Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8379
Docket No. 8341
2-BNI-MA-'80

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That the Burlington Northern, Inc., violated the controlling Agreement, Rule 35, but not limited thereto, when, on November 17, 1978, Machinist R. V. Wentink was improperly and unjustly dismissed from Carrier's service.

2. That accordingly, Machinist R. V. Wentink be reinstated to the service of the Carrier with payment for all lost time with seniority rights unimpaired and all other rights and privileges restored.

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 was dismissed from service as a result of an incident which occurred on Carrier's property on October 13, 1978, wherein Claimant was accused of violating Rules 661, 665 and 667 of Carrier's Safety Rules in that he left his work assignment without proper authority prior to the completion of his shift; that he filled out his time card to indicate that he had worked his entire shift on that day, and further that he failed to comply with instructions from proper authority. Prior to assessing discipline, Carrier additionally took into account Claimant's previous work record, particularly as it related to absences from duty, failure to comply with instructions, and previous instances of insubordinate conduct.

The major focus of Claimant's contention is limited to: (1) an objection regarding the admissibility of a written statement rather than the direct testimony of a witness at the investigation hearing; and (2) the severity of the penalty imposed. Claimant contends that Carrier violated Rules 34 and 35 of the controlling Agreement in that the hearing officer denied Claimant a fair and impartial hearing by allowing the admission of hearsay evidence

(a witness's written statement) into the record thus violating Claimant's basic right to confront his accusors and to test their testimony through cross examination.

Claimant further contends that discharge for an offense which involves leaving work five (5) minutes early is not commensurate with the seriousness of the alleged infraction and, therefore, is an arbitrary and capricious exercise of managerial authority.

Lastly, Claimant maintains that Carrier, in the absence of any significant basis for its actions relative to this instant matter, improperly raised the issue of Claimant's previous involvement in similar situations thereby attempting to penalize Claimant twice for the same infraction.

Carrier argues that its decision to dismiss Claimant was not arbitrary or capricious, nor did the submission of a witness's prepared, written statement rather than direct testimony prejudice the fairness and/or impartiality of the investigatory hearing.

As to the propriety of its action, Carrier contends that Claimant's improper activities were substantially documented and were unrefuted. Moreover, Carrier maintains that neither Claimant nor his Organization denied that he left work early, or that he signed his time card to indicate that he had worked a complete shift. Therefore, Carrier concludes that Claimant was dishonest and such action is intolerable on the part of any employee.

Regarding the submission of a witness's written statement at the investigatory hearing rather than the direct testimony of the witness himself, Carrier contends that the facts contained in the written statement were nothing more than a corroboration of the direct testimony of a previous witness. Furthermore, Carrier maintains that such a written statement was necessary since this particular witness had suffered a heart attack and it was unknown when he could participate in person at the hearing. Additionally, Carrier argues that the submission of a prepared, written statement rather than direct testimony is not prohibited by the parties' Collective Bargaining Agreement and, therefore, is allowable.

After a complete and careful review of the record in this instant dispute, this Board is persuaded that Claimant committed the specific infractions as charged. The evidence which has been proffered by the Carrier is of substantial weight to sustain the charge of Claimant's guilt; and this factor together with the apparent thrust of Claimant's and his Organization's argumentation, combine in equal measure to convince the Board of the appropriateness of the aforesaid conclusion.

Having disposed of the initial question in this dispute, our attention now turns to the Claimant's contentions regarding the issues of the admissibility of the written statement at the investigatory hearing and the severity of the penalty which was assessed. Despite the previous determination of the Claimant's guilt in this matter, it is a well accepted tenet of labor arbitration that a favorable finding on either or both of these additional questions may serve to mitigate the severity of the penalty which has been imposed.

Claimant's and his Organization's contentions regarding the admissibility of the General Foreman's written statement at the investigatory hearing, though he (General Foreman) himself was not present at that same hearing, is of particular concern to this Board and therefore, is most worthy of comment. Both parties have offered numerous prior Board decisions in support of their respective positions regarding this particular aspect of the case. Rather than comment upon each of these decisions however, only those which are most relevant to this instant case will be enumerated.

As a general premise, the Carrier is correct in arguing that, absent any specific contractual limitation, written statements are admissible in an investigatory hearing without the writer/preparer of such a document being present (See: First Division Award No. 22 294; Second Division Award No. 6232; and, Third Division Award No. 9624). Furthermore, the Carrier is also correct in arguing that such admissions do not, in themselves, impinge upon an employee's right to a fair and impartial hearing as specified in Rules 34 and 35 of the parties' Agreement. However, this Board believes that even in its most liberal of forms, this application is not without limitation, for if such were the case then the "fairness and impartiality of the hearing", which is the essence of Rules 34 and 35, would be nothing but meaningless verbage which would work to deprive an employee of even the most basic of due process protections (See: Second Division Award No. 6083; and Third Division Award No. 20033). Unquestionably, absent any specific contractual limitation, written statements, such as those which are involved herein, are admissible at an investigatory hearing without the writer/preparer being present; however, it is equally recognized in labor arbitration that uncorroborated or otherwise unidentified statements are ordinarily not admissible, and if subsequently admitted by the hearing officer over the objection of the employee's representative such statements are generally accorded little weight as probative evidence (See: Owen Fairweather, Practice and Procedure in Labor Arbitration, Chapter XII - Rules of Evidence Generally, pp. 213-216; and, Frank and Edna Elkouri, How Arbitration Works, Third Edition, Chapter VII - Evidence, pp. 269-272).

In the case at hand, all those critical factors specified above which weight positively in favor of the admissibility of the disputed written statement were operative; and the investigatory hearing, therefore, was conducted properly without impairment of Claimant's due process rights. Said critical factors are as follow: (1) no contractual limitation prohibited Carrier from submitting such a statement; (2) said statement served merely to corroborate evidence which had been submitted previously; (3) author/preparer of said statement was identified and there was no reason to discredit his recorded observations; (4) utilization of the written statement format rather than direct testimony was prompted by valid considerations on the part of Carrier (General Foreman's heart attack); and (5) said statement did not add any significant information to the record other than that which had already been presented in direct testimony by other witnesses.

Having determined that Claimant was guilty as charged and also that the investigatory hearing was conducted in a fair and impartial manner, our attention now turns to the contention that the penalty of discharge was arbitrarily harsh and excessive in view of the relatively insignificant infraction (leaving work five minutes early) which is involved.

This Board is unpersuaded by this particular pleading since Claimant's actions were deliberate, premeditated and unauthorized; he had been warned and disciplined previously for similar infractions; and the impact of Claimant's actions upon Carrier's operation was far greater than that which the early leaving and the five (5) minute pay claim might superficially suggest. More importantly, however, even if it had been concluded that the discharge was excessive, this Board would have been exceedingly reluctant to substitute its judgement for that of Carrier in assessing discipline, particularly when Claimant's guilt has been established by substantial evidence and when it has been determined that a fair and impartial hearing had been conducted in the matter. Perhaps this reluctance has been articulated most cogently in Third Division Award No. 19791, BRAC v. PC, wherein Referee Brent concluded:

> "... (U)nauthorized absences from duty, if proven, are serious offenses, and often result in dismissal from service. In accordance with the broad latitude given carriers by this Board in the matters of assessing discipline, we will not upset the punishments decided upon by the Carrier, even though the sanction chosen may be grater than that which the Board might choose."

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 11th day of June, 1980.