

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8423
Docket No. 8340
2-SLSW-CM-'80

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

Parties to Dispute: { System Federation No. 45, Railway Employees'
{ Department, A. F. of L. - C. I. O.
{ (Carmen)
{ St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That the St. Louis Southwestern Railway Company violated the provisions of the controlling agreement when Carman C. G. Alexander, Jr. was unjustly suspended from service at 9:00 AM, October 23, 1978, and subsequently dismissed from service on December 11, 1978, without being afforded a fair and impartial hearing and without substantive evidence being adduced to substantiate the charges against him.
2. That the St. Louis Southwestern Railway Company be ordered to restore Carman C. G. Alexander, Jr. to active service and make whole for all lost benefits including seniority and vacation rights unimpaired, health and welfare cost, retirement and unemployment and sickness benefit entitlements, and all wages that he would have earned as a Carman with the St. Louis Southwestern Railway Company.

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 suspended from service on October 23, 1978, and subsequently dismissed on December 11, 1978, for violating Rule 801 of the Carrier's Rules and Regulations Governing Mechanical Department Employees, it being alleged that he refused to comply with instructions given to him by the Car Foreman and also that he was insubordinate concerning those instructions.

Claimant's Organization contends that Claimant did not receive a fair and impartial hearing and that Carrier failed to substantiate its charges with substantive evidence.

Regarding its unfair hearing claim, Organization maintains that Carrier's hearing officer was biased in that he was directly involved in the discharge incident; he preferred the charges against Claimant; he became the hearing officer; acted as a prosecutor during the hearing; revised the hearing record after the hearing had been held; and, lastly, he assessed the discipline which was levied against Claimant.

As to the alleged lack of substantive evidence regarding the initial charge, Organization argues that: (1) Car Foreman who issued charges against Claimant was not Claimant's direct supervisor; (2) Claimant never actually refused a direct order issued by Car Foreman; (3) Claimant's actions were justified in that he was attempting to clarify a misunderstanding and he was following normal procedures in doing so; and, (4) Claimant was not argumentative or abusive at any time throughout the incident.

Carrier maintains that the subject hearing was fair and impartial and that evidence adduced at investigatory hearing clearly demonstrates that Claimant refused proper instructions and that his actions were insubordinate. Accordingly, Carrier argues that these actions are serious infractions which warrant the penalty of discharge.

Regarding the role of the hearing officer at the investigatory hearing, Carrier maintains that the existing Collective Bargaining Agreement does not prohibit a Carrier officer from acting in multiple capacities in disciplinary matters, nor does the multiplicity of roles, in itself, preclude a claimant from receiving a fair and impartial hearing. Additionally, Carrier maintains that regardless of Claimant's objections to his work assignment, his appropriate course of action at that time should have been to comply with the order and then file a grievance later.

As the Board views this instant dispute, there are two distinct yet interwoven factors which are significant and which, therefore, necessitate our attention. The first is the Organization's contention regarding the alleged lack of fairness and impartiality on the part of the hearing officer; and the second is the specific facts surrounding the discharge incident itself.

Regarding the issue of the fairness of the hearing, this Board believes that while the hearing officer did not have first-hand knowledge as a witness to the specific incident which is central to this dispute, he did have some direct knowledge of what transpired by virtue of the fact that immediately after the incident the Claimant, and later, the two supervisors, separately came into his office to discuss the matter with him. Thereafter, the hearing officer wrote a letter of charges against Claimant; conducted the investigatory hearing; and then issued the discipline.

As a general proposition, decisions of this Board, over the years, have determined that the mere fact that a Carrier officer serves multiple roles in a disciplinary proceeding does not, in and of itself, constitute a violation of due process or deprive an employee of a fair and impartial hearing (See: Second Division Awards No. 4360, 7136 and 7196; also Public Law Board No. 1971, No. 1 and Public Law Board No. 1589, No. 6). In such matters, the real test is whether, upon a review of the record, such multiple roles, through the conduct of the hearing officer, is so biased or so prejudiced against the claimant that it is

apparent that the hearing officer had drawn a conclusion concerning the claimant's guilt either prior to or during the conduct of the hearing.

In the instant case, the hearing officer not only served in those multiple roles as described above, but he also had some direct knowledge of the specific incident under investigation which, undeniably, would make it even more difficult for him to remain fair and impartial. Though this may be true, however, and while Carrier would have been well advised to utilize the services of another hearing officer so as to avoid the issue and to clearly preclude the distinct possibility that the hearing officer would be unable to perform his duties properly, we conclude that, though this case is borderline, the conduct of the hearing officer was not so tainted, prejudiced, or partial so as to deprive Claimant of his contractual rights under the existing agreement.

Now to the second issue regarding the specific charges which have been levied against Claimant.

In this particular consideration, a careful examination of the record clearly indicates that neither side is totally blameless since each, albeit in varying degrees, is partially responsible for the development of this unfortunate incident. Though this be true, however, Claimant himself must bear the major responsibility since he failed to adhere to the most honored of labor/management tenets, "work now and grieve later", which, under the circumstances was the most appropriate and reasonable course of action for Claimant to pursue (See Second Division Awards Nos. 1542, 4782, 6050; and Third Division Awards Nos. 10107, 12985 and 16286). Claimant contends that he was being "hassled" by the Car Foreman and that "he wanted to talk to someone about his assignment". These pleadings do not appear to this Board to be sufficient reason for refusing to obey an order such as that which has been offered in this case. Likewise, Claimant's contention that Car Foreman was not his regular Supervisor, thus implying that he was relieved from any obligation to follow Car Foreman's orders, is an equally unpersuasive argument since no such limited degree of supervisory authority has been established in the record, nor would such an application be a reasonable operational procedure within such an industrial environment.

Having determined that Claimant was partially responsible for the development of the problem which is disputed herein, the same must also be said of the two supervisors who also were involved. This conclusion emanates from the fact that the record clearly demonstrates that Claimant was given ambiguous and seemingly conflicting orders; and though one cannot condone Claimant's choice of actions, one can certainly understand his apparent sense of frustration and confusion. Moreover, when the supervisors confronted Claimant so as to determine the cause and scope of his difficulty, rather than attempting to resolve the matter in a common sense, rational, and positive manner, the supervisors immediately became accusative and rigidly authoritarian in their demeanor, and the end result of this less than tactful approach was that the situation deteriorated even further to the point where both parties were left in a seemingly unretractable and extreme position.

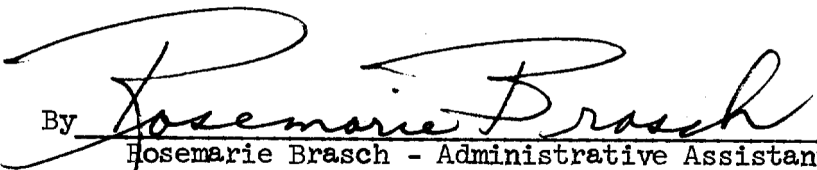
Given the facts and analysis posited above, this Board is of the conclusion that, under the circumstances, the penalty of discharge is unduly severe and the following award, therefore is directed:

A W A R D

Claimant's discharge shall be rescinded and will be converted to a one (1) year suspension from a period of October 23, 1978 to October 23, 1979. Thereafter, Claimant will be restored in service of Carrier as of October 24, 1979, as a full time employee and he will be compensated fully in accordance with the applicable terms of the parties' existing Collective Bargaining Agreement.

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 July, 1980.