Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8945
Docket No. 8858
2-SLSW-CM-'82

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(St. Louis Southwestern Railway Company

Dispute: Claim of Employes:

1. That the St. Louis Southwestern Railway Company violated the provisions of the controlling agreement when Carman G. E. Essary was unjustly suspended from service at 7:00 AM, July 11, 1979, and subsequently dismissed from service by letter dated July 30, 1979, without being afforded a fair and impartial hearing and without substantive evidence being adduced to substantiate the charge against him.

2. That the St. Louis Southwestern Railway Company be ordered to restore Carman G. E. Essary to active service with seniority and vacation rights unimpaired, made whole for all health and welfare and insurance benefits, made whole for pension benefits, including Railroad Retirement and unemployment insurance, and be made whole for all lost wages. This claim to start on July 11, 1979.

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 case arose out of an incident, on July 10, 1979 involving Claimant and his Foreman. Allegedly, Claimant did not follow the Foreman's instructions, respecting a task, and then laid off sick despite the fact that the Foreman told him he could not leave. On July 11, 1979 Claimant was advised that he was removed from service, effective July 10th, pending formal investigation for his alleged violation of Rule 801. Additionally, on July 10th Carrier sent Claimant a letter advising of a formal investigation, of the alleged violation of Rule 801, that was to take place on July 18th. This letter stated, in part: "You will report ... for formal investigation for alleged violation of Rule 801. Employees will not be retained in service who are insubordinate, quarrelsome ... Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the Company ..." Claimant was later advised that such investigation was postponed to July 26th. Pursuant to the results of that investigation

Claimant was notified, by letter dated July 30, 1979, that he was dismissed from service.

At the outset several procedural objections by Organization must be considered.

The first of these is a contention that Rule 24-2, of the Agreement, was violated because Claimant was not apprised of the precise charge against him. It seems to be Organization's position that since no specific physical conduct, which is complained of, is mentioned in the charge, the latter lacked precision. However, the purpose of a rule such as 24-2 is to provide Claimant with sufficient information, as to conduct of his which is regarded improper, so that he will be able to defend himself against charges relating to such conduct at an investigative trial. But this purpose was served by the charge. It mentioned Rule 801 and cited the latter's language. Claimant knew that this charge related to what had transpired between himself and Foreman Fisher on July 10th because he knew that he had been laid off at the beginning of his work shift on July 11th, effective July 10th, and he knew that he and the Foreman had had, at least some form of words or disagreement on July 10th. Consequently, Claimant certainly had been sufficiently alerted to what would be at issue at the investigative trial and the type of matter against which he would then need to defend himself.

As authority to such effect see Award No. 5541, Second Division. Here, Claimant, who had been involved in a disagreement with a Shop Engineer, was charged "for your violation of Rule N of the General Rules ... on July 21st, 1966 at 7:50 A.M. ... while on duty at the 49th Street Shop". The Board said:

> "The notice received by Claimant specifically referred to Rule 'N' ... which provides ...
>
> > 'Rule N. Courteous deportment is required of all employees in their dealings with the public, their subordinates and each other ...'
>
> ...
>
> Although Rule 'N' includes various offenses, including insubordination, the record reveals that Claimant was fully familiar with the particular facts of events under investigation as evidenced by his testimony and that of a witness called on his behalf at the hearing. Consequently, he was neither deceived or mislead, as to the nature of the charges against him and had ample opportunity to prepare his defense..."

It is thus clear that, in the instant case, no substantive violation of Rule 24-2 occurred.

Other procedural objections raised by Claimant are along the following lines: a) the hearing process was unfair because the Hearing Officer played too many roles in the hearing and disciplinary process to which Claimant was subject. It

is alleged that the Hearing Officer, in his capacity as a Railroad Official, would have had to have been first consulted for Claimant to have been suspended from service and also that, as the official to whom the first appeal was made, he reviewed his own actions and decision as Hearing Officer; b) the Hearing Officer was biased rather than impartial and had pre-judged the case; (e.g. he asked "leading questions of Claimant seeking to badger the latter into admissions adverse to himself;) c) the Foreman who testified against Claimant was antagonistic to the latter even prior to the occurrence of the incident from which the instant case evolved, had testified against Claimant in two other proceedings thought Claimant a "not very good worker", and was seeking to have Claimant dismissed so that this Foreman's past actions against Claimant would seem justified.

Carrier resists consideration of any of these procedural objections on the grounds that they were not raised at the hearing itself. And it cites considerable authority to the effect that points, issues and objections not brought forth in the handling of the claim on the property may not be advanced in behalf of a party's position in the submission of such party. For example, strongly in this vein is Award No. 7048, Second Division, which forcefully stated:

> "The established principle of inadmissibility of 'new matter' not raised during the handling of the dispute on the property has been reaffirmed in innumerable prior Awards of this Division as well as all other Divisions of the Board. The concept of 'stare decisis' can well be said to apply to this issue, nor is it necessary to cite supporting cases."

There is also Award No. 6792, Second Division:

> "The prevailing view on this Board is that failure to cite specific rules violations during the handling on the property precludes any consideration of such alleged rules violations before the Board."

The point is, indeed, iterated in Second Division Awards:

> Award No. 6806
>
> "... It should be well understood that our Board does not ... consider matters not raised and properly joined in handling on the property..."
>
> Award No. 6995
>
> "... Several other procedural objections were raised at the Board level but being untimely will not be considered herein."

However, in this case, on the merits of these procedural objections, as explained below, we find no such fundamental deprivation of crucial rights, so the issue of their untimeliness need not be faced.

Regarding the Hearing Officer's multiple roles, in the process of Claimant's discipline, it may be pointed out that there are many cases certifying the legitimacy of such multiple roles. For example in Award No. 1788, Second Division, a Shop Superintendent filed the charges, presided at the hearing, asked questions at the hearing, determined Claimant's guilt and imposed the penalty, but no impropriety was found. Also in Award No. 1795, Second Division, a Master Mechanic filed the charges, conducted the hearing, asked questions at the hearing, determined the issues and assessed the penalty. Again, no impropriety was found. Award No. 5360, Second Division, contains strong reasoning indicating why multiplicity of roles does not invalidate the process:

> "... It was not improper for the same official of the Carrier to sign the notice of the charges against the Claimant, to conduct the hearing ... and to sign the notice of the Claimant's discharge. There is nothing inconsistent with the mixing of these functions and the holding of a fair hearing ...
>
> In providing that the hearing is to be before an 'officer of the Carrier' Rule 39 recognizes that the complete detachment of the judge in a criminal proceeding is not going to be present in a hearing under Rule 39. There is a 'fair hearing' within the meaning of Rule 39 when the employee is given an adequate opportunity to know the evidence against him and to present evidence in his defense before an officer of the Carrier who is not so personally involved in the dispute that he cannot view the matter objectively."

Award No. 6057, Second Division, also indicates why a Hearing Officer's multiplicity of roles does not render the process illegitimate vis a vis Claimant:

> "The circumstance that the Master Mechanic served in multiple capacities in filing charges, conducting the investigation and assessing discipline, does not, in and of itself, constitute reversible error where, as here, ... the Claimant was afforded a fair hearing."

In any event, in this case, there would be no grounds, whatsoever, for finding an impropriety in the fact that the Hearing Officer was also the official to whom the first appeal was made, resulting in his reviewing his own decision, since this is explicitly provided for in the Agreement. Rule 24-5 states: "The initial appeal in discipline cases will be made to the Carrier Officer rendering the original decision in the case..."

The Organization also asserts that the Hearing Officer was biased against Claimant and had pre-judged the case against the latter. The record does not reflect such prejudice as Organization alludes to or any action on the part of

Hearing Officer which could be interpreted as depriving Claimant of a fair hearing. (At one point the Hearing Officer did try to forestall the Foreman from having to answer a question regarding whether subsequent to the incident in question, between Claimant and the Foreman, the Foreman was a participant in a conversation where the phrase "will fire the bastard" was used, regarding Claimant. But this, in itself, is surely not adequate index of an unfair hearing.)

At the top of page 5 of its submission the Organization alludes to the following question, asked of Claimant by the Hearing Officer: "Did you tell Mr. Fisher he was a crazy son of a bitch and you were not going to move the single car test device". This is referred to as a "leading" question by the Organization. However, it is simply a question seeking to determine whether Claimant admits to doing something he was clearly alleged, at the hearing as having done. Thus it is an effort to directly ascertain information which is relevant to determining whether Claimant was guilty of the conduct with which he was charged.

Also, toward the close of the hearing an Organization representative who had been present at the hearing he requested be permitted to be called as a witness, on Claimant's behalf despite the fact that "We realize that it is contreary (sic) to any policy, for one witness to be present and hear the testimony of another witness..." The Hearing Officer responded: "We realize the seriousness of this charge the (sic) man you have requested to take the witness stand ... is highly irregular (sic) but ... we will permitt (sic) it." Here is a situation in which, according to custom, the Hearing Officer would have frustrated Claimant's desires, but, instead bent over backward to accommodate them. Contrary to demonstrating prejudice such an incident bespeaks an attitude of responsiveness to Claimant's needs and concerns by the Hearing Officer.

The Organization also alleged procedural irregularity respecting the fact that Foreman Fisher, who testified against Claimant, had testified against Claimant in two previous hearings, was antagonistic toward him, and considered him a "Not very good worker". These facts would certainly not lead one to expect that this Foreman would be well, or sympathetically, disposed toward Claimant. But since he was still Claimant's Foreman, at the time of the incident in question, if the argument that his past difficulties with Claimant automatically rendered any charges he were to bring, or any testimony he were to give, against Claimant invalid then the Foreman would be in the position of having to accept anything that Claimant wished to render as his work performance, regardless of how flagrantly inadequate. Under such a conception any charges brought by this Foreman against this Claimant, would be ipso facto dismissed. This is obviously an untenable position and hence the Foreman cannot here be considered prejudicial against Claimant to the point where it is impossible for the latter to receive a fair hearing.

Taking into account the context of the relationship between Foreman and Claimant the fairness of the hearing must speak for itself. On the basis we cannot find the hearing to be unfair on grounds of the past relationship between the Foreman and Claimant.

In this matter the Organization also contends that Claimant should not have been suspended pending the hearing. It points to Rule 24-1 which provides for "Suspension in proper cases ..." and asserts that this was not such a case. In support of its position it cites Award No. 7465, Second Division in which it was found that Claimant had been improperly suspended because it would not be substantiated "that leaving Claimant in service pending hearing could endanger the employee or his fellow employees". However, as indicated in Award No. 7034, there are suspension rules, one of which may have been in issue in Award No. 7465, which speak in terms of suspension being appropriate only when "leaving the man in service pending an investigation would endanger the employee or his fellow employees..." But as was true in Award No. 7034, the relevant rule in this case i.e. 24-1, is not so confined respecting suspension criteria. Thus the fact that although Foreman said that after his discussion with Claimant, after Claimant had allegedly failed to perform the task that the Foreman had assigned him, he returned to his office in fear of his safety but, later in his testimony, acknowledged that Claimant did not make any threats on his person would not, in and of itself, by its suggestion that Claimant was not really a danger to anyone, repudiate the propriety of a suspension in this case.

The record reveals an exceedingly sharp conflict in testimony in this case. The Foreman alleges that Claimant did not move a device from one car to another when the Foreman instructed Claimant to do so and, further, that in indicating his objection to doing so Claimant became loud in his speech and referred to the Foreman as a "Crazy Son of a Bitch". The Carrier also alleges that if indeed, Claimant moved such device at all (which the Carrier denies) he did so after he'd had second thoughts about the mentioned episode with the Foreman. Claimant, on the other hand, testified that he moved the device as requested by the Foreman and strongly denies he called the Foreman a "Crazy Son of a Bitch." The only possible wrongdoing which Claimant admits to is, that because his confrontation with the Foreman made him feel ill, he left his assignment to go to his family physician, even though the Foreman said that he did not have permission to leave.

The context of this case is also illuminated by reference to the past disciplinary record of Claimant on November 26, 1976 Claimant was advised by the Mechanical Foreman that the latter's instructions had not been carried out in two separate respects. On February 18, 1977 Claimant was advised to the effect that he was out of compliance with Carrier's safety rules in his failure to wear the proper protective "hard hat" which is furnished by Carrier. On April 20 and April 21, 1978 investigation was conducted into charges that Claimant had violated General Rule N of Uniform Code of Safety Rules in that he a) had failed to comply with work instructions of a Foreman, b) had been dishonest in claiming overtime for work not actually done and c) had, without provocation, struck another employee. As a result of these latter investigations Claimant was dismissed from service. (However, based on assurances from Claimant, that he now understood and would comply with the rules, he was, on a leniency basis, reinstated but without pay for time lost.)

Given this background of insubordination, unreliability and being a difficult employee to deal with it can be seen how, if the Foreman's version of the facts in the instant case are accepted, suspension pending a hearing seems an appropriate, if not, indeed, necessary step for Carrier to take. If Claimant

indeed became loud and insubordinate in response to work instructions from a Foreman and hurled epithets at the latter Carrier could be justly suspicious of whether Claimant would perform his duties in an orderly and safe manner during the period prior to the hearing date.

Authority to this effect is represented by Award No. 7150, Second Division where the Board stated:

> "There are numerous awards of various Divisions, as well as Public Law Board awards, that hold that insubordination is a 'proper case' for suspension pending a hearing."

There are also cases in which Claimant's actions might be interpreted as much less disruptive than Claimant's here might be thought, if Foreman Fisher's version of the facts is given credence to, in which it was nevertheless held that suspension of Claimant was "proper". In Award Nos. 3310 and 4404, both Second Division cases, suspension was upheld for a Claimant's refusal to work overtime assignments, while in Award No. 7034, Second Division, a suspension for failure to comply with directives relating to personal appearance was sustained. Also, in Award No. 6518, Second Division, a Foreman told a Claimant how to jack a car but the Claimant insisted that the procedure he wanted to use was safer. After acquainting himself with the facts of this dispute the General Foreman instructed the Claimant to use the procedure the Foreman had wanted used. Claimant still refused, and at that point, was held out of service pending investigation. The Board stated:

> "We find nothing improper in the Carrier suspending, pending the hearing ... an employee who refuses to obey the instructions of his supervisors."

The Organization also makes a point of the fact that the Foreman with whom Claimant was involved, in the episode at the heart of this case, did not suspend Claimant on July 10th, the day of the episode, but waited until Claimant reported to work on July 11th to do so. From this fact the Organization deduces the assumption that the urgency usually connected with a suspension was not present here, since Claimant was not advised of the suspension until the day following the disputed incident, and that, therefore, suspension pending hearing was not necessary at all. In other words, suspension implies the necessity of taking immediate disciplinary action against Claimant, from the point of view of protecting the interests of the Railroad, and since the Railroad saw no need to suspend Claimant as soon as he'd committed his allegedly improper acts, there was not felt imminent peril to the Railroad's interests. This, in turn, implies that Claimant could have been kept at work until the investigative hearing occurred.

But the logic of this argument is undercut by two factors. First of all, the suspension, when issued, was made effective on July 10th, the date of the incident in question. But, more importantly, Claimant left work, right after such incident, to go to his physician, so that the earliest practicable time at which he would be advised of his suspension was when he reported to work on July 11th. This is exactly when he was advised of his suspension. Therefore the time that Claimant was advised of suspension was consistent with the notion that in cases where suspension is "proper" it is necessary to remove a Claimant from his work assignment at the earliest practicable time.

As to the dismissal penalty assessed against Claimant, the Carrier contends that it is entirely appropriate, in these premises, in view of Claimant's past disciplinary record, cited above. The Carrier points to Claimant's previous dismissal and subsequent reinstatement on the understanding that Claimant then fully comprehended his responsibilities for acting in an appropriate manner on the job. His actions in the instant matter, Carrier asserts, signify a betrayal of the bargain, to thenceforth comply with the rules, which Claimant struck with Carrier at the time of such reinstatement. Hence dismissal here is fully supportable.

As has been indicated above there is a sharp conflict in the testimony in this case. In essence Foreman Fisher says that Claimant did not do as he was told, respecting a work task, and cursed him out for giving Claimant the instructions. Claimant asserts he did do what was asked of him and did not use profanity in reference to the Foreman. In this situation Carrier leans heavily on the well established principle that this Board functions in an appellate capacity and does not re-evaluate Carrier's resolution of the weight of conflicting testimony, based on the investigative trial itself. There are a plethora of decisions in this vein, running throughout this Board's (and this Division's) history. For example, see Award No. 1809, Second Division, wherein it was stated:

> "There was direct conflict in the evidence. The Board is in no position to resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony is for the trier of facts to determine."

Also, Award No. 6084, Second Division, where the Board observed:

> "... It is true that we have a conflict in testimony, but ... it is not our function to resolve such a conflict. We are not able to judge the credibility of witnesses since we were not present to observe their conduct and demeanor."

Finally, in Award No. 6372, Second Division, the Board commented:

> "... it is not the function of this Board to substitute its judgment where there is conflicting testimony ... If we were to decide every case in favor of a Claimant where it was one man's word against another all that would be required would be a denial of the charge."

So it is Carrier's strong position that the evidence in this matter was fairly heard at the investigative trial and that Carrier objectively resolved it against Claimant and assessed a penalty entirely consistent with that resolution, especially in view of Claimant's spotty disciplinary record, referred to above.

However, some factors in this case do seem worthy of note. As previously mentioned, this Foreman and this Claimant had had difficulties in the past and the Foreman may have had the normal, understandable human, amount of animus against Claimant arising out of having before testified against Claimant in a disciplinary matter. Additionally, the Foreman acknowledged that he had an unfavorable impression of Claimant as a worker. Claimant also testified that, in the

incident here in question, the Foreman upbraided the Claimant and that this upset the latter because of a condition relating to an irritated or nervous digestive system for which he'd been under medical care. (Claimant provided evidence indicating that he'd been to consult with a physician on four different occasions between January, 1979 and July, 1979, including July 10th.) Claimant testified he then felt that he had to leave work to see his physician but that the Foreman would not grant him permission to do so because the Foreman said there was too much work to be done.

It is possible, perhaps probable, that these various factors, and their combination, exacerbated the reactions of Claimant in the factual situation at the core of this matter. Hence even accepting the finding that he acted improperly as charged, and violated Rule 801, it may well be that such mitigating factors played a part in his actions. Consequently the Board feels that Claimant ought to be given one, unmistakably last, chance. He should be reinstated, without any compensation for time lost.

A W A R D

Claim sustained, but only to the limited extent indicated above.

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.