Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 8943
SECOND DIVISION Docket No. 8838
2-SLSF-CM-'82

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

Parties to Dispute: Brotherhood Railway Carmen of the United States and Canada

St. Louis-San Francisco Railway Company

Dispute: Claim of Employes:

1. That the St. Louis-San Francisco Railway Company acted capriciously when they removed Carman Jerome Taylor, Birmingham, Alabama, from service on July 23, 1979, and subsequently dismissed him following an investigation conducted on July 31, 1979, in violation of the controlling Agreement.

2. That Carman Jerome Taylor be restored to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired, with compensation for all time lost plus six percent (6%) annual interest and reimbursed for all losses sustained account of loss of coverage under health and welfare and life insurance during the time he was wrongfully, unjustly and unfairly held out of service.

3. That the St. Louis-San Francisco Railway Company leprived Carman Jerome Taylor of a fair hearing, in violation of the controlling Agreement, in the following particulars: First, allowed only one member of the Local Committee to participate in the representation of Jerome Taylor on July 31, 1979. Second, that Claimant was charged with violation of Carrier rules and regulations which did not apply to Claimant. Third, the evidence produced at the formal investigation clearly and unquivocally demonstrated that Claimant was not negligent and was alert.

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 incident from which this case arises relates to Claimant driving a pick-up truck in the early morning of July 23, 1979. A Foreman instructed Claimant to meet another employee and Claimant, on his way to do so, drove a GMC pick-up truck on the South side of track 21. It was alleged that it was not customary to drive such a truck on the South side of track 21. In any event, this truck

became lodged between a pole and cars. The space between such pole and cars was 6'6" while, allegedly, the truck measured 6'7" from left fender to right fender and 8' from left side view mirror to right side view mirror. Claimant asserted that the truck became lodged when it swerved out of control as a result of a tire blow out. Because it became so lodged as well as subsequent efforts to extricate the truck the latter allegedly incurred considerable damage. After this truck became wedged Claimant obtained a pick-up truck, allegedly without permission, from the Locomotive Department which he intended to use in seeking to dislodge the GMC pick-up truck. In driving this Locomotive Department truck to the site where the GMC truck was wedged Claimant allegedly damaged the former by, e.g., throwing the lid of a tool box and knocking off a side view mirror. The foreman who had originally instructed Claimant to take the GMC truck then met Claimant at the site where the GMC truck had been lodged and together they employed the Locomotive Department truck to pull the GMC truck from between the pole and cars. It is acknowledged that this dislodging process caused further damage to the GMC truck.

Claimant was notified, by letter dated July 23, 1979 that he was suspended from service, effective 8:00 A.M., July 23, 1979, pending investigation. Also, by letter of July 23rd Claimant was advised to report for an investigation on July 31, 1979.

> "... in connection with damage to the Car Department pickup truck and the Locomotive Department pickup truck on the morning of July 23, 1979 ...
>
> You are being charged with violation of General Regulation B & C of the Rules ... and instructions Governing (sic) Mechanical Department Employees...
>
> Pertinent parts of General Regulation B reads: 'Employees who are negligent ... will not be retained in the service.'
>
> Pertinent part of General Regulation C reads: 'Employees must be alert .. in matters pertaining to their respective branches of the service (sic) ...'"

Pursuant to the investigation, Claimant was notified by letter dated August 30, 1979 that he was dismissed from the service of the Carrier.

This case comes before the Board in a curious posture, because after it was completely dealt with on the property, through the various appeal levels, the Claimant wrote a letter, dated May 21, 1980, to the Chief Mechanical Officer which stated, in part: "... I lied about the whole accident ... I lied because I was afraid and I thought I would get away with it..." Thus, by Claimant's own admissions, he is made out as basically guilty of the offenses charged in the matter. However, the Organization contends that this letter represents new matter and, since it is not evidence presented at the actual investigative hearing, should not be taken into account in determining this Claim. Putting aside what might be thought of as the fantastical quality of making an objective determination of the guilt or innocence of someone who has already admitted his guilt it can

be mentioned that a review of the record of the investigative hearing does support a finding that the charges against Claimant were proved by substantial evidence. For example, while Claimant sought to account for a damaged side view mirror, on the Locomotive Department pick-up truck, and a missing tool box lid on this truck, by indicating that such damage, as well as other damage was occasioned to this truck when it was utilized to extricate the GMC pick-up truck from where it had lodged, the Foreman involved in this matter testified that the tool box lid was already missing from the truck at the time the Foreman arrived at the accident and was found ten or fifteen car lengths up the track from the truck. He also testified one side view mirror of the Locomotive Department truck was already lying on the front seat when he got in to this truck for the purpose of using it to try to extricate the wedged GMC truck. Similarly the Foreman testified that because of the conditions on the South side of track 21, including considerable quantities of pipe lying about the GMC pick-up could not be driven at a sufficient speed to lodge between pole and cars because of swerving after a tire blow out, as Claimant alleged it did. The Foreman also questioned Claimant's testimony regarding whether it was customary to drive trucks such as the GMC pick-up on the South side of track 21 and which tire on the GMC pick-up was blown out and why. Thus, as indicated, putting aside his subsequent admission against interest, the record contained substantial evidence from which it might be found that the charges made against Claimant were proved.

The Organization has also alleged certain procedural improprieties in this matter. It asserts that the charge against Claimant was not precise, in violation of the requirement of Rule 35 (a), that the Claimant "and his duly authorized representative will be apprised in writing of the precise charge," because it cites Rules which were not applicable to claimant. The Organization also contends that there was a procedural flaw in the hearing in that only one Organization representative was present to represent Claimant in contravention of Rule 34(h) which reads: "Conferences between local officers and local committee to be held during regular working hours ... to (sic) not more than three committeemen..."

The Carrier asserts that such objections are not even eligible for consideration, at this point, since they were not urged at the investigative hearing itself. In support of this position it cites cases such as Award No. 4639, Second Division, ("The contention of the Employees that the notice of hearing did not contain a specific charge was not raised at the hearing nor in the handling of this claim on the property, so it cannot be considered here,") and Award No. 1402, Secord Division, ("... an accused employee having authorized representatives of his own choice present will not ordinarily be permitted to participate in a disciplinary hearing without objection as to the manner in which it is conducted and after an unfavorable result, complain of its fairness.") However, in this case it is unnecessary to determine whether procedural objections not raised at the hearing are shut off from later consideration since, as will be indicated below, such procedural objections would not, in any event, carry.

Regarding the alleged failure of the charge to be precise the Organization contends that the Rules "B" and "C" cited in the charge were not applicable to Claimant at the time of the incident. It asserts that Claimant was subject to Rules, Regulations, Safety Rules and Instructions Governing Mechanical Department Employees, effective July 1, 1979. It cites Rules "B" and "C" of the latter to

demonstrate that they do not contain the language of the Rules "B" and "C" cited in the charge. It may be that the form of the rules applicable to Claimant were changed shortly before the incident of July 23, 1979 occurred. Not enough evidence is presented to this Board to resolve the issue of whose version of Rules "B" and "C", Organization's or Carrier's, was applicable to Claimant at the precise time of the incident in question. We are, however, confident that even if such a change in the form of the rules did transpire, shortly before the incident here in question occurred, so that Rules "B" and "C" of the new form of the rules did not literally contain the language mentioned in the charge as belonging to Rules "B" and "C". The form of new rules does contain, elsewhere, in substance, proscription against the negligent and non-alert conduct with which Claimant was charged. In other words, quite aside from the labels Rules "B" and "C" Claimant, from the charge understood, clearly, he was being charged with being "negligent" and failing to be "alert", "in connection with damage to the Car Department pick-up truck and the Locomotive Department pick-up truck on the morning of July 23, 1979..." Hence Claimant was fully apprised of what would be at issue in the investigative hearing. This is sufficient to fulfill the purpose of the Rule requiring precision of charge, viz; that Claimant will be apprised of sufficient information so that he may adequately prepare his defense against the allegations of wrongdoing. To this effect see, for example, Award No. 6346, Second Division, which stated:

> "The Organization has contended that the Claimant was not notified of specific rule violations prior to his hearing on the property. A review of the Carrier's notice of hearing shows the circumstances of the dispute were adequately described. The Carrier's allegations in the notice alerted the Claimant to the nature of the case so he could properly prepare his defense. The Claimant was quite aware that he was being charged with misconduct ..."

In the same vein is Award No. 5541, Second Division, in which a "Rule 'N'" was referred to in the charge. In this case the Board observed:

> "Although Rule 'N' includes various offenses, including insubordination, the record reveals that Claimant was fully familiar with the particular facts or events under investigation as evidenced by his testimony ... Consequently, he was neither deceived or misled as to the nature of the charges against him and had ample opportunity to prepare his defense ... Hence we must conclude that the notice was sufficiently precise."

The Organization has also asserted procedural imperfection in that Claimant was represented by but one Organization representative at the investigative hearing, despite Rule 34(h) cited above. In refutation the Claimant cites Rule 35(a) of the Agreement, reading, in part: "At a reasonable time prior to the hearing such employee and his duly authorized representative ..." (emphasis supplied) in support of its position that the Agreement contemplates but a single Organization representative to assist Claimant at the investigative

hearing. In Award No. 3568, Second Division, the Board said of the language, in the pertinent Agreement, "the employee ... may be represented by the duly authorized representative of his craft" that it "plainly contemplates a single representative..." and that "in view of the plain language ... Claimant's contractual right to be represented by a representative of his choice was not infringed" when two Organization representatives were not permitted to represent Claimant at an investigative hearing. Also in Award No. 5042, Second Division, it was stated: "... the only reference in the rules to representation of employees in discipline proceedings (Rule 34) is in the singular..."

In any event, Rule 35 is the directly applicable rule respecting disciplinary hearings. Rule 34 relates to "Time Claims and Grievances" which suggests matters initiated upon the complaint of an employee rather than one in which charges have been brought against an employee. Additionally, Rule 34(h), speaks of "Conferences between local officers and local committee" and not of investigative type "hearings". Consequently, Rule 34(h) is not really germane to Claimant's rights of representation at an investigative hearing and the Board, therefore, finds that failure to be represented by more than one Organization representative at the investigative hearing did not deprive Claimant of any rights to which he was entitled.

Regarding the discipline assessed in this case it may be observed that Claimant's work record, prior to the incident involved here, was extremely spotty. It includes the following episodes; a) a letter relating to being off duty for 30 days without a proper medical leave of absence; b) letters regarding absence from job for several days; c) letters regarding failure to report for work on time or failure to report off from work on time; e) letter instructing Claimant to improve attendance record; f) letters relating to sleeping on the job.

The Organization contends that these episodes do not relate to the charges in this case and that, therefore, it is not appropriate to take them into account in determining the discipline appropriate here even if it is assumed that the charges have been proved.

In the first place, it might be noted that, for example, a charge such as sleeping on the job is not totally unrelated to the formal charge here of being non-alert. Secondly, this type of past work record bespeaks an attitude of irresponsibility and unreliability on the part of Claimant in reference to his job, which perhaps, is not so distantly connected to the type of conduct in which Claimant was here charged as engaging. Also, that past disciplinary infractions need not be qualitatively related to the instant charge, to be taken into account in assessing discipline regarding such instant charge as indicated by a case such as Award No. 6617, Second Division. There the charge was that Claimant had recklessly and carelessly driven Carrier's vehicle. In considering the possibility of a reduction in the assessed penalty against Claimant, which it did not grant, the Board mentioned a ten day suspension for failure to protect an assignment and properly perform his work, that he received two written and two verbal reprimands and a 15 day suspension (it is not noted in relation to what events) and that he was in and out of Veteran's Hospital from September 29, 1971 to March 6, 1972.

Additionally, there is a long line of cases standing for the proposition that Carrier determination of discipline cannot be modified by the Board unless arbitrary, capricious or unreasonable. See, for example, Award No. 6481, Second Division, where the Board stated: "We are limited ... in cases involving disciplinary action ... (to) determin(ing) whether Claimant was afforded a fair hearing and that the penalty assessed was not arbitrary, capricious or unreasonable." Similarly, in Award No. 6448, Second Division, it was said: "This Board has repeatedly refused to interfere with the determination of employers as to discipline assessed for proven infractions unless same is clearly excessive and unreasonable."

In this case, in the context of Claimant's long record of notations regarding questionable work performance, there seem no compelling reasons to amend the discipline assessed by Carrier. Thus, in light of the doctrine that such assessments should not be lightly modified by this Board, the discipline based on proof of the charges must be upheld.

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 3rd day of March, 1982.