

The Second Division consisted of the regular members and in addition Referee Francis X. Quinn when award was rendered.

Parties to Dispute: { International Brotherhood of Electrical Workers
{ Union Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Union Pacific Railroad Company violated the current agreement when Electrician Helper Apprentice Mark E. Mittermeier was improperly suspended from service on November 28, 1978, and unjustly dismissed from service on December 13, 1978 at Omaha, Nebraska.
2. That Mark E. Mittermeier, Electrician Helper Apprentice, be restored to service with all seniority rights and benefits unimpaired and be compensated for all lost wages and benefits from date of November 28, 1978.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 claimant, Mr. Mark E. Mittermeier, was last employed by the Carrier as an Electrician Helper Apprentice, Omaha, Locomotive Diesel Shops, Omaha, Nebraska. M. Mittermeier was removed from service account violation of Rules B, 700 and 702 of Form 7908, "Rules Governing Duties and Deportment of Employes, Safety Instructions and Use of Radio," effective October 1, 1974. These rules read as follows:

"Rule B. Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation."

"Rule 700. Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations."

"Rule 702. Employees must report for duty at the designated time and place. They must be alert and attentive and devote themselves exclusively to the company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority."

The Carrier's charge was based in part upon articles appearing in the Omaha World Herald. These articles appearing on different days allege that Mr. Mittermeier was arrested and charged with two counts of "stabbing with intent to kill, wound or maim" on November 26, 1978, and was released after posting 10 percent of the \$7,000 bond. Subsequently, Mr. Mittermeier pleaded guilty on March 16, 1979 to two counts of misdemeanor assault and battery and was placed on two years' probation.

On November 28, 1978, Notice of Hearing was issued by Superintendent of Shops R. T. Johnson and investigation was scheduled for December 1, 1978, at 10:30 A.M. The investigation was conducted at the designated time and date, and after an evaluation of the testimony and evidence contained in the transcript of investigation, Superintendent of Shops R. T. Johnson notified Mr. Mittermeier in writing that he was dismissed from service for violation of Rules B, 700 and 702.

Rule 37 of the Union Pacific Railroad Company's Schedule of Rules reads as follows:

"No employe shall be disciplined without a fair hearing by designated officer of the carrier, and a copy of the transcript of the hearing shall be furnished the employe involved and his duly authorized representative. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension of dismissal."

The Carrier based its case on allegations in a newspaper account. To receive a fair hearing the accused must be able to face his accusers and have the right to cross-examine. Newspaper articles cannot be cross-examined.

The Hearing officer for the investigation, the General Locomotive Foreman, asked the Claimant:

"Mr. Mittermeier, I have here two newspaper articles, which we're going to offer into evidence, first one coming from the Omaha World Herald, dated Monday, November 27, 1978. I will read the article found on page 28."

The Local Chairman objected:

"I object to that because that's hearsay, there's no mention of Mr. Mittermeier in that article. Also, the article states that no formal charges have been filed yet, and you allege in your Notice of Hearing that the man was charged, you don't seem to have the right man or you don't have the right charge, either one.

First, the evidence upon which the Carrier primarily relied on that Claimant was guilty was based upon hearsay editorial evidence.

Secondly, numerous awards support the position that the Hearing Officer's duties are to ascertain the true facts both for and against the defendant and not to participate in a prejudiced manner. Two of these awards are noted below:

Second Division Award 2923:

"Investigations such as was held are for the purpose of ascertaining all the facts, not to prove the guilt of the accused. It must be fair and impartial. It is not sufficient that the accused be notified of the precise charge, and that he be advised of his rights. The officer conducting the investigation is charged with the responsibility of developing all the facts and the circumstances surrounding them. The judicial officer must make his decision based on all the relevant evidence, and any extenuating circumstances. Otherwise, the investigation would be a mockery and likely a miscarriage of justice would result."

Fourth Division Award 2158:

"The presiding officer cannot have an adversary role at an investigation hearing. He is obliged to seek out all the facts surrounding the incident in question, those which favor as well as those which militate against the Claimant. He is a trier of fact and an ascertainment of the truth. Consequently, for him to attend a preliminary meeting at which all the Carrier witnesses are present and the case under consideration is discussed is violative of Rule 13. It matters not that the presiding officer, himself, did not participate in such discussion. His mere presence there is incompatible with the role of a hearing officer seeking to find all the material facts of the incident in question."

Finally, Rule 22 of the controlling agreement reads as follows:

"In case an employe is unavoidably kept from work he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause, shall notify his foreman as early as possible."

Foreman admitted that he had been notified the Claimant would be absent from work, as noted below:

Questions by J. B. McGonigal, Local Chairman, Answers by G. W. Nielsen, OGEMP Foreman.

"Q. One question, were you notified that Mark would not be in.
A. Yes, I was notified.

Q. Were you notified before 8:00 o'clock.
A. Pretty close to that time. I was out, the time element was reasonably close before 8:00 o'clock. The specific time I couldn't verify but I was notified shortly thereabout's that he wouldn't be in."

From the testimony and statements of the Hearing Officer:

"He does not have authority to give anyone permission to be absent, that is why that letter was put out, that is why a follow up letter is coming on it. There is a misunderstanding..."

we learn that there was some confusion whether the Carrier had a clear policy or rule for the employees to follow when calling in to lay off from work.

A letter from the Superintendent of Shops addressed to the Supervisors contained the following information. It states:

"In the near future all personnel now employed in the shop area will receive a notice from this office which will list appropriate telephone numbers to call when they want to request authority to be absent."

Apparently Claimant followed the instructions that were currently in effect on the date in question. It is apparent from the record that the Carrier was not handling the question on how an employee must lay off in a uniform manner for all employees.

Second Division Award 7832 held:

"... the Board is not fully convinced said rule has been applied and enforced by Carrier with reasonably uniformity for all employees at the location in question. In Second Division Award 6196, Referee stated: 'A Carrier's disciplinary decision is unreasonable, arbitrary, capricious or discriminatory when the Carrier, (among other things), does not apply and enforce the rules with unreasonable uniformity for all employees...'"

The burden of proof is upon the Carrier to prove with a preponderance of evidence that the employee committed a willful offense. This principle has been upheld in numerous prior Awards in discipline cases. Carrier has not met the burden of proof. Therefore, we will sustain the claim.

Form 1
Page 5

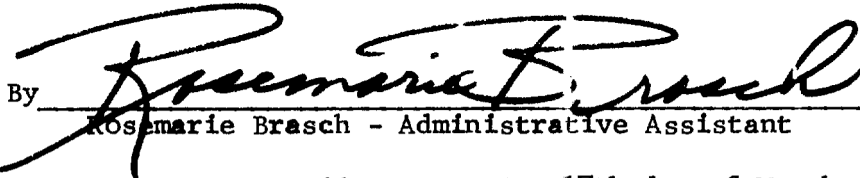
Award No. 8990
Docket No. 8520
2-UP-EW-'82

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 17th day of March, 1982.

DISSENT OF CARRIER MEMBERS
TO
AWARD 8990 (DOCKET 8520)
(Referee Quinn)

Dissent to this Award is required. The Majority has asserted that:

"The Carrier based its case on allegations in a newspaper account. To receive a fair hearing the accused must be able to face his accusers and have the right to cross-examine. Newspaper articles cannot be cross-examined."
(P.2)

"First, the evidence upon which the Carrier primarily relied on that Claimant was guilty was based upon hearsay editorial evidence." (P.3)

Our dissatisfaction is with the Majority's errant conclusion that such was the sum and substance behind the Carrier's action.

The Majority cites a portion of the Hearing transcript at pp. 2-3 of the Award concerning two newspaper articles, but quotes from only one. The second article identified the assailant as one, Mark E. Mittermeier, who was charged with two counts of "stabbing of intent to kill", and was being held in jail in lieu of bail. The matter was confirmed by a check made by the Carrier's Special Agent Department; and in the hearing given Claimant, after the two newspaper articles and the Special Agent's report were read into the record, we find the following testimony:

"Q. Before we proceed any further, Mr. Mittermeier, you and your representatives would probably like to examine that (exhibits) and make some comments.

"A. Okay.

"Q. Do you have some statement to make.

"A. No objections.

"Q. Mr. Mittermeier, are you the Mark E. Mittermeier that was involved in the incidents as set forth in the letter from Mr. Allen (special agent).

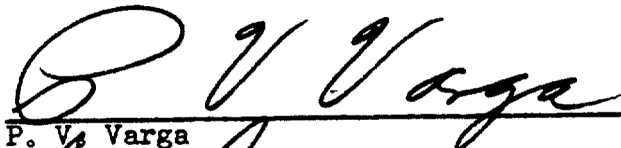
"A. Yes."

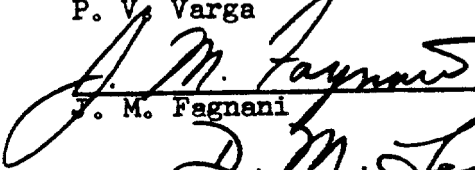
Certainly, this is NOT a case where Carrier's action was "based upon heresay editorial evidence". Carrier used three means of evidence: the newspaper articles; the special agent's report, and Claimant's admissions, as the grounds for taking action in this matter. Certainly, Claimant's admission eliminates any doubt as to the substantial evidence produced in the record. (Second Division Awards: 8971 - Quinn; 8406 - Weiss; 8212 - McMurray; 8069 - Cushman; 6535 - Lieberman; 6425 - Bergman; 6057 - Gilden, to list but a few of the many awards on this point).

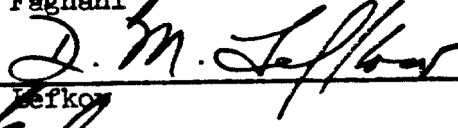
This Majority should have considered the entire record, and should have followed the advice of Third Division Award 17914 - Quinn:

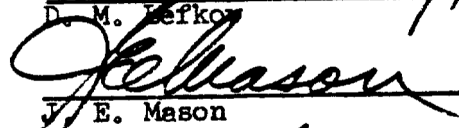
"The precedent is well established that this Board should not substitute its judgment for that of the Carrier in discipline cases where it has produced substantial evidence that the offense charged was committed. While the administration of disciplinary action should not seem haphazard or capricious, it is clear that the imposition of discipline is within managerial discretion."

We dissent.


P. V. Varga


J. M. Fagnani


D. M. Lefkowitz


J. E. Mason


J. R. O'Connell