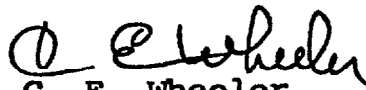
. W. GOHMANN

We have reviewed Carrier Members' dissent to Award No. 7606 and submit it has no sound basis.

Certainly the author of the written statements was available for cross examination. The fact that a statement was given is indication the author was cooperative with the Carrier. And, as stated in the record, there were two employees involved with the same name as Claimant. The statement was unclear and everything but precise. It could have been cleared up through cross examination. Second Division Awards 6083 and 6463 properly hold that cross examination of those bearing witness against you to be a fundamental right.

We agree with the Majority that a fair hearing requires more than a mere notation when an objection is raised. There should be at the least sufficient discovery to determine the validity of the objection.

We believe the Findings in Award No. 7606, Docket No. 7539 to be sound and concur therewith.


C. E. Wheeler
Labor Member