

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. 76, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Coach Cleaner Robert Norris was unjustly assessed forty-five (45) days deferred suspension on May 10, 1977.
2. Coach Cleaner Robert Norris was erroneously charged with reading a newspaper while on duty on April 26, 1977.
3. That the Chicago and North Western Transportation Company be ordered to remove the forty-five (45) days deferred suspension from Coach Cleaner Robert Norris' file.

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.

Claimant received a 45-day deferred suspension for his "failure to responsibly perform your duties in that you were observed seated and reading a newspaper on April 26, 1977, ..." In its assessment of the penalty the Carrier relied on Rule 14 ("Employes ... must be alert, attentive and devote themselves exclusively to the Company's service while on duty ...") and on a specific bulletin prohibiting reading non-work related material while on duty.

Claimant was observed seated in a railroad car, with a newspaper in front of him. His job, however, involves the collection and stacking of newspapers. The issue is solely whether he was performing his duties or, as concluded after brief observation by two Carrier representatives, was reading a newspaper and therefore inattentive to his duties.

One of the two Carrier observers, and the only one who questioned the Claimant at the time, was the Superintendent, Car Department - Passenger. He also initiated the charge leading to an investigative hearing, conducted the hearing, and then determined the Claimant's guilt and assessed the penalty.

In addition to defending the Claimant as to the facts of the matter, the Organization argues that the Claimant did not receive a fair hearing as required by the Agreement and that the charge must fall because of this.

This issue has been ruled upon many times by the Board, with findings that multiple roles of the hearing officer have been prejudicial in some cases and have not interfered with the full defense of the claimant in other cases. In most instances, this multiplicity of roles has not, in and of itself, caused a finding of an unfair hearing. The Board recognizes that Carrier supervisory personnel are called upon to carry out many functions, and that of hearing officer cannot or need not always be completely separated from other responsibilities. The central point in many of the disputes on this issue before the Board is whether or not the defense of the Claimant is impaired.

The dispute in this case does not turn on the rule invoked, about which there is no question, nor on the severity of the discipline, which in this case is relatively mild. But centrally and solely at issue is credibility. The Claimant denies he was reading; the Carrier says there is sufficient evidence to show that he was reading.

The only Carrier witness was a General Car Foreman who was with the Superintendent when the Claimant was observed. The General Car Foreman, in his testimony, assigned himself a subsidiary role in the observation, as in this interchange from the transcript of the investigative hearing:

"Q. Then how did you know that he wasn't doing his work?

A. Mr. Diesch (the Superintendent) is the one that was talking to Mr. Norris (the Claimant)."

Thus the Board finds that this is not an instance of "minor overlapping" of roles (as found in many other disputes). Rather the Hearing Officer was also the principal Carrier representative responsible for determining that the Claimant was remiss in his duties.

In these circumstances it is difficult to see how the Superintendent could hold a fair and impartial investigation. What he is hearing is whether or not his own conclusions are substantially accurate. Nothing else of substance is involved. Based on these facts in this particular dispute, the Board relies on its findings in Award No. 7119 (Eischen), the only difference being that in the present dispute the hearing officer did not deny the appeal once the dispute procedure was invoked following the disciplinary penalty. Award No. 7119 holds in part:

"We have reviewed the conflicting awards cited by the parties on the question of multiplicity of roles by Carrier officers in discipline cases. We continue to adhere to our earlier general opinions that Carrier combines such functions in one individual at its peril; that some minor overlapping of roles, while not to be encouraged, is not prima facie evidence without more of prejudicial procedural imperfections; that the greater the merging of roles the more compelling the influence of prejudgment or prejudice and, that each such case must turn on its own merits. In the instant case we find that H. W. Sanders did not actually testify against Claimant in the hearing but that is literally the only function he did not fulfill in this matter. He activated the investigation, preferred the charges, held the hearing, reviewed the record, assessed the discipline, and denied the appeal. In so doing he fulfilled roles of investigator, prosecutor, trial judge and appellate judge. The disinterested development of evidence, the unbiased review thereof and the objective assessment of appropriate penalty inherent in concepts of fair and impartial discipline cannot be accomplished with such egregious overlapping of functions. This was not a mere technicality but a substantial denial of Claimant's rights. We are left with no alternative but to sustain the claim. See Awards 4536, 6329, 6439, 6795, and 7032."

On this basis alone, the claim of failure to provide a fair hearing must be upheld.


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 4th day of April, 1979.