

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: ( Sheet Metal Workers' International Association, AFL-CIO  
( St. Louis - San Francisco Railway Company

Dispute: Claim of Employees:

1. That the St. Louis - San Francisco Railway Company violated the controlling agreement, particularly Rule 35, when Sheet Metal Worker Gary W. Pyatt was dismissed from service on October 29, 1979, following investigation which was begun on July 1, 1979, postponed and finally concluded on September 27, 1979.
2. That accordingly, the St. Louis-San Francisco Railway Company be ordered to compensate Sheet Metal Worker Pyatt as follows:
  - a) Restore him to service with all seniority rights unimpaired;
  - b) Compensate him for all time held out of service from December 30, 1978 with 6% interest per annum;
  - c) Make him whole for all vacation rights;
  - d) Pay Hospital Association dues or insurance for all time out of service;
  - e) Pay the premium for Group Life Insurance for all time out of service;
  - f) Pay for all holidays;
  - g) Pay for all sick pay;
  - h) Pay for all insurance premiums;
  - i) Pay for all jury duty lost.

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.

On December 30, 1978, Claimant was driving a company owned truck when he collided with the rear of a stopped automobile driven by Mr. Alexander Flato. Exactly what happened next is disputed in the record, but it is clear that the Claimant left the scene of the accident in the truck shortly after the collision; he was pursued by Flato in his car. Again, there is argument in the record as to what happened next, but the Claimant's vehicle ultimately met a utility pole. A physical altercation then began between the Claimant and Flato. Thereafter, the Claimant traveled on foot to a nearby tavern. He was subsequently arrested by local police and booked on charges of leaving the scene of an accident, disobeying a stop signal, and possession of marijuana. The Claimant was removed from service pending the Carrier's investigation of the above events. At the Organization's request the investigation was postponed until July 31, 1979. Local police interrupted the investigation and took the Claimant with them pursuant to what they thought were outstanding warrants for his arrest. The investigation resumed on September 27, 1979, and resulted in the Claimant's permanent removal from the service of the Carrier.

The Carrier's version of the events of December 30 may be summarized as follows: After the Claimant rear-ended Flato's car he fled the scene at a high speed. Flato chased him in his car, overtook him, and blocked him from proceeding any further. The Claimant then tried to back the truck away and struck a utility pole. The two men fought. Around this time or shortly thereafter, the Claimant threw a small plastic bag of marijuana over a nearby chain link fence. He then fled to a nearby tavern, where he was arrested. The Carrier further maintains that the Claimant was dismissed from service for violating the following rules:

"Rule G. The use or possession of intoxicants or narcotics is prohibited.

Rule 175. Civil, mannerly deportment is required of all employees in their dealings with the public...employees must not enter into altercations with any person, no matter what provocation may be given, but will make note of the facts and report to their immediate superior.

Rule 176. Employees who are...insubordinate...or who conduct themselves and handle their personal obligations in such a way that the railroad will be subject to criticism and loss of good will, will not be retained in the service..."

The Claimant's version is somewhat different, and may be summarized as follows: After the first collision Flato came back and struck the Claimant through the truck's open window. The Claimant then left the scene in the truck on his way to call the police. He was heading for a place called the "Waterhouse" when Flato ran him off the road and into a utility pole. The Claimant then called the police.

The Organization asserts that the Carrier's investigation was in violation of Rule 35(a) advancing the following allegations: (1) charge preferred against Claimant was not precise; (2) General Chairman was not permitted to use a tape recorder during the course of the hearing to ensure that all testimony would be a matter of record; (3) report addressed to H. E. Johnson, prepared by Special Agent Whitecotton, was read into the transcript over the objections of General Chairman Moorhead; (4) statement of Alexander Flato read into the transcript; (5) although

Claimant had been absolved of all police charges, Special Agent Whitecotton, during the course of the investigation, had police come to the hearing room to arrest Claimant; (6) Claimant was not permitted to have witnesses of his choice; (7) Division Engineer D. A. Bell, the first interrogating officer at the investigation of July 31, 1979, was permitted to testify at the investigation held on September 27, 1979, over the objection of the General Chairman; and (8) coercion by Carrier officials to prevent Lennie Dixon from testifying in behalf of Claimant.

Rule 35(a) is quoted in part below:

"An employee who has been in the service more than sixty (60) days, or whose application has been formally approved, shall not be disciplined without a fair hearing by designated officer of the Carrier. Suspension in proper cases pending hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised in writing of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses."

Before discussing the merits of the case the Board will evaluate the above claims. With regard to specificity of charges (item 1 above), the Organization cites Third Division Award 14267 which states in part: "...We have held many times that all we require is that the employee be made aware of the charges pending against him so that he may properly defend himself against such charges...He should not have the ...burden of constructing a charge out of a paragraph of meaningless words and phrases." The Board in the instant matter agrees with the Third Division and has evaluated the Carrier's January 8, 1979 letter to the Claimant against the standards outlined in their Award 14267. The January 8 letter contains the following paragraph:

"You are charged with allegedly having in your possession marijuana and the use of intoxicants while driving a Company truck unauthorized and becoming involved in a traffic accident and leaving the scene at approximately 4:18 p.m. on the 12-30-78 at Manchester at McCausland and then becoming involved in an altercation with Mr. Alexander Flato, the individual involved in the first accident, in the 6500 block Mitchell Ave. and in trying to leave that location totally demolished 1977 ½-ton pickup, valued at approx. \$5000.00 by hitting a City light pole."

The Board is of the opinion that the above statement of charges is sufficient to allow the Claimant to properly defend himself against them. The language used by the Carrier is far from "meaningless"; on the contrary, it appears direct, precise, and clear.

With respect to item (2) above, the Board sees nothing inherently objectionable to the General Chairman's request to tape record the investigation hearing. The important aspect of that request concerns whether the Carrier's denial resulted in something less than due process for the Claimant. Certainly, the Organization should have access to a full record of the hearing, and a tape recording might provide such a record. But the stenographer's transcript also constitutes such a

record. The Organization identified one place in the transcript where the stenographer was not taking down some statements, but the fact that the Organization cited exact transcript language to do so does little to support an argument that the transcript is incomplete. Furthermore, the Board sees nothing else in the record to suggest that the stenographer's transcript does not reflect the full hearing. It is therefore, reasonable to conclude that the Carrier's denial of the Organization's request to tape record the hearing did not deprive the Claimant of due process or violate Rule 35(a).

The Organization is also concerned about the reading into the transcript of written statements from Special Agent Whitecotton and Mr. Flato, arguing that it had no opportunity to cross examine Flato or a patrolman paraphrased in Whitecotton's report. However, there are Awards in Divisions One through Four which support the inclusion of such written statements into an investigation without their authors being present, especially when they are not employees of the Carrier and the Carrier lacks subpoena power (First Division Awards 20063 and 22294; Second Division Award 6232; Third Division Award 16308; and Fourth Division Award 1152). The Board notes that greater weight is usually attached to testimony of witnesses present during a hearing than that normally associated with written statements of those not present.

With respect to Item (5), the Carrier readily acknowledges that Special Agent Whitecotton's call to the police alerted them to the Claimant's whereabouts on July 31, 1979. It is unfortunate that their arrival and subsequent arrest of the Claimant that day interrupted the investigatory hearing, but there is nothing in the record to indicate that Whitecotton violated the Controlling Agreement by calling them.

The Investigation Officer's refusal to allow one of the Claimant's witnesses to testify at the hearing is disturbing. The Carrier argues that the proposed witness had no direct knowledge of the charges against the Claimant, yet it is the Board's opinion that an Investigation Officer cannot legitimately make such a determination without evaluating the testimony of the witness in question. Furthermore, it appears that the proposed witness was excluded merely because he was the Claimant's attorney in connection with formal legal action in this matter (Page 24 of Carrier's Exhibit B). Again, however, the Investigation Officer had no way of knowing to what this witness would attest unless, at the very least, some questions were asked of him to establish a foundation as to his direct knowledge of the facts. Accordingly, the Board has concluded that the exclusion of this witness from the investigation hearing was improper, and in violation of Rule 35(a).

The Organization's seventh procedural argument concerns the testimony of Division Engineer D. A. Bell. It claims his testimony was biased and prejudiced, but that is a proper matter to the Board to determine. Furthermore, the Board has examined Mr. Bell's testimony and finds it relevant to issues raised.

The Organization also claims that a Mr. Dixon was coerced by Carrier representatives not to testify on behalf of the Claimant. Dixon submitted two related written statements: the first supporting the Organization's claim, the second refuting it. Furthermore, both statements were submitted after the investigation was concluded. The Board therefore finds no evidence to support this allegation.

Finally, the Organization maintains that the Carrier did not prove its case on the merits. The Board disagrees. First, it is clear from the record that the Claimant had marijuana seeds in his pocket at the time of this arrest on December 28, 1978. And, while the Board notes that Mr. Flato is a party to this matter and that he did not testify at the hearing, his reported contention to police officers at the scene that he observed the Claimant throw a plastic bag (ultimately found to have contained marijuana) over a nearby fence is somewhat credible in light of the seeds found in the Claimant's pocket. Second, the fact that the Claimant left the scene of the first accident is most serious. His claim that he feared for his safety lacks credibility considering he was about forty years younger than Mr. Flato, who was 63 at the time. Moreover, rather than driving away he simply could have locked himself in the truck. In summary, and based upon the record as a whole, the Board has concluded that the Carrier's version of the events of December 30, 1978, is the more credible and that the Claimant violated Carrier Rules G, 175, and 176. The Board understands that the City did not press charges against the Claimant but holds that the employer's right to discipline an employee is independent of any civil or criminal proceedings which may or may not occur over the same issues.

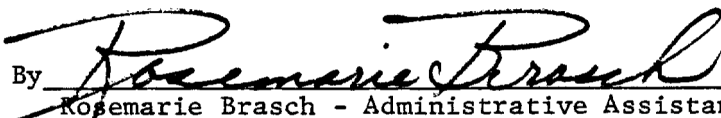
It is the Board's opinion that in view of the seriousness of the charges against the Claimant and his relatively short length of service with the Carrier (about eight months), dismissal is not an unreasonable penalty. Moreover, while the Board has noted earlier that the Carrier created an element of procedural inequity by the exclusion of a potential witness for the Claimant, it has concluded that this single procedural violation is not sufficient to set aside the Carrier's disciplinary action.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this, 22nd day of July, 1982.